

No. _____

IN THE
Supreme Court of the United States

KRYSTLE PERRY, individually and on behalf of their minor child K.P., and ANTHONY PERRY, individually and on behalf of their minor child K.P.,
Petitioners,

v.

STACY MARTENEY, in her official capacity as the Virtual Learning Coordinator of the Upshur County Virtual School; and CHRISTINE MILLER, in her official capacity as Superintendent of the Upshur County School District,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Krystle and Anthony Perry enrolled their daughter K.P. in West Virginia’s virtual public school. When officials learned that K.P. was not fully vaccinated, they disenrolled her. The Perrys sought an accommodation to the state’s compulsory-vaccination law based on their sincerely held religious beliefs. Officials denied that request—even though K.P. schools only at home and despite the fact that the law treats homeschooled students and students attending a learning pod or a microschool more favorably by granting them a blanket vaccine exemption.

The Fourth Circuit rejected the Perrys’ free-exercise claim, applying rational-basis review. It reasoned that the law does not favor secular conduct over religious conduct because the decision to send K.P. to virtual school was not religiously motivated—though her parents’ beliefs on vaccination are. It also held that *Mahmoud v. Taylor*, 606 U.S. 522 (2025), which addressed an “instrument of ideological indoctrination,” does not apply to a “public health measure.” App.39a.

The questions presented are:

1. Whether a law that exempts people based on secular criteria but not religious reasons is subject to strict scrutiny and violates the First Amendment even when the religious burden is implicated by an act—like attending school or working—that is not itself religiously motivated.
2. Whether a law is subject to strict scrutiny under *Mahmoud* when it imposes a non-curricular requirement that substantially burdens parents’ rights to guide the religious development of their child.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioners are Krystle and Anthony Perry, individually and on behalf of their minor child K.P.

Respondents are Stacy Marteney, in her official capacity as the Virtual Learning Coordinator of the Upshur County Virtual School, and Christine Miller, in her official capacity as Superintendent of the Upshur County School District.

The following parties were also Defendants in the proceedings in the district court: the Board of Education of the County of Upshur; Dr. Matthew Christiansen, in his official capacities as the State Health Officer and Commissioner of the Bureau of Public Health; Doug Cipoletti, in his official capacity as Executive Director of the West Virginia Virtual School Academy; and Bryan Hoylman, in his official capacity as Chair of the Board of Directors of Mountain State Learning Solutions, Inc. d/b/a West Virginia Virtual Academy.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Fourth Circuit, No. 24-2132, *Perry v. Marteney*, judgment entered April 8, 2026.

U.S. District Court for the Northern District of West Virginia, No. 2:24-cv-00018-TSK, *Perry v. Marteney*, motion for preliminary injunction entered October 15, 2024.

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DECISIONS BELOW

The district court's order granting Petitioners' motion for preliminary injunction is available at 2024 WL 7020477 (N.D. W. Va. Oct. 15, 2024), and reprinted at App.43a–104a.

The Fourth Circuit's opinion reversing the district court's decision granting a preliminary injunction is reported at 172 F.4th 315 (4th Cir. 2026), and reprinted at App.1a–42a.

STATEMENT OF JURISDICTION

The Fourth Circuit entered judgment on April 8, 2026. The lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1292(a)(1). On June 5, 2026, the Chief Justice extended the time to file this petition until September 5, 2026. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Relevant constitutional provisions and statutes are reprinted at App.105a–07a.

INTRODUCTION

West Virginia law requires all students to be vaccinated but exempts those who are homeschooled or attend microschools or learning pods. The Perrys—who have declined vaccinations for their daughter K.P. based on sincerely held religious beliefs—sought a similar exemption for her to attend West Virginia’s *virtual* public school from home. But local school officials denied that request and disenrolled K.P. Over Judge Niemeyer’s dissent, the Fourth Circuit rejected the Perrys’ free-exercise claim. For two independent reasons, that decision warrants this Court’s review.

First, the Fourth Circuit’s conclusion that the vaccine mandate is generally applicable—and thus subject only to rational-basis review—creates a 2–1 circuit split, conflicts with this Court’s precedent, and threatens free-exercise rights.

The court below conceded that the vaccine law exempts a secular category of students (“children educated outside the school system”) while denying religious vaccine exemptions for “children attending the Virtual Academy.” App.16a. But the court nonetheless rejected the free-exercise claim, reasoning that “the Perrys do not allege that K.P.’s *desire to attend the Virtual Academy* is religiously motivated, so this is merely an instance of West Virginia treating some secular activity more favorably than other secular activity.” *Ibid.* (emphasis added).

That new rule effectively eviscerates this Court’s decision in *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam). For example, if a city police department’s homicide unit requires an employee to work on her Sabbath but the arson unit grants secular exemp-

tions, a police officer who desired an exemption from working on the Sabbath would be barred from pursuing a *Tandon* claim if the decision to be a homicide detective rather than an arson investigator was not religiously motivated. The Third and Ninth Circuits have reached the opposite conclusion, holding that strict scrutiny applies even if the burden-triggering conduct is not itself religiously motivated.

The Fourth Circuit’s reasoning also has far-reaching consequences. Its rule leaves states free to impose religious burdens—while granting secular exemptions—on the jobs people work, the places they work, and the schools they attend (to name just a few), provided that an individual’s choice of job or school is not *itself* religiously motivated. The Court should resolve the circuit split on this important free-exercise issue.

Second, the Fourth Circuit’s ruling conflicts with *Mahmoud*. The compulsory-attendance and -instruction policies in *Mahmoud* merely “expose[d] children to values or beliefs ... hostile to their parents’ religious beliefs.” App.21a. But applying the compulsory-vaccination requirement here directly compels the Perrys to violate their beliefs and forces them to choose between a free public education and their faith.

Regrettably, the Fourth Circuit’s decision is just the latest example of a circuit court cabining *Mahmoud*. In *Mirabelli v. Bonta*, 607 U.S. 492, 496–97 (2026) (per curiam), this Court criticized the Sixth and Ninth Circuits for brushing *Mahmoud* aside as a narrow decision about curriculum. But the decision below and a subsequent Second Circuit decision have continued reading *Mahmoud* narrowly even after *Mirabelli*—confining both those cases to their facts.

That’s wrong. The vaccination requirement here irrevocably burdens the Perrys. Yet the Fourth Circuit—and now the Second—conflated what level of scrutiny applies with whether a law survives review. This Court should intervene to stop the circuits’ grudging treatment of *Mahmoud* and resolve the confusion on this recurring issue.

STATEMENT OF THE CASE

I. Background

A. West Virginia mandates vaccines for some but not all students.

Like all other states, West Virginia requires all children within a specified age range to attend school. W. Va. Code § 18-8-1a(a). Parents can choose from multiple options to satisfy that requirement:

- Parents can send their kids to a traditional brick-and-mortar public school;
- They can also select a private, parochial, or other approved school. *Id.* § 18-8-1(b);
- Parents can provide their children with “home instruction.” *Id.* § 18-8-1(c);
- Children can “participate[] in a learning pod or microschool.” *Id.* § 18-8-1(n). A “learning pod” is “a voluntary association of parents” who “group their children together” for schooling “as an alternative to ... public school, private school, homeschool, or microschool.” *Id.* § 18-8-1(n)(1)(A). A “microschool” is “a school initiated by one or more teachers or an entity created to operate a school that charges tuition for the students who enroll and is an alternative to

enrolling in a public school, private school, homeschool, or learning pod.” *Id.* § 18-8-1(n)(1)(B);

- Finally, parents can enroll their children in the West Virginia Virtual Academy, a tuition-free K-12 online public school available to all state residents. See <https://wvva.k12.com/about-our-school/>.

Also like all other states, West Virginia has a compulsory-vaccination law. School children must be “immunized against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough.” W. Va. Code § 16-3-4(c). And just as in all the other states, West Virginia’s law contains a medical exemption—a child need not be vaccinated if a physician certifies that “immunization is contraindicated or there exists a specific precaution to a particular vaccine.” *Id.* § 16-3-4(h). But unlike 45 other states, West Virginia’s law does not contain a religious or philosophical exemption. (The other four states are California, Connecticut, Maine, and New York.)

West Virginia’s mandatory-vaccination law applies to all children attending a “public, private [or] parochial school” in the state. W. Va. Code § 16-3-4(a). But the law exempts all children receiving home instruction and children participating in a learning pod or microschool, no matter whether they refrain for a religious reason, a secular reason, or no reason at all. Nor does West Virginia require vaccination for any school staff or proof of vaccination for those attending school events. App.139a, 155a–56a.

B. Krystle and Anthony Perry decline vaccines for religious reasons.

Krystle and Anthony Perry live with their daughter K.P. in Fayette County, West Virginia. App.28a. The Perrys are Christians and attend Brooklyn Community Church in Fayetteville. App.121a–22a. Their religious beliefs shape every aspect of their lives, including their parenting decisions. *Ibid.*

Until K.P. was two years old, she received doses of the vaccines mandated by the compulsory-vaccination law. App.122a, 124a. But then the Perrys learned that many vaccines are developed and produced using aborted fetal cells. App.121a–24a. Indeed, the record includes sworn testimony from a world-renowned virologist, often referred to as the Godfather of vaccines, App.123a, discussing how he worked in vaccine development with dissected pieces of organs—lungs, skin, kidneys, spleen, heart, tongue—harvested from aborted fetuses. Joint Appendix, *Perry v. Marteney*, No. 24-2132 (4th Cir. Jan. 6, 2025) (“JA”) at JA90–92.

The Perrys believe that abortion is a sin—the taking of an innocent human life—and that giving K.P. vaccinations developed using aborted fetal cells would require them to condone abortion. App.124a. After further prayer and reflection, the Perrys also came to believe that they should not seek medical intervention, including vaccines, unless K.P. is sick. App.124a–25a. The Perrys believe that humans are made in God’s image, according to his perfect plan. *Ibid.* Based on Bible verses like Mark 2:17, they believe that only the sick should take medicine after determining that their God-given immune systems cannot eliminate an illness. *Ibid.*

A preemptive measure, in the Perrys' view, reveals a lack of faith in God. *Ibid.* The Perrys therefore stopped vaccinating K.P. when she was two years old. As a result, K.P. has received some but not all the vaccines that the law requires for her to attend public or private school in West Virginia. JA182.

C. The Perrys enroll K.P. in the Virtual Academy.

In 2022, the Perrys enrolled K.P. in the West Virginia Virtual Academy through the Upshur County School District. App.142a. Although students in the Virtual Academy attend school remotely, the Academy is free and part of the K-12 public-school system. App.141a–42a.

The Virtual Academy was a great fit for the Perry family. Mrs. Perry works outside the home as the family's sole breadwinner. App.142a. Mr. Perry is 100% disabled and has severe physical and intellectual impairments. App.126a. Although he cannot serve as a homeschool teacher, he can oversee K.P.'s at-home virtual schooling. App.128a.

K.P. excelled in the program. She earned straight As. *Ibid.* She was excited about learning and enjoyed interacting with her peers online. App.126a. In short, she thrived from the instruction, structure, and social interactions the Virtual Academy provided.

D. Officials disenroll K.P. because of her vaccination status.

That all changed in January 2024. After K.P. had been enrolled in the Virtual Academy for about 16 months, Respondent Stacy Marteney—the Virtual Learning Coordinator for Upshur County Schools—contacted Mrs. Perry to ask about K.P.’s vaccination status. JA233. Mrs. Perry confirmed that she could not vaccinate her daughter because of her religious beliefs. App.127a.

Local officials disenrolled K.P. from the school, canceling her online credentials. *Ibid.* Mrs. Perry sought a religious exemption for K.P., but Ms. Marteney informed her that she could not allow opt-outs for religious reasons. JA127.

Without an exemption to accommodate their religious beliefs, the Perrys must homeschool K.P. App.127a. That presents major obstacles because of Mrs. Perry’s work schedule and Mr. Perry’s disability. K.P. has also suffered—homeschooling has curbed her enthusiasm for learning and deprived her of valuable instructional resources and at-home social outlets that the Virtual Academy afforded. App.127a–29a.

II. Procedural history

A. The district court grants a preliminary injunction.

The Perrys filed suit in federal court on behalf of themselves and K.P. under Section 1983, alleging that the school officials' actions violated their free-exercise rights. App.162a. The Perrys also moved for a preliminary injunction to ensure that K.P. could continue to attend the Virtual Academy while the case proceeded. App.44a. The district court granted the Perrys a preliminary injunction, concluding that all four preliminary-injunction factors were met.

First, the court held that the Perrys were likely to succeed on the merits of their free-exercise claim because West Virginia's compulsory-vaccination law is not generally applicable and cannot satisfy strict scrutiny. App.86a–97a. The court concluded that the statute is not narrowly tailored to serve the State's interest in preventing the spread of infectious disease because (1) 45 other states offer religious or philosophical exemptions from their vaccine requirements and (2) the law “provide[s] carve outs for other students removed from physical school structures,” like those “in learning pods or microschools.” App.94a–95a.

Second, the court held that the Perrys' loss of free-exercise rights caused irreparable harm. App.98a. The law makes the Perrys choose between their “preferred method of constitutionally[]required education” and their religious beliefs. *Ibid*. Further, they “face obstacles in homeschooling” because of Mr. Perry's disabilities and Mrs. Perry's work schedule. *Ibid*.

Finally, the court held that the equities and the public interest weigh in favor of protecting First Amendment rights. App.99a. The State suffers no harm, the court said, when prevented from enforcing likely unconstitutional restrictions. *Ibid.*

B. A split Fourth Circuit panel reverses.

In a sharply divided decision, the Fourth Circuit reversed, holding that the Perrys are not entitled to a preliminary injunction because West Virginia’s compulsory-vaccination law is likely constitutional. App.3a, 5a–6a.

The majority held that the law is neutral and generally applicable and is rationally related to the State’s interest “in reducing the spread and severity of infectious diseases.” App.9a–10a. The majority invoked states’ “police power” and several of this Court’s decisions from the first half of the twentieth century rejecting constitutional challenges to other states’ compulsory-vaccination laws. App.7a–8a (discussing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), *Zucht v. King*, 260 U.S. 174 (1922), and *Prince v. Massachusetts*, 321 U.S. 158 (1944)). The majority reasoned that other “[p]arents and grandparents have their own interest in not seeing their children and grandchildren in school environments with significant numbers of unvaccinated peers.” App.11a.

The majority rejected the district court’s conclusion on general applicability. The Fourth Circuit acknowledged that government officials cannot “treat comparable secular activity more favorably than religious exercise.” App.16a (citation modified). It also conceded that the law allows secular exemptions for

adults working in schools and children educated at home or in pods or microschools, treating them “more favorably than children” who desire religious exemptions and “attend[] the Virtual Academy.” *Ibid.* But the majority concluded that the differential treatment presents no constitutional problem: Because “the Perrys do not allege that K.P.’s desire to attend the Virtual Academy is religiously motivated,” the majority reasoned, “this is merely an instance of West Virginia treating some secular activity more favorably than other secular activity.” *Ibid.*

Finally, the majority concluded that this Court’s decision in *Mahmoud* did not require strict scrutiny here. It reasoned that the burden imposed by the compulsory-vaccination law “is not remotely of the same character as those imposed in [*Wisconsin v. Yoder*, 406 U.S. 205 (1972)] and *Mahmoud*.” App.21a (citation modified). Forcing individuals to violate their religious beliefs, the majority explained, is less burdensome than mere exposure to views hostile to those beliefs, as in *Mahmoud*. *Ibid.*

Judge Niemeyer dissented. He criticized the majority for conducting its analysis “mostly from 10,000 feet above.” App.32a–33a. He explained that “the issue here is not whether we must defer to” government officials, but whether those officials have “deferred to the Constitution and the fundamental individual rights of the Perrys.” App.34a.

Judge Niemeyer concluded that the Perrys are likely to succeed on the merits. Under *Employment Division v. Smith*, 494 U.S. 872 (1990), Judge Niemeyer would have held that “the mandatory vaccination law is not generally applicable as it does not

apply to children who receive home instruction, to children who are educated in learning pods, and to children who attend microschools.” App.37a. Those students are “in a similarly remote context” to students attending the Virtual Academy, and all of them have a “minimal” risk of “exposure to other children.” *Ibid.* That means “the state’s policy treats public-school virtual students who assert a religious objection to vaccination differently than other similarly situated children” and triggers strict scrutiny. *Ibid.*

Judge Niemeyer also would have held that strict scrutiny applies under *Mahmoud*. The State’s law “forc[es]” the Perrys “to choose between a free public education and adherence to their religious beliefs.” *Ibid.* And he criticized the majority for making the same error—confining *Mahmoud* to curricular requirements—that this Court corrected in *Mirabelli*. App.39a–40a.

Finally, Judge Niemeyer explained that the law cannot satisfy strict scrutiny. The law is not narrowly tailored, he reasoned, because “[t]he circumstances of *virtual* students are far more akin to those of children receiving education from home instruction, in learning pods, and in microschools than to those *physically* present in a school classroom.” App.40a–41a. The district court’s injunction thus “hardly affects West Virginia’s compelling interest in preventing the spread of infectious disease, as the injunction treats virtual students the same as other West Virginia students not physically attending a school while, at the same time, preserving the Perrys’ free exercise rights.” App.27a.

REASONS FOR GRANTING THE WRIT

This case raises two pressing free-exercise questions that call for this Court’s review.

First, this Court has directed that strict scrutiny applies to state laws that burden religion and are not generally applicable. And the law here has exemptions for categories of students and adults who need not be vaccinated—for a secular reason or no reason at all. Yet the Fourth Circuit avoided applying strict scrutiny by discounting the burden the State’s law imposes on the Perrys’ religious exercise because the act triggering that burden—here, attending a virtual public school—was not itself religiously motivated. That novel rationale created a 2–1 circuit split, conflicts with this Court’s precedent, and jeopardizes free-exercise claims more broadly. This Court should step in.

Second, just last year, this Court held in *Mahmoud* that strict scrutiny applies to laws that substantially interfere with parents’ rights to direct their children’s religious upbringing. That holding straightforwardly applies here. After all, local school officials are conditioning public-school attendance on the Perrys’ willingness to violate their religious beliefs. That burden is worse than conditioning public-school attendance on exposure to educational lessons and materials that merely challenge parents’ religious beliefs. Yet the Second and Fourth Circuits have continued the pre-*Mirabelli* trend of lower courts artificially cabining *Mahmoud* to avoid applying strict scrutiny. This Court should clarify that confusion and set the circuits back on course.

I. The Fourth Circuit’s general-applicability holding creates a circuit split, violates this Court’s precedent, and jeopardizes religious liberty.

In *Tandon*, this Court held that government regulations are not generally applicable and thus trigger strict scrutiny under the First Amendment “whenever they treat *any* comparable secular activity more favorably than religious exercise.” 593 U.S. at 62. In the decision below, the Fourth Circuit agreed that West Virginia’s law treats certain children (who are home-schooled or attend microschools or learning pods and may choose not to be vaccinated for any reason, secular or otherwise) “more favorably” than children like K.P. (who attend virtual school but are denied a religious exemption). App.16a. Yet the Fourth Circuit held that strict scrutiny does not apply because the underlying act that triggered the religious burden—attending virtual school—was not itself religiously motivated.

The Fourth Circuit’s holding warrants this Court’s review. It split from the Third and Ninth Circuits, conflicts with *Tandon*, and would eviscerate many free-exercise freedoms.

A. The decision below creates a 2–1 circuit split.

The decision below split from two other circuits regarding how to implement *Tandon*’s comparability analysis.

1. The Fourth Circuit below conceded that the compulsory-vaccination regime here treats “children educated outside the school system and adults working in schools” “more favorably than children attending the Virtual Academy.” App.16a. The former need not be vaccinated for any reason, whether secular or religious, or no reason at all. But virtual-school attendees like K.P. must vaccinate, despite sincere religious beliefs to the contrary. The Fourth Circuit did not question that the mandatory-vaccination policy burdens the Perrys’ sincere religious beliefs.

Yet the Fourth Circuit declined to apply strict scrutiny. Instead of addressing the religious burden caused by that differential treatment, the court shifted its focus. Because “the Perrys do not allege that K.P.’s desire to attend the Virtual Academy is religiously motivated,” the court held, West Virginia is merely “treating some secular activity more favorably than other secular activity.” *Ibid.* It explained that the “only religiously motivated conduct” was “K.P.’s refusal to get vaccinated” and—ignoring the categories of children and adults who can choose not to vaccinate for any reason—said the only exemption to the law was a not-comparable medical carveout. App.17a. The upshot: government officials can treat the Perrys’ religious views less favorably than parents’ secular decisions not to vaccinate if they homeschool or use microschools or learning pods.

2. The Ninth Circuit parts ways with this analysis. In two cases, it has held that strict scrutiny applies to government actions that burden religious exercise even when the conduct that precipitated the religious burden was not itself religiously motivated.

Start with *Bacon v. Woodward*, 104 F.4th 744 (9th Cir. 2024). There, the city of Spokane terminated firefighters who failed to comply with a COVID-19 vaccine mandate. *Id.* at 747–48. But the city also used firefighters from neighboring departments—with whom the city had a mutual-assistance agreement—to fill gaps in coverage. *Id.* at 748, 751. The catch: Those other fire departments granted religious exemptions from the same vaccine requirement. *Id.* at 751.

The Ninth Circuit held that the city’s policy was not generally applicable. There was no allegation that the fired Spokane firefighters had a religious motivation to work for the city rather than neighboring fire departments. But that did not matter. The city “exempted certain firefighters based on a secular criterion—being a member of a neighboring department—while holding firefighters who objected to vaccination on purely religious grounds to a higher standard.” *Ibid.* That uneven application “undermined” the city’s interest in enforcing the vaccination requirement—stopping the spread of COVID-19—against those with religious opposition. *Id.* at 752. It thus violated the Free Exercise Clause. *Id.* at 753.

The Ninth Circuit reached the same conclusion in *Waln v. Dysart School District*, 54 F.4th 1152 (9th Cir. 2022). The school district there had a policy that barred students from decorating their graduation caps. A student who attended one school in the district sought a religious exemption allowing her to wear an eagle feather on her cap. *Id.* at 1155. The district denied her request. But it allowed a graduate at a different school in the district to put a breast-cancer-awareness sticker on his cap. *Id.* at 1159. The

district argued that the situations were not comparable because the students “attended different high schools” and “different graduation ceremonies.” *Ibid.*

The Ninth Circuit held that the district’s “argument misses the mark.” *Ibid.* Relying on *Tandon*, the court held that the district could not allow altered graduation caps with a secular message but not with a religious symbol—even though the plaintiff did not allege that she attended her school instead of the neighboring school for religious reasons. The two “present a nearly identical threat” to the district’s interests in fostering unity and avoiding disruption. *Ibid.* And the district could not satisfy strict scrutiny. *Id.* at 1164.

3. The Fourth Circuit’s analysis also broke from the Third Circuit’s approach. In *Smith v. City of Atlantic City*, 138 F.4th 759 (3d Cir. 2025), that court addressed a claim brought by Mr. Smith, a Christian firefighter, concerning an exception he sought to the city’s grooming policy, which prohibited growing a beard. The city classified all employees—both those actively engaged in fire suppression and administrative staff—as firefighters subject to the policy. *Id.* at 768, 771. But the city never required administrative staff to undergo fit testing to ensure that their masks seal properly. *Id.* at 771. Both the grooming policy and the fit-testing requirement serve the city’s interest in safety. *Ibid.*

Though Mr. Smith asserted no religious motivation to serve in either firefighter role, the Third Circuit said the city’s policy “fails general applicability” by “permitt[ing] certain kinds of conduct that undermines its interest” (no fit testing) “while disfavoring

religious conduct undermining the same interest” (Mr. Smith’s desire to grow a beard). *Ibid.* The Third Circuit dissenter echoed the Fourth Circuit, reasoning that the fit-testing requirement was not an exception to the grooming policy but was instead a separate regime that distinguishes between administrative and active-fire-suppression jobs, *id.* at 781 (Chung, J., dissenting)—like homeschooling is an alternative means to comply with the compulsory-education law, but is not an exception to the vaccination requirement. The majority rejected that argument because both requirements serve the same safety interest. *Id.* at 771–72. The court held that the policy did not satisfy strict scrutiny because the city could “at least *try* and fit test Smith” to see if the mask would seal properly around his facial hair. *Id.* at 773–74.

In the Fourth Circuit, all these prevailing plaintiffs would have lost. The Fourth Circuit would have said that the terminated firefighters did not choose to work for the city of Spokane for religious reasons, that the student in *Waln* did not choose to attend her public school for religious reasons, and that Mr. Smith did not choose his position for religious reasons. In short, the Fourth Circuit would deprive many individuals of the religious protection that *Tandon* is supposed to provide. At the same time, the Perrys—and many others like them—would have a valid free-exercise claim in Washington or New Jersey but not in West Virginia or North Carolina. This Court should resolve that divide so that the Constitution’s applicability does not turn on mere geography.

B. The decision below conflicts with this Court’s precedent.

In addition to creating a split, the Fourth Circuit’s new rule is wrong. As noted, *Tandon* held that the First Amendment demands that a law satisfy strict scrutiny if it treats “*any* comparable secular activity more favorably than religious exercise.” 593 U.S. at 62. *Tandon* instructs courts to assess comparability based on “the risks various activities pose” to “the asserted government interest that justifies the regulation at issue.” *Ibid*.

Applying that test here, the compulsory-vaccination requirement makes distinctions that require it to meet strict scrutiny. As the Fourth Circuit conceded, West Virginia’s law treats children in homeschools, learning pods, or microschools who have not been vaccinated for any (or no) reason better than children in virtual school who seek exemption for a religious reason. App.16a. This is so even though homeschoolers “pose” an identical “risk[]” to the government’s interest as virtual schoolers, and students in pods or microschools almost certainly pose an even greater “risk[]” to that interest than virtual schoolers. *Tandon*, 593 U.S. at 62. As Judge Niemeyer flatly stated in dissent, “the state’s policy treats public-school virtual students who assert a religious objection to vaccination differently than other similarly situated children” who assert a secular compunction (or provide no reason at all). App.37a. And that’s even before considering the “risk[]” that adults working at in-person public schools “pose” when they work unvaccinated—for any reason or no reason—around public-school children. *Tandon*, 593 U.S. at 62.

In other words, that scheme presents a textbook *Tandon* problem, triggering strict scrutiny. Yet the Fourth Circuit failed to hold Respondents to their burden.

Indeed, it is difficult to fathom what interest the government has in compelling virtual schoolers to be vaccinated in violation of their faith while allowing homeschool, microschool, and learning-pod students to go unvaccinated for secular reasons or no reason at all. Respondents certainly cannot “show that the religious exercise at issue is more dangerous than those activities” or that “measures less restrictive of the First Amendment activity could not address its interest.” *Tandon*, 593 U.S. at 63. As Judge Niemeyer explained, “making an exception for the limited number of students whose parents both have a sincere religious objection to vaccinating their children and who wish to take advantage of the *virtual* school option offered by a public school system would itself be a prime example of a less restrictive alternative that would help the State advance its interests without needlessly burdening students’ religious beliefs.” App.41a.

The Fourth Circuit’s flawed reasoning—that the law was merely differentiating between two secular acts because the Perrys did not argue that their religion motivated them to send K.P. to virtual school—is misguided. Cf. *Mahmoud*, 606 U.S. at 545 (holding that school’s curriculum burdened religious exercise even though the choice to send children to public school was not religiously motivated). The implication of that logic is that the Perrys should homeschool K.P. or send her to a microschool or learning pod to avoid the religious burden.

But this Court rejected that argument just last year in *Mahmoud*: “[M]any parents cannot afford ... a substitute,” like a microschool, “[a]nd homeschooling comes with a hefty price as well.” 606 U.S. at 561–62. That is true—in both respects—for the Perrys. App.126a.

The flaws in the Fourth Circuit’s new rule run deeper. The court deemed it proper to compare the Perrys’ religious choice not to vaccinate K.P.—the “only religiously motivated conduct at issue here”—only to the medical exemption available to students already subject to the vaccine requirement. App.17a–19a. But that analysis ignores the large swaths of students and school personnel left outside the vaccine mandate’s reach from the outset: all students who do not attend a “public, private [or] parochial school” in West Virginia, W. Va. Code § 16-3-4(a), and all adult workers at every school, App.139a–40a. The Fourth Circuit appeared to treat those groups as different in kind, irrelevant to the analysis because “legislatures can craft *particular* compromises” and need not structure a law to reach everyone. App.12a.

That’s wrong, at least when burdens on religion arise. The First Amendment “protects religious observers against unequal treatment.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (citation modified). The groups a legislature leaves categorically outside a law’s grasp surely count in determining whether the State favors “*any*” comparable non-religious activity. *Tandon*, 593 U.S. at 62. That some parents might choose homeschool or microschool options for religious reasons does not change the fact that the category itself—the reason why the group is exempt from the vaccine

requirement—is secular. (In any event, nothing in the record suggests that *only* religious people choose to homeschool or send their children to microschools or learning pods.*) Regardless, that logic would not provide a basis to favor adults working in public schools.

At bottom, the Fourth Circuit seems to have been motivated by the view that the Perrys’ claim would “deprive states of their historic sovereignty,” “infringe on the democratic prerogative of societal self-protection,” and “invite[] the return of ancient scourges to these very modern times.” App.24a–25a. That overstates the implications. The Perrys seek only an as-applied religious exemption for K.P. to attend school *virtually*—*i.e.*, at home, without other students physically present. Meanwhile, the law exempts from the requirement thousands of Mountaineer children who are homeschooled or attend microschools or learning pods, plus unvaccinated adults working in public schools. This Court can rule for K.P. without deciding whether Respondents can require vaccination for children attending a public or private school *in person*.

Even the government’s broad police power “must give way” to the Constitution. *Morris v. Jones*, 329 U.S. 545, 553 (1947). Given the secular exemptions built into West Virginia’s vaccination scheme, the First Amendment demands that the Perrys’ religious beliefs be given the same respect.

* If that were the case, a different First Amendment problem would arise: The government cannot prefer some religious denominations or sects (those whose faiths require them to homeschool) over others (those whose faiths do not). *Catholic Charities Bureau, Inc. v. Wisconsin Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 247–50 (2025).

II. The Fourth Circuit’s decision narrows *Mahmoud*’s holding to a nubbin.

In *Mahmoud*, this Court reiterated that parents have the right “to direct the religious upbringing of their children.” 606 U.S. at 546 (citation modified). “[G]overnment policies that substantially interfere with the religious development of children” burden parents’ rights. *Ibid.* (citation modified). And a law that imposes a burden of that “character” is subject to strict scrutiny even if it “is neutral [and] generally applicable.” *Id.* at 564.

As Judge Niemeyer explained, this case implicates *Mahmoud*’s clear rule. Respondents “force[d]” the Perrys “to choose between a free public education” for K.P. and “adherence to their religious beliefs” against vaccinating her. App.37a. The Perrys had to pick between the “public benefit” and “their religious exercise”—precisely what *Mahmoud* says triggers strict scrutiny. 606 U.S. at 561. He criticized the majority’s “cramped reading of *Mahmoud*” and *Mirabelli* as practically ignoring the “binding, repetitive, and dispositive instruction” those decisions provide. App.39a.

Indeed, the burden on the Perrys is even greater than the burden on the parents in *Mahmoud*. The parents in *Mahmoud* could at least try to counteract their children’s finite exposure to the storybook curriculum that undermined the parents’ beliefs there. See App.21a. Here, receiving the vaccine is permanent and is itself a sin, according to the Perrys’ religious beliefs. That cannot be undone or untaught.

Despite those high stakes, the courts of appeals have consistently tried to cabin *Mahmoud*. And while this Court tried to restore order in *Mirabelli*, the lower courts still have not received the message. The Fourth Circuit in this case and, more recently, the Second Circuit have continued after *Mirabelli* to confine *Mahmoud* in unjustified ways. This Court should grant the petition to send a clear message that *Mahmoud* means what it says.

A. *Mirabelli* attempts to course-correct the circuits’ narrow reading of *Mahmoud*.

In *Mahmoud*, this Court held that religious parents have a constitutional right to receive notice and opt their children out of classroom instruction that undermines the parents’ faith. 606 U.S. at 528–30. *Mahmoud* followed directly from *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where this Court similarly held that the Constitution gave parents the right to a religious exemption from Wisconsin’s compulsory-education law that substantially burdened their Amish religious practices. *Id.* at 218, 234–35; *Mahmoud*, 606 U.S. at 549–50 (discussing *Yoder*).

The common thread: The state policies “pose[d] ‘a very real threat of undermining’ the religious beliefs and practices that the parents wish to instill in their children.” *Mahmoud*, 606 U.S. at 565 (quoting *Yoder*, 406 U.S. at 218). The Court held that “strict scrutiny is appropriate” to evaluate any law imposing a burden “of the same character.” *Id.* at 564–65.

Yet, from the start, the courts of appeals read *Mahmoud* too narrowly. The Sixth Circuit held that *Mahmoud* did not apply to religious parents’ challenge to a school district’s policy permitting students to use the bathroom consistent with their gender identity. See *Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, 2025 WL 2453836, at *6–7 (6th Cir. Aug. 26, 2025). The court held that the policy “does not impose a burden ‘of the same character’” as in *Mahmoud* and *Yoder* because it “was not an educational requirement or curricular feature.” *Id.* at *7 (citation modified). It further explained that “*Mahmoud*’s reasoning principally relates to curricular requirements” and does not stand “for the broad proposition that strict scrutiny is automatically triggered when a school does not allow religious students to opt out of any school policy that interferes with their religious development.” *Id.* at *7 n.3.

The Ninth Circuit soon followed suit. Parents challenged California’s policies “requiring teachers to hide a student’s gender nonconformity and social transition, including from the student’s parents,” absent the student’s consent. *Mirabelli v. Bonta*, 2026 WL 44874, at *1 (9th Cir. Jan. 5, 2026) (per curiam). The Ninth Circuit agreed with the Sixth’s treatment of *Mahmoud*—labeling it “a narrow decision focused on uniquely coercive ‘curricular requirements.’” *Id.* at *3 (quoting *Doe*, 2025 WL 2453836, at *7 n.3). And it echoed the Sixth Circuit’s conclusion that *Mahmoud* does not demand strict scrutiny when schools deny the right to “opt out of any school policy that interferes with [students’] religious development.” *Ibid.* California’s policy differed from the one in *Mahmoud*, the court held, because it applies “only when a *student*

makes the voluntary decision to share their gender nonconformity with the school.” *Ibid.* It criticized the district court for “improperly extend[ing] the reasoning of *Mahmoud*.” *Ibid.*

This Court disagreed. Vacating the Ninth Circuit’s stay, the Court explained that *Mahmoud* cannot be “brushed aside” as “a narrow decision focused on uniquely coercive curricular requirements.” 607 U.S. at 495 (quoting *Mirabelli*, 2026 WL 44874, at *3). The Court repeated that “*Mahmoud* demands” strict scrutiny when a state policy “substantially interfere[s] with the right of parents to guide the religious development of their children.” *Id.* at 496 (citation modified). Crystallizing the point, the Court clarified that the “unconsented facilitation of a child’s gender transition” imposes a “greater” burden on parents’ free-exercise rights than the storybook curriculum “sufficient to trigger strict scrutiny in *Mahmoud*.” *Ibid.*

B. Two circuits—including the Fourth Circuit below—continue the wayward trend.

Mirabelli did not correct the lower courts’ course. The courts of appeals have continued to cabin *Mahmoud* artificially. The Fourth Circuit led the charge in the decision below. The court accepted that *Mahmoud* subjects to strict scrutiny a law that “substantially interferes with the religious development of a child.” App.20a (citation modified). And it recognized that *Yoder* and *Mahmoud* required exemptions because the government policies there “carried with them a very real threat of undermining the religious beliefs that the parents wished to instill in their children.” App.20a–21a (citation modified).

But then the Fourth Circuit went off track—down the same path as the Sixth and Ninth Circuits. It held that the burden imposed by West Virginia’s compulsory-vaccination law “is not remotely ‘of the same character’ as [the burdens] imposed in *Yoder* and *Mahmoud*.” App.21a. While the policies in *Yoder* and *Mahmoud* were “instrument[s] of ideological indoctrination,” the Fourth Circuit hedged, West Virginia’s law “is a public health measure.” *Ibid*. While the other policies “expose[d] children to values or beliefs that might be hostile to their parents’ religious beliefs,” the court continued, “[a]ll th[is] law requires is that ... children get themselves vaccinated before attending school.” *Ibid*. West Virginia’s law recognizes “[t]he need for some to protect the health and well-being of all”—an interest “not present in *Yoder* or *Mahmoud*.” *Ibid*. The Fourth Circuit similarly distinguished *Mirabelli* as “a preliminary action that did not involve a public health measure.” *Ibid*.

The Second Circuit also followed that course. Amish parents challenged New York’s compulsory-vaccination law, asserting their sincere religious beliefs. See *Miller v. McDonald*, 180 F.4th 420, 424 (2d Cir. 2026) (per curiam). The Second recognized that—under *Mahmoud* and *Yoder*—“[a] burden is ‘of the same character’ when it ‘substantially interfer[es] with the religious development’ of a child and ‘pose[s] a very real threat of undermining the religious beliefs and practices that the parents wish to instill.’” *Id.* at 432 (quoting *Mahmoud*, 606 U.S. at 565).

But from there, the Second Circuit lost its way, calling the Fourth’s reasoning “persuasive.” *Id.* at 433. The Second Circuit held that, compared to the policies in *Yoder* and *Mahmoud*, the vaccine requirement “is different”—it “does not regulate what children are taught, does not require them to affirm any belief, does not expose them to state-selected instruction contrary to their parents’ faith, and does not enlist school officials to displace parental religious formation.” *Id.* at 432–33. Instead, it is “a health-and-safety condition.” *Id.* at 433.

The Second Circuit also distinguished *Mirabelli*. While acknowledging that *Mirabelli* “confirms that *Mahmoud* reaches beyond curriculum,” it limited *Mirabelli*’s reasoning to policies that “conceal[] from parents a matter central to their child’s identity and upbringing, and thus displac[e] the parents’ role in it.” *Ibid.*

C. This Court should step in now.

This Court’s attempt to correct the lower courts’ misinterpretations of *Mahmoud* has not succeeded. The misreading is taking root and growing. This Court should intervene now before the lower courts bear more bad fruit.

Mahmoud’s rule is clear: government actions must satisfy strict scrutiny if they substantially interfere with—by threatening to undermine—parents’ religious development of their children. 606 U.S. at 530, 556. While *Mahmoud* applied that rule to the particular policy at issue in that case (compulsory curriculum), nothing in the Court’s reasoning cabins its rule to that context.

Indeed, the inquiry is “fact-intensive,” *id.* at 550, and experience shows that government policies can threaten parents’ religious instruction in many different ways. *E.g.*, *Yoder*, 406 U.S. at 211, 218 (compulsory-attendance law burdened Amish beliefs); *Mahmoud*, 606 U.S. at 528–30, 564–65 (LGBTQ curriculum); *Mirabelli*, 607 U.S. at 496–97 (secret-social-transition policies).

The burden here is just as great—if not greater. While the compulsory-attendance and -instruction policies in *Yoder* and *Mahmoud* “*expose[d]* children to values or beliefs ... hostile to their parents’ religious beliefs,” App.21a (emphasis added), the compulsory-vaccination policy here would directly and irrevocably violate the Perrys’ beliefs—requiring them to sin. There is no way to undo, counteract, or countermand a vaccine once given.

The Second Circuit rejected this argument, noting that the burden is not the same “in kind,” even if “more ... serious” in degree. *Miller*, 180 F.4th at 433. Like the Fourth Circuit, its only basis for that conclusion is that the vaccine law deals with public health. See *ibid.*; see also App.21a.

But government policies may claim to advance health and safety interests *and* pose a real threat to parents’ religious direction of their children—like the secret-social-transition policies in *Mirabelli*, 607 U.S. at 496–97 (noting California’s asserted interest in “student safety” and that gender dysphoria bears on “a child’s mental health”); see *Lukumi*, 508 U.S. at 538–39 (noting city’s “legitimate governmental interest[] in protecting the public health”).

The public-health nature of a government requirement might well make a difference when it comes to *applying* strict scrutiny. But it provides no support for evading such review in the first place. The Second and Fourth Circuits conflated those two questions: whether a law triggers strict scrutiny (on the one hand) and withstands it (on the other). But that distinction is critical. It also explains why the Fourth Circuit was wrong to rely on this Court’s decision in *Prince v. Massachusetts*.

Prince noted in dictum that a parent’s rights, even when grounded in a claim “to control the child’s course of conduct on religion or conscience,” do not supersede the state’s authority to require “compulsory vaccination.” 321 U.S. at 166–67. But *Prince* has a “narrow scope”: it allows states to limit parents’ rights if they “pose[] some substantial threat to public safety, peace or order”—*i.e.*, “will jeopardize the health or safety of the child, or have a potential for significant social burdens.” *Yoder*, 406 U.S. at 230, 233–34. So *Prince*’s dictum speaks to a hypothesized neutral and generally applicable vaccination requirement.

To be sure, some laws that burden parents’ free-exercise rights might pass muster. Strict scrutiny “is not inevitably fatal in fact.” *United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996) (citation modified). But the government cannot meet that burden here, as it has no apparent interest in treating at-home, virtual-school students who want a religious exemption different than homeschool, microschool, or learning-pod students who can go unvaccinated for any reason or no reason. So the government cannot *prove* its policy is “narrowly tailored to achieve” its public-health interest. *Mahmoud*, 606 U.S. at 565 (citation modified).

Courts can—and should—account for health and safety interests when applying scrutiny. But they should not allow public-health considerations to distort the independent question of whether a law triggers strict scrutiny in the first place. Under *Mahmoud*, West Virginia’s law does.

III. The issues presented are important and recurring.

Three circuits are now split on the first question presented, and four circuits have erred in various applications of the second. People of faith deserve better.

People hold “religious beliefs of all kinds,” and the First Amendment protects their right “to live out their faiths in daily life.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). Yet the Fourth Circuit’s *Tandon* holding threatens to wipe out wide swaths of free-exercise claims.

For example, if a city police department’s homicide unit requires an employee to work on the employee’s Sabbath but the arson unit gives a Sabbath-day exemption, the homicide detective would be unable to pursue a claim under *Tandon*. That’s because the decision to investigate murders rather than arson is not religiously motivated. Cf. *De Souza v. New York*, 824 F. Supp. 3d 336, 378 (S.D.N.Y. 2026) (analyzing state employee’s free-exercise challenge to Sabbath work requirement under *Smith*); *Groff v. DeJoy*, 600 U.S. 447 (2023) (discussing religious beliefs against work on the Sabbath).

Indeed, many people find their religious beliefs burdened in activities that are not themselves religiously motivated. The job they work. See, e.g.,

Atlantic City, 138 F.4th at 771; *Polk v. Montgomery Cnty. Pub. Schs.*, 166 F.4th 400, 421 (4th Cir. 2026) (rejecting teacher’s claims in part because “no one forced Polk to become a substitute teacher in Montgomery County”); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (Jehovah’s Witness working at foundry); *Groff*, 600 U.S. at 454–56 (person of faith working for the U.S. Postal Service); *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012) (discussing religious burdens on woman who sought to become a school counselor). Where they work their job. *E.g.*, *Bacon*, 104 F.4th at 751–53 (city fire department barred religious exemptions to vaccine but hired non-vaccinated firefighters from neighboring departments). Or, as in this case, the school they attend. *E.g.*, *Waln*, 54 F.4th at 1159 (school policy prohibited religious expression at graduation); *Ward*, 667 F.3d at 730 (school policy prohibited counseling student from referring patients for religious reasons); cf. *Mahmoud*, 606 U.S. at 561.

Yet under the Fourth Circuit’s rule, courts must focus only on whether those antecedent acts have some religious basis, leaving states vast power to imperil fundamental rights.

The Fourth Circuit’s *Mahmoud* holding raises similar concerns. As this Court explained there, “for many people of faith,” “few religious acts” matter more than “rais[ing] their children in a way that is consistent with their religious beliefs and practices.” 606 U.S. at 547. The First Amendment’s recognition of that right has deep roots in “enduring American tradition.” *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 486 (2020) (citation omitted).

History reveals, too, that governments often fail to guard that right as they ought: from flag salutes (*West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)), to compulsory school attendance (*Yoder*), curricular requirements (*Mahmoud*), secret-social-transition policies (*Mirabelli*), and beyond.

This case cleanly presents these legal issues, giving this Court an opportunity to resolve a 2–1 circuit split that the Fourth Circuit forged and to provide lasting clarity regarding *Mahmoud*’s scope. Granting the petition would also ensure the Court could stamp out the dangers the Fourth Circuit’s reasoning portends before it spreads or causes more harm. Governments will be emboldened to engage in all kinds of religious discrimination if the lower courts fail to apply strict scrutiny to arbitrary policies like the one here—blanket vaccine exemptions for students attending learning pods and microschools but no religious exemption for students attending virtual school in the privacy of their own homes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 2026

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-2132

KRYSTLE PERRY, individually and on behalf of their
minor child K.P.; ANTHONY PERRY, individually
and on behalf of their minor child K.P.,

Plaintiffs – Appellees,

v.

STACY MARTENEY, in her official capacity as the
Virtual Learning Coordinator of the Upshur County
Virtual School; CHRISTINE MILLER, in her official
capacity as Superintendent of the Upshur County
School District,

Defendants – Appellants,

and

THE BOARD OF EDUCATION OF THE COUNTY
OF UPSHUR; DR. MATTHEW CHRISTIANSEN, in
his official capacities as the State Health Officer and
Commissioner of the Bureau of Public Health; DOUG
CIPOLETTI, in his official capacity as Executive
Director of the West Virginia Virtual School
Academy; BRYAN HOYLMAN, in his official capacity
as Chair of the Board of Directors of Mountain State
Learning Solutions, Inc. d/b/a West Virginia Virtual
Academy,

Defendants.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Thomas S. Kleeh, Chief District Judge. (2:24-cv-00018-TSK)

Argued: January 27, 2026 Decided: April 8, 2026

Before WILKINSON, NIEMEYER, and AGEE,
Circuit Judges.

Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Judge Agee joined. Judge Niemeyer wrote a dissenting opinion.

ARGUED: William M. Lorensen, BOWLES RICE, LLP, Charleston, West Virginia, for Appellants. Christopher David Wiest, CHRIS WIEST, ATTORNEY AT LAW, PLLC, Covington, Kentucky, for Appellees. **ON BRIEF:** Robert J. Kent, Ryan S. Moore, Leigh Anne Wilson, BOWLES RICE, LLP, Parkersburg, West Virginia, for Appellants. Aaron Siri, Elizabeth A. Brehm, Walker Moller, SIRI & GLIMSTAD LLP, New York, New York, for Appellees.

WILKINSON, Circuit Judge:

Anthony and Krystle Perry brought this suit on behalf of their daughter to obtain a religious exemption from West Virginia's compulsory vaccination law. Religious exemptions are not available under state law, but the Perrys claim they are required by the First Amendment. After finding

that the Perrys were likely to succeed on the merits of their free exercise claim, the district court granted them a preliminary injunction. We now reverse the district court's decision to grant preliminary relief.

Rights, as important as they are, do not swing free and clear of the larger social compact. We live in a society that accords its citizens enormous benefits. In return, states can, in a measured way, require certain exactions and accommodations to the broader social interest. The police power of the states "embrace[s], at least, such reasonable regulations . . . as will protect the public health and the public safety." *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). West Virginia's compulsory vaccination law does exactly that. It is a legitimate exercise of the state's power to protect the health and well-being of school children. Striking the law down would undermine not just our system of dual sovereignty, but also a long line of Supreme Court precedent.

I.

A.

West Virginia requires children attending schools in the state to be vaccinated against a host of infectious diseases, including chickenpox, hepatitis B, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus, and whooping cough. W. Va. Code § 16-3-4(c). Similar compulsory vaccination laws exist in all fifty states. West Virginia is an outlier, however, in its refusal to grant exemptions to children whose sincerely held religious beliefs prevent them from getting vaccinated. J.A. 42.

The only permissible basis for receiving an exemption is if a child's "physical condition . . . is such that immunization is contraindicated or there exists a specific precaution to a particular vaccine." W. Va. Code § 16-3-4(h)(1). A contraindication is "a medical condition which renders an immunization improper for a particular individual." W. Va. Code R. § 64-95-2.4. The CDC's Advisory Committee on Immunization Practices publishes contraindications for each vaccine. *Id.* A precaution is "a condition defined under the current standards of immunization practice that might increase the chance or severity of an adverse vaccine reaction or compromise the ability of the vaccine to produce immunity." *Id.* § 64-95-2.10.

To request a medical exemption, a child must obtain the certification of a licensed physician. W. Va. Code § 16-3-4(h)(1). West Virginia's Immunization Officer then decides whether there is sufficient medical evidence to justify an exemption. *Id.* § 16-3-4(h)(2). The Immunization Officer's decision can be appealed to the State Health Officer who makes the final determination. *Id.* § 16-3-4(h)(4)–(5). If a child is unsatisfied with the outcome of the administrative process, she has a right to judicial review under West Virginia's Administrative Procedures Act. *Id.* §§ 16-3-4(h)(5), 29A-5-4(a).

B.

Anthony and Krystle Perry enrolled their daughter K.P. in the Virtual Academy, a public school that provides online education to children in West Virginia. After K.P. had been enrolled in the school for 16 months, the Virtual Learning Coordinator contacted Mrs. Perry regarding K.P.'s vaccination

status. When Mrs. Perry confirmed that her daughter was not fully vaccinated, K.P. was disenrolled from the school. Mrs. Perry later sought a religious exemption from the vaccine requirement, but the Virtual Learning Coordinator informed her that religious exemptions were not available.

Mr. and Mrs. Perry then brought this suit on behalf of themselves and K.P. They claimed that West Virginia's compulsory vaccination law violated their First Amendment right to freely exercise their Christian faith. The Perrys also sought a preliminary injunction that would permit K.P. to re-enroll in the Virtual Academy while the litigation progressed.

The district court found that the Perrys were likely to succeed on the merits of their free exercise claim. Applying the framework laid out in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the court concluded that West Virginia's compulsory vaccination law was neither generally applicable nor narrowly tailored to serve a compelling state interest. After finding the other preliminary injunction factors satisfied, the court granted preliminary relief to the Perrys. This appeal followed.

II.

We review a district court's decision to grant a preliminary injunction for abuse of discretion. *Air Evac EMS, Inc. v. McVey*, 37 F.4th 89, 102 (4th Cir. 2022). However, any legal conclusions involved in reaching that decision are reviewed de novo. *Id.* The only issue on appeal is whether the district court erred when it concluded that the Perrys were likely to succeed on the merits of their claim. Because West

Virginia’s compulsory vaccination law is in all likelihood constitutional, we hold that it did.

A.

1.

The First Amendment guarantees that “Congress shall make no law . . . prohibiting the free exercise” of religion. U.S. Const. amend. I. Following passage of the Fourteenth Amendment, the states became equally incapable of enacting such laws. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). “But neither the [fourteenth] amendment . . . nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people.” *Barbier v. Connolly*, 113 U.S. 27, 31 (1884). At the very core of the states’ police power is the authority to “protect the public health and the public safety” by “enact[ing] quarantine laws and ‘health laws of every description.’” *Jacobson*, 197 U.S. at 25.

One common health measure is vaccination, and its history stretches back to our nation’s founding. During the Revolutionary War, General George Washington ordered the mandatory inoculation of the Continental Army against smallpox, declaring that “[n]ecessity not only authorizes but seems to require the measure, for should the disorder infect the Army . . . we should have more to dread from it than from the Sword of the Enemy.” Letter from George Washington to William Shippen, Jr. (Feb. 6, 1777), in 8 THE PAPERS OF GEORGE WASHINGTON, REVOLUTIONARY WAR SERIES, JANUARY 1777 – MARCH 1777, at 264 (Frank E. Grizzard, Jr. ed. 1998).

Decades later in 1810, Massachusetts passed one of the first laws in the nation promoting vaccination. An Act to Diffuse the Benefits of Inoculation for the Cow Pox, ch. CXVI, 1810 Mass. Acts 204, 204. And in 1855, Massachusetts became one of the first states to require children to get vaccinated as a condition of entering public school. An Act to Secure General Vaccination, ch. 414, 1855 Mass. Acts 812, 812.

The Supreme Court first considered the constitutionality of compulsory vaccination laws fifty years later in *Jacobson*. There, it affirmed the conviction of a defendant for refusing to get vaccinated against smallpox after finding that the law did not “invade[] any right secured by the Federal Constitution.” *Jacobson*, 197 U.S. at 38. The Court explained that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27. “The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the [state] essential to the safety, health, peace, good order, and morals of the community.” *Id.* at 26 (quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)). If “the rule [were instead] that each [man] is a law unto himself,” then society “would soon be confronted with disorder and anarchy.” *Id.*

The Supreme Court reaffirmed its decision in *Zucht v. King*, 260 U.S. 174 (1922), where it held that a law requiring school children to be vaccinated did not violate the due process and equal protection clauses of the Fourteenth Amendment. *Id.* at 176–77. According to the Court, *Jacobson* had already “settled that it is within the police power of a state to provide for compulsory vaccination.” *Id.* at 176. Indeed,

Jacobson favorably discussed several state laws requiring “the vaccination of children [as] a condition of their right to enter or remain in public schools.” 197 U.S. at 31–33.

Two decades later, in *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court clarified that a state’s authority to protect a child’s health and well-being “is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience.” *Id.* at 166. Citing *Jacobson*, the Court explained that a parent “cannot claim freedom from compulsory vaccination for [his] child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or [one’s] child to communicable disease or the latter to ill health or death.” *Id.* at 166–67 & n.12.

That brings us to the Supreme Court’s decision in *Smith*. There the Court was asked to hold that an individual’s right of free exercise is violated whenever a generally applicable law requires him to perform an act that his religious beliefs forbid. 494 U.S. at 878. It declined to do so. Echoing the concerns it expressed in *Jacobson*, the Court reasoned that such a rule would “permit every citizen to become a law unto himself” by making “religious belief superior to the law of the land.” *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)). It thus held that “the right of free exercise does not relieve an individual of the obligation to comply with” neutral and generally applicable laws. *Id.*

The *Smith* Court also refused to apply any form of heightened scrutiny to such laws. It warned that

doing so “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind,” including “compulsory vaccination laws.” *Id.* at 888–89. The Court then favorably cited the Supreme Court of Arkansas’s decision in *Cude v. State*, 377 S.W.2d 816 (Ark. 1964), which held that “it is within the police power of the State to require that school children be vaccinated against smallpox, and that such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise.” *Id.* at 819. Indeed, the principle was “so firmly settled that no extensive discussion [was] required.” *Id.*

After *Smith*, then, courts will only scrutinize neutral and generally applicable laws for a rational basis. *Polk v. Montgomery Cnty. Pub. Schs.*, 166 F.4th 400, 413 (4th Cir. 2026). A law can withstand rational basis scrutiny so long as it is “rationally related to a legitimate governmental interest.” *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013) (quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006)).

2.

This unbroken line of decisions resolves the case before us.

West Virginia legitimately exercised its police power to protect the health and well-being of school children when it enacted its compulsory vaccination law. *See* W. Va. Code § 16-3-5 (“Immunization of children at an early age . . . is essential to maintain our children’s health and well-being.”). Because the law is neutral and generally applicable, the Perrys’

free exercise rights do not relieve them of their obligation to comply with it. *Accord Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353–54 (4th Cir. 2011) (“[F]ollowing the reasoning of *Jacobson* and *Prince*, we conclude that the West Virginia statute requiring vaccinations as a condition of admission to school does not unconstitutionally infringe [plaintiff]’s right to free exercise.”).

West Virginia has a legitimate—indeed, compelling—interest in reducing the spread and severity of infectious diseases. *See id.* at 353 (“[T]he state’s wish to prevent the spread of communicable diseases clearly constitutes a compelling interest.”). The diseases covered by the law are serious and can lead to debilitating, life-threatening complications: diphtheria (myocarditis, kidney failure, nerve damage, death); polio (permanent paralysis, meningitis, death); measles (pneumonia, respiratory tract damage, brain swelling, death); mumps (brain swelling, meningitis, death); rubella (hemorrhagic issues, brain swelling, birth defects, death); whooping cough (pneumonia, brain swelling, seizures, death); tetanus (spasms, nerve dysfunction, death); chickenpox (bacterial infections, brain swelling, lung inflammation, death); and hepatitis B (cirrhosis, liver cancer, death). 2 GERALD MANDELL ET AL., *PRINCIPLES AND PRACTICE OF INFECTIOUS DISEASES* 1964–66, 2069–72, 2128–29, 2202–04, 2231–33, 2346–48, 2690–91, 2958, 3092–93 (7th ed. 2010).

Vaccines are not just rationally related to reducing the spread and severity of infectious diseases, they are specifically designed to do so. Smallpox went from killing 10% of London’s population in the 17th century and 500 million people

globally between 1880 and 1980 to *completely* eradicated by 1980 after a global vaccination campaign. D.A. HENDERSON, SMALLPOX: THE DEATH OF A DISEASE 11–12, 39 (2009). Deaths caused by the diseases covered by West Virginia’s law have also been significantly reduced since vaccines were first developed: diphtheria (100%); polio (100%); measles (100%); mumps (100%); rubella (100%); whooping cough (99.3%); tetanus (99.2%); chickenpox (81.9%); and hepatitis B (80.2%). Sandra W. Roush & Trudy V. Murphy, *Historical Comparisons of Morbidity and Mortality for Vaccine-Preventable Diseases in the United States*, 298 JAMA 2155, 2156 tbl.1, 2158 tbl.2 (2007).

For these reasons, a state’s interest in vaccinating its citizens and protecting its school children has long been recognized as of the utmost importance. *See, e.g., Jacobson*, 197 U.S. at 25–27. This is not just some hum, every day “compelling interest.” Even under the strictest scrutiny, courts should not annul and eviscerate this fundamental state concern merely because a challenged law in some respect falls short of some perceived perfection. And much less is required of neutral and generally applicable laws. *See City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (“*Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”).

Remember too that the plaintiffs’ rights are not the only things at issue here. Parents and grandparents have their own interest in not seeing their children and grandchildren in school environments with significant numbers of unvaccinated peers. The fact that the executive

branch of the federal government may be evincing skepticism to vaccinations does not require the enlistment of the judicial branch in an assault upon state vaccination requirements. It is possible we take the benefits of vaccination so much for granted that we regard too casually the opening of a second front. States remain free to recognize the weighty medical evidence supporting the value of vaccinations in safeguarding public health. Such determinations lie at the very heart of the states' police power. *See United States v. Skrmetti*, 145 S. Ct. 1816, 1836 (2025) (“We afford States ‘wide discretion to pass legislation in areas where there is medical and scientific uncertainty.’” (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007))).

Our friend in dissent chides us for approaching the issue “mostly from 10,000 feet above” and lauds his own attention to the particulars. Diss. Op. at 30. Of course the particulars are important but that hardly justifies lodging all responsibility for their examination in the courts. Quite missing from the dissent is any appreciation that legislatures can craft *particular* compromises. It is what they do. Also missing is any recognition that the accumulation of particulars will assuredly in time eviscerate general and fundamental principles. This danger is nowhere so underestimated as at its inception.

B.

The district court erred in reaching the opposite legal conclusion. In its view, West Virginia’s compulsory vaccination law is not generally applicable because the process for granting medical exemptions involves “significant individualized

discretion.” J.A. 586. We cannot agree. Determining whether a child qualifies for a medical exemption may require some degree of professional judgment, but that is not the kind of unfettered discretion that undermines the general applicability of a law.

In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court explained that “[a] law is not generally applicable if it ‘invite[s]’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions.’” *Id.* at 1877 (quoting *Smith*, 494 U.S. at 884). As an example of one such mechanism, the Court pointed to its decision in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert* concerned a provision in South Carolina’s Unemployment Compensation Act that deemed claimants ineligible for unemployment benefits if they refused to accept work “*without good cause*.” *Id.* at 400–01 (emphasis added). The *Fulton* Court explained that the “good cause” standard operated as a mechanism for granting individualized exemptions because it “permitted the government to grant exemptions based on the circumstances underlying each application.” 141 S. Ct. at 1877.

The facts in *Fulton* provide another example. That case concerned a provision in Philadelphia’s standard foster care contract that prohibited discrimination on the basis of sexual orientation “unless an exception is granted by the Commissioner . . . in his/her *sole discretion*.” *Id.* at 1878 (emphasis added). The Supreme Court found that the city’s antidiscrimination policy created “a formal system of entirely discretionary exceptions” by inviting the Commissioner “to decide which reasons for not

complying with the policy [were] worthy of solicitude.” *Id.* at 1878–79.

Unlike the “good cause” standard in *Sherbert* and the “sole discretion” standard in *Fulton*, West Virginia’s compulsory vaccination law does not provide a mechanism for granting individualized exemptions. State officials do not have any discretion “to decide which reasons” for refusing vaccination “are worthy of solicitude.” *Id.* at 1879. The law recognizes only one kind of exemption—medical exemptions—and clearly articulates the circumstances in which state officials can grant them: when there is “sufficient medical evidence” that a child’s “physical condition . . . is such that immunization is contraindicated or there exists a specific precaution to a particular vaccine.” W. Va. Code § 16-3-4(h). To the extent state officials must exercise discretion when deciding whether sufficient medical evidence exists in a particular case, it is cabined by judicial review. *Id.* §§ 16-3-4(h)(5), 29A-5-4(a), (g).

We do agree with the district court that West Virginia’s process for granting medical exemptions “involves discretion and judgment.” J.A. 587. Determining whether an individual qualifies for an exemption will often require some individualized assessment. But as the Tenth Circuit has explained, “that kind of limited yes-or-no inquiry is qualitatively different from the kind of case-by-case system envisioned by the *Smith* Court in its discussion of *Sherbert* and related cases.” *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004). If it were otherwise, then there would be no limiting principle. Every legal standard or criterion that required some degree of professional judgment in its application

would suddenly run afoul of the Free Exercise Clause. This cannot be.

Indeed, as far as we are aware, every circuit court that has considered the issue has held that medical exemptions to compulsory vaccination laws are not “mechanisms for individualized exemptions” within the meaning of *Fulton*. See *Does 1-6 v. Mills*, 16 F.4th 20, 30 (1st Cir. 2021); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 288–89 (2d Cir. 2021); *Spivack v. City of Philadelphia*, 109 F.4th 158, 173 (3rd Cir. 2024); *Doe v. S.D. Unified Sch. Dist.*, 19 F.4th 1173, 1180 (9th Cir. 2021).

The Perrys claim that two decisions are to the contrary. Resp. Br. at 20–21 (citing *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 733–34 (6th Cir. 2021); *Does 1-11 v. Bd. of Regents of the Univ. of Colo.*, 100 F.4th 1251, 1273 (10th Cir. 2024)). But neither decision is on point. In both cases, the court held only that a compulsory vaccination policy lacked general applicability because it permitted university officials to grant religious exemptions on an individualized basis. *Dahl*, 15 F.4th at 733–34; *Does 1-11*, 100 F.4th at 1273. West Virginia’s law does not permit religious exemptions of any kind.

C.

Finally, the Perrys ask us to affirm the district court’s decision on three alternate bases. None are persuasive.

1.

The Perrys first argue that West Virginia’s compulsory vaccination law is not generally applicable for another reason: it does not apply to

other groups that pose a similar hazard to public health. While K.P. must get vaccinated to attend the Virtual Academy, the Perrys point out that the vaccine mandate does not apply to: (1) children educated outside of the school system (*i.e.*, educated at home, in learning pods, or in microschools); (2) adults working in schools; or (3) children attending school who have been granted a medical exemption.

It is certainly true that West Virginia's vaccine mandate could sweep more broadly than it does. The law could apply in other contexts, to other age groups, and to other infectious diseases. But a law does not lack general applicability merely because it makes classifications. All laws do so to one degree or another. Classifications only pose a constitutional concern if they treat "comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). That is, we ask whether the law "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877.

The first two groups the Perrys identify—children educated outside the school system and adults working in schools—are treated more favorably than children attending the Virtual Academy. However, the Perrys do not allege that K.P.'s desire to attend the Virtual Academy is religiously motivated, so this is merely an instance of West Virginia treating some secular activity more favorably than other secular activity. That does not undermine the law's general applicability under *Fulton* and *Tandon*.

The only religiously motivated conduct at issue here is K.P.’s refusal to get vaccinated. The Perrys argue that medical exemptions undermine West Virginia’s asserted health interests in the same way that granting religious exemptions would because every unvaccinated child is at an elevated risk of developing and transmitting infectious diseases, regardless of the reason why they remain unvaccinated.

The Second Circuit confronted a similar argument in *We The Patriots USA, Inc. v. Connecticut Office of Early Childhood Development*, 76 F.4th 130 (2d Cir. 2023). There, the plaintiffs argued that “[w]hen two unvaccinated children walk through the schoolhouse door, disease will not walk up to them and ask them why they are . . . unvaccinated.” *Id.* at 153. Even so, the Second Circuit concluded that permitting medical exemptions while refusing religious exemptions “does, in both instances, advance the State’s interest in promoting health and safety.” *Id.* The court’s explanation is worth quoting at length:

The Act promotes the health and safety of *vaccinated* students by decreasing, to the greatest extent medically possible, the number of unvaccinated students (and, thus, the risk of acquiring vaccine-preventable diseases) in school. The Act also promotes the health and safety of *unvaccinated* students. Not only does the absence of a religious exemption decrease the risk that unvaccinated students will acquire a vaccine-preventable disease by lowering the number of unvaccinated peers they will encounter at

school, but the medical exemption also allows the small proportion of students who cannot be vaccinated for medical reasons to avoid the harms that taking a particular vaccine would inflict on them. . . . In contrast, exempting religious objectors from vaccination would only detract from the State's interest in promoting public health by increasing the risk of transmission of vaccine-preventable diseases among vaccinated and unvaccinated students alike.

Id. We are in accord with the reasoning of the Second Circuit, as are several of our sister circuits. *See Doe*, 19 F.4th at 1177–78; *Spivack*, 109 F.4th at 176; *Does 1-6*, 16 F.4th at 31–32. We note that the Supreme Court vacated and remanded a similar Second Circuit decision for reconsideration in light of *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025). *See Miller v. McDonald*, 146 S. Ct. 879 (2025) (mem.). As we set forth below, West Virginia's compulsory vaccination law is altogether distinguishable from the policy at issue in *Mahmoud*.

West Virginia requires school children to get vaccinated because vaccination generally promotes their health and well-being. Nothing about that health decision disfavors religious beliefs. The two things simply run on separate tracks. Medical exemptions are thus categorically incomparable to conscientious exemptions of all stripes in terms of how they affect West Virginia's health interests.

Indeed, medical exemptions will often not be comparable to religious exemptions when the government's asserted interest relates to health.

Medical classifications and exemptions are an inescapable part of health regulation, and they generally exist to advance the state's health interests, not to undermine them. A state that limits the scope of a health law for medical reasons is not thereby compelled to grant religious or other non-health exemptions. To hold otherwise would lead to a slow unravelling of all manner of health and safety regulation. "The First Amendment's protection of religious liberty does not require" such an interference with the states' police power. *Smith*, 494 U.S. at 889.

Consider a law that prohibits the use of certain drugs without a medical prescription. Does the allowance of medically prescribed drug use mean the state must permit religiously motivated drug use? *See id.* at 874, 878 (rejecting a free exercise challenge to one such law). Or consider a law that prohibits doctors from administering hormones or puberty blockers to minors except to treat a medically verifiable disorder of sex development. Could a transgender minor get around this prohibition by claiming his desire to identify as the opposite sex is religiously inspired? *Cf. Skrmetti*, 145 S. Ct. at 1829 (rejecting an equal protection challenge to one such law).

The same proposition holds true for compulsory vaccination laws. West Virginia has significant latitude to determine when vaccines are beneficial to its residents' health and well-being. These determinations will not offend the Free Exercise Clause so long as West Virginia remains focused in all cases on health and safety.

2.

The Perrys next argue that *Smith* does not apply because this case is governed instead by the Supreme Court’s decisions in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025). Under *Yoder* and *Mahmoud*, a law that “substantially interfer[es] with the religious development” of a child is subject to strict scrutiny “regardless of whether the law is neutral or generally applicable.” *Mahmoud*, 145 S. Ct. at 2361.

Yoder concerned a compulsory school attendance law that “place[d] Amish children in an environment hostile to Amish beliefs . . . during the crucial and formative adolescent period of life.” 406 U.S. at 211. The law “expos[ed] Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and . . . substantially interfer[ed] with the religious development of the Amish child and his integration into the way of life of the Amish faith community.” *Id.* at 218. Compulsory school attendance thus “carrie[d] with it a very real threat of undermining the Amish community.” *Id.*

Mahmoud concerned a school policy that would not allow parents to opt their children out of instruction involving “‘LGBTQ+-inclusive’ storybooks.” 145 S. Ct. at 2343–46. These storybooks were “designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected.” *Id.* at 2353. Because the values and beliefs celebrated by the storybooks were “‘hostile’ to the[] parents’ religious beliefs,” the storybooks “carr[ied] with them ‘a very real threat of undermining’ the religious beliefs that

the parents wish[ed] to instill in their children.” *Id.* at 2355 (quoting *Yoder*, 406 U.S. at 211, 218).

The burden imposed by West Virginia’s compulsory vaccination law is not remotely “of the same character” as those imposed in *Yoder* and *Mahmoud*. *Id.* at 2361. The law is a public health measure, not an instrument of ideological indoctrination. It does not expose children to values or beliefs that might be hostile to their parents’ religious beliefs. It does not require that school instruction extoll the virtues of vaccines. All the law requires is that, in the interest of protecting others, children get themselves vaccinated before attending school. The need for some to protect the health and well-being of all was not present in *Yoder* or *Mahmoud*.¹

The Supreme Court’s decision in *Prince* is instructive on this issue. As in *Mahmoud*, the *Prince* Court recognized the right of parents to direct the religious upbringing of their children. 321 U.S. at 165–66 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)). However, the Court qualified that “neither rights of religion nor rights of parenthood are beyond limitation” and explained that a state’s authority as *parens patriae*

¹ The Supreme Court’s recent action in *Mirabelli v. Bonta*, 146 S. Ct. 797 (2026) (per curiam), is distinguishable for similar reasons. It was a preliminary action that did not involve a public health measure. Rather, it dealt with whether schools could facilitate children’s efforts to identify as the opposite gender without notifying their parents.

is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.

Id. at 166–67. *Prince*, like *Jacobson* before it, is directly on point. Nothing in *Yoder* or *Mahmoud* casts doubt on the validity of these precedents, and we are bound to follow them. Regretfully, the dissenting opinion all but ignores these two decisions. We have repeatedly been told to follow Supreme Court decisions until the Court itself overrules them. *See, e.g., Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2038 (2023); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Apparently the temptation to jump the gun has in some quarters inadvisably proved irresistible.

3.

Because West Virginia's law is neutral, generally applicable, and distinguishable from the burdens imposed in *Mahmoud* and *Yoder*, it is subject to rational basis scrutiny. *Polk*, 166 F.4th at 413. The Perrys' final argument is that the law cannot even survive this highly deferential standard of review. In their view, there is no rational basis for requiring children who attend school virtually to get vaccinated because online learning yields no appreciable risk of disease transmission.

The Perrys cannot succeed under rational basis review simply by nibbling away at West Virginia's law one bite at a time. Children who attend school

virtually may be at a lower risk of contracting and spreading infectious diseases, but the risk still remains. To be sure, states can enact religious exemptions to vaccination requirements, or they can leave vaccination purely as a matter of personal choice. But in our federal system, states also have a legitimate interest in minimizing public health risks to the degree they deem advisable. A state can thus require significant swaths of its population to be vaccinated, so long as it reasonably believes such a step would protect and promote the public health. *See, e.g., Jacobson*, 197 U.S. at 12–13, 25–27 (upholding a law that required “all the inhabitants of Cambridge” to get vaccinated). The estimation of risk is preeminently a legislative matter, resting as it does on empirical assessment and public sentiment. Courts should not rush to second-guess these legislative judgments; the judiciary should hesitate before compelling religious exemptions to a host of civic obligations. *See Smith*, 494 U.S. at 888–89.

The Perrys’ real issue with the law is not that it is overbroad, but that it is underinclusive. For example, they suggest there is no rational basis for requiring children who attend school virtually to get vaccinated when children educated at home, in learning pods, and in microschools can remain unvaccinated. Under rational basis review, however, West Virginia does not need to “strike at all evils at the same time or in the same way.” *Semler v. Or. State Bd. of Dental Exam’rs*, 294 U.S. 608, 610 (1935). It can “take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955).

Unlike children educated at home, in learning pods, or in microschools, children who attend the Virtual Academy are part of the school system. They alone can participate in school-provided extra-curricular activities and must go to school in person for periodic testing. Oral Arg. at 4:35. “The differences between the two activities may not be striking, but differentiation need not be striking in order to survive rational-basis scrutiny.” *City of Dallas v. Stanglin*, 490 U.S. 19, 28 (1989). “If the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’” *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

III.

Is the West Virginia law at issue one we would have drafted? Maybe so, maybe not. Is the West Virginia statute constitutional? Yes.

Any difference is no mystery. Vaccines, of course, are generally aimed at prevention, antibiotics at treatment. A judicial scratch on the surface of these twin pillars of modern medicine would in time become a gash, as courts progressively chipped away at the means by which ends of undisputed public benefit are implemented. It is ever so.

Individual rights and liberties are a cherished part of American constitutionalism. Equally valued however is our constitutional structure. The dissenting opinion ignores the Constitution’s architecture. Its litigious erosion of mandatory state vaccination laws does more than deprive states of

their historic sovereignty. It does more than infringe on the democratic prerogative of societal self-protection. It invites the return of ancient scourges to these very modern times, and the infliction of preventable pain and personal suffering that rivals the individual right that the good plaintiffs in this case have come to assert.

The district court erred when it concluded that the Perrys were likely to succeed on the merits of their free exercise claim. West Virginia has significant discretion to pass legislation it believes best serves the collective good, and it did not abuse that discretion here. The state's compulsory vaccination law serves a compelling interest and evinces no hostility to religion. Accordingly, we reverse the district court's decision to grant a preliminary injunction and remand the case for proceedings duly informed by the decision herein.

REVERSED AND REMANDED

NIEMEYER, Circuit Judge, dissenting:

When, based on sincerely held religious beliefs, Krystle and Anthony Perry refused to fully vaccinate their young school-aged child, as required by West Virginia's mandatory vaccination law, Upshur County school officials expelled the child from its Upshur County Virtual School, a tuition-free, online, at-home schooling program that was offered in lieu of physically attending public school. Because the mandatory vaccination law did not require that homeschooled children be vaccinated, the Perrys attempted to homeschool their child, but they did so imperfectly. Krystle Perry could not devote the necessary time to the child's homeschooling because she was the bread winner in the family and her job took her out of the home, and Anthony Perry, who was totally disabled, was unable to perform all the duties of homeschooling. The Perrys thus faced potential criminal prosecution under West Virginia Code § 18-8-2 for failing to educate their child.

The Perrys commenced this action against Upshur County school officials ("School Officials") under 42 U.S.C. § 1983 and the First Amendment's Free Exercise Clause, as incorporated by the Fourteenth Amendment, seeking a religious exemption from the mandatory vaccination of their child. They pointed out that West Virginia law exempts school-aged children from vaccination who are homeschooled or who attend a "learning pod" (group homeschooling) or a "microschool" (an alternative school initiated by one or more teachers or an entity). But the law does not exempt students attending public virtual schools at home online. They also pointed out that 45 other States provide religious

exemptions from vaccination, but not West Virginia. In their complaint, the Perrys sought declaratory and injunctive relief, requiring the School Officials to reenroll their child in the Upshur County Virtual School without requiring them to vaccinate her in violation of their religious beliefs.

The district court granted the Perrys a preliminary injunction prohibiting the School Officials from enforcing the mandatory vaccination law against the Perrys and their child in recognition of their religious beliefs and prohibiting the School Officials from denying the child's reenrollment in the Upshur County Virtual School based on the child's "unvaccinated status." The court concluded that the mandatory vaccination law, West Virginia Code § 16-3-4, was subject to strict scrutiny and that, with respect to *virtual* students in particular, the law was not sufficiently tailored to the State's compelling interest in preventing the spread of infectious disease in view of exceptions that the mandatory vaccination law allowed. Accordingly, it concluded that the Perrys were likely to succeed on their claim and that the other factors for entering a preliminary injunction were satisfied.

I agree with the district court. The injunction entered here hardly affects West Virginia's compelling interest in preventing the spread of infectious disease, as the injunction treats virtual students the same as other West Virginia students not physically attending a school while, at the same time, preserving the Perrys' free exercise rights. Moreover, since the district court entered the preliminary injunction in this case, the Supreme Court has issued opinions that confirm the district

court’s decision and, indeed, command such an injunction. See *Mahmoud v. Taylor*, 606 U.S. 522 (2025); see also *Miller v. McDonald*, 146 S. Ct. 879 (mem.) (2025); *Mirabelli v. Bonta*, 146 S. Ct. 797 (per curiam) (2026). I would affirm.

I

The Perrys, residents of Fayette County, West Virginia, had enrolled their young daughter in the Upshur County Virtual School, which enabled the Perrys’ child, as well as other students in the school, to participate in schooling online from home, much like students receiving homeschooling. But while virtual schooling is conducted by state-certified teachers, homeschooling is provided by the students’ parents. Even though the Perrys’ child was not physically present in a public school classroom with other children, she enjoyed interacting with them virtually, and she excelled in learning. This structure enabled Anthony Perry, who was disabled, to “seamlessly oversee [his child’s] education” from home.

In December 2023, the Superintendent of the West Virginia Department of Education sent guidance to school officials across the State, advising them that, just like students physically attending school in person, “virtual students are required to be fully immunized according to W. Va. Code 16-3-4.” The Superintendent’s guidance instructed School Officials to “review the enrollment records of your full-time virtual students and work with your administrators and school nurses to correct any non-compliant enrollment occurrences.”

In response to that notice, Upshur County School Officials advised the Perrys that their child was missing required vaccinations and that she needed to receive all the vaccines required by § 16-3-4 in order to continue attending the Upshur County Virtual School. Krystle Perry indicated that the Perrys could not vaccinate their child, as it conflicted with their sincerely held Christian beliefs. After considering her request, School Officials advised Krystle that her child nonetheless had to be vaccinated and that “if the Legislature permitted a religious exemption in the future or [the Perrys] decided to vaccinate [their child],” then the child could re-enroll in the Upshur County Virtual School.

The applicable provisions of the West Virginia Code are not in dispute. West Virginia requires that every child in the State, within specified ages, attend school. W. Va. Code § 18-8-1a. But children receiving approved home instruction are exempt from attending school, *id.* § 18-8-1(c), as are children participating in “learning pod[s]” and children attending “microschool[s],” *id.* § 18-8-1(n). “Learning pods” are voluntary associations of parents “choosing to group their children together to participate in their . . . studies as an alternative to enrolling in a . . . school.” *Id.* § 18-8-1(n)(1)(A). And “microschools” are schools “initiated by one or more teachers or an entity to operate a school that charges tuition” and “is an alternative to enrolling in” a more traditional school. *Id.* § 18-8-1(n)(1)(B).

The mandatory vaccination law provides that every child *entering a public, private, or parochial school* in the State “must be immunized against [10 specified diseases]” and that no child “may be

admitted or received in any of the schools of the state . . . until he or she has been immunized against [those diseases].” W. Va. Code § 16-3-4(a)–(c). The statute does not require the vaccination of children who are approved to receive instruction at home, as they do not attend school. The law also does not apply to children participating in learning pods or attending microschools. *See id.* § 18-8-1(n)(8). The mandatory vaccination law also exempts children from vaccination if the Commissioner of the Bureau of Public Health determines, based on medical evidence, that “immunization is contraindicated or there exists a specific precaution to a particular vaccine.” *Id.* § 16-3-4(h).

In short, all children in West Virginia physically attending schools must be vaccinated, but those receiving homeschooling, participating in learning pods, or attending microschools are exempt, as are children who are exempted by the Commissioner for medical reasons. The mandatory vaccination law contains no exemption or exception for religious reasons, nor does it exempt children enrolled in a public *virtual* school.

The Perrys formally requested a religious exemption from vaccination for their child, and when School Officials denied their request, they commenced this action against Upshur County School Officials for declaratory and injunctive relief to enforce their rights under the First Amendment’s Free Exercise Clause, as incorporated against the States by the Fourteenth Amendment. The Perrys made clear in their complaint that their action was “an ‘as applied’ challenge” limited to their particular circumstances — as parents holding sincere religious beliefs against

vaccination whose minor child was excluded from a public *virtual* school because she was not fully vaccinated.

Shortly after filing their complaint, the Perrys filed a motion for a preliminary injunction, requesting an order requiring that their child be re-enrolled in the Upshur County Virtual School while the litigation was ongoing. Following full briefing and a hearing, the district court granted the Perrys' motion with a memorandum opinion and order dated October 15, 2024.

In entering its order, the district court addressed all four factors required by *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), but it focused most particularly on the requirement that the Perrys demonstrate a likelihood of success on the merits, concluding that they had satisfied that factor. After concluding that the West Virginia mandatory vaccination law was “not a generally applicable statute” and therefore that the law was subject to strict scrutiny, the court concluded that the statute, as applied to the Perrys, failed to satisfy strict scrutiny. While the court agreed with the School Officials that they had established “a compelling state interest in preventing the spread of infectious disease,” it concluded that the School Officials had “failed to demonstrate W. Va. Code § 16-3-4 [was] narrowly tailored to achieve the identified compelling state interest.”

At the outset, the court noted that “the approach West Virginia [had] taken [was] broader than” that taken by “45 other states [that] have religious or philosophical exemption options to their vaccine

mandates.” But more particular to its decision, the court noted that “West Virginia [had] also provided carve outs” from the compulsory vaccination law “for other students removed from physical school structures,” such as children who are homeschooled or those who participate in “learning pods” or “microschools.” The court observed that “[t]hese students, like virtual students, rarely, if ever, physically attend class or school” and therefore that it “strain[ed] reason to find [that] W. Va. Code § 16-3-4 [was] sufficiently [narrowly] tailored to advance the State’s interest” when similarly situated students were treated differently.

In addition to finding that the Perrys were “likely to succeed in the merits” of their free exercise claim, the court also found that the Perrys had satisfied the three other *Winter* factors — that they were likely to suffer irreparable harm were they not granted immediate relief because the Perrys’ child “ha[d] been denied her parents’ preferred method of constitutionally-required education,” and they would consequently be required to face the daunting challenges of homeschooling her, “solely because [they] refused to sacrifice their religious beliefs” and that both the balance-of-the-equities and the public-interest factors were established because there was a likely First Amendment violation.

From the district court’s preliminary injunction order, the School Officials filed this interlocutory appeal. *See* 28 U.S.C. § 1292(a).

II

The majority opinion’s analysis to reverse the district court’s order is conducted mostly from 10,000

feet above, maintaining that neutral and generally applicable compulsory vaccination laws are constitutional, based on Supreme Court cases that have long so held. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Zucht v. King*, 260 U.S. 174 (1922); *Prince v. Massachusetts*, 321 U.S. 158 (1944). The majority opinion also trumpets that such compulsory vaccination laws exist in all 50 States (although it fails to observe that in 45 of those States, religious exceptions are afforded). And with this *unremarkable and uncontested observation* from above, the opinion concludes that rational basis review applies here and therefore that the “Perrys’ free exercise rights do not relieve them of their obligation to comply with [West Virginia’s mandatory vaccination law].” *Ante* at 9. The opinion characterizes the Perrys’ claim unfairly, stating, “The Perrys cannot succeed under rational basis review simply by nibbling away at West Virginia’s law one bite at a time. Children who attend school virtually may be at a lower risk of contracting and spreading infectious diseases, but the risk still remains. . . . West Virginia does not need to strike at all evils at the same time or in the same way.” *Ante* at 20–21 (cleaned up).

The majority opinion curtly dismisses the fact that the Perrys hold sincere religious beliefs against vaccination; that their child is schooled *at home* under the virtual school program, just as are homeschooled children who need not be vaccinated under the law; and that the Supreme Court’s recent decisions hold that, in circumstances as presented by the Perrys, “a court will proceed to ask whether the policy can survive strict scrutiny,” so as to protect free exercise rights. *Mahmoud*, 606 U.S. at 564. Indeed, the

Mahmoud Court clarified that, as applicable here, “when a law imposes a burden of the same character as that in” *Wisconsin v. Yoder*, 406 U.S. 205 (1972) — that is, when a law substantially interferes with “the critical right of parents to guide the religious development of their children” — “strict scrutiny is appropriate *regardless of whether the law is neutral or generally applicable*,” *id.* at 559, 565 (emphasis added), an instruction essentially ignored by the majority.

In apparent critique of this position, the majority retreats to the platitude that “[c]ourts should not rush to second-guess . . . legislative judgments.” *Ante* at 21. And employing its approach, the majority summarily defers to the West Virginia legislature, ruling simply:

It is certainly true that West Virginia’s vaccine mandate could sweep more broadly than it does. The law could apply in other contexts, to other age groups, and to other infectious diseases. But a law does not lack general applicability merely because it makes classifications. All laws do so to one degree or another.

Ante at 15. The majority does not, however, explain how to account for the fact that the law exempts homeschooled students, students participating in learning pods, and students attending microschools. And more importantly, the issue here is not whether we must defer to the West Virginia legislature, but whether the West Virginia legislature has deferred to the Constitution and the fundamental individual rights of the Perrys as protected by the First and Fourteenth Amendments.

Further, to avoid *Mahmoud*'s recent lesson on that topic, the majority says, again simply, "The burden imposed by West Virginia's compulsory vaccination law is not remotely 'of the same character' as those imposed in *Yoder* and *Mahmoud*." *Id.* at 19. Yet, this conclusion was flatly contradicted by the Supreme Court when it indicated that a similar compulsory vaccination law, to which a similar religious objection was made, should be considered again in light of *Mahmoud*. *See Miller*, 146 S. Ct. 879. Moreover, in both *Yoder* and *Mahmoud*, as well as in *Mirabelli*, the plaintiffs objected to public education regulations and practices on the basis of the burden they imposed on religious exercise, and in all, the Court applied strict scrutiny to protect the plaintiffs' free exercise rights.

III

This case focuses specifically on the rights of parents to raise their children consistent with their religious beliefs and the violation of those rights when "government policies substantially interfere with the religious development" of their children. *Mahmoud*, 606 U.S. at 546 (cleaned up). The rights of religious upbringing "extends to the choices that parents wish to make for their children outside the home," thus limiting "the government's ability to interfere with a student's religious upbringing in a public school setting." *Id.* at 547. Thus, the Supreme Court continues repeatedly to emphasize that "public education is a public benefit, and *the government cannot condition its availability on parents' willingness to accept a burden on their religious exercise.*" *Id.* at 561 (emphasis added) (cleaned up). Indeed, the *Mahmoud* Court observed:

It is both insulting and legally unsound to tell parents that they must abstain from public education in order to raise their children in their religious faiths, when alternatives can be prohibitively expensive and they already contribute to financing the public schools.

Id. at 562.

These circumstances are presented here. Upshur County School Officials told the Perrys that they “must abstain” from public education if the Perrys refused to fully vaccinate their child, even though the School Officials understood that doing so would violate the Perrys’ sincerely held religious beliefs. The district court recognized this, and it issued a preliminary injunction enforcing this principle pending trial. Its ruling, I submit, was both factually and legally sound, and it has been fully vindicated by decisions issued by the Supreme Court since the district court ruled.

To begin, it is clear that the Upshur County School Officials’ policy must satisfy strict scrutiny. It is well understood that “the government is *generally* free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable.” *Mahmoud*, 606 U.S. at 564 (emphasis added) (citing *Employment Div. v. Smith*, 494 U.S. 872, 878–79 (1990)). Thus, neutral and generally applicable laws that burden religious exercise are ordinarily subject to rational basis review. But if the government policy is not generally applicable, the government must demonstrate that the policy can survive strict scrutiny. *See id.* And a law is not generally applicable if the government

“treat[s] any *comparable* secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam) (emphasis altered). The *Tandon* Court explained that “whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue” and that “[c]omparability is concerned with the risks various activities pose.” *Id.*

In this case, the mandatory vaccination law is not generally applicable as it does not apply to children who receive home instruction, to children who are educated in learning pods, and to children who attend microschools. These exceptions are presumably made because the children’s learning environment in those circumstances is remote and their exposure to other children is minimal, such that the purposes of the mandatory vaccination law would not be substantially served. The Perrys’ child is also educated at home and thus is in a similarly remote context with a similar risk because the child’s exposure to other children would be similarly minimal. Yet the state’s policy treats public-school virtual students who assert a religious objection to vaccination differently than other similarly situated children. *See Tandon*, 593 U.S. at 62 (requiring the government to explain why activities posing comparable risks are treated differently). School Officials enforced their mandatory vaccination policy against the Perrys despite their religious objection, forcing them to choose between a free public education and adherence to their religious beliefs, even though their child was learning remotely. As the Perrys argue:

West Virginia allows a variety of comparable secular activities that undermine its disease mitigation efforts to much greater degree than permitting [them] the option to pursue a religious exemption to attend online school would. In [their child’s] situation, it is clear the government has made an unconstitutional value judgment that secular motivations for opting out of vaccination are perfectly acceptable, but that religious reasons will not be tolerated — even in the virtual school setting.

Yet, as *Mahmoud* instructs, because “public education is a public benefit,” “the government cannot condition its availability on parents’ willingness to accept a burden on their religious exercise.” 606 U.S. at 561 (cleaned up). Indeed, in such circumstances, “strict scrutiny is appropriate *regardless of whether the law is neutral or generally applicable*.” *Id.* at 565.

Were this not clear enough, the Supreme Court’s yet more recent decisions continue to emphasize the importance of *Mahmoud*. On a petition for writ of certiorari to the Second Circuit, where that court had upheld the enforcement of a mandatory vaccination law, like the majority does here, notwithstanding the religious beliefs of the plaintiffs, *see Miller v. McDonald*, 130 F.4th 258 (2d Cir. 2025), the Supreme Court vacated the Second Circuit’s judgment and remanded the case to the Second Circuit for further consideration in light of *Mahmoud*. *See Miller*, 146 S. Ct. 879.

And again and more recently in *Mirabelli*, where parents challenged California public school gender-

identity policies on free exercise grounds, the Supreme Court held — in the context of reviewing a stay of an injunction — (1) that the school policies “likely trigger strict scrutiny under [the Free Exercise Clause] because they substantially interfere with the right of parents to guide the religious development of their children,” and (2) the policies “will likely not survive the strict scrutiny that *Mahmoud* demands.” *Mirabelli*, 146 S. Ct. at 802 (cleaned up).

While the Supreme Court has thus provided binding, repetitive, and dispositive instruction for cases of the kind before us, the majority opinion hardly addresses these decisions, rising above and finding comfort in a highly generalized distinction that the Court has expressly rejected for cases in the school context where the government has imposed a burden on religious exercise that substantially interferes with the right of parents to guide their child’s religious development. *See Mahmoud*, 606 U.S. at 556, 564. Indeed, just like the circuit court in *Mirabelli*, the majority has “brushed aside *Mahmoud* as a narrow decision focused on uniquely coercive curricular requirements,” *Mirabelli*, 146 S. Ct. at 802 (cleaned up), finding *Mahmoud* inapplicable on the ground that the mandatory vaccination law at issue here “is a public health measure, not an instrument of ideological indoctrination,” *ante* at 19. But that cramped reading of *Mahmoud* fails to give full effect to the Court’s clear instruction that when a law effectively “tell[s] parents that they must abstain from public education in order to raise their children in their religious faiths,” 606 U.S. at 562, that law must survive strict scrutiny to be consistent with the space the Free Exercise Clause affords to parents “to

direct the religious upbringing of their children,” *id.* at 546 (cleaned up).

And when applying strict scrutiny to West Virginia’s mandatory vaccination law, as applied to *virtual* students like the Perrys’ child, I conclude that the law does not satisfy that standard. “To survive strict scrutiny, a government must demonstrate that its policy advances interests of the highest order and is narrowly tailored to achieve those interests.” *Mahmoud*, 606 U.S. at 565 (cleaned up). Such “narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest.” *Tandon*, 593 U.S. at 63. And this standard is not to be “watered down; it really means what it says.” *Id.* at 65 (cleaned up). Yet, the School Officials have not shown how their mandatory vaccination law is narrowly tailored in the circumstances of this case, where the Perrys seek to re-enroll their child in a *virtual* school.

To be sure, West Virginia absolutely has a compelling state interest to prevent the spread of infectious disease in order to protect the health and safety of the public, as the district court acknowledged and the majority emphasizes. But the School Officials have failed to show that the law’s failure to make an exception for virtual students with a sincere religious objection to complying with the mandatory vaccination law is consistent with narrow tailoring when students similarly situated with regard to the risk addressed need not comply at all. The circumstances of *virtual* students are far more akin to those of children receiving education from home instruction, in learning pods, and in microschools

than to those *physically* present in a school classroom. Indeed, making an exception for the limited number of students whose parents both have a sincere religious objection to vaccinating their children and who wish to take advantage of the *virtual* school option offered by a public school system would itself be a prime example of a less restrictive alternative that would help the State advance its interests without needlessly burdening students' religious beliefs. Thus, "The State's interest in safety could be served by a policy that allows religious exemptions" for students *learning remotely*, while enforcing the mandatory vaccination policy for students *physically attending schools*. *Mirabelli*, 146 S. Ct. at 802.

Stepping back to view our action today, just as we must protect "the sanctity of public discourse" as speech that must remain free from government intrusion, *Garten Trucking LC v. NLRB*, 139 F.4th 269, 277 (4th Cir. 2025) (Wilkinson, J.), we must similarly protect the sanctity of religious exercise from government intrusion, *see EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800–01 (4th Cir. 2000) (Wilkinson, J.) (noting that the religious ministerial exception in Title VII, which is "rooted" in the First Amendment, "promotes the most cherished principles of religious liberty" and is "robust"). Making room for religion is rightly recognized as essential to a democratic society, providing the moral underpinning necessary for true freedom. *See, e.g., Alexis de Tocqueville, Democracy in America* (Henry Reeve trans., George Dearborn & Co. 1838). And this principle has special relevance in the context of parents' rights to supervise their children's religious

development. Yet regretfully, the majority opinion gives this no play today.

At bottom, strict scrutiny applies to the Perrys' free exercise challenge and the Upshur County School Officials have not shown that applying the State's compulsory vaccination law to students enrolled in virtual public schools whose parents hold sincere religious beliefs against vaccinations is consistent with the kind of narrow tailoring required by the Constitution. I would accordingly affirm the district court's preliminary injunction.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA**

**KRYSTLE PERRY and
ANTHONY PERRY,
individually and on behalf
of their minor child K.P.,**

Plaintiffs,

v.

**STACY MARTENEY et al,
Defendants.**

**Civil Action No.
2:24-CV-18**

**ORDER GRANTING IN PART AND DENYING
IN PART DEFENDANTS' MOTION TO
DISMISS [ECF NO. 29], GRANTING
PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION [ECF NO. 7] AND DENYING
DEFENDANT'S MOTION TO STAY
[ECF NO. 22]**

Pending before the Court are Defendants Stacy Marteney, Christine Miller, and the Upshur County Board of Education's Motion to Dismiss [ECF No. 29], Plaintiffs' Motion for Preliminary Injunction and Expedited Consideration [ECF No. 7] as well as Defendant Matthew Christiansen's Motion to Stay [ECF No. 22]. The motions are fully briefed and, after oral argument on August 12, 2024 at the Clarksburg point of holding court, are ripe for decision. For the reasons and to the extent set forth herein, Plaintiffs' Motion for Preliminary Injunction [ECF No. 7] is

GRANTED, Defendants' Motion to Dismiss [ECF No. 29] is **GRANTED IN PART** and **DENIED IN PART** and Defendant's Motion to Stay [ECF No. 22] is **DENIED**.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs, Krystle and Anthony Perry, individually and on behalf of their minor child, K.P., filed their Complaint on July 5, 2024. ECF No. 1. Therein, they claim their respective First Amendment rights have been infringed by West Virginia's mandatory vaccination law, W. Va. Code § 16-3-4. Specifically, they claim the mandatory vaccinations provided for under state law run counter to their sincerely held religious beliefs and, with Defendants' refusal to enroll K.P. in virtual school, they seek relief under 42 U.S.C. § 1983 including injunctive relief and attorneys' fees. In their pending motion, Plaintiffs request the Court enjoin Defendants from enforcing the challenged statute against K.P. as it pertains to her efforts to enroll in virtual schooling for the 2024-2025 academic year.

Defendants argue against any injunction and, via separate motion, urge the Court to stay this matter under the Pullman abstention doctrine. In addition, the Upshur County Defendants urge the Court to dismiss Plaintiffs' Complaint for multiple reasons including Eleventh Amendment immunity and failure to join indispensable parties.

II. FINDINGS OF FACTS

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court makes the following findings of

fact in support of the injunction entered with this Order.¹

Plaintiffs filed the instant civil action, individually and on behalf of their minor child, K.P., against the School Board Parties — the Upshur County Board of Education, Superintendent Christine Miller, and Virtual School Coordinator Stacey Marteney; Dr. Matthew Christiansen, as the State Health Officer and Commissioner of the Bureau of Public Health; and Mr. Doug Cipoletti,² as Executive Director of the West Virginia Virtual Academy, on July 5, 2024. See generally Compl., ECF No. 1.

From August 2022 through January 2024, K.P., Plaintiffs' minor daughter, was enrolled in an online learning program but was not physically present in a classroom with other children. Id. ¶¶ 2 and 70. K.P. was enrolled in Upshur County Virtual School for approximately 16 months. Id. ¶ 75.³

Regarding the mandatory immunization of school children, West Virginia Code § 16-3-4 prohibits K.P. from attending school in West Virginia unless she receives all the vaccines required under the statute

¹ The Court offered each party the opportunity to call witnesses and present any other evidence they believed the Court should consider at the August 12, 2024 hearing. The parties declined the invitation noting the written record was sufficient.

² Mr. Cipoletti has been replaced by Bryan Hoylman as a Defendant. ECF No. 20.

³ The Complaint alleges K.P. was enrolled in the West Virginia Virtual Academy; however, she was actually enrolled as a student with the Upshur County Virtual School – a separate program offered exclusively through Upshur County. The parties agreed at the April 12, 2024, hearing this was the case.

absent medical exemption. Id. ¶ 1. In West Virginia, it is unlawful for any child to attend “any of the schools of the state or a state-regulated childcare center until he or she has been immunized against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough” and “[n]o person shall be allowed to enter school without at least one dose of each required vaccine.” Id. ¶ 18; see also W. Va. Code § 16-3-4. Similarly, no child may be “admitted or received in any of the schools of the state” unless they have received the required vaccinations. ECF No. 1 at ¶ 99; see also W. Va. Code § 16-3-4. K.P. has not received all the vaccines listed in the statute. ECF No. 1 at ¶ 6. Plaintiffs allege that they possess deeply held religious beliefs that forbid them from fully vaccinating K.P., as required under W. Va. Code § 16-3-4. Id. ¶ 11.⁴

On December 18, 2023, the Superintendent of the West Virginia Department of Education sent the Superintendent’s Update email, which included a directive to county school systems across the state, informing them that all full-time virtual students were “required to be fully immunized according to W. Va. Code § 16-3-4 exactly as they would be when enrolling for in-person instruction” and that the school boards were to “review the enrollment records of [their] full-time virtual students and . . . correct any noncompliance enrollment occurrences.”

On June 14, 2023, the West Virginia State Board of Education authorized an immediate intervention of

⁴ No dispute has been raised as to this allegation and the Court accepts it as true for purposes of this motion.

the Upshur County School system. As a result of the Special Circumstance Review, it was the recommendation of the West Virginia Department of Education that extraordinary circumstances existed in the county that constituted major impediments to the provision of education programs and services for students, and that the Upshur County school system be issued Non-approval status. It was further recommended that since these extraordinary circumstances had been documented and existed, delaying the intervention by the State Board into Upshur County Schools for any period of time would not have been in the best interest of the students and staff in Upshur County in accordance with W. Va. Code § 18-2E-5. The State Board made findings related to preliminary investigations and broadly delegated the county's statutory authority to the State Board. See also W. Va. Code § 18-2E-5. Among the State Board's findings was that "the authority of the Upshur County Board of Education shall be limited in areas that compromise the delivery of a thorough and efficient education to its students as designated by the WVBE . . .". In addition, the State Board appointed Stephen L. Wotring as interim Superintendent and granted the Deputy State Superintendent the authority to hire a county superintendent to replace the interim. The State Board "limited the authority of the Upshur County Board of Education as to finances, personnel, federal programs and any other areas designated by the WVBE. . ." On June 14, 2023, the State Board commenced its immediate intervention. In January 2024, following the State Board's takeover, K.P. withdrew from Upshur County Virtual School

because she elected not to receive the required vaccinations due to religious beliefs.

Plaintiffs' eight-year-old child, K.P., was enrolled in the Upshur County Virtual School for 17 months, from August of 2022 to January of 2024. ECF No. 1 at ¶ 134. Defendant Miller is the duly empaneled Superintendent of the Upshur County School system and directs Defendant Marteney's actions, including enrollment and dis-enrollment of students in the virtual school. *Id.* ¶ 94. In December 2023, Defendant Marteney, the Virtual Learning Coordinator for the Upshur School District, informed Plaintiffs that K.P. would not be enrolled in the Upshur County Virtual School if she did not receive all vaccines required under W. Va. Code § 16-3-4. *Id.* ¶ 75. Plaintiffs thereafter requested a religious exemption for K.P. so she could continue her education in the virtual school without receiving any additional vaccine doses. Defendants rejected that request. *Id.* ¶ 183; see also ECF No. 1-7 (denial of Plaintiffs' religious exemption request).

In their verified Complaint, Plaintiffs allege, and submit competent evidence via their verifications, Defendant Marteney is "tasked with implementing and enforcing, and does implement and enforce, the mandatory vaccination requirements of W. Va. Code § 16-3-4 against school-aged children desiring to attend the Virtual Academy, and she enforced the [statute] against the Plaintiffs and excluded K.P. from the Virtual Academy" after Plaintiffs requested a religious exemption. ECF No. 1 ¶ 92. Defendant Miller is also tasked, under W. Va. Code § 18-4-10, with implementing and enforcing all procedures of state law, including enforcing W. Va. Code § 16-3-4

against K.P., which necessarily extended to oversight of the denial of her religious exemption request and exclusion from the virtual school. Id. ¶ 94.

West Virginia Governor Jim Justice vetoed a bill passed by the West Virginia Legislature during the 2024 regular session that would have allowed for exemptions from vaccination requirements for students enrolled only in virtual public schools. Id. ¶ 143. Currently, the only exemption to the compulsory immunization of school children is a medical exemption. Id. ¶¶ 144 and 170; see also W. Va. Code § 16-3-4.

In their Complaint, Plaintiffs seek a declaration by this Court related to the constitutionality of W. Va. Code § 16-3-4, specifically the lack of religious exemption thereto. Id. Plaintiffs allege violations of their First Amendment Free Exercise Rights. Id. at Count I. Additionally, Plaintiffs seek to enjoin the Upshur County Board from implementing and enforcing W. Va. Code § 16-3-4 as it relates to K.P. Id.

Given the issues presented in the myriad of motions pending, a review of certain West Virginia statutes as it pertains to the parties and their duties under law is necessary.

As a statutory corporation, a West Virginia county school board only has those powers expressly granted by state law or which arise by necessary implication from expressly granted powers. See, e.g., Shinn v. Bd. of Educ., 20 S.E. 604 (W. Va. 1894) (“The board of education of a school district is a corporation created by statute with functions of a public nature expressly given and no other; and it can exercise no power not expressly conferred or fairly arising from

necessary implication, and in no other mode than that prescribed or authorized by statute.”); Honaker v. Bd. of Educ., 24 S.E. 544 (W. Va. 1896). Regarding boards of education, the Supreme Court of Appeals of West Virginia has observed “the rule of law applies of strict construction and a consequent limitation of the rights which may be exercised by them and the duties which they can legally perform.” Herald v. Bd. of Educ., 65 S.E. 102 (W. Va. 1909).

Historically and currently, a board of education is a “creature of statute” with no powers other than those expressly given to it or that arise by necessary implication. See, e.g., State v. Rouzer, 32 S.E.2d 865 (W. Va. 1945); Dooley v. Board of Education, 93 S.E. 766 (W. Va. 1917). Thus, the Board may only act in the mode prescribed or authorized by statute. Id. In addition, the Board is a political subdivision of the State of West Virginia, maintains a corporate character, and is charged with the control and management of the schools and the district pursuant to West Virginia Code §§ 18-5-1, 18-5-5, and 18-5-13.

A county superintendent of schools has statutory duties enumerated by the West Virginia Legislature. Specifically, a county superintendent shall:

- (1) Act as the chief executive officer of the county board as may be delineated in his or her contract or other written agreement with the county board, and, under the direction of the state board, execute all its education policies;

(10) Exercise all other authority granted by this chapter or required by the county board or state board; []

W. Va. Code § 18-4-10.

With respect to compulsory immunization of school children, West Virginia Code § 16-3-4 provides:

(a) Whenever a resident birth occurs, the commissioner shall promptly provide parents of the newborn child with information on immunizations mandated by this state or required for admission to a public, private and parochial school in this state or a state-regulated child care center.

(b) Except as hereinafter provided, a child entering school or a state-regulated child care center in this state must be immunized against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough.

(c) No child or person may be admitted or received in any of the schools of the state or a state-regulated child care center until he or she has been immunized against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio,, rubella, tetanus and whooping cough or produces a certificate from the commissioner granting the child or person an exemption from the compulsory immunization requirements of this section.

(d) Any school or state-regulated child care center personnel having information concerning any person who attempts to be

enrolled in a school or state-regulated child care center without having been immunized against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough shall report the names of all such persons to the commissioner.

(e) Persons may be provisionally enrolled under minimum criteria established by the commissioner so that the person's immunization may be completed while missing a minimum amount of school. No person shall be allowed to enter school without at least one dose of each required vaccine.

(f) County health departments shall furnish the biologicals for this immunization for children of parents or guardians who attest that they cannot afford or otherwise access vaccines elsewhere.

(g) Health officers and physicians who provide vaccinations must present the person vaccinated with a certificate free of charge showing that they have been immunized against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough, or he or she may give the certificate to any person or child whom he or she knows to have been immunized against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough.

(h) The commissioner is authorized to grant, renew, condition, deny, suspend or revoke exemptions to the compulsory immunization requirements of this section, on a statewide basis, upon sufficient medical evidence that immunization is contraindicated or there exists a specific precaution to a particular vaccine.

(1) A request for an exemption to the compulsory immunization requirements of this section must be accompanied by the certification of a licensed physician stating that the physical condition of the child is such that immunization is contraindicated or there exists a specific precaution to a particular vaccine.

(2) The commissioner is authorized to appoint and employ an Immunization Officer to make determinations on request for an exemption to the compulsory immunization requirements of this section, on a statewide basis, and delegate to the Immunization Officer the authority granted to the commissioner by this subsection.

(3) A person appointed and employed as the Immunization Officer must be a physician licensed under the laws of this state to practice medicine.

(4) The Immunization Officer's decision on a request for an exemption to the compulsory immunization requirements of this section may be appealed to the State Health Officer.

(5) The final determination of the State Health Officer is subject to a right of appeal pursuant to the provisions of article five, chapter twenty-nine a of this code.

(i) A physician who provides any person with a false certificate of immunization against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough is guilty of a misdemeanor and, upon conviction, shall be fined not less than \$25 nor more than \$100.

W. Va. Code § 16-3-4.

Effective September 14, 2015, the State Board of Education promulgated a legislative rule related to “Health Promotion and Disease Prevention,” known as Policy 2423. 126 W. Va. C.S.R. § 51. Specifically, this legislative rule includes provisions related to statewide immunization tracking, state-declared health promotion through up-to-date immunizations, disease prevention measures through immunizations, and required vaccinations for students. See 126 W. Va. C.S.R. 51 at §§ 4.23, 5.1, 6.1, 6.2, 6.3, 6.4, 7.1.

III. ANALYSIS

A. Subject Matter Jurisdiction and Ex Parte Young

In Count I of the Complaint, Plaintiffs allege the Upshur County Defendants (the Upshur County Board of Education, Defendant Marteney, and Defendant Miller) and Defendant Christiansen have and continue to violate their respective First Amendment rights and seek redress, specifically injunctive relief and attorneys’ fees pursuant to 42

U.S.C. § 1988, under 42 U.S.C. § 1983. ECF No. 1. That claim vests this Court with jurisdiction per 28 U.S.C. § 1331—federal question jurisdiction.⁵

Defendants argue, however, the Eleventh Amendment prohibits Plaintiffs from pursuing their claims in this Court. Plaintiffs contend the relief sought does not run afoul of constitutional immunity. The Court, being mindful of the Fourth Circuit’s direction in Sonda v. West Virginia Oil and Gas Conservation Comm’n, 92 F.4th 213 (4th Cir. 2024),⁶ considers the issue of jurisdiction first.

The Eleventh Amendment to the United States Constitution provides that “[t]he Judicial power of the

⁵ During the August 12, 2024 oral argument, the parties alluded to the limitations on federal court jurisdiction under Article III of the United States Constitution. Of course, “[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.” Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986). The parties cannot conjure subject-matter jurisdiction, nor can a defect in subject-matter jurisdiction be waived. See United States v. Cotton, 535 U.S. 625, 630 (2002). Thus, questions of subject-matter jurisdiction may be raised at any point during the proceedings and may (or, more precisely, must) be raised sua sponte by the court. See Bender, 475 U.S. at 541 (“[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it.”) (internal quotation marks omitted).

⁶ As discussed infra, Defendants urge the Court to exercise its discretion and decline Plaintiffs’ invitation to adjudicate their First Amendment claims or, at least, stay this case invoking Pullman abstention. Sonda is much discussed in the briefs and herein on that issue. However, the Fourth Circuit made clear in Sonda that subject matter jurisdiction must be considered initially. See id. at 219-220.

United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. The Supreme Court of the United States has interpreted this Amendment to mean that a state may not “be sued as defendant in any court in this country without [its] consent . . .” Hans v. Louisiana, 134 U.S. 1, 17 (1890) (quoting Cunningham v. R.R. Co., 109 U.S. 446, 451 (1883)); see also Doyle v. Hogan, 1 F.4th 249, 254 (4th Cir. 2021) (citing Va. Off. For Protection & Advocacy v. Stewart, 563 U.S. 247 (2011) (“In general, States may not be haled into federal court without their consent.”)). The question of Eleventh Amendment immunity is a jurisdictional one. See Suarez Corp. Industries v. McGraw, 202 F.3d 676, 683 n.12 (4th Cir. 2000) (citation omitted).

1. Dr. Christiansen as A State Entity

The threshold (but not necessarily dispositive) issue is whether any of the defendants are considered “the state” under the Eleventh Amendment. The Court addresses each Defendant in turn starting with the more obvious question of Defendant Dr. Christiansen. He serves as State Health Officer and Commissioner for the West Virginia Department of Health and Human Resources. ECF No. 1 at ¶ 95. Under the challenged statute, W. Va. Code § 16-3-4, Dr. Christiansen is charged with implementing the mandatory vaccination requirements for school-aged children, while also granting medical exemptions for

the same. Id.⁷ He is only named as a defendant in his official capacity. Id. An “official capacity suit” is merely another way to assert a claim against the state itself. See Panico v. City of Westover, Civil Action No. 21-CV-96, 2022 WL 989120, at *6 (N.D.W. Va. March 31, 2022) (citing Kentucky v. Graham, 473 U.S. 159, 165-66 (1985)). Thus, Dr. Christiansen is considered a state official for Eleventh Amendment purposes.

2. Upshur County Defendants as State Entities

The Upshur County Defendants present a more complicated assessment. Typically, “counties [and therefore their employees] are not arms of the state and thus do not fall within the ambit of the Eleventh Amendment.” Workman v. Mingo County Schools, 667 F. Supp. 2d 679, 685 (S.D.W. Va. 2009). However, as discussed above, the State Board of Education has assumed control of the Upshur County Board of Education. It has also, under its statutory authority, appointed the individual defendants, Virtual Learning Coordinator Stacy Marteney and Superintendent Christine Miller, to their positions. The parties have thoroughly addressed the complicating factor the State takeover presents here. At the August 12, 2024 oral argument, Plaintiffs offered to dismiss the Upshur County Board of Education as a defendant noting it an unnecessary party to secure the injunctive relief sought here and to avoid any Eleventh Amendment immunity

⁷ Plaintiffs allege Defendant Christiansen is charged with “enforcing” W. Va. Code § 16-3-4. For the reasons discussed herein, the Court disagrees with that interpretation of his duties under that statute.

entanglements. No party did or has objected. The Court, having no objection of its own, hereby **DISMISSES** the Upshur County Board of Education as a party-defendant at Plaintiffs' request.

Two inquiries can bring a local government body within the protection of Eleventh Amendment immunity. First, "if the State treasury will be called upon to pay a judgment against a governmental entity, then Eleventh Amendment immunity applies to that entity." Cash v. Granville Cty Bd. of Educ., 242 F.3d 219, 223 (4th Cir. 2001). Because Plaintiffs in this matter seek only declaratory and prospective injunctive relief, the first factor does not apply.

The second inquiry, often referred to as the "sovereign dignity" inquiry, considers whether the government entity and the State are "sufficiently close to make the entity an arm of the State." Id. at 224. In determining whether a government entity is an "arm of the state," the Court must consider:

- (1) the degree of control that the State exercises over the entity or the degree of autonomy from the State that the entity enjoys;
- (2) the scope of the entity's concerns—whether local or statewide—with which the entity is involved; and
- (3) the manner in which State law treats the entity.

Id. In Cash, the Fourth Circuit concluded that because, under North Carolina law, the local school board had nearly full autonomy to act, including the power to hire and fire administrators, because its

concerns were generally local, and because the State treats local school boards as local entities, the local school board in Cash was not an arm of the State.

This Court has the benefit of Judge Goodwin’s analysis in Workman. There, Judge Goodwin applied the sovereign dignity test to the entity defendant Mingo County Board of Education, concluding that it was an arm of the State entitled to sovereign immunity. Workman, 667 F. Supp.2d at 687. The court reached this conclusion primarily because the Mingo Board had been taken over by the State Board of Education under W. Va. Code § 18-2E-5(p)(4)(C). Under that provision, the court reasoned that because the Mingo Board “ha[d] little to no rights of autonomy and self-control,” and because the State Board was effectively “empowered to manage the schools in Mingo County and accordingly control the Mingo Board,” the Mingo Board—after takeover—was an arm of the State entitled to state sovereign immunity. As a result, the court concluded that all claims against the Mingo Board were barred in federal court and dismissed it as a defendant.

Here, the State Board of Education has used the same statute to take over the Upshur County Board of Education. See ECF No. 40-2. Through its takeover order, the State Board has removed the county superintendent and all employees who served at the pleasure of the county superintendent. Id. at ¶ 6; 9. The State Board further limited the Upshur Board’s authority “in areas that comprise the delivery of a thorough and efficient education to its students as designated by the WVBE by rule,” including delegating decision-making authority to the Deputy State Superintendent. Id. at ¶ 5. Although the

provisions of the takeover law are now somewhat different, the level of control possessed by the State Board remains the same. Accordingly, the Upshur Board is, in the circumstances presented, an arm of the state entitled to state sovereign immunity. That entity has already been voluntarily dismissed. See supra.

However, the County Superintendent and Virtual Learning Coordinator remain parties in their official capacities. ECF No. 1. ¶¶ 92 and 94. The County Superintendent, Defendant Miller, was hired by the Deputy State Superintendent, see ECF No. 40-2 at ¶ 7–8, and operates under the authority of the State Board of Education via the takeover order. Moreover, because the Deputy State Superintendent was empowered to fill all administrative positions in the Upshur County Schools, see ECF No. 40-2 at ¶ 10, both the County Superintendent and the Upshur County Virtual Learning Coordinator would be considered “state officials” for Eleventh Amendment purposes. See Workman, 667 F. Supp. 2d at 688. “Even though the language of the Eleventh Amendment preserves sovereign immunity of only the **States** of the Union, it is settled that this protection extends also to ‘state agents and state instrumentalities,’ or stated otherwise, to ‘arms of the State’ and State officials.” Cash, 242 F.3d at 222 (emphasis in the original) (cleaned up).

3. Ex parte Young

Plaintiffs contend quite correctly this does not end the inquiry, however. In Ex parte Young, the Supreme Court observed that “a suit against individuals, for the purpose of preventing them, as

officers of a state, from **enforcing** an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of the [Eleventh] Amendment.” 209 U.S. 123, 154 (1908) (emphasis added) (citation omitted).

If the act which [a state officer] seeks to enforce [is] a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159–60. Accordingly, “federal courts may exercise jurisdiction over claims against state officials by persons at risk of or suffering from violations by those officials of federally protected rights, if (1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective.” Republic of Paraguay v. Allen, 134 F.3d 622, 627 (4th Cir. 1998).

Nevertheless, “[i]n making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act[.]” Ex parte Young, 209 U.S. at 157; see also Doyle, 1 F.4th at 254. Otherwise, a plaintiff “is merely making him a party as a representative of the State, and thereby attempting

to make the State a party.” *Id.* The Fourth Circuit has further explained that “Ex parte Young requires a ‘special relation’ between the state officer and the challenged statute to avoid the Eleventh Amendment’s bar.” Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 331 (4th Cir. 2001); Doyle, 1 F.4th at 254. Moreover, a general authority to enforce the laws of a state is not a close enough relation. *Id.* “Instead, the officer sued must be able to enforce, if he [or she] so chooses, the specific law the plaintiff challenges.” Doyle, 1 F.4th at 255. Overall, “[t]he exception is narrow: it applies only to prospective relief, [and] it does not permit judgments against state officers declaring that they violated federal law in the past. . . .” P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

a. Dr. Christiansen Remains Immune

The Court first examines Ex parte Young with respect to Dr. Christiansen, named only in his official capacity as State Health Officer and Commissioner of the Bureau of Public Health. ECF No. 1. The relief sought is largely limited to prospective enforcement of the West Virginia mandatory vaccine law, W. Va. Code § 16-3-4, as it pertains to Plaintiffs. Dr. Christiansen’s legal authority under the challenged statute is limited to (1) providing parents of newborn children with information on mandated vaccinations, W. Va. Code § 16-3-4(a); (2) providing medical exemptions, W.Va. Code § 16-3-4(c), (h); (3) developing a minimal criteria for the provisional enrollment of a student who has “at least one dose of each required vaccine,” “so that the [student’s] immunization may be completed while missing a minimum amount of school,” W. Va. Code § 16-3-4(e);

and (4) appointing and employing an Immunization Officer, W. Va. Code § 16–3–4(h)(2). As Plaintiffs vociferously protest, West Virginia law does not provide Dr. Christiansen or anyone else authority to grant any other exemptions including exemption for religious objections.

Dr. Christiansen is irrelevant to fashioning the remedy requested in the Complaint. Dr. Christiansen cannot force Upshur County officials – even while that county’s schools are under State control – to re-enroll the Plaintiff. The State Health Officer does not have the authority to mandate that any student be enrolled, or unenrolled in a school. In short, the State Health Officer has no control over the State Superintendent, the County Board of Education, or any individual school. See W. Va. Code §§ 16-1-5 (designating that the State Health Officer may also serve as the Commissioner of the Bureau for Public Health); 16-1-6 (enumerating powers of the Commissioner of the Bureau for Public Health). In short, Dr. Christiansen lacks the legal ability to remedy the alleged constitutional violation as Plaintiffs expressly seek in their Prayer for Relief. See ECF No. 1, at ¶¶ 283-84. No “special relation” or even “some connection” exists between Defendant Christiansen and the relief sought here. See Doyle, 1 F.4th at 254. Accordingly, this Court lacks jurisdiction over Dr. Christiansen as he remains vested with immunity from suit in this Court under the Eleventh Amendment and must be dismissed.⁸

⁸ Dr. Christiansen also argues Plaintiffs lack standing to seek even injunctive relief against him in his official capacity. Although not raised via Rule 12(b)(1) motion, “federal courts are

**b. Upshur County Individual Defendants
Are Not Immune**

With respect to Defendants Marteney and Miller, the Court ultimately reaches a different decision, however. Again, although the Eleventh Amendment technically bars a party from suing a state or its agency to seek injunctive relief,⁹ a plaintiff may bring the suit against a state officer in his or her official capacity seeking prospective injunctive relief, thereby effecting the same result. Seminole Tribe v. Florida, 517 U.S. 44, 71 n.14 (1996) (“An individual can bring suit against a state officer in order to ensure that the officer’s conduct is in compliance with federal law.”). It remains a narrow exception to constitutional sovereign immunity. “Young’s applicability has been tailored to conform as precisely as possible to those specific situations in which it is necessary to permit the federal courts to vindicate federal rights and hold

under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines.” FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (internal quotations and citations omitted), holding modified by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004). For the same reasons the Court finds Dr. Christiansen is cloaked in Eleventh Amendment immunity here, the Court concludes Plaintiffs have not established either the requisite “causal connection” between their claimed injury and Dr. Christiansen’s conduct or that Dr. Christiansen could, even under this Court’s command, redress that injury. See Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315 (4th Cir. 2002). Plaintiffs’ lack of standing with respect to their claims against Dr. Christiansen requires his dismissal on this separate, independent basis.

⁹ See Cory v. White, 457 U.S. 85, 91 (1982) (“Thus, the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction.”).

state officials responsible to the supreme authority of the United States.” Papasan v. Allain, 478 U.S. 265, 277 (1986); Griffin v. Cnty. School Bd. of Prince Edward Cnty., 377 U.S. 218, 228 (1964) (noting “suits against state and county officials” to enjoin unconstitutional action are permitted under Ex parte Young). In such cases, citizens can bring suits against a state officer, in his official capacity, where he has a “special relation” to the challenged act. Id. at 157; see also Quern v. Jordan, 440 U.S. 332, 346-49 (1979); Edelman v. Jordan, 415 U.S. 651, 665-69 (1974).

To meet the “special relation” requirement, the challenged official must have “proximity to and responsibility for the challenged state action,” thus ensuring “that a federal injunction will be effective with respect to the underlying claim.” South Carolina Wildlife Federation v. Limehouse, 549 F.3d 324, 332-33 (4th Cir. 2008). This test does not require the challenged statute specify the official’s role, but where there are express obligations, the officer’s duty is made clearer. See Ex parte Young, 209 U.S. at 157. Ultimately, the “important and material fact” is that “the state officer, by virtue of his office, has some connection with the enforcement of the act.” Id.

Defendant Miller (“Superintendent Miller”) is the duly appointed Superintendent of the Upshur County School System and has been sued only in her official capacity as Superintendent. Her duties are outlined in W. Va. Code § 18-4-10 and include enforcement of all policies and procedures by state law, including, as is relevant here, enforcement of W. Va. Code § 16-3-4 against Plaintiffs. Again, Superintendent Miller was appointed by the State Department of Education, and is subject, at present, to their oversight rather than

that of the local board. See ECF 40-2. Among other things, statutory authority renders Superintendent Miller the “chief executive officer” of the board and empowers her to “under the direction of the state board, execute all its education policies.” W. Va. Code § 18-4-10(1) and (10).

Defendant Marteney works as the Virtual Learning Coordinator for Upshur School Schools, the system through which Plaintiffs enrolled, and attempted to re-enroll, K.P. into the Upshur County Virtual School. ECF No. ¶ 92. Marteney is sued solely in her official capacity. Id. Ms. Marteney is tasked with implementing and enforcing, and does implement and enforce, the mandatory vaccination requirements of W. Va. Code § 16-3-4 and cited this statute when refusing to re-enroll K.P. in the county’s virtual school. Id. Plaintiffs allege Marteney was primarily responsible for the decision made subject of the Complaint. Id. ¶¶ 75-79.

In fact, the challenged statute, specifically W. Va. Code §16-3-4(c) and (d) charges the schools and school boards to enforce the mandatory vaccine requirement. Those sections provide:

(c) No child or person may be **admitted** or received **in any of the schools of the state** or a state-regulated child care center until he or she has been immunized against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio,, rubella, tetanus and whooping cough or produces a certificate from the commissioner granting the child or person an exemption from the compulsory immunization requirements of this section.

(d) Any **school** or state-regulated child care center personnel having information concerning any person who attempts to be **enrolled in a school** or state-regulated child care center without having been immunized against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough shall report the names of all such persons to the commissioner.

Id. (emphasis added).

This Court once again finds Judge Goodwin's analysis in Workman compelling on this particular issue. There, the plaintiffs asserted claims against the Mingo County Board of Education, which had likewise been taken over by the State Board of Education, and others challenging the constitutionality of W. Va. Code § 16-3-4. See Workman, 667 F. Supp.2d at 681-684. Judge Goodwin found the official capacity claims against the individual defendants including the State Superintendent of Schools and the Superintendent of Mingo County Schools survived Eleventh Amendment immunity challenges under Ex parte Young such that he "must address the merits of [plaintiffs'] claims." Id. at 688. In doing so, he highlighted the fact that the county superintendent (post-state take over) "was hired by a state officer, to enact state policy." Id. "Local officers, depending on the particular circumstances, may be entitled to

Eleventh Amendment protection as agents of the state.” Id. (citation omitted).¹⁰

The same result is appropriate here.¹¹ Both Defendants Marteney and Miller were installed after the State Board of Education assumed control of the Upshur County Board of Education and its operations. In their respective roles of Virtual Learning Coordinator and County Superintendent, they have the authority to admit and enroll students, or not to do so, in accordance with state law including W. Va. Code § 16-3-4. The Court, at this preliminary injunction stage, concludes both Defendants Marteney and Miller have the requisite degree of “some connection” to the West Virginia mandatory vaccine statute. Thus, considering the prospective injunctive relief sought, this Court has jurisdiction over Plaintiffs’ claims against those specific Defendants pursuant to Ex parte Young.¹²

¹⁰ In affirming Judge Goodwin’s grant of summary judgment to defendants, the Fourth Circuit did not substantively address plaintiffs’ assignment of error on subject matter jurisdiction including the Eleventh Amendment. See Workman v. Mingo County Board of Education, 419 Fed. Appx. 348 (4th Cir. 2011).

¹¹ The Upshur County Defendants inexplicably urge this Court to follow Judge Goodwin’s lead in Workman and find the individual defendants “agents of the state” for Eleventh Amendment purposes but to plot a different path on application of Ex parte Young. ECF No. 45 at 17. They argue Defendants Marteney and Miller were only hired to “enact state policy” which ostensibly includes W. Va. Code § 16-3-4. The Court rejects the inconsistent argument instead concluding those assigned duties establish “some connection” to the challenged statute triggering Ex parte Young.

¹² The Upshur County Defendants do argue that some “state treasure” may be implicated calling into question Ex parte Young’s application. The Court finds that argument unavailing

B. Pullman Abstention

Defendant Dr. Christiansen first raised the issue of abstention in his Motion to Stay. He has now been dismissed which arguably renders that relief moot. However, the Upshur County Defendants argued in support of abstention or, alternatively, a stay. The Court therefore considers whether either is appropriate here. First, the Court must – and does – determine it has jurisdiction over this matter. See Sonda, 92 F.3d at 219 (noting a court’s “independent obligation to satisfy itself of its jurisdiction.”). Plaintiffs’ claims arise under federal law, i.e., 42 U.S.C. § 1983, vesting original jurisdiction here. See 18 U.S.C. § 1331. Defendants make no argument or suggestion to the contrary.¹³

“The generally applicable rule is that a federal court, whose jurisdiction has been invoked, must exercise that jurisdiction and address the matter before it.” Sonda, 92 F.3d at 219. Both the Supreme Court and the Fourth Circuit have repeatedly instructed district courts this is their “strict duty.” Martin v. Stewart, 499 F.3d 360, 363 (4th Cir. 2007) (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996)). Indeed, the Supreme Court has emphasized that this duty is a “virtually unflagging obligation.” Deakins v. Monaghan, 484 U.S. 193, 203 (1988) (quoting Colo. River Water Conservation Dist.

upon review of Plaintiffs’ Complaint. The only monetary recovery sought is for attorney’s fees under 42 U.S.C. § 1988. Such relief does not vitiate jurisdiction here. See Hutto v. Finney, 437 U.S. 678 (1978); Missouri v. Jenkins, 491 U.S. 274 (1989); Kentucky v. Graham, 473 U.S. 159 (1985).

¹³ The Court rejects the remaining Defendants Eleventh Amendment immunity argument. See supra.

v. United States, 424 U.S. 800, 813 (1976)). Federal courts have “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” Cohens v. Virginia, 19 U.S. 264, 404 (1821) (Marshall, C.J.).

However, “an extraordinary and narrow exception” to this duty exists when abstention is justified by the relevant circumstances, as for example, under the abstention doctrine articulated in Pullman. See Quackenbush, 517 U.S. at 728 (cleaned up). Defendants ask the Court to abstain from deciding the issues presented or stay this matter pending state court resolution of the purported state law issues implicated. The Pullman exception may be applied when “there is (1) an unclear issue of state law presented for decision (2) the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is potentially dispositive.” Wise v. Circosta, 978 F.3d 93, 101 (4th Cir. 2020) (en banc) (quoting Educ. Servs., Inc. v. Md. State Bd. for Higher Educ., 710 F.2d 170, 174 (4th Cir. 1983)).

Defendants argue abstention is appropriate here considering the 2023 enactment of the Equal Protection for Religion Act (“EPRA”) in West Virginia. That statute, found at W. Va. Code § 35-1A-1, largely codifies the traditional strict scrutiny standard deployed in constitutional question litigation. Specifically, the EPRA prohibits the state from “substantially burden[ing] a person’s exercise of religion unless applying the burden to that person’s exercise of religion in a particular situation is essential to further a compelling governmental interest; and is the least restrictive means of

furthering that compelling governmental interest” W. Va. Code § 35-1A-1(a)(1). The EPRA, however, also creates a “claim” for violation of this standard for “injunctive or declaratory relief and reimbursement of costs and reasonable attorney fees.” W. Va. Code § 35-1A-1(b)(1).

Plaintiffs, however, assert no EPRA claim here. See generally Compl., ECF No. 1. In fact, they have repeatedly disclaimed any such cause of action here. This strikes the Court as significant as to whether exercising its discretion under Pullman is even an option. The first step in a Pullman analysis is to determine if there is “an unclear issue of state law **presented for decision.**” Wise, 978 F.3d at 101 (emphasis added). The Fourth Circuit has further noted the ambiguous state law claim must be “in issue” and “not duplicative” of the asserted claims. Educational Services, Inc. v. Maryland State Board for Higher Education, 710 F.2d 170, 174 (1983). Simply, neither of these prerequisites are satisfied here.

Again, Plaintiffs have expressly disavowed an EPRA claim. It is therefore not “presented” or “in issue” directly. Moreover, it is difficult to discern what ambiguity exists in the EPRA which would justify this Court pausing consideration of Plaintiffs’ claims given the presence of jurisdiction. The statute codifies strict scrutiny and enables a state law challenge to any state effort to burden religious observance. Nothing about the statute is unclear as it is, contrary to Educational Services’ holding, duplicative of Plaintiffs’ claims before this Court.

Defendants also tepidly point to the mandatory vaccine statute as a potential basis for triggering Pullman abstention. Like EPRA, nothing in W. Va. Code § 16-3-4 presents as ambiguous. The mandatory vaccine statute specifically lists the required vaccines and declares only those medically exempted are excused from compliance. Again, nothing in either statute at the forefront of Plaintiffs' claims is ambiguous such that deference to the West Virginia state courts is advisable. "[W]hen a statute is not ambiguous, there is no need to abstain even if state courts have never interpreted the statute." City of Houston, Tex. v. Hill, 482 U.S. 451, 469 (1987).¹⁴

Defendants rely heavily upon Judge Bailey's reasoned decision in West Virginia Parents for Religious Freedom v. Christiansen, 685 F. Supp.3d 371 (N.D.W. Va. 2023) where His Honor elected to invoke Pullman abstention. There, the plaintiffs asserted a constitutional challenge to the same statute, W. Va. Code § 16-3-4, but sought wider relief including mounting a facial challenge, in addition to an as-applied challenge, to the statute. After the State of West Virginia submitted its amicus curiae brief arguing the EPRA was "directly relevant" to the issues before the Court, Judge Bailey granted the defendant's motion for summary judgment to the

¹⁴ As noted, the EPRA merely codifies the strict scrutiny standard. As the Court discusses supra, there is little ambiguity about the impact strict scrutiny analysis has on Plaintiffs' as-applied challenge to the mandatory vaccine statute either. "[S]trict scrutiny, in practice, is virtually impossible to satisfy" Washington Post v. Manus, 944 F.3d 506, 520 (4th Cir. 2019)

extent it urged Pullman abstention was the proper course of action.

Respectfully, this Court has a different interpretation of the issues presented in this specific case. Plaintiffs have undertaken a different tact in this case: different parties, different facts (a student only seeking ability to enroll virtually), and a different constitutional challenge (as-applied challenge only). Plaintiffs eschewed any reference to the EPRA and, instead, Defendants ask the Court to impose that statute and potential claim here over Plaintiffs' objection. Also, here, the Court does not have the benefit of the "State's" position in this as-applied challenge as Judge Bailey had – despite notice being afforded. ECF No. 40-1. The EPRA, although not presented here, is duplicative of Plaintiffs' First Amendment challenge.

In summary, the Court does not find the Pullman factors to be satisfied; therefore, it would be inappropriate to abstain where jurisdiction is otherwise established. See Sonda, 92 F.4th at 219-220.

C. Rule 19 Motion to Dismiss

Defendants Marteney and Miller also move to dismiss Plaintiffs' Complaint for failure to join an indispensable party arguing the State Board of Education and State Superintendent should have been named as party-defendants. ECF No. 29. Specifically, Defendants argue they are powerless to "consider a religious exemption" to W. Va. Code § 16-3-4 and, in addition, the state takeover renders them largely unable to do much of anything other than

follow direction from the State Board and State Superintendent.¹⁵

“Courts are loathe to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result.” Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 441 (4th Cir. 1999) (citation omitted). Therefore, before dismissing, courts conduct an in-depth, two-step inquiry to assure non-joinder is in fact fatal to the claim. See National Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of South Carolina, Inc., 210 F.3d 246, 249 (4th Cir. 2000) (“Federal Rule of Civil Procedure 19 sets forth a two-step inquiry for a district court to determine whether a party should be joined in an action.”). First, courts consider whether a party is necessary “because of its relationship to the matter under consideration.” Owens-Illinois, Inc., 186 F.3d at 440. Next, “[i]f a party is necessary, it will be ordered into the action.” Id. Only when a party cannot be joined will the court “determine whether the proceeding can continue in its absence, or whether it is indispensable pursuant to Fed. R. Civ. P. 19(b) and the action must be dismissed.” Id.; see also Teamsters Local Union No. 171 v. Keal Driveaway Co., 173 F.3d 915, 917–18 (4th Cir. 1999).

Federal Rule of Civil Procedure 19(a) identifies persons that are to be joined “if feasible,” including a

¹⁵ Defendants Marteney and Miller likewise argue Defendant Christiansen is indispensable as the “chief enforcer” of W. Va. Code § 16-3-4, the singular statute made subject of Plaintiffs’ as-applied challenge here. The Court, for reasons set forth previously, rejects this argument.

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person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction, if:

(A) in that person's absence, the court cannot accord complete relief among existing parties, or

(B) that person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect that interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a).

In determining whether a party is indispensable, Rule 19 specifies the following factors for the Court to consider:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b)(1)-(4).

The Upshur County Defendants argue both the West Virginia Department of Education and the West Virginia State Superintendent of Schools are indispensable parties here based on their respective duties imposed under state law. Plaintiffs contend the named (and remaining) defendants, if enjoined, can afford them complete relief.

1. No other party is necessary to afford Plaintiffs complete relief.

The Court agrees with Plaintiffs here. If the Court enjoins Defendants Marteney and Miller and – even – those acting in concert with them “from enforcing W. Va. Code § 16-3-4 against Plaintiffs, unless the government provides an option for Plaintiffs to request a religious exemption to the Virtual Academy” (ECF No. 1 at ¶ 55), Plaintiffs would obtain complete relief against the existing parties to the suit, and that relief would be sufficient to remedy the constitutional violations alleged. See Dixon v. Edwards, 290 F.3d 699, 713 (4th Cir. 2002) (holding that a party was not necessary where the “injunction entered by the district court in fact gave [the plaintiff] complete relief.”).

Defendants Marteney and Miller's assertion that complete relief cannot be provided without the State Department of Education and the State

Superintendent as parties to the suit is unpersuasive. Defendants claim the State Board and the State Superintendent are tasked generally with “interpreting” and “enforcing” the laws touching on public schools, including the mandatory vaccination law, and that they consequently have an “interest” in this litigation. See ECF No. 30 at 14. Defendants Marteney and Miller then imply they will potentially be subject to “incurring inconsistent obligations” if the Court grants injunctive relief, and the State Department of Education and the State Superintendent then interpret the mandatory vaccination statute contrary to the Court’s directives and require them to violate a federal court order.

Other courts have held that inclusion of sufficient officials to effect relief satisfies the Rule 19 requirements of joining necessary parties, even if perhaps other parties have some interest in the matter – rejecting the contentions of Defendants here. See Fitzgerald v. Wildcat, 687 F. Supp. 3d 756, 784-785 (W.D. Va. 2023) (holding that inclusion of sufficient officials in their official capacities to afford relief meets the necessary party requirement); see also Salt River Project Agr. Imp. & Power Dist. v. Lee, 672 F.3d 1176, 1180 (9th Cir. 2012). Again, the Supreme Court has explained that official-capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent.” Kentucky v. Graham, 473 U.S. 159, 165 (1985). Thus, they are not “suit[s] against the official personally, for the real party in interest is the entity.” Id. at 166.

Here, the County Superintendent is acting under the authority and agent of the State Board due to the

takeover of the local district. And her inclusion in her official capacity is sufficient to impute their interests in all events. Moreover, the State Board and State Superintendent are unable to merely replace Superintendent Miller to avoid the requirements of an injunction, because the official capacity suit against her and any injunction entered against her in her official capacity will flow to any successor in office. See Fed. R. Civ. P. 25(d).

In Robertson v. Jackson, 972 F.2d 529 (4th Cir. 1992), the official primarily responsible for enforcement of the challenged action argued that other officials should be made a party. However, the Fourth Circuit found no error in not joining the additional officials to the action because the official before the Court was sufficient to provide the relief ordered. Id. at 535. The court noted “no evidence has been presented to suggest he cannot do so with the authority he enjoys under Virginia law.” Id. “The potentiality that the Commissioner may, at some future time, be unable to cause a particular local agency to comply with federal requirements does not relieve him of his responsibility under federal law to attempt fully to ensure compliance.” Id.

Later, the Fourth Circuit followed the same path in Staley v. Darlington County Sch. Dist., 84 F.3d 707 (4th Cir. 1996). There the Fourth Circuit found that joinder of the state board, despite their general supervision over local school districts, was not necessary under Rule 19. The Court reasoned including the local officials who engaged in segregation was sufficient to fashion and award the desegregation injunctive relief orders entered by the court.

The same reasoning applies here. The Fourth Circuit in Stanley concluded the state board was not necessary because “the [School] District has failed to provide a single example of how the State has impeded the district’s compliance with the court’s order and federal law since 1970.” Id. at 714. There, the court ultimately found no error by not forcing the Plaintiffs to include the state board because it was not necessary to afford relief. Id. (“The federal rules, however, do not authorize a defendant to compel an unwilling plaintiff to assert a claim against a second defendant.”).

In terms of joinder of the State Board of Education, the Fourth Circuit in Jackson observed that “[w]e do not address the question of whether we should refuse to entertain the claim of necessary parties, because we do not believe that either the State Board or the local agencies are parties that must be joined to grant complete relief.” Id. at 536. To that end, “[t]he district court’s order, requiring the Commissioner to bring about full compliance with federal timely processing and program access requirements, cannot be considered either ‘partial’ or ‘hollow’ relief.” Id. (citing Fed. R. Civ. P. 19(a)(1) advisory committee’s note; and 3A J. Moore, J. Lucas & G. Grotheer, *Moore’s Federal Practice*, P 19.071[1] (2d ed. 1991) (joinder is not necessary “where, although certain forms of relief are unavailable due to a party’s absence, meaningful relief can still be provided”)). “Neither the State Board nor the local agencies has been shown to be an impediment to the achievement of full compliance with the federal regulations.” Id.

The analysis in Robertson is equally applicable here. There is no evidence that inclusion of the State Board of Education, or of the State Superintendent, is necessary to effect remedial relief. Enjoining Defendants Miller and Marteney is sufficient to effect K.P.'s re-enrollment. Defendants' arguments to the contrary are unavailing. See, e.g., Luce v. Lexington Cnty. Health Servs. Dist., 3:22-03998-MGL, 2023 WL 8809994, at *6 (D.S.C. September 20, 2023) (determining that state official was not a necessary party and inclusion of local officials in official capacity was sufficient). The specific claim and relief sought here ultimately informs the Court's decision. "An 'as applied' challenge contends that a law's application to a particular person under particular circumstances deprives that person of a constitutional right. Thus, a successful 'as applied' challenge precludes the enforcement of a statute against a plaintiff alone." Marcellus v. Virginia State Bd. of Elections, 168 F. Supp. 3d 865, 872 n.8 (E.D. Va. 2016), aff'd, 849 F.3d 169 (4th Cir. 2017) (citing Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 481 (2007)). The remaining Defendants – Ms. Marteney and Mr. Miller – are sufficient to permit the Court to fashion a full and proper remedy if warranted.

2. There is no prejudice to the State parties and no inconsistent obligations imposed on Defendants Marteney and Miller.

Defendants also argue prejudice if the State Board and/or State Superintendent are not present to defend their interests and potential inconsistent obligations if this case proceeds as postured. The Court disagrees.

First, the nature of the Board and Superintendent's duty under the challenged statute is minimal. The enforcement mechanism of W. Va. Code § 16-3-4 lies with the local school system. See W. Va. Code § 16-3-4(c) ("No child or person may be admitted or received in any of the schools of the state . . ."). Other than generalized supervision responsibility, see W. Va. Code § 18-2-5, the State Board and Superintendent have no direct connection to the mandatory vaccination statute. The state takeover of Upshur County schools makes no significant difference here. The duly appointed County Superintendent and Virtual Learning Coordinator are charged with county-level administration. Therefore, outside of an interest in enforcing the law generally, those entities have no real interest to defend here.

Defendants Marteney and Miller are also not, realistically, exposed to "incurring inconsistent obligations" under Rule 19(a)(1)(B)(ii) if the Court grants injunctive relief. There is no legitimate scenario where any entity, including the State Board or State Superintendent, would direct the remaining Defendants to ignore or act in contravention of an order from this Court. Judge Chambers of the Southern District of West Virginia dismissed a similar argument in Nelson v. Warner, 446 F. Supp. 3d 119, 126 (S.D.W. Va. 2020) – albeit in a facial challenge. Regardless, this Court is satisfied it has jurisdiction over the remaining Defendants and Plaintiffs' claims thereby ensuring compliance with any ultimate resolution and judgment. Moreover, because this is an as-applied challenge, injunctive relief would only extend to Defendants Marteney and

Miller with respect to K.P. and her enrollment in the Upshur County Virtual School.

“Dismissal of a case is a drastic remedy, however, which should be employed only sparingly.” Teamsters Local Union No. 171, 173 F.3d at 918. In determining whether to dismiss a complaint, a court must proceed pragmatically, “examin[ing] the facts of the particular controversy to determine the potential for prejudice to all parties, including those not before it.” Id. Having done so, the Court concludes no necessary parties, and certainly no indispensable parties, are absent. Defendants’ motion on this ground is therefore **DENIED**.

D. Preliminary Injunction Standard

A preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Dewhurst v. Century Aluminum Co., 649 F.3d 287, 290 (4th Cir. 2011) (quoting Winter v. Nat. Res. Def. Counsel, Inc., 555 U.S. 7 (2008)); see Peterson v. Nat’l Telecomms. & Info. Admin., 505 F. Supp.2d 313, 317 (E.D. Va. 2006) (quoting Direx Israel Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1992)) (recognizing that “[a] preliminary injunction is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it”).

In order to justify the extraordinary remedy that a preliminary injunction provides, the movant has the burden of demonstrating the following: (1) “that he is likely to succeed on the merits”; (2) “that he is likely to suffer irreparable harm in the absence of

preliminary relief”; (3) “that the balance of equities tips in his favor”; and (4) “that an injunction is in the public interest.” Dewhurst, 649 F.3d at 290 (internal quotation marks and citations omitted); see Direx Israel, 952 F.2d at 812 (indicating that the moving party bears the burden of demonstrating the propriety of a preliminary injunction). In Dewhurst, the United States Court of Appeals for the Fourth Circuit emphasized the fact that controlling precedent from the Supreme Court mandates that a plaintiff “clearly show” that he is likely to succeed on the merits. Dewhurst, 649 F.3d at 290 (quoting Winter, 555 U.S. at 22) (emphasis added).

The demanding standard outlined in Dewhurst becomes even more exacting when, as here, a plaintiff seeks a preliminary injunction that mandates action, as opposed to the typical form of preliminary injunctive relief seeking to preserve the status quo pending trial. See East Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 828 (4th Cir. 2004) (quoting Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980)) (noting that “mandatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demands such relief”). Preliminary injunctions are ordinarily intended to “protect the status quo and to prevent irreparable harm during the pendency of the lawsuit or alternately to preserve the court’s ability to render a meaningful judgment on the merits.” In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 525 (4th Cir. 2003). In Microsoft, the Fourth Circuit elaborated that such “[m]andatory preliminary injunctive relief in any circumstance is disfavored, and warranted

only in the most extraordinary circumstances.” *Id.* (citation omitted). The court further noted that the “application of th[e] exacting standard of review [for preliminary injunctions] is even more searching” when the movant requests relief that “is mandatory rather than prohibitory in nature.” *Id.*

With this framework in mind, the Court turns to the substance of Plaintiffs’ claims against Defendants.

E. The Free Exercise Clause

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I. The “Free Exercise” component of the First Amendment applies to states through the Fourteenth Amendment, rendering “the legislatures of the states as incompetent as Congress to enact such laws.” *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The Supreme Court has held that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (quotation omitted). In considering whether a plaintiff’s rights under the Free Exercise Clause are infringed, a court must determine whether the plaintiff’s religious exercise has been burdened and whether the burden the government has imposed is constitutionally permissible. *Id.* A plaintiff bears the burden of showing an infringement of his or her rights under the Free Exercise Clause, and if he or she does so, “the focus then shifts to the defendant to show that its

actions were nonetheless justified and tailored consistent with the demands of [Supreme Court] case law.” Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 142 S. Ct. 2407, 2421 (2022).

To establish a Free Exercise violation, a plaintiff may show that “a government entity has burdened his [or her] sincere religious practice pursuant to a policy that is not neutral or generally applicable.” Id. at 2422 (quotation omitted). As with many constitutional challenges, the key issue here is the level of scrutiny the Court must apply. When a religiously neutral and generally applicable law incidentally burdens Free Exercise rights, courts will sustain the law against constitutional challenge if it is rationally related to a legitimate governmental interest. See Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021) (citing Employment Division v. Smith, 494 U.S. 872, 878-82 (1990)). When a law is not neutral or generally applicable, however, the statute may survive only if it is narrowly tailored to achieve a compelling governmental interest. Id. at 1881 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

In determining whether a law is neutral or generally applicable, “[a] law is not generally applicable if it invites the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions.” Fulton, 593 U.S. at 533 (quotation omitted). Under that rule, if a state reserves the authority to “grant exemptions based on the circumstances underlying each application,” it must provide a compelling reason to exclude “religious hardship” from its scheme. Id. (quoting Smith, 494 U.S. at 884). A law also fails to be

generally applicable “if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” Id.

A policy is not neutral if it is “specifically directed at religious practice,” meaning that it either “discriminates on its face” or “religious exercise is otherwise its object.” Kennedy, 597 U.S. at 526 (quotations omitted). “Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.” Fulton, 593 U.S. at 533 (citing Masterpiece Cakeshop, Ltd. V. Colo. Civ. Rights Comm’n, 584 U.S. 617, 138 S. Ct. 1719, 1730-32 (2018)). “Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny.” Kennedy, 597 U.S. at 526.

1. West Virginia’s Mandatory Vaccine Program is not generally applicable.

Plaintiffs contend the West Virginia mandatory vaccination statute institutes a discretionary exemption to the compulsory vaccination schedule that permits families with medical objections to seek medical exemptions but prohibits families with religious objections from seeking an exemption for religious reasons.

Defendants argued the contrary of course. They do concede general applicability may be absent when a law provides “a mechanism for individualized exemptions,” because it creates the risk that administrators will use their discretion to effectively create exemptions on a case-by-case basis, exempting individuals from complying with the law for secular

reasons, but not religious reasons. Smith, 494 U.S. at 884 (citations omitted). Defendants note, in Smith, the Court considered an exemption that was granted for “good cause” as an example of such “individualized exception.” 494 U.S. at 884. Similarly, they argue, in Fulton, a city official was able to create exemptions in his or her “sole discretion,” which was violative of the general applicability framework. Fulton, 593 U.S. at 523.

Defendants rely heavily on the First Circuit’s decision in Does 1-6 v. Mills, 16 F.4th 20 (1st Cir. 2021), in urging the Court to find W. Va. Code § 16-3-4 generally applicable. In Does 1-6, the First Circuit assessed a challenge to Maine’s state regulation mandating healthcare workers receive a COVID-19 vaccination. See id. at 24. Among the many issues raised, the court had to determine which level of scrutiny applied to the healthcare workers’ constitutional claims and specifically if the state regulations were generally applicable under Smith. See id. at 29-30. The court ultimately concluded the regulatory scheme was generally applicable subjecting the Maine vaccination rule to something less stringent than strict scrutiny. “The emergency rule does not require the state government to exercise discretion in evaluating individual requests for exemptions.” Id. at 30.

That conclusion stands to reason because no state official approval or review of the exemption is required under Maine’s compulsory vaccination rules. No “request” is actually made. Instead, a “medical exemption is available to an employee who provides a written statement from a licensed physician, nurse practitioner or physician assistant that, in the

physician's, nurse practitioner's or physician assistant's professional judgment, immunization against one or more diseases may be medically inadvisable." Me. Rev. Stat. Ann. tit. 22, § 802. Nor is there any administrative appeal to a Maine state, county, or local government agency for an adverse decision or the like. An employer is only required to keep the physician's certification "in the permanent health record for that employee for a minimum of six years after termination." Code Me. R. tit. 10-144 Ch. 264, § 3. Maine's statutory and regulatory scheme is sufficiently different from West Virginia's mandatory vaccination statute to make Does 1-6 readily distinguishable on the generally applicable issue.¹⁶

Although W. Va. Code 16-3-4 does not tend toward the unbridled discretion found in Fulton ("sole discretion") or Smith ("good cause"), the Court finds the medical exemption provided in West Virginia law, as applied to K.P., to be sufficiently discretionary to fall outside the "generally applicable" field. The statute provides the health commissioner "is authorized to grant . . . exemptions to the compulsory immunization requirements . . . on a statewide basis, upon sufficient medical evidence that immunization is contraindicated or there exists a specific precaution to a particular vaccine." W. Va. Code § 16-3-4(h). The statute is silent as to an exemption for any family who

¹⁶ The Court likewise finds Defendants' other points of authority – Miller v. McDonald, No. 1:23-CV-00484 EAW, 2024 WL 1040777 (W.D.N.Y. Mar. 11, 2024) and Royce v. Bonta, No. 3:23-CV-02012-HBLM, 2024 WL 1269485 (S.D. Cal. Mar. 25, 2024) – on this question unavailing as well. The Court finds the other cited authority that predates Fulton unpersuasive. See, e.g., ECF No. 21 at p.12.

may have religious objections. As alleged in the Complaint, Defendants communicated the same to Plaintiffs when they requested a religious exemption for K.P.

At the first level of the medical exemption process, a physician must complete a form, the Request for Medical Exemption from Compulsory Immunization Form,¹⁷ requesting an exemption and justifying the request. If and when the medical exemption form is signed by a physician, it is then forwarded to the State's Immunization Officer for personalized review. See ECF No. 1-2, Dr. Alvin Moss Declaration, ¶¶ 5-12. According to the West Virginia Office of Epidemiology and Prevention Services, the Immunization Officer will review the evidence obtained from the child's physician. If the evidence or information is incomplete, the Immunization Officer will make a request for additional evidence. If all the evidence received by the Immunization Officer, including **all medical opinion(s)**, is consistent and there is sufficient evidence to determine whether to grant an exemption, the Immunization Officer will make a determination or decision based on that evidence. If the exemption is approved, that student is permitted to attend school without having received the mandated vaccines. If the Immunization Officer denies the medical exemption, the decision can be appealed to the State Health Officer, who reviews the

¹⁷ The form can be located at <https://oeeps.wv.gov/immunizations/Documents/Childcare,%20School%20and%20College%20Requirements/WV%20Medical%20Exemption%20Request%20Form-05-03-2024.pdf> (last visited October 15, 2024). It provides several lines for the physician to discuss medical diagnoses and any "further information you feel is relevant to this request."

appeal on a case-by-case basis and determines whether to uphold or reverse the State Immunization Officer's decision. See W. Va. Code § 16-3-4(h)(4).

In practice, based on the record currently before the Court, there is significant individualized discretion in this process. First, the Exemption Request form requires diagnosis information and “any other relevant information” from a practicing physician. The Immunization Officer then considers evidence including “medical opinions” in determining whether to approve the request. Plaintiffs also provide testimony from Dr. Alvin Moss, a West Virginia physician, who has evaluated schoolchildren and determined in his discretion whether their health conditions qualify them for a medical exemption under West Virginia Code § 16-3-4(h). See ECF No. 1-2, ¶¶ 12-17. Dr. Moss further details the inherent case-by-case discretion associated with evaluating these requests. Id. at ¶¶ 8-12. The criteria by which medical exemptions are evaluated are not objective and are subject to the opinion of each government official who evaluates the exemption request and differing outcomes can and are reached depending on the evaluator of the request. Id. Moreover, the implementing regulations for the medical exemption provide for consideration of “evidence from medical sources, such as medical history, **opinions**, and statements about treatment the child has received.” W. Va. C.S.R. § 64-95-17.2.a.2 (emphasis added).

As Dr. Moss's Declaration makes clear, the practice of medicine including in the area of contraindication for vaccines involves discretion and judgment. Reasonable minds, of course, may differ. The process set forth in W. Va. Code § 16-3-4 involves

multiple layers of medical judgment and review. Initially, a practicing physician offers his or her opinions. Then, the government becomes involved reviewing and passing judgment on the treating physician's recommendation. This review requires discretion and judgment to be exercised – not the simple task of checking objective boxes. Ultimately, the Court concludes this process is sufficiently similar to the standards at issue in Fulton and Smith to consider W. Va. Code § 16-3-4 short of general applicability.

The Court therefore concludes W. Va. Code 16-3-4 is not a generally applicable statute under Fulton.¹⁸ Thus, Plaintiffs' as-applied challenge triggers strict scrutiny.

2. Defendants fail to satisfy strict scrutiny.

Where strict scrutiny applies, government policy survives “only if it advances interests of the highest order and is narrowly tailored to achieve those interests,” meaning that “so long as the government can achieve its interests in a manner that does not burden religion, it must do so.” Fulton, 593 U.S. at 541 (quotation omitted). When considering the governmental interests at issue, a court must not rely on “broadly formulated interests”; instead, it “must scrutinize the asserted harm of granting specific exemptions to particular religious claimants.” Id. (quotation omitted). The relevant question is not whether the government has a compelling interest in enforcing its policies generally, but instead whether

¹⁸ The Court need not – and for purposes of resolving the pending motions, does not – reach the question of whether W. Va. Code § 16-3-4 is neutral.

the government has such an interest in denying a religious exemption to a particular plaintiff. Id.

The parties debate the impact of the Fourth Circuit’s decision in Workman here. That case, decided over 13 years ago, addressed the same statute challenged here, W. Va. Code 16-3-4. Workman, 419 Fed. Appx. 348 (4th Cir. 2011).¹⁹ Ultimately, the Fourth Circuit affirmed Judge Goodwin’s summary judgment finding for the defendants noting the mandatory vaccination statute served a compelling state interest. Id. at 353. “[T]he state’s wish to prevent the spread of communicable diseases clearly constitutes a compelling interest.” Id.: see also Does 1-6 v. Mills, 16 F.4th 20, 32 (1st Cir. 2021) (“Few interests are more compelling than protecting public health against a deadly virus.”).²⁰

Notably, however, the Workman court did not address whether the statute was sufficiently narrow in

¹⁹ Plaintiffs make much of Workman being an unpublished decision. Although “unpublished opinions are not binding precedent in this circuit,” Rule 32.1 permits citation to the decision which occurred after January 1, 2007. Even if unpublished, this Court affords serious and significant consideration to any pronouncement of the Fourth Circuit and has done so here. Considering the recent developments in the law and for all the reasons articulated herein, the Court reaches a different conclusion.

²⁰ Plaintiffs argue the efficacy and purpose of some of the mandated vaccines should inform the Court’s decision here. The Court finds it unnecessary to delve into those matters to resolve the pending motions. Moreover, the Court does not believe it proper to adjudicate such important questions without the benefit of a fully developed factual record.

its tailoring.²¹ The court relied on the oft-cited combination of Jacobson v. Massachusetts, 197 U.S. 11 (1905) and Prince v. Massachusetts, 321 U.S. 158 (1944). The Jacobson decision was certainly prevalent in the litigation surrounding various COVID-era executive orders and the like. There, the Supreme Court found compulsory vaccination against smallpox a valid exercise of the state’s police power without infringing any federal constitutional rights. See Workman, 419 Fed. Appx. at 353. Of course, since Workman and the even further removed time of Jacobson, the Supreme Court has wrestled with Free Exercise Clause challenges to the exercise of that “police power” during the COVID pandemic. This Court now has the benefit of that analysis and guidance in assessing Plaintiffs’ claims here.

As discussed above, if strict scrutiny applies, Defendants must satisfy the stringent strict scrutiny standard – and both prongs of it. “[H]istorically, strict scrutiny requires the State to further ‘interests of the

²¹ Defendants also point the Court to the Supreme Court of Appeals of West Virginia’s decision in D.J. v. Mercer County Board of Education, No. 13-0237, 2013 WL 6152363 (W. Va. November 22, 2013). There, the court considered a challenge to the State’s vaccination requirements under the West Virginia Constitution’s equal protection and due process clauses. It does not appear a Free Exercise challenge was mounted. Although not binding here, the Court always gives careful consideration to the State’s highest court’s analysis particularly on matters of State law such as those presented here. However, the Supreme Court of Appeals did not consider the “narrowly tailored” prong of the strict scrutiny analysis despite acknowledging its application and the compelling interest of protecting the health and safety of the public. Id. at *4. The Court, therefore, finds little guidance in that decision when resolving Plaintiffs’ claims here.

highest order’ by means ‘narrowly tailored in pursuit of those interests.” Tandon v. Newsom, 593 U.S. 61, 64-65 (2021) (quoting Church of Lukumi Babaly Aye, Inc., 508 U.S. at 546). “That standard is not watered down; it really means what it says.” Id. (internal quotations and citations omitted). At this stage of these proceedings, considering Workman and the other authority Defendants cite, the Court finds Defendants have carried their burden to show a compelling state interest in preventing the spread of infectious disease. See, e.g., D.J. v. Mercer County Board of Education, 2013 WL 6152363, at *4 (“[T]he protection of the health and safety of the public is one of the most important roles of the state.”); Does 1-6, 16 F.4th at 32 (“Few interests are more compelling than protecting public health against a deadly virus.”).

However, the Court finds Defendants have failed to demonstrate W. Va. Code § 16-3-4 is narrowly tailored to achieve the identified compelling state interest. As an initial matter, and as Plaintiffs note, 45 other states have religious or philosophical exemption options to their vaccine mandates. Thus, it is readily apparent the approach West Virginia has taken is broader than other states, rendering any suggestion W. Va. Code § 16-3-4 is narrowly tailored to advance the identified compelling interest of stemming infectious disease spread unpersuasive.²²

²² As discussed supra, Governor Justice’s veto message touted the broad sweep of West Virginia’s vaccination requirements and its relative success rate in advancing the state’s compelling interest in curbing the spread of contagious disease.

In addition, West Virginia has also provided carve outs for other students removed from physical school structures from the mandatory vaccination statute. Specifically, children are exempted from compulsory school attendance requirements, and are excluded from “any other provision of law relating to education,” if they participate in learning pods or microschools. W. Va. Code § 18-8-1(n)(8). Under West Virginia law, a “learning pod” means “a voluntary association of parents choosing to group their children together to participate in their elementary or secondary academic studies as an alternative to enrolling in a public school, private school, homeschool, or microschool, including participation in an activity or service provided to the children in exchange for payment.” W. Va. Code § 18-8-1(n)(1)(A). A “microschool” “means a school initiated by one or more teachers or an entity created to operate a school that charges tuition for the students who enroll and is an alternative to enrolling in a public school, private school, homeschool, or learning pod.” W. Va. Code § 18-8-1(n)(1)(B).

Unlike students enrolled in virtual school such as K.P., West Virginia pupils advancing their education in either an otherwise permissible learning pod or microschool are excluded from the requirements of W. Va. Code § 16-3-4. There is no statutory requirement that either learning pods or microschools adhere to or teach any religious curriculum or belief system. These students, like virtual students, rarely, if ever, physically attend class or school. It therefore strains reason to find W. Va. Code § 16-3-4 is sufficiently tailored to advance the State’s interest within constitutional confines when similarly situated

secular students are excused from the statute's reach. "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." Church of Lukumi Babaly Aye, Inc., 508 U.S. at 543.

In determining there exists a narrower path to advance the State's compelling interest, the Court also considers recent legislative activity demonstrating the possibility. During the 2024 Regular Legislative Session, the West Virginia Legislature passed House Bill 5105 which sought to amend the challenged statute here, W. Va. Code § 16-3-4, by, inter alia, creating an exemption to the mandatory vaccine requirement for full-time virtual public school students. Governor Justice vetoed this legislation citing feedback primarily from the medical community and West Virginia's success in combating the spread of the diseases listed in W. Va. Code § 16-3-4(b) – the compelling interest here.²³

²³ Respectfully, the political machinations of the legislative process assist the Court only in assessing if a more narrowly tailored approach is available. The merits of the arguments over House Bill 5105 are better left to other branches of government. Legislative enactments, of course, must remain within the Constitution's framework. As the Supreme Court summarized,

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other

However, House Bill 5105 bolsters Plaintiffs' argument that a more narrowly tailored approach is possible to advance that interest which, to withstand strict scrutiny, the Constitution requires. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000) (citation omitted) (assessing Free Speech claim under the First Amendment). Many other states have deployed a less restrictive measure to advance the identified compelling interest. The West Virginia Legislature has indicated it is possible as well. At this point, Defendants have failed to sustain their burden on this issue.

Having found W. Va. Code § 16-3-4 is subject to strict scrutiny in deciding Plaintiffs' Free Exercise challenge, the Court finds Plaintiffs are likely to succeed on the merits in that the mandatory vaccine statute is not sufficiently narrowly tailored to satisfy Constitutional safeguards. The Court, therefore, must assess the remaining Winter factors.

3. Plaintiffs will suffer Irreparable Harm.

Plaintiffs must also demonstrate irreparable harm for injunctive relief to issue. See Hyman v. City of Salem, 396 F. Supp.2d 666, 670 (N.D.W. Va. 2019) (citation omitted). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). The Supreme

fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Court has been clear and has reiterated in recent years that a plaintiff may be “irreparably harmed by the loss of free exercise rights ‘for even minimal periods of time.’” Tandon, 593 U.S. at 64 (quoting Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 19 (2020)). The Fourth Circuit has echoed the same. “[T]he denial of a constitutional right . . . constitutes irreparable harm for purposes of equitable jurisdiction.” Ross v. Meese, 818 F.2d 1132, 1135 (4th Cir. 1987); see also Recht v. Justice, No. 5:20-CV-90, 2020 WL 6109430, at *7 (N.D.W. Va. June 26, 2020) (Bailey, J.).

Based on the record before it, the Court finds Plaintiffs are likely to suffer irreparable harm. Plaintiffs’ Free Exercise rights vis-à-vis their legal obligation to educate K.P. have been burdened. K.P. has been denied her parents’ preferred method of constitutionally-required education. As alleged in their Complaint, and there is no present dispute, Plaintiffs have and will continue to face obstacles in homeschooling K.P. as Mrs. Perry works full-time to provide for her family and Mr. Perry suffers from physical disabilities. Of course, Plaintiffs face criminal prosecution and sanctions if they fail to educate their daughter. See W. Va. Code § 18-8-2. These hardships are imposed solely because Plaintiffs refused to sacrifice their religious beliefs. K.P. was enrolled and excelling in the Upshur County Virtual School program prior to Defendants’ refusal to afford her a religious exemption from West Virginia’s mandatory vaccine statute in response to the December 2023 email blast from the State

Superintendent.²⁴ Plaintiffs have satisfied their burden to demonstrate irreparable harm at this stage.

4. Balance of Equities and Public Interest

With respect to the third and fourth Winter factors, the Court turns to Judge Bailey’s analysis and summary in Recht.

[T]he third and fourth Winter factors (the balance of equities and the public interest) are established when there is a likely First Amendment violation. Id. at 191. “[A] state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction.” Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002) (internal quotation marks omitted). It also teaches that “upholding constitutional rights surely serves the public interest.” Id.

Recht, 2020 WL 6109430, at *7. The Court, having found Plaintiffs are likely to succeed on their First Amendment claim, also concludes the remaining Winter factors counsel in favor of issuing the requested injunctive relief.

²⁴ The record presently before the Court does not reveal any particular prompt for the State Superintendent’s email about virtual students and their vaccination status. That missive was the impetus for K.P. being disenrolled and this Free Exercise challenge being filed.

IV. CONCLUSION

As the Supreme Court has long observed, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” Fulton, 593 U.S. at 533 (quoting Thomas v. Review Bd. Of Ind. Employment Security Div., 450 U.S. 707, 714 (1981)). “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Barnette, 319 U.S. at 642. The wisdom of Plaintiffs’ choices about vaccines is rightfully not before this Court. Vindication of their First Amendment rights is, however. Their burden to secure proactive injunctive relief is not a light one. Defendants’ burden in surviving strict scrutiny is a heavier one.

A. Scope of Injunction

Here, Plaintiffs have satisfied their burden while Defendants have failed in theirs; thus, the Court grants the injunctive relief sought in the Complaint. To be clear, Plaintiffs assert **only** an as-applied challenge with respect to W. Va. Code § 16-3-4 and specifically as to how Defendants have applied that statute to K.P. in refusing to enroll her in the Upshur County Virtual School program. The preliminary injunction issued here is **only** designed to prevent Defendants from continuing to violate Plaintiffs’ First Amendment rights and to permit K.P.’s enrollment in that virtual schooling program if she seeks a valid religious exemption from Defendants. This Court

makes no finding on the facial constitutionality of W. Va. Code § 16-3-4; nor does the Court's order apply to any other students in any other educational program elsewhere in the State of West Virginia.

Therefore, pursuant to Fed. R. Civ. P. 65(d), Defendants and their officers, agents, servants, and employees, and anyone acting in active concert or participation with them (collectively hereinafter, "the Enjoined Parties"), are hereby **PRELIMINARILY ENJOINED** as follows:

Effective October 15, 2024, the Enjoined Parties shall be enjoined from enforcing W. Va. Code § 16-3-4 against Plaintiffs, unless Defendants provide an option for requesting a religious exemption that is meaningfully processed. K.P. shall not be prevented from enrolling in the Upshur County Virtual School due to her unvaccinated status.

This injunction shall remain in place as stated herein pending further Order of this Court.

B. Rule 65(c) Security

Rule 65(c) states that a court may issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). "This rule is mandatory and unambiguous." Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 421 (4th Cir. 1999). Failure to require a bond upon issuing injunctive relief is considered reversible error. See

District 17, UMWA v. A&M Trucking, Inc., 991 F.2d 108, 110 (4th Cir. 1993). Here, no party has requested any specific bond be required or set. The record does not reveal significant risk of grave potential harm to either Defendant if this injunction ultimately proves improvidently granted. In such circumstances, the Fourth Circuit has instructed:

In fixing the amount of an injunction bond, the district court should be guided by the purpose underlying Rule 65(c), which is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order. The amount of the bond, then, ordinarily depends on the gravity of the potential harm to the enjoined party:

[T]he judge usually will fix security in an amount that covers the potential incidental and consequential costs as well as either the losses the unjustly enjoined or restrained party will suffer during the period he is prohibited from engaging in certain activities or the complainant's unjust enrichment caused by his adversary being improperly enjoined or restrained.

11A Charles Alan Wright et al., Federal Practice & Procedure § 2954, at 292 (2d ed.1995). Where the district court determines that the risk of harm is remote, or that the circumstances otherwise warrant it, the court may fix the amount of the bond accordingly. In some circumstances, a nominal bond may

suffice. See, e.g., International Controls Corp. v. Vesco, 490 F.2d 1334 (2d Cir.1974) (approving district court's fixing bond amount at zero in the absence of evidence regarding likelihood of harm).

Hoechst Diafoil Co., 174 F.3d at 421 n.3.

Considering the totality of the record and circumstances before the Court, the Rule 65(c) bond is fixed at zero dollars. See, e.g., Bernstein v. Sims, 643 F. Supp.3d 578, 589 (E.D.N.C. 2022) (“In light of the important federal rights at issue in this case, and absent any request from defendants for plaintiff to provide security, the Court determines a zero dollar bond is appropriate in this instance.”).

In summary, for the reasons set forth herein, the pending motions are decided as follows:

1. Plaintiffs’ Motion for Preliminary Injunction [ECF No. 7] is **GRANTED**;
2. Defendant Christiansen’s Motion to Stay [ECF No. 22] is **DENIED**; and
3. Defendants Marteney and Miller’s Motion to Dismiss [ECF No. 29] is **DENIED**.

Furthermore, Dr. Mathew Christiansen is hereby **DISMISSED** as a Defendant in this action.

It is so **ORDERED**.

The Clerk is hereby directed to forward a copy of this Order to all counsel or record.

The Clerk is **DIRECTED** to transmit copies of this Order to counsel of record.

104a

DATED: October 15, 2024

Tom S. Kleeh

THOMAS S. KLEEH, CHIEF JUDGE
NORTHERN DISTRICT OF WEST VIRGINIA

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof

W. Va. Code § 16-3-4

**Compulsory immunization of school children;
information disseminated; offenses; penalties**

(a) Whenever a resident birth occurs, the commissioner shall promptly provide parents of the newborn child with information on immunizations mandated by this state or required for admission to a public, private and parochial school in this state or a state-regulated child care center.

* * *

(c) No child or person may be admitted or received in any of the schools of the state or a state-regulated child care center until he or she has been immunized against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough or produces a certificate from the commissioner granting the child or person an exemption from the compulsory immunization requirements of this section.

* * *

(h) The commissioner is authorized to grant, renew, condition, deny, suspend or revoke exemptions to the compulsory immunization requirements of this section, on a statewide basis, upon sufficient medical

evidence that immunization is contraindicated or there exists a specific precaution to a particular vaccine.

(1) A request for an exemption to the compulsory immunization requirements of this section must be accompanied by the certification of a licensed physician stating that the physical condition of the child is such that immunization is contraindicated or there exists a specific precaution to a particular vaccine.

* * *

W. Va. Code § 18-8-1

Compulsory school attendance; exemptions

* * *

(c) A child is exempt from the compulsory school attendance requirement set forth in § 18-8-1a of this code if the requirements of either subdivision (1) or subdivision (2) of this subsection, both relating to home instruction, are met.

(1) The instruction shall be in the home of the child or children or at some other place approved by the county board and for a time equal to the instructional term set forth [in the code]

* * *

(n) A child is exempt from the compulsory school attendance requirement set forth in § 18-8-1a of this code if the child participates in a learning pod or microschool pursuant to this subsection.

(1) For the purposes of this subsection:

(A) “Learning pod” means a voluntary association of parents choosing to group their children together to participate in their elementary or secondary academic studies as an alternative to enrolling in a public school, private school, homeschool, or microschool, including participation in an activity or service provided to the children in exchange for payment; and

(B) “Microschool” means a school initiated by one or more teachers or an entity created to operate a school that charges tuition for the students who enroll and is an alternative to enrolling in a public school, private school, homeschool, or learning pod.

* * *

W. Va. Code § 18-8-1a

Commencement and termination of compulsory school attendance; public school entrance requirements; exceptions

(a) Notwithstanding the provisions of section one of this article, compulsory school attendance begins with the school year in which the sixth birthday is reached prior to July 1 of such year or upon enrolling in a full-time publicly funded kindergarten program, and continues to the 17th birthday or for as long as the student continues to be enrolled in a school system after the 17th birthday.

* * *

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA**

KRYSTLE PERRY and
ANTHONY PERRY,
*individually and on behalf of
their minor child K.P.,*

Plaintiffs,

Against

STACY MARTENEY *in her
official capacity as the Virtual
Learning Coordinator of the
Upshur County Virtual School;*
THE BOARD of EDUCATION
of the COUNTY of UPSHUR;
CHRISTINE MILLER, *in her
official capacity as
Superintendent of the Upshur
County School District;* DR.
MATTHEW CHRISTIANSEN,
*in his official capacities as the
State Health Officer and
Commissioner of the Bureau of
Public Health;* AND DOUG
CIPOLETTI *in his official
capacity as Executive Director
of the West Virginia Virtual
School Academy;*

Defendants.

ELECTRONICALLY
FILED
7/05/2024
U.S. DISTRICT COURT
Northern District of WV

Civil Action No.:
2:24-cv-18 Kleeh

**VERIFIED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

SUMMARY

1. Plaintiffs Krystle Perry and Anthony Perry individually and on behalf of their minor child, K.P. (“**Plaintiffs**” or “the **Perrys**”), maintain profound religious objections to injecting their eight-year-old child, K.P., with the vaccinations required under W.VA. CODE § 16-3-4 (c) and (e) (“the **Compulsory Vaccination Law**” or the “**CVL**”). West Virginia prohibits K.P. from attending school in West Virginia unless she receives all the vaccines required under the CVL. This prohibition on education, confoundingly, extends to virtual school, an option available in West Virginia.

2. Until very recently, Plaintiffs were able to ensure K.P. received a quality education, while simultaneously upholding their religious integrity. Plaintiffs did so through enrolling K.P. in the West Virginia Virtual Academy (the “**Virtual Academy**”), a robust online learning program created by statute in W.VA. CODE §18-2E-9 in which K.P. was not physically present in a classroom with other children.

3. This program is a tuition-free online public school available to all West Virginia residents.¹

4. When Plaintiffs attempted to re-enroll K.P. in the Virtual Academy during the 2024 school year, including by requesting a religious exemption to the CVL, the request was denied. Virtual Academy officials explained that West Virginia prohibits religious exemptions to the CVL, including for students desiring to further their education remotely.

¹ See WEST VIRGINIA VIRTUAL ACADEMY, *available at* <https://wvva.k12.com> (last visited July 5, 2024).

5. However, all schools in West Virginia, including the Virtual Academy, permit unvaccinated children to apply for medical exemptions.

6. Because K.P. is unvaccinated, and lacks secular reasons for being unvaccinated, she was ejected from the Virtual Academy. As a mother who works outside the home, Mrs. Perry is unable to homeschool K.P. Equally problematic, Mr. Perry is 100% disabled and has historically relied heavily on Virtual Academy staff to help facilitate K.P.'s education. Mr. Perry is now homeschooling K.P., while Mrs. Perry tries her very best to help after she finishes work, causing an irregular learning schedule for K.P. Consequently, Plaintiffs have been left for the last six months without viable options to ensure K.P. receives the education her peers enjoy.

7. Plaintiffs face potential criminal prosecution under W.VA. CODE §18-8-2 if they fail to educate K.P.

8. The straightforward legal issue presented in the Complaint is whether the State of West Virginia violated and continues to violate the Free Exercise clause of the First Amendment through denying K.P. continued enrollment in the Virtual Academy after she sought a religious exemption to the CVL, while permitting children who remain unvaccinated for secular reasons to enroll in the Virtual Academy, and, in addition, in other public and private schools throughout the state and in other settings that undermine any asserted interest in the prevention of communicable diseases.

9. Recent and directly on point Supreme Court precedent, as applied specifically to Plaintiffs' situation, makes crystal clear that West Virginia's

vaccination policy flagrantly violates the United States Constitution. Accordingly, for the reasons more fully detailed below, Plaintiffs request declaratory and injunctive relief.

INTRODUCTION

10. According to the Pew Research Center, 77% of West Virginians say that “they believe in God with absolute certainty.”² West Virginia is among the most religious states in America.³

11. Plaintiffs possess deeply held religious beliefs that forbid them from vaccinating K.P.

12. Those beliefs have been substantially burdened by West Virginia through the CVL.

13. Mr. and Mrs. Perry’s decision to maintain their and K.P.’s religious convictions have required significant sacrifices. Under threat of criminal penalties, Plaintiffs must ensure K.P. receives an education. However, West Virginia has made it virtually impossible in Plaintiffs’ specific case to educate their child, **even remotely from home**, and simultaneously uphold their religious convictions.

14. West Virginia’s compulsory school attendance law requires children between the ages of six and seventeen to be enrolled in an education program. See W. VA. CODE § 18-8-1a.

² See PEW RESEARCH CENTER, *Religious Landscape Study*, <https://www.pewresearch.org/religiouslandscape-study/database/west-virginia/> (last visited July 5, 2024).

³ See PEW RESEARCH CENTER, *How religious is you state?* <https://www.pewresearch.org/facttank/2016/02/29/how-religious-is-your-state/?state=west-virginia> (last visited July 5, 2024).

15. West Virginia’s Supreme Court of Appeals has held that “[t]he mandatory requirements of ‘a thorough and efficient system of free schools’ found in . . . the West Virginia Constitution, make education a fundamental, constitutional right in this State.” *Pauley v. Kelly*, 162 W. Va. 672, 707 (W. Va. 1979); *see also State v. Beaver*, No. 22-616, 2022 W. Va. LEXIS 700, at *36 (“Both the State Constitution and [West Virginia courts] have established that education is a fundamental right”); *see also Goss v. Lopez*, 419 U.S. 565, 95 (1975) (when state law creates a right to public education, that right becomes protected by the Due Process Clause of the Fourteenth Amendment).

16. Despite access to public education in West Virginia being deemed as a fundamental right, Plaintiffs’ child has nevertheless been excluded from West Virginia’s educational system—including the Virtual Academy—because of her parents’ religious beliefs.

17. K.P. is unable to access the practical and social benefits of a formal education that her peers enjoy, including peers that remain unvaccinated for secular reasons.

18. In West Virginia, it is unlawful for any child to attend “any of the schools of the state or a state-regulated childcare center until he or she has been immunized against chickenpox [*i.e.*, varicella], hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough” and “[n]o person shall be allowed to enter school without at least one dose of each required vaccine.” W. VA. CODE § 16-3-4 (c) and (e).

19. While it prohibits the option for a religious exemption, West Virginia permits discretionary medical exemptions to the CVL. *See* W. VA. CODE § 16-3-4 (h) (the State Health Officer may grant a medical exemption “upon sufficient medical evidence that immunization is contraindicated or there exists a specific precaution to a particular vaccine.”).

20. This exemption scheme is neither neutral nor generally applicable, and therefore, triggers strict scrutiny. A law triggers strict scrutiny if it is either not generally applicable, or if it lacks neutrality. *Employment Division v. Smith*, 494 U.S. 872 (1990).

21. The *Smith* framework to addressing free exercise claims grew out of a concern that allowing religious exemptions to certain neutral and generally applicable laws “would be courting anarchy,” *Smith*, 494 U.S. at 888, because such laws “could not function” in the face of religious exemptions, *United States v. Lee*, 455 U.S. 252, 260 (1982). In other words, the rationale behind *Smith*’s general applicability framework does not hold where a law is readily amenable to a workable religious exemption option, because allowing a religious exemption in such cases does not invoke the concern that every citizen with a purported religious exemption to the law could become a law unto themselves, and permitting exceptions to the law would not “court anarchy.” *Smith*, 494 U.S. at 888,

22. West Virginia’s vaccination scheme is amenable to exemptions. The government allows for medical exemptions, and does in fact grant many medical exemptions every year. And religious

exemptions can just as easily be allowed as medical exemptions are in West Virginia.

23. That the state refuses to allow for religious exemptions renders the law as not neutral and not generally applicable.

24. West Virginia is a radical outlier; forty-five states permit both medical and religious exemptions to childhood vaccination laws. Mississippi's vaccination scheme, which also previously lacked a religious exemption option while providing a medical exemption, was recently struck down under the First Amendment. *See Bosarge v. Edney*, 2023 U.S. Dist. LEXIS 67439, at *27 (S.D. Miss. Apr. 18, 2023) (holding that Mississippi's mandatory vaccination scheme, which lacked a religious exemption option but allowed for a medical exemption option, violated the First Amendment).

25. The overwhelming majority of states have for many decades offered religious exemptions to their school vaccination requirements without generating the "anarchy" the *Smith* Court was so concerned about. Thus, *Smith's* animating rationale does not apply where the government has shown that the law can be seamlessly administered while also permitting exceptions.

26. West Virginia is also tremendously relaxed in enforcing the CVL, permitting functional exceptions for children who are willfully non-complaint to continue attending school.

27. As such, childhood vaccination schemes, including in West Virginia, are clearly amenable to exemptions. The government's refusal to allow for a

religious exemption option renders the CVL not generally applicable and not neutral under *Smith*. The existence of a religious exemption in West Virginia would not generate anarchy, because an exemption scheme is already in place.

28. And the CVL triggers strict scrutiny on additional grounds.

29. The CVL fails the general applicability test on other grounds because the government permits medical exemptions that are reviewed and accepted or denied on an individualized basis.

30. Multiple layers of personalized and individualized review of medical exemption requests are performed. At each level, West Virginia officials possess discretion to approve or deny each medical exemption request.

31. However, Defendants have made a categorical decision that no commensurate process shall be allowed for those desiring to be exempt from the CVL for religious reasons. Under recent Supreme Court precedent in *Fulton v. City of Philadelphia*, 593 U.S. 522, 537, (2021), the Court held that the “creation of a formal mechanism for granting exceptions renders a policy not generally applicable” where a commensurate mechanism is unavailable to religious adherents. *Id.*

32. As applied specifically to Plaintiffs’ situation, the CVL violates the First Amendment on additional alternative grounds. Independent of *Fulton*, West Virginia’s CVL violates the First Amendment because it permits, from a risk perspective, “comparable”

secular activity that fatally undermines the State's infectious disease related goals.

33. A law intended to counteract the spread of infectious diseases is unconstitutional where it permits secular activity while prohibiting similar religious activity. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17-18 (2021) (holding that a New York regulation involving COVID-19 restrictions that prohibited religious gatherings but permitted similar secular gatherings violated the First Amendment); see also *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (holding that a California law intended to slow the spread of COVID-19 violated the First Amendment because it treated “comparable secular activity more favorably than religious exercise.”).

34. Whether two activities are comparable for purposes of the free exercise clause depends on “the asserted government interest that justifies the regulation at issue.” *Tandon*, 593 U.S. at 62. Whether religious and secular conduct is comparable in the infectious disease context, courts are “concerned with the risks [the] activities pose, not the reasons why” the activities are carried out. *Tandon*, 593 U.S. at 62.

35. West Virginia maintains that it has a compelling infectious disease mitigation interest in requiring children to comply with the CVL while they are physically present at school. However, as applied to the Virtual Academy, this interest is non-sensical, because there is no physical congregation for a course of instruction that is conducted solely online, where the child is physically located only in his or her home.

36. Further, West Virginia permits a series of comparable secular activities that endanger the state interests undergirding the CVL.

37. *First*, West Virginia has granted many medical exemptions to the CVL, and these medical exemptions are for children who attend school in-person. Unvaccinated schoolchildren with a medical exemption are permitted to attend school and intermingle with other children on a daily basis. From a risk perspective, a single child with a medical exemption who attends in-person instruction presents an exponentially greater threat to any purported West Virginia public health interests than permitting K.P. to continue her education in the Virtual Academy with a religious exemption.

38. *Second*, West Virginia permits scores of unvaccinated children to continue their education, despite non-compliance with the CVL, and these children intermingle in person with their peers on a daily basis. These children have not presented a medical or religious reason for non-compliance with the CVL. From a risk perspective, a single child out of compliance with the law permitted to continue attending school presents an exponentially greater threat to West Virginia's public health goals than permitting K.P. to continue her education in the Virtual Academy with a religious exemption.

39. *Third*, West Virginia permits adults working in the school system—teachers, administrators, lunch staff, bus drivers, etc.—to altogether disregard the vaccination requirements of the CVL. Most adults working in the system have never been required to receive the full menu of vaccines required under the

CVL. From a risk perspective, a single adult working in person in the school system who has not received the vaccines required by the CVL presents an exponentially greater threat to West Virginia's public health goals than permitting K.P. to continue her education in the Virtual Academy with a religious exemption.

40. *Fourth*, West Virginia does not place restrictions on unvaccinated children or adults outside of the school setting, or outside of school hours. One unvaccinated child or adult attending a University of West Virginia Mountaineers' basketball game—under the government's logic—presents a considerably greater threat to West Virginia's public health goals than permitting K.P. to continue her education in the Virtual Academy with a religious exemption.

41. *Fifth*, even if the State's infectious disease related goals could logically be restricted to children, and exclusively in a school setting during school hours, West Virginia permits unvaccinated children to be educated in unlimited numbers in "learning pods," a school setting where children intermingle on a daily basis. Under W.V. Code § 18-8-1, the government permits unvaccinated children—whatever their reasons for declining vaccination—to be educated in these learning pods. This too presents a considerably greater threat to West Virginia's public health goals than permitting K.P. to continue her education in the Virtual Academy with a religious exemption.

42. Collectively, the aggregation of individual behaviors the government permits—medical

exemptions, students who are permitted to attend school on a daily basis while willfully out of compliance with the CVL, teachers and staff who are not subject to the law, the learning pod option for unvaccinated children, and members the general public who have not received vaccines required under the law but who regularly intermingle on school campuses and mass gatherings throughout the state—pose a dramatically greater risk to West Virginia’s goals than would permitting K.P. a process to pursue a religious exemption in order to obtain a **virtual** education.

43. Further, this aggregation of individual behaviors Defendants permit pose a significantly greater risk to Defendants’ goals than would permitting a religious exemption option to the CVL to all students who attend virtual online schools without in-person instruction such as the Plaintiff.

44. Defendants’ actions have deprived and will continue to deprive Plaintiffs of their inalienable rights under the United States Constitution.

45. To be clear, this is an “as applied” challenge. Plaintiffs assert the CVL’s specific application to K.P.’s situation violates the First Amendment. Plaintiffs do not assert or seek a ruling on whether the law violates the First Amendment in every conceivable application statewide.

46. Defendants’ actions have deprived and will continue to deprive Plaintiffs of their inalienable rights under the United States Constitution.

47. Defendants’ actions have irreparably harmed and will continue to irreparably harm Plaintiffs.

48. Defendants committed each act alleged herein under the color and authority of West Virginia law.

JURISDICTION AND VENUE

49. This Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(a). This action arises under the First Amendment to the United States Constitution.

50. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(1) and (2) because one or more Defendants reside in this judicial district and a substantial part of the events or omissions giving rise to this action occurred in this judicial district. More specifically, this action involves K.P.'s disenrollment from West Virginia Virtual Academy, administered through the Upshur County School District. Venue is proper in the District because: (i) Plaintiffs registered and enrolled K.P. in the Virtual Academy through the Upshur County School District; (ii) K.P.'s online learning was administered through the Upshur County School District, from this judicial district and division; (iii) Defendants, by and through their course instruction, communicated such instruction to Plaintiffs and K.P. from this district and division; (iv) Defendants denied Plaintiffs' religious exemption request from this judicial district and division; and (v) the coercion and punishment of Plaintiffs for their religious beliefs were directed from this judicial district and division.

51. This Court has the authority to grant declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, implemented through Rule 57, Federal Rules of Civil Procedure.

PARTIES

I. PLAINTIFFS ANTHONY AND KRYSTLE PERRY

A. Plaintiffs Maintain Profound Religious Objections to Vaccination

52. Mrs. Perry has been a Christian for most of her adult life. Her Christian beliefs inform every aspect of her life, including how she raises K.P.

53. The Perrys attend Brooklyn Community Church in Fayetteville, West Virginia.

54. K.P attends Sunday school with her peers. As a family, the Perrys regularly pray and seek guidance from God. They pray in the mornings, before meals, and regularly read the Bible.

55. Mrs. Perry has experienced God's healing power in the darkest moments of her life. When she was diagnosed with a blastomycosis, Mrs. Perry feared she would not survive to raise K.P. After much prayer, Mrs. Perry believes God miraculously intervened and healed the condition. She attributes her recovery to the number of people who prayed for her healing and to God's mercy. After this experience, Mrs. Perry's faith grew considerably stronger, and she vowed to put her faith in her God in all aspects of life, especially for health and wellness decisions.

56. Mrs. Perry presently holds, and for many years has held, sincere religious beliefs in conflict with vaccinating K.P.

57. When K.P. was born, Mrs. Perry was unaware that many vaccines had illicit connections to abortion.

58. Mrs. Perry became aware of fetal cell involvement in childhood vaccine development and

production in 2018, when K.P. was two years old. Before Mrs. Perry became aware of these connections, K.P. received doses of the vaccines required under the Compulsory Vaccination Law.

59. Relying on the Bible verse Job 31:15, Plaintiffs believe it is God who forms children in the womb. As a mother and devout Christian, Mrs. Perry strongly opposes what she deems as the sin of abortion. She views the taking of an unborn life through abortion as murder. She considers injecting a vaccine that relies on abortion to exist to be a sin – a sin that, in her system of religious beliefs would have eternal consequences for herself, her family, and K.P.

60. Mr. Perry shares these beliefs.

61. Religious objections to vaccination based on fetal cell involvement in the development and production of vaccines on the childhood schedule is not an attenuated or foundationless religious objection. Abortion and fetal cell research in the development of childhood vaccines is well-documented. For example, in just one study over 75 normally developing babies were aborted, and while keeping the fetuses alive for harvesting their body parts, had nearly every body part chopped up into little cubes to culture viruses on, including chopping up their tongues, livers, intestines, pituitary glands, kidneys, and hearts. See **Exhibit 1**, The Wistar Institute of Anatomy and Biology, *Cytological Virological and Chromosomal Studies of Cell Strains from Aborted Human Fetuses* (May 1966) (detailing aborted pre-born and normally developing children in support of vaccination research and development).

62. In sworn testimony, Dr. Stanley Plotkin—who is commonly referred to as the “Godfather” of childhood vaccines, and one of lead researchers on the aforementioned study—candidly admitted he worked with the chopped up pituitary glands, kidneys, spleens, and hearts of seventy-six healthy, normally developing babies, whose mutilated bodies were utilized in furtherance of his vaccine research. *See Exhibit 2*, excerpts of Deposition of Stanley Plotkin, Jan. 11, 2018, at pdf pp. 9-12 of 17. *See also* excerpt of deposition video of Dr. Stanley Plotkin discussing this study, *available at* <https://www.sirillp.com/plotkin-abortion/> (last visited July 5, 2024).

63. Additionally, many of the required vaccines contain genetic material derived from aborted fetuses, materials that would be injected directly into K.P.’s body were Plaintiffs to comply with West Virginia’s mandatory vaccination requirements. *See, e.g.*, Food and Drug Administration (“FDA”) Package Insert for M-M-R II Vaccine, attached hereto as *Exhibit 3*, at pdf p. 8 of 12 (stating the Measles, Mumps, and Rubella (“MMR”) combination vaccine contains strains of “human diploid lung fibroblasts” cultured from a fetal cell line); *see also* FDA Package Insert for VARIVAX vaccine, attached hereto as *Exhibit 4*, at pdf pp. 9-10 of 16 (stating the Varicella vaccine was propagated in “human diploid cell cultures” and “contains residual components of [a fetal cell line] including DNA and protein”).

64. For Plaintiffs, to vaccinate K.P. would be to force them into participating in an action with illicit connections to the termination of an innocent life, and into activity that condones abortion. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022) (the

First Amendment protects the right to abstain from “performing physical acts) (citation omitted); *see also Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972) (the First Amendment protects one’s right to abstain from activities that would “endanger [a parent’s] own salvation and that of their children”).

65. After learning that many vaccines have been researched, tested, and developed through the use of aborted fetal cell lines, and that several vaccines required under the CVL contain human genetic material derived from aborted pre-born children, the Perrys ceased vaccinating when K.P. was two years old. Plaintiffs cannot in good conscience knowingly inject K.P. with anything that would make them complicit in the sin of abortion. Plaintiffs believe abortion constitutes a taking of an innocent human life, relying on Proverbs 6:16-17 (instructing that God hates those who “shed innocent blood”). Accordingly, Plaintiffs believe that supporting abortion would potentially endanger their and K.P.’s souls.

66. After thoughtful prayer and reflection, Plaintiffs also developed religious objections to vaccination based on the belief that they must not alter K.P.’s God-given natural immune system. Plaintiffs believe that human beings were created in God’s image, according to God’s perfect plan (even though physical imperfections exist). Based on the Bible passage Mark 2:17, which counsels that healing is to be directed towards those who are actually sick, Plaintiffs do not seek medical attention unless they or K.P. are sick, and additionally, only in cases where, after thought and prayer, they are certain their God-given immune systems are incapable of eliminating that sickness. To do otherwise would be to

preemptively alter the immune system God designed and would demonstrate a lack of faith in God.

67. While Plaintiffs are not opposed to all medication, they do not seek out medical intervention where no serious illness exists. As such, for religious reasons, Plaintiffs do not initiate medical procedures preemptively, like vaccination, for K.P. In Plaintiffs' system of religious beliefs, preemptively altering God's perfect and unique design for K.P.'s immune system would violate God's plan for K.P.'s life.

B. Plaintiffs' Religious Beliefs and Practices are Substantially Burdened by the CVL

68. Plaintiffs have been negatively impacted on multiple fronts by the decision to exercise their sincerely held religious beliefs in conflict with vaccination. K.P. has been categorically excluded from West Virginia's educational system, including the irrational and punitive exclusion of K.P. from pursuing her education at home, online, through the Virtual Academy.

69. In or around May 2022, and as permitted by state law, Mrs. Perry enrolled K.P. in the Virtual Academy through the Upshur County School District. She did this because her cousin informed Mrs. Perry that the Upshur County School District did an exceptional job of keeping parents informed regarding Virtual Academy requirements and did an excellent job at facilitating enrollment and administration of Virtual Academy requirements. The Virtual Academy enrollment process is very easy to navigate and is efficient. In 2022, Plaintiffs were able to get K.P. enrolled in less than a week.

70. From August of 2022 through January of 2024, K.P. excelled in learning in the Virtual Learning Academy.

71. K.P. received high grades in English, Math, Science, History and Art. In the Virtual Academy, K.P. was enthusiastic about learning, and thrived in the structure and social interactions the Academy provided.

72. K.P. enjoyed interacting with her peers virtually through the Virtual Academy. Daily interactions with her peers were an integral aspect of K.P.'s educational and social development.

73. Mrs. Perry's husband is 100% disabled and receives Supplemental Security Income ("SSI") through the Social Security Administration. Mr. Perry was born prematurely and has experienced profound health complications throughout his life. He is 100% blind in one eye and has been diagnosed with a learning disability.

74. While Mrs. Perry worked, Mr. Perry was able to seamlessly oversee K.P.'s education with the significant resources provided by Virtual Academy administrators.

75. After K.P. had been enrolled and learning in the Virtual Academy for approximately 16 months, Mrs. Perry was contacted by Virtual Learning Coordinator for the Upshur County Schools, Stacy Marteney, sometime in December 2023. Ms. Marteney inquired regarding K.P.'s vaccination status, informing Mrs. Perry that K.P. had to receive the vaccines required under the CVL if she desired to continue her education in the Virtual Academy.

76. On or around December 27, 2023, Ms. Marteney followed up and asked Mrs. Perry if K.P. was up to date on her vaccines. Mrs. Perry replied that she cannot vaccinate K.P.

77. On January 3, 2024, Mrs. Perry was again contacted by Ms. Marteney regarding K.P.'s vaccination status, and when Mrs. Perry again confirmed that she could not vaccinate K.P. Ms. Marteney notified Mrs. Perry that K.P. would promptly be dis-enrolled from the Virtual Academy.

78. K.P. was permitted to finish out the week, and then her online virtual learning credentials were cancelled on or around January 5, 2024, leaving her with no access to her teachers, classmates, or curricula materials.

79. On April 1, 2024, Mrs. Perry inquired whether she could submit a religious exemption to the CVL to continue K.P.'s education through the Virtual Academy. On April 3, 2024, Ms. Marteney replied that "unfortunately there is still not a religious exemption available." See Exhibit 7, Denial of Religious Exemption.

80. K.P. must now be homeschooled, with little to no interaction with children of her age for her education.

81. This change has caused a significant decrease in K.P.'s enthusiasm for learning. K.P. was thriving at the Virtual Academy, but her appetite for learning diminished once she was transitioned to full-time homeschool.

82. K.P. no longer has any routine or structure in her day. While attending the Virtual Academy, K.P.

would meet with her homeroom on Mondays and Fridays at 9:00 AM. After homeroom, K.P. would attend optional elective courses.

83. K.P.'s lessons targeted core subjects each day.

84. On occasions where K.P. was unable to immediately grasp concepts, K.P. and Mr. Perry had access to a full range of support through the Virtual Academy to help K.P. grapple through and conquer the learning issues she confronted.

85. K.P. earned straight A's while in the Virtual Academy.

86. With the support system the Virtual Academy provided, Mr. Perry was able, despite his disabilities, to seamlessly guide K.P. through the virtual educational program. Without the support system the Virtual Academy provides, Mr. Perry has struggled to advance K.P.'s education at the same level K.P. was learning through the Virtual Academy.

87. If West Virginia continues to prohibit religious exemptions to the Virtual Academy, the only remaining option for the Perrys to ensure K.P. receives an education is to homeschool. Because of the Perrys' unique situation, homeschooling is a less-than-optimal situation for K.P.'s learning needs.

88. K.P. is unable to access the practical and social benefits of a typical education that her secular peers enjoy. In short, without a religious exemption, the Perrys have been deprived of the West Virginia's guarantee of a public education, unless they violate their sincerely held religious beliefs.

89. West Virginia's refusal to allow K.P. to continue her education through the Virtual Academy is having and will have lifelong and negative impacts on K.P.

C. Despite Being Categorically Excluded from Receiving an Education in West Virginia, K.P. Regularly Interacts with her Peers

90. Notwithstanding the CVL, K.P. regularly socializes with other children her age. K.P. interacts regularly with her West Virginia peers outside of school on a weekly basis (e.g., at group church gatherings and at various other community activities).

91. K.P. frequently visits with her cousins, friends, and plays with and learns alongside children at Sunday school.

II. DEFENDANTS

92. Defendant, Stacy Marteney (**“Ms. Marteney”**) is the Virtual Learning Coordinator for the Upshur School District, the District through which Plaintiffs enrolled, and attempted to reenroll, K.P. into the Virtual Academy. Ms. Marteney is sued solely in her official capacity. Ms. Marteney is tasked with implementing and enforcing, and does implement and enforce, the mandatory vaccination requirements of the CVL against school-aged children desiring to attend the Virtual Academy, and she enforced the CVL against the Plaintiffs and excluded K.P. from the Virtual Academy. She is located at 102 Smithfield St. Buckhannon, West Virginia, 26201.

93. The Board of Education of the County of Upshur (“**Board**”) is the duly empaneled school board for Upshur County, which pursuant to W. VA. CODE §§ 18-5-1, 18-5-5, 18-5-34, has authority and control over the school district, and, pursuant to state law, was responsible for enforcing the CVL against Plaintiffs, resulting in the exclusion of K.P. from school. The Board is located at 102 Smithfield St. Buckhannon, West Virginia, 26201.

94. Christine Miller (“**Ms. Miller**”) is the duly empaneled Superintendent of the Upshur County School District, being sued only in her official capacity as Superintendent, with the duties as outlined in W. VA. CODE § 18-4-10 to include enforcement of all policies and procedures by state law, including, as is relevant here, enforcement of the CVL against Plaintiffs and K.P. Ms. Miller is located at 102 Smithfield St. Buckhannon, West Virginia, 26201, and is sued solely in her official capacity.

95. Defendant Dr. Mathew Christiansen (“**Dr. Christiansen**”) is made party to this action in his official capacity as State Health Officer and Commissioner for the West Virginia Department of Health and Human Resources. Under West Virginia law, and specifically the CVL, at W. VA. CODE § 16-3-4 (c), (d), (e), and (h), Dr. Christiansen is specifically tasked with implementing and enforcing, and does implement and enforce, the mandatory vaccination requirements of the CVL for school-aged children, including children wishing to enroll in the Virtual Academy, while simultaneously granting medical exemptions under the CVL to unvaccinated West Virginia schoolchildren. He is sued solely in his official capacity.

96. Defendant, Doug Cipoletti (“**Mr. Cipoletti**”) is the Executive Director of the Virtual Academy.⁴ Mr. Cipoletti is tasked with implementing and enforcing, and does implement and enforce, the mandatory vaccination requirements of the CVL against school-aged children desiring to attend the Virtual Academy, including K.P. The West Virginia Virtual Academy is a tuition free online Public School offered to children grades K-12. While the Virtual Academy has a physical location at 3508 Staunton Ave., 3rd Floor, Charleston, West Virginia, 25304, the Virtual Academy enforces the CVL against schoolchildren throughout the state, including in this judicial division and district, and was involved in enforcing the CVL generally resulting in the exclusion of K.P. He is sued solely in his official capacity.

STATEMENT OF FACTS

I. DEFENDANTS’ CATEGORICAL “NO RELIGIOUS EXEMPTION POLICY” AND NONENFORCEMENT OF THE CVL.

A. CVL Requirements and Limitations of the Mandated Vaccines

97. Under the CVL, every “child entering school or a state-regulated childcare center in this state must” receive certain vaccines. W. VA. CODE § 16-3-4 (b).

98. In West Virginia, it is unlawful for any child to attend “any of the schools of the state or a state-regulated childcare center until he or she has been

⁴ See WEST VIRGINIA VIRTUAL ACADEMY, *available at* <https://wvva.k12.com/about-our-school/letterfrom-our-head-of-school/> (last visited July 5, 2024).

immunized against chickenpox [*i.e.*, varicella], hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough [*i.e.*, pertussis]” and “[n]o person shall be allowed to enter school without at least one dose of each required vaccine.” W. VA. CODE § 16-3-4 (c) and (e).

99. No child may be “admitted or received in any of the schools of the state” unless they have received these vaccines. *Id.* at § 16-3-4 (c). And § 16-3-4 (d) requires school and childcare personnel to report to the commissioner (who is also the State Health Officer) any attempts to enroll unvaccinated children in schools.

100. Many of these vaccines have been combined into single dose shots (e.g., the measles, mumps, and rubella (“**MMR**”), whereby multiple vaccinations are combined into one injection, and multiple vaccination are administered in a single dose.

101. Most of the injections required under the CVL provide at best personal protection.

102. For example, the tetanus, diphtheria, and pertussis vaccine (“**DTaP**” and/or “**Tdap**”) does not prevent infection or transmission of the diseases it targets. This vaccine potentially provides only a level of personal protection by preventing a recipient from experiencing the symptoms of these infections.

103. Tetanus is not even an infectious disease. As such, the tetanus vaccine does not prevent infection and transmission of a communicable disease, but rather can only provide personal protection for the recipient. *See* CDC Pink Book,

available at <https://www.cdc.gov/vaccines/pubs/pinkbook/tetanus.html#:~:text=Tetanus%20is%20not%20contagious%20from,is%20infectious%20but%20not%20contagious> (stating “Tetanus is not contagious from person to person.”) (Last visited July 5, 2024).

104. Likewise, the pertussis vaccine provides only personal protection. See e.g., <https://pubmed.ncbi.nlm.nih.gov/31333640/> (stating “Natural infection evokes both mucosal and systematic immune responses, while aPVs [acellular pertussis vaccine, the exclusive pertussis vaccine used in the United States] induce only a systemic immune response. ... Mucosal immunity is essential to prevent colonization and transmission of *B. pertussis* organisms. Consequently, preventive measures such as aPVs that do not induce a valid mucosal response **can prevent disease but cannot avoid infection and transmission. ... aPV pertussis vaccines do not prevent colonization. As such, they do not reduce the circulation of *B. pertussis* and do not exert any herd immunity effect.**”) (Emphasis added) (last visited July 5, 2024).

105. The same is true of the diphtheria vaccine—it is at best a personal protection device. See e.g., <https://pubmed.ncbi.nlm.nih.gov/5026197/> (Diphtheria vaccine only creates antibodies to a toxin released by the diphtheria bacteria and does not generate any antibodies to the diphtheria bacteria itself, hence “**Diphtheria toxoid helps prevent symptomatic disease but does not prevent the carrier state nor stop the spread of infection.**”) (Emphasis added) (last visited July 5, 2024).

106. The meningococcal vaccine also does not contribute to herd immunity but at best provides an undefined personal benefit to the vaccine recipient. “Rates of meningococcal disease have declined in the United States since the 1990s and remain low today. Much of the decline occurred before the routine use of MenACWY vaccines. ... [D]ata suggest MenACWY vaccines **have provided protection to those vaccinated, but probably not to the larger, unvaccinated community (population or herd immunity).**” See CDC, *Meningococcal Vaccination: What Everyone Should Know*, available at <https://www.cdc.gov/vaccines/vpd/mening/public/index.html> (emphasis added) (last visited July 5, 2024).

107. Contrary to the common conceptions, the currently mandated polio vaccine (and the only one available in the United States) also does not prevent infection and transmission of the targeted pathogen. It too is a personal protection device. That is because the “inactivated polio vaccine (IPV) is the only polio vaccine that has been given in the United States since 2000.”⁵ “IPV... protects people from polio **disease but does not stop transmission of the virus.**” See CDC webpage, *Polio Disease and Poliovirus Containment*, available at <https://www.cdc.gov/orr/poliovirus/containment/diseaseandvirus.htm>, which links to the CDC *et al.*, *Polio Global Eradication Initiative* webpage, available at <https://polioeradication.org/poliotoday/polio-prevention/the-vaccines/ipv/> which further explains: “IPV induces very low levels of

⁵ See CDC webpage, *Polio Vaccination*, available at <https://www.cdc.gov/vaccines/vpd/polio/index.html> (Last visited July 5, 2024).

immunity in the intestine. As a result, when a person immunized with IPV is infected with wild poliovirus, the virus can still multiply inside the intestines and be shed in the feces ... **IPV does not stop transmission of the virus.**” (Emphases added) (last visited July 5, 2024).

108. Like COVID-19 vaccines, these vaccines are not designed to create, nor do they result in “herd immunity.”

109. Since these products reduce symptoms, but do not prevent infection and transmission, those vaccinated with these products are more likely to asymptotically spread the pathogen due to a false sense of security and misunderstanding of the limitations of the injections.

110. Further, hepatitis B is not transmitted in a school setting, as confirmed by federal health authorities. In response to a FOIA request, the CDC stated, “A search of our [CDC] records failed to reveal any documents” of “transmission of Hepatitis B in an elementary, middle or high school setting.” See **Exhibit 5**, CDC FOIA Response Regarding Hep B Vaccine. This makes sense since hepatitis B is not transmitted through activities that occur in a school setting. It is also worth noting that “almost all children 6 years and older and adults infected with the hepatitis B virus recover completely and do not develop chronic infection.” See CDC, *Hepatitis B*, available at <https://www.cdc.gov/hepatitis/hbv/index.htm>. (Last visited July 5, 2024).

111. Thus, four of the six injections⁶ required under the CVL are incapable of preventing infection and transmission of target pathogens in the school setting and are, at best, personal protection devices.

112. The only remaining vaccines required under the CVL are the MMR and varicella injections. K.P. has received the first dose of both these vaccines, before they Perrys learned of these injections illicit connections to abortion.

113. The difference of protection stated by the CDC is negligible between one and two doses of the MMR vaccine. The CDC states that a single dose of the MMR K.P. received is 93% effective against the disease, as compared to 97% for two doses.⁷

114. Further, for the varicella vaccine (i.e., the chickenpox), CDC states that a single dose of the varicella K.P. received is 100% effective against “severe varicella,” and 82% effective at “preventing any form of varicella,” while two doses are likewise 100% effective against “severe varicella,” and 92% effective at “preventing all varicella.”⁸ The gains from additional injections are, therefore, marginal at best.

⁶ Ten vaccines are required under the CVL, *see* W. VA. CODE § 16-3-4 (c) and (e), but because they are injected in combination vaccines, a total of six distinct products with multiple doses for several of the vaccines (e.g., MMR, DTaP, varicella, etc.) are required.

⁷ *See* CDC, *About Measles*, available at <https://www.cdc.gov/measles/vaccination.html> (Last visited July 5, 2024).

⁸ *See* CDC, *About the Varicella Vaccines*, available at <https://www.cdc.gov/vaccines/vpd/varicella/hcp/about-vaccine.html> (Last visited July 5, 2024).

115. In addition, the varicella vaccine is a live virus vaccine, meaning there is, albeit modified, live chicken pox virus in each dose. Those vaccinated with this live virus can infect others with the chicken pox virus for up to six weeks after receipt of the live vaccine. This is why its package insert, approved by FDA, explains “that transmission of varicella vaccine virus (Oka/Merck) resulting in varicella infection including disseminated disease may occur between vaccine recipients (who develop or do not develop a varicella-like rash) and contacts susceptible to varicella including healthy as well as high-risk individuals” and that “[d]ue to concern for transmission of vaccine virus, vaccine recipients should attempt to avoid whenever possible close association with susceptible high-risk individuals for up to six weeks following vaccination” including “[i]mmunocomposed individuals [and] [p]reganant women ... [and] [n]ewborn infants of mothers without documented history of varicella.” See <https://www.fda.gov/media/76008/download?attachment>. (Last visited July 5, 2024). Nonetheless, Defendants do not exclude those vaccinated with this product from schools for six weeks after vaccination to prevent transmission.

B. The Government Grants Medical Exemptions and Practical Exceptions Through Non-Enforcement of the CVL

116. While West Virginia requires that unvaccinated children enrolled in school be reported to the Department of Health pursuant to W. VA. CODE § 16-3-4 (d), Defendants liberally allow unvaccinated children to remain in school.

117. West Virginia allows unvaccinated children to remain enrolled in school and to attend in-person classes, provided they do not, like Plaintiffs, request a religious exemption before enrolling or re-enrolling. For example, in response to requests under the West Virginia Freedom of Information Act, W. VA. CODE § 29B-1-1, et seq., (“WVFOIA”), the Fayette County Board of Education responded that currently, in the 2023/2024 school year, 440 unvaccinated children were enrolled in in-person classes for more than thirty days.⁹ The Monongalia County School District reported 147 children out of compliance with the Compulsory Vaccination Law were enrolled in in-person classes for more than thirty days,¹⁰ and the Upshur County School District—the district K.P. enrolled in the Virtual Academy, and the district in which her virtual education was administered—reported that 46 unvaccinated children who are out of compliance with the CVL were enrolled in in-person classes for more than thirty days.¹¹

118. These are just three examples of school districts who permit unvaccinated students to attend in-person classes. On information and belief, many more unvaccinated students are permitted to attend in-person classes while out of compliance with the CVL in school districts throughout the state.

119. Official government records also indicate considerable non-compliance rates for West Virginia kindergarteners attending in-person classes. For example, according to CDC records for the 2022-2023

⁹ See **Exhibit 8**, Fayette County WVFOIA response.

¹⁰ See **Exhibit 9**, Monongalia County WVFOIA response.

¹¹ See **Exhibit 10** Upshur County WVFOIA response.

school year, as many 4.4% of West Virginia kindergarteners are out of compliance with the CVL. See CENTERS FOR DISEASE CONTROL, *Vaccination Coverage and Selected Vaccines and Exemption Rates Among Children in Kindergarten – United States, 2022-23 School Year*, available at [https://www.cdc.gov/mmwr/volumes/72/wr/mm7245a2.htm#:~:text=National%20coverage%20remained%20near%2093,22%20school%20year%20\(2.6%25\)](https://www.cdc.gov/mmwr/volumes/72/wr/mm7245a2.htm#:~:text=National%20coverage%20remained%20near%2093,22%20school%20year%20(2.6%25)) (detailing percentages of religious and medical exemption rates, along with non-compliance rates, for U.S. kindergarteners in the 2022-23 school year, and detailing a non-compliance rate in West Virginia of approximately 4.4%) (last visited July 5, 2024)).

120. These involve instances of school districts and children that are willfully out of compliance with the CVL, yet the students are permitted to continue their educations in-person, while K.P. was ejected from the Virtual Academy after seeking a religious exemption.

121. West Virginia's lackadaisical approach to its vaccination requirements in school settings is further demonstrated by the fact that teachers and others working in West Virginia's educational system are not subject to the vaccination requirements of the CVL. Many, if not most, teachers, administrators, and staff working in the West Virginia school system have never been required to receive the full battery of injections required by the CVL.

122. This is because, as of 1986, when many of the adults in the school system were themselves in school, there were only three routine vaccines in the U.S. It was only after 1986, the year Congress gave

pharmaceutical companies immunity for liability for injuries caused by childhood vaccines, that the explosion in the childhood vaccine schedule occurred. *See* 42 U.S.C. §§ 300aa-11. And on the tails of this liability protection, West Virginia first required the recombinant Hep-b vaccine (first licensed in 1986) for school; the varicella vaccine (first licensed in 1995); the pertussis vaccine (licensed in 2005); and conjugate meningococcal vaccine (first licensed in 2005).

123. This means that most adults in the State, who comprise over 80% of the state's population,¹² were never subject to most of the State's school vaccine requirements.

124. West Virginia also permits medical exemptions to its childhood vaccination requirements. While religious exemptions are prohibited, a child may be exempt from the requirements upon producing a certificate "granting the child . . . a[] [medical] exemption from the compulsory immunization requirements." W. VA. CODE § 16-3-4 (h).

125. For example, in response to WVFOIA requests, the Harrison County School District reported that it had recently granted nine medical exemptions to the CVL,¹³ the Monongalia County School District reported seven medical exemptions,¹⁴

¹² *See* UNITED STATES CENSUS BUREAU, QuickFacts, West Virginia, available at <https://www.census.gov/quickfacts/fact/table/WV,US/PST045223> (last visited July 5, 2024)

¹³ *See* **Exhibit 11**, Harrison County WVFOIA response.

¹⁴ *See* **Exhibit 9**, Monongalia County WVFOIA response.

and the Upshur County School District reported two medical exemptions.¹⁵

126. These are just three examples of school districts who grant medical exemptions to in-person students. On information and belief, many more unvaccinated students are permitted to attend in-person classes with medical exemptions, and the Virtual Academy also allows for medical exemptions.

C. K.P. was Thriving at the West Virginia Virtual Academy, Where She Posed a Non-Existent Threat to Defendants' Infectious Disease Related Goals

127. West Virginia's justification for the CVL is to mitigate against infectious disease, specifically amongst children in school settings.

128. Because infectious diseases do not only spread in school settings, and impact adults and schoolchildren alike, the CVL can never credibly fulfill West Virginia's contagious disease mitigation goals.

129. Even if the State's interest in vaccinating its citizens could somehow logically be limited exclusively to children in a formal school setting, allowing K.P. to access a religious exemption to the Virtual Academy—**where she does not interact in person with classmates**—does not remotely threaten Defendants' goals, and certainly not to the degree that medical exemptions do.

130. The Virtual Academy is a tuition-free online public school offering virtual education to

¹⁵ See Exhibit 10, Upshur County WVFOIA response.

children from kindergarten through grade twelve.¹⁶ The program is available for all West Virginia residents.¹⁷

131. The Virtual Academy is administered through local school districts. Parents must enroll in virtual school through a county school district.

132. Once enrolled, administrators from the sponsoring school district provide the family with credentials to access the program. Plaintiffs were provided enrollment credentials through representatives from the Upshur County School District.

133. The Virtual Academy offers a flexible learning curriculum with core subjects in English, Science, Math, History and Art. The program allows for a customized educational experience for each child.

134. For approximately 17 months, from August of 2022 to January of 2024, K.P. was enrolled in and thrived at the Virtual Academy without her vaccination status being an issue and without endangering the government's public health goals.

135. The situation was ideal for Plaintiffs as Mrs. Perry is a working mother and is unable to personally homeschool K.P. full time, which, prior to the availability of the Virtual Academy, was the only educational option in West Virginia for children who remained unvaccinated for religious reasons.

¹⁶ See WEST VIRGINIA VIRTUAL ACADEMY, *available at* <https://wvva.k12.com/> (last visited July 5, 2024).

¹⁷ *Id.*

136. Mr. Perry, who is 100% disabled, shepherded K.P. through Virtual Academy from home, with considerable assistance for Virtual Academy staff.

137. All learning materials, books, and lesson plans are provided to the family free of charge, or at very low cost. This virtual learning program allows for flexible learning hours to fit the child's needs and schedule.

138. Even though Virtual Academy students learn from home and are not required to interact in person with their virtual classmates, Virtual Academy students are subject to the CVL's requirements.

139. Plaintiffs have requested that they be permitted to seek a religious exemption to the CVL so their child can continue her education. Their request for a religious exemption and accommodation were rejected.

140. However, the CVL and Defendants have made clear that medical exemptions are available for schoolchildren with secular reasons for declining vaccination, including those enrolled for in person learning as well as for Virtual Academy students.

D. West Virginia's Categorical Intolerance for Non-Vaccination for Religious Reasons, Even in Virtual Settings

141. West Virginia simply cannot tolerate non-vaccination for religious reasons. The State is perfectly fine if children remain unvaccinated for medical reasons and attend in person school, or even if they are willfully non-compliant with the law (for

any reason they choose) and attend school, provided they do not, like Plaintiffs, request a religious exemption to continue in school.

142. However, from a disease prevention and risk perspective, there is no reason “why religion alone must bear the burden” of the State’s push to mitigate against infectious disease. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 544 (1993).

143. As conclusive evidence of West Virginia’s intolerance for non-vaccination for religious reasons, West Virginia Governor Jim Justice recently vetoed a bill that would have allowed for religious exemptions in virtual public schools, like the Virtual Academy.¹⁸

144. The medical exemption option, however, remains intact and children unvaccinated for secular reasons are permitted to intermingle daily with their classmates at school.

145. Further, while the State made the conscious choice to prohibit religious exemptions even in virtual settings, West Virginia continues in its relaxed enforcement of the CVL, allowing many hundreds of unvaccinated schoolchildren who are willfully noncompliant with the law to continue to attend classes in-person.

146. Because of Governor Justice’s veto, Plaintiffs specifically chose not to challenge the CVL under the recently enacted West Virginia Equal Protection for Religion Act, West Virginia Code § 35-

¹⁸ See WV HB5105, *A Bill to Eliminate Vaccine Requirements for Public Virtual Schools*, <https://www.billtrack50.com/billdetail/1687129> (last visited July 5, 2024).

1A-1 (2023) (the “**EPRA**”), which arguably contains protections that may overlap with the concrete protections the First Amendment affords.

147. This is because, whatever protection EPRA may hypothetically provide, that theoretical shield for religious freedom in West Virginia is transient and passing, contingent on the shifting opinions of elected officials (like Governor Justice and a future legislature).

148. Elected officials can just as easily rescind EPRA, and whatever religious freedoms it may protect. And given Governor Justice’s veto, it is clear that EPRA would not have been enacted if it included an option for a religious exemption to childhood vaccination.

149. Thus, Plaintiffs seek the bedrock, unchanging protections only accessible under the First Amendment. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (observing that one’s “right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”).

E. Recent First Amendment Free Exercise Developments

150. Directly applicable constitutional jurisprudence has fundamentally evolved to require strict scrutiny review for situations virtually identical to the issues presented here.

151. Religious exemptions have long been the norm when it comes to school vaccination laws. Forty-five states (plus the District of Columbia) currently

offer religious exemptions to their school vaccination laws.¹⁹

152. West Virginia is a radical outlier in prohibiting a religious exemption option. Only five states do not currently allow for religious exemptions, and for most of them, this is a relatively recent development. California, Maine, Connecticut, and New York historically allowed religious exemptions,

¹⁹ See Ala. Code § 16-30-3; Alaska Admin. Code tit. 7, § 57.550; Ariz. Rev. Stat. Ann. §§ 15-872(G), -873(A)(1); Ark. Code Ann. § 6-18-702(d)(4)(A); Colo. Rev. Stat. §§ 25-4-902, -903(b)(V); Del. Code Ann. tit. 14, § 131(a)(6); D.C. Code §§ 38-501, -506(1); Fla. Stat. § 1003.22(1); Ga. Code Ann. § 20-2-771(e); Haw. Rev. Stat. §§ 302A-1154, -1156(2); Idaho Code §§ 39-4801, -4802(2); 105 Ill. Comp. Stat. § 5/27-8.1(6); Ind. Code § 21-40-6; Iowa Code § 139A.8(4)(a)(2); Kan. Stat. Ann. § 72-6262(b)((2); Ky. Rev. Stat. Ann. § 214.034(2); La. Stat. Ann. §§ 17:170(E), 40:31.16(D); Md. Code Ann., Educ. § 7-403(b)(1); Mass. Gen. Laws ch. 76, § 15; Mich. Comp. Laws §§ 333.9208, .9215(2); Minn. Stat. § 121A-15; Mo. Rev. Stat. §§ 167.181(3), 210.003; Mont. Code Ann. §§ 20-5-403, -405(1)(a); Neb. Rev. Stat. §§ 79-217, 221(1); Nev. Rev. Stat. §§ 392.435, .437; N.H. Rev. Stat. Ann. § 141-C:20-a, :20-c; N.J. Stat. Ann. § 26:1A-9.1; N.M. Stat. Ann. § 24-5-1, -3(A); N.C. Gen. Stat. §§ 130A-155, -157; N.D. Cent. Code § 23-07-17.1(3); Ohio Rev. Code Ann. § 3313.671(B)(4); Okla. Stat. tit. 70, §§ 1210.191, .192; Or. Rev. Stat. § 433.267(1)(c)(A); 28 Pa. Cons. Stat. §§ 23-83, -84; 16 R.I. Gen. Laws § 16-38-2(a); S.C. Code Ann. § 44-29-180(D); S.D. Codified Laws § 13-28-7.1; Tenn. Code Ann. § 49-6-5001(b)(2); Tex. Educ. Code Ann. § 38.001(c)(1)(B); Utah Code Ann. § 53G-9-303(3); Vt. Stat. Ann. tit. 18, §§ 1121, 1122(3)(A); Va. Code Ann. §§ 22.1-271.2(C), 32.1-46(D)(1); Wash. Rev. Code § 28A.210.080, .090(1)(c); Wis. Stat. § 252.04(3); Wyo. Stat. Ann. § 21-4-309(a). Mississippi now offers a religious exemption after a federal court issued a permanent injunction following a free exercise challenge requiring Mississippi to provide a religious exemption process. See *Bosarge v. Edney*, 669 F. Supp. 3d 598, 625 (S.D. Miss. 2023).

but those options were recently removed by the legislatures of those states.²⁰

153. More importantly, First Amendment jurisprudence has fundamentally evolved in recent years. There have been five Supreme Court cases that are particularly relevant to the First Amendment issues at hand, and those cases each in isolation dictate strict scrutiny review here.

154. Before *Emp’t Div. v. Smith*, 494 U.S. 872 (1990), courts struggled with what level of judicial scrutiny to apply to free exercise claims. Because of the country’s diversity of religious beliefs, almost every government regulation burdened, to some degree or another, a religious belief system. The *Smith* Court confronted this issue and held that laws that only “incidentally” burden religion expression ordinarily are not subject to strict scrutiny under the Free Exercise Clause, reasoning to do otherwise would be “courting anarchy.” *Id.* at 888.

155. However, the *Smith* Court held that strict scrutiny would apply to regulations that either were not neutral (because they overtly targeted out religious observance for worse treatment), or did not apply generally to the population, containing no exceptions the law.

²⁰ See, e.g., Cal. Health & Safety Code § 120325 *et seq.* (religious exemption eliminated in 2016); N.Y. Pub. Health Law § 2164(1) (religious exemption removed in 2019); Conn. Gen. Stat. § 10-204a (religious exemption eliminated in 2021); Me. Stat. tit. 20-A, § 6355 (religious exemption eliminated in 2019). West Virginia is the only state that has never offered a religious exemption. W. Va. Code § 16-3-4.

156. The *Smith* Court's animating rationale was that allowing religious exemptions to certain neutral and generally applicable laws "would be courting anarchy," *Smith*, 494 U.S. at 888, because such laws "could not function" in the face of religious exemptions, *United States v. Lee*, 455 U.S. 252, 260 (1982).

157. That is not the case here. Childhood vaccination schemes are clearly capable of smoothly functioning with exemption options, including for religious reasons.

158. Again, West Virginia permits many hundreds of unvaccinated children out of compliance with the CVL to remain in school, and it does not require the tens of thousands of adults working in the school system to comply with the CVL's requirements.

159. Consequently, the government has shown through action and inaction that its infectious disease related goals can be accomplished while allowing exceptions to the CVL.

160. Finally, the overwhelming majority of states have for decades recognized the compelling interest in respecting their citizens' religious freedoms and allow for a religious exemption option to childhood vaccination requirements, further demonstrating childhood vaccination requirements are more than capable of allowing for religious exemptions without generating the anarchy the *Smith* Court was so concerned about.

161. Here, the option for a religious exemption mechanism can be seamlessly implemented, like it has been in forty-five other states, without

endangering ordered governance and preservation of the CVL.

162. The CVL also provokes strict scrutiny under *Smith*'s progeny.²¹

163. The *Smith* Court held that strict scrutiny would apply to regulations that either were not neutral (because they targeted religious observance) or were not generally applicable. *Smith*, 494 U.S. at 881.

164. A couple of years later, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court outlined the parameters of the neutrality and general applicability standards when examining a local ordinance that banned animal sacrifice, a practice of the Santeria faith. Because it appeared that the government had targeted religious observance for exclusion, and because the local government allowed similar secular conduct (absence of restrictions on how hunters were to dispose of an animal carcass), the Court applied strict scrutiny and struck the ordinance. *Lukumi*, 508 U.S. at 547.

165. More recently, the Supreme Court has protected Free Exercise rights in the face of state regulations related to infectious diseases. In *Tandon v. Newsom*, 593 U.S. 61, 62 (2021), the Supreme Court ruled that a law is not neutral and generally applicable, and thus invokes strict scrutiny review, if it treats “any comparable secular activity more favorably than religious exercise.” *Id.* at 62 (emphasis in original). In *Tandon*, California regulations

²¹ Plaintiffs also believe *Smith* was wrongly decided and preserve the right to argue *Smith* should be overturned.

intended to slow the spread of COVID-19 limited religious gatherings but treated comparable secular gatherings – such as getting haircuts and retail shopping – more favorably. *Id.* at 63. The Court applied strict scrutiny and granted a preliminary injunction in favor of the religious plaintiffs. *Id.* at 64.

166. The Court employed similar reasoning in *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14 (2020), holding that a New York regulation that prohibited religious gatherings but permitted similar secular gatherings violated the First Amendment where the secular and religious activities in question presented comparable contagion risks. *Id.* at 17.

167. A couple of months after its Tandon ruling, the Supreme Court examined the issue of whether a regulation is generally applicable where it provides for secular exceptions that are unavailable to citizens with religious beliefs. In *Fulton v. City of Philadelphia*, 593 U.S. 522, 537, (2021), the Court—in a 9-0 decision—held that the “creation of a formal mechanism for granting exceptions renders a policy not generally applicable” where that mechanism is unavailable to religious adherents. In deciding to apply strict scrutiny, the Court observed that the regulation in question had a procedure that was subject to individualized review and approval at the “sole discretion” of a government official. *Id.* at 537.

F. West Virginia has Created a Discretionary Medical Exemption Process

168. West Virginia has instituted an individualized discretionary exemption to the CVL that categorically preferences non-vaccination for

secular reasons above non-vaccination for religious reasons.

169. Students are categorically prohibited from seeking exemption from the required vaccines for religious reasons. However, students are permitted to seek a medical exemption from the required vaccines.

170. Through the plain language of the relevant statute, West Virginia has reserved discretion to accept or deny medical exemptions.

171. The statute dictates in relevant part that the health commissioner “is authorized to grant . . . exemptions to the compulsory immunization requirements . . . on a statewide basis, upon sufficient medical evidence that immunization is contraindicated or there exists a specific precaution to a particular vaccine.” W. VA. CODE § 16-3-4 (h).

172. It offers no similar pathway for an exemption where the requirement substantially burdens a sincerely held religious belief.

173. The medical exemption process includes even more individualized discretion than what may be initially apparent.

174. Under the statutory scheme, there are multiple levels of discretionary review whereby government officials and private physicians are empowered to press the red light or green light on each medical exemption request, and at each level, the government prefers non-vaccination for secular reasons above non-vaccination for religious reasons.

175. At the first level of review, the state has delegated private health care providers discretion to determine the variety of circumstances which are eligible for a medical exemption, and those which are not.

176. Acting on behalf of the state, these physicians conduct an individualized assessment of each request for a medical exemption and have latitude to decide whether to certify the request, and then submit their opinion for medical exemption on a government form.²²

177. In practice, West Virginia physicians exercise broad discretion when deciding to grant or deny each medical exemption request. Different decisions can be reached, and are reached, depending on which physician evaluates the request.

178. If and when the medical exemption form is signed by a physician, it is then forwarded to the State Immunization Officer who reviews each medical exemption request on a case-by-case basis. If the exemption is ultimately approved by the State Immunization Officer, the student is permitted to attend school without having received all of the mandated vaccines.

179. If the Immunization Officer denies the medical exemption, the decision can be appealed to the State Health Officer, who reviews the appeal on a case-by-case basis and determines whether to uphold or reverse the State Immunization Officer's decision.

²² See **Exhibit 12**, West Virginia Medical Exemption Request Form.

See W. VA. CODE § 16-3-4 (h)(4); see also **Exhibit 6**, Medical Exemption Denial Reconsideration Form.

180. In practice, government officials and physicians acting on behalf of the Government exercise individualized discretion as to whether to grant or deny each medical exemption request.

181. The criteria by which medical exemptions are evaluated are not objective and are subject to the opinion of each government official who evaluates the exemption request. Different outcomes can be reached, and are reached, depending on who reviews the request.

182. Even the implementing regulations for the medical exemption in West Virginia provide that Defendant Dr. Christiansen shall consider “evidence from medical sources, such as medical history, opinions, and statements about treatment the child has received.” W. Va. Code R. § 64-95-17.2.a.2.

183. A similar exemption process is unavailable to citizens with religious objections to compulsory vaccination. For example, Plaintiffs requested that they be permitted to re-enroll K.P. in the Virtual Academy with a religious exemption, but they were rejected.²³

184. In case there were any doubt that religious exemptions shall not be allowed, while medical exemptions are permitted, the West Virginia Department of Health’s webpage outlines the process for seeking and receiving a medical exemption but makes clear that religious exemption cannot be

²³ See **Exhibit 7**, Re-Enrollment and Religious Exemption Request.

pursued because “West Virginia does not grant non-medical exemptions.”

185. While West Virginia will not entertain a religious exemption request and forbids those tasked with enforcing the CVL to consider granting one, the State grants many medical exemptions annually.

G. West Virginia Permits Additional Comparable Secular Activity

186. Defendants liberally allow for non-vaccination for secular reasons throughout the State, including in school settings.

187. Again, Defendants allow for and do in fact grant many medical exemptions to the CVL.

188. Defendants have granted many medical exemptions to students who attend classes in person and who interact with other students and staff significantly more frequently (indeed, every day of classroom instruction, year-round) than K.P. would as a student in the Virtual Academy.

189. On belief, Defendants have also granted medical exemptions to the Virtual Academy.

190. From a risk perspective, one online student with a medical exemption to the CVL poses the same risk to Defendants’ goals as allowing Plaintiff a religious exemption – which is to say virtually no risk at all.

191. From a risk perspective and following the government’s logic, one in-person student with a medical exemption to the CVL poses a much greater risk to West Virginia’s goals than allowing Plaintiffs

a mechanism to pursue a religious exemption for K.P. to the Virtual Academy.

192. Further, West Virginia does not strictly enforce its childhood vaccination policies and permit functional exemptions through non-enforcement of the CVL. In other words, as discussed *supra*, West Virginia presently permit many hundreds of students lacking one or more of the required vaccines to attend class in person, even though they are willfully non-compliant with the CVL.

193. The government also permit teachers and staff who are not fully up to date with the required vaccines to roam freely throughout campuses across the state and intermingle with schoolchildren without showing proof of vaccination or even adhering to enhanced safety protocols.

194. Even if the government's infectious disease related goals could logically be restricted to children, and exclusively in a school setting during school hours, West Virginia permits unvaccinated children to be educated in unlimited numbers in "learning pods," a school setting where children intermingle on a daily basis. Under W.V. Code § 18-8-1, the government permits unvaccinated children—whatever their reasons for declining vaccination—to be educated in these learning pods. This too constitutes comparable activity under *Tandon*, and, under the government's logic, presents a considerably greater threat to West Virginia's public health goals than permitting K.P. to continue her education in the Virtual Academy with a religious exemption.

195. Defendants also permit the public, including countless numbers of West Virginia citizens

who remain unvaccinated or partially unvaccinated for any reason they choose, including secular reasons, to freely access school campuses throughout the state without vaccination-based entry restrictions.

196. Defendants also permit unvaccinated members of the public to attend high transmissibility events in which there are large crowds gathered in close proximity, such as high school basketball and football games, without showing proof of vaccination, and then enter school campuses the next day, if desired.

197. However, Defendants prohibit Plaintiffs from pursuing an education for K.P., even in virtual settings, based on their religious objections to the CVL.

198. A single unvaccinated person or student on a West Virginia school campus poses a greater risk to Defendants' goals than permitting K.P. access to an online education through the Virtual Academy.

199. Collectively, the aggregation of individual secular behaviors Defendants permit (e.g., medical exemptions, unvaccinated teachers and staff, lax enforcement of the CVL, unvaccinated children in learning pods, and unvaccinated members of the general public intermingling at high transmissibility events who then access school campuses unprohibited) pose an infinitely greater threat to any possible goals undergirding the CVL than permitting Plaintiffs' child—an online student—to access the State's educational benefits from her own home with a religious exemption to the CVL.

H. The CVL is Amenable to Exemptions; there are Many Less Burdensome Alternatives; and the Law is Both Under- and Over-Inclusive Relative to Defendants' Infectious Disease Related Goals

200. Every state in the country has a mandatory vaccination policy for childhood education. However, the overwhelming majority of these states—forty-five—have a process for both religious and medical exemptions to compulsory vaccination requirements.

201. These states have demonstrated their goals undergirding vaccination requirements can be satisfied while simultaneously respecting students' religious freedoms.

202. In short, the CVL can be seamlessly implemented without endangering West Virginia's disease mitigation goals while also allowing for exceptions to the policy.

203. Universal vaccination is not the only disease prevention tactic that can be deployed. States with a religious exemption process deploy a variety of alternative tactics, such as quarantine in the event of an outbreak, or face masking, distancing, sanitation, and others. Notably, the states contiguous to West Virginia that allow for religious exemptions to childhood vaccination laws all implement the less restrictive alternative of quarantining, if an outbreak of an infectious disease were ever to occur.²⁴

²⁴ See, e.g., 28 Pa. Code § 27.77(e) (Pennsylvania: "Whenever one of the diseases ... has been identified within a child care group

204. West Virginia does not even require any of these countermeasures for children with medical exemptions, or for unvaccinated teachers and staff working in the school system. Indeed, if vaccination is effective against transmission of disease, as West Virginia claims is the justification for the CVL, then a handful of religious exemptions for in-person students would present absolutely no risk to the remaining vaccinated students who attend school in person, particularly assuming as true Defendants position that the mandated vaccines work.

setting, the [health] Department ... may order the exclusion from the child care group setting ... which is determined to be at high-risk of transmission of that disease, of an individual susceptible to that disease in accordance with public health standards ..."); Kentucky Exemption Form ("In the event that the county health department or state health department declares an outbreak of a vaccine-preventable disease for which proof of immunity for a child cannot be provided, he or she may not be allowed to attend childcare or school for up to three (3) weeks, or until the risk period ends.") *available at* <https://www.chfs.ky.gov/agencies/dph/dehp/imm/EPID230a.pdf>; Md. Code Regs. 10.06.04.05(B) (Maryland: "The exemption allowed under ... this regulation does not apply when the Secretary declares an emergency or epidemic of disease"); Oh. Rev. Code § 3313.671(C) (Ohio: "a school may deny admission to a pupil otherwise exempted from the chicken pox immunization requirement if ... a chicken pox epidemic exists in the school's population. The denial of admission shall cease when the director notifies the principal ... that the epidemic no longer exists"); 12 Va. Admin Code 5-110-80(A)(3) (Virginia: "Upon the identification of an outbreak, potential epidemic, or epidemic of a vaccine-preventable disease in a public or private school, the commissioner has the authority to require the exclusion from such school of all children who are not immunized against that disease.").

205. Plaintiffs will comply with any reasonable, less burdensome alternatives that would allow them to continue pursuing their child's online education.

206. Moreover, the CVL also fails to regulate enough conduct to satisfy West Virginia's goals. In short, the CVL is glaringly and substantially underinclusive relative to the objectives the government seeks to achieve.

207. For example, sporting events on West Virginia school campuses, graduation ceremonies, or any other student and/or community gatherings do not require proof of vaccination.

208. These mass gatherings pose a significantly greater risk to West Virginia's goals to mitigate against infectious disease spread than would permitting K.P. to pursue her online education with a process for obtaining a religious exemption.

209. Notwithstanding being ejected from the Virtual Academy, however, K.P. can attend sporting events, just as any other member of the public can and does. As such, the CVL does not mitigate against the purported risk of transmission on campuses, and therefore, it is severely underinclusive. This is true, even when engaging in the fiction that all the required vaccines are capable of preventing infection and transmission of the targeted pathogens, given that CDC and other public health authorities document breakthrough infections following receipt of several of the required vaccines.

210. The CVL is also underinclusive because it permits medical exemptions for students (both online

and in person). The CVL is underinclusive relative to West Virginia's objectives because it permits unvaccinated online and in-person students possessing medical exemptions to receive an education throughout the state.

211. If a student with a medical exemption can safely attend in-person class every single school day of instruction, then K.P., an online student, can certainly complete her education with a religious exemption without endangering the government's goals.

212. The CVL is further substantially underinclusive because West Virginia does not require vaccines meant to protect from highly contagious viruses spread via respiratory secretions, such as COVID-19 and influenza, which are arguably more lethal and result in more hospitalizations every year than those diseases for which vaccines are required under the CVL.

213. In fact, West Virginia outright prohibits requiring COVID-19 vaccines as a condition of entering school. *See* W.V. Code §§ 16-3-4b, 16-3-4c.

214. The CVL is also overbroad because it captures more conduct than necessary to achieve its goals.

215. First, the CVL fails to include a reasonable religious exemption for the miniscule fraction of families who, like Plaintiffs, hold sincere religious beliefs in conflict with the CVL and who desire to enroll their children in the Virtual Academy.

216. Second, assuming the required vaccines provide the protection that Defendants claim and

considering that the overwhelming majority of West Virginia families have vaccinated their children in compliance with the CVL, Defendants do not meaningfully advance their goals by forcing Plaintiffs to violate their sincerely held religious beliefs by injecting K.P. with the required vaccines as a condition of education. While the Government may have a compelling interest in the abstract, that does not mean that it has one “in each marginal percentage point by which” it achieves its general goals. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 803 n.9 (2011).

217. Third, the Policy is overbroad because many of the required vaccines, including pertussis, tetanus, diphtheria, polio, and meningococcal do not prevent transmission or infection of the diseases they target. *See supra*, §I.B. Rather, these vaccines merely provide a level of personal protection by potentially preventing recipients from experiencing the symptoms of these infections.

218. Fourth, K.P. has received doses of the vaccines required under the CVL. Thus, West Virginia can only, at best, point to miniscule gains to its disease mitigation goals by forcing K.P. to receive the few additional doses she lacks.

219. However, despite these realities, the government has completely destroyed the option for religious objections in the compulsory vaccination arena, including in the virtual school setting, a plainly overbroad application of its justification for requiring vaccination to mitigate the spread of infectious diseases.

COUNT I

42 U.S.C. § 1983

**VIOLATION OF PLAINTIFF’S FIRST
AMENDMENT FREE EXERCISE RIGHTS
For Declaratory and Injunctive Relief (as
applied challenge to the CVL)**

220. Plaintiffs incorporate the allegations in the foregoing paragraphs as if set forth fully herein.

221. The First Amendment of the U.S. Constitution provides that: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” This clause has been incorporated against the states. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

222. The Supreme Court recently reaffirmed that the First Amendment’s Free Exercise Clause “does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through ‘the performance of (or abstention from) physical acts.’” *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2421 (2022) (quoting *Smith*, 494 U. S. at 877)).

223. The Supreme Court has repeatedly recognized that “[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” *Smith*, 494 U.S. at 877.

224. Parents have the right to “direct the religious upbringing of their children” and “when the interests of parenthood are combined with a free exercise claim [...] more than merely a ‘reasonable relation to some purpose within the competency of the

State' is required to sustain the validity of the State's requirement under the First Amendment." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

225. Courts should not inquire into the validity or plausibility of a person's beliefs; instead, the task is to determine whether "the beliefs professed [] are sincerely held and whether they are, in [a believer's] own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163, 185 (1965).

226. The "guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981).

227. Plaintiffs' sincerely held religious beliefs that prohibit them from vaccinating their minor child have been unconstitutionally burdened by the State of West Virginia. Plaintiffs' attempts to maintain K.P.'s enrollment in the Virtual Academy with a religious exemption request were rejected.

228. As such, West Virginia has pitted Plaintiffs' religious integrity against educating their child. West Virginia has created a system of public education whereby it guarantees an education to every student. *See, e.g., Pauley*, 162 W. Va. at 707 (holding that "[t]he mandatory requirements of 'a thorough and efficient system of free schools' found in . . . the West Virginia Constitution, make education a fundamental, constitutional right in this State." *see also State v. Beaver*, No. 22-616, at *36 ("Both the State Constitution and [West Virginia courts] have established that education is a fundamental right").

229. The Free Exercise Clause of the First Amendment protects against “indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.” *Carson v. Makin*, 142 S. Ct. 1987 (2022) (quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 450 (1988)). “In particular, [the U.S. Supreme Court has] repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.” *Id.*

230. Nevertheless, despite West Virginia’s guarantee of a free public-school education, K.P. cannot obtain a formal education because of her parents’ convictions, not in public school, private school, or even the Virtual Academy.

231. However, West Virginia families with secular, medical motivations for declining compulsory immunization can be exempted from the CVL’s requirements. Those exempt children are then free to attend class in person.

232. Considering the foregoing, and directly on-point Supreme Court precedent, the CVL provokes and cannot survive strict scrutiny.

The CVL Triggers Strict Scrutiny under Smith

233. The CVL substantially burdens Plaintiffs’ religious beliefs and practices, and the law triggers strict scrutiny under *Smith*, 494 U.S. at 888, because the State has shown the CVL is readily amenable to exceptions to the state’s vaccination policy. The prohibition of a religious exemption option, despite the reality of a feasible exemption scheme, reveals the CVL’s lack of neutrality and lack of general

applicability under *Smith*. Because the CVL is readily amenable to a religious exemption option, the law triggers strict scrutiny.

234. The State of West Virginia has made an unconstitutional value judgment that secular (*i.e.*, medical) motivations for opting out of compulsory immunization are permitted, but that religious motivations are not.

The CVL Clearly Triggers Strict Scrutiny on Additional Grounds under Smith's Progeny

235. Further, should the Court determine the CVL does not trigger strict scrutiny under *Smith* because the law is readily amenable to a religious exemption option, the CVL fails both the general applicability and neutrality tests under *Smith's* progeny.

236. While West Virginia may have a general healthcare interest in promoting childhood immunization, the First Amendment's Free Exercise Clause prohibits the government from enacting non-neutral and non-generally applicable legislation unless it is narrowly tailored to a compelling government interest. *Lukumi*, 508 U.S. at 531.

237. The CVL fails the general applicability test under *Fulton* because the medical exemption system provides for individualized discretionary review. "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable . . ." *Fulton*, 593 U.S. at 537.

238. In such instances, the government may not refuse to extend the possibility for an exemption

“to cases of religious hardship without compelling reason.” *Id.* at 534 (cleaned up).

239. Because its medical exemption process provides for discretionary review at multiple levels, West Virginia’s CVL fails the general applicability test. West Virginia has instituted a system of customized review – delegated first to private physicians and second to the State Immunization Officer and the Health Officer – who at each level conduct individualized review of medical exemption requests.

240. The CVL also fails the neutrality test because the government made a categorical choice to prohibit the option for religious exemptions in virtual settings and in private schools, but it made the deliberate choice to maintain the medical exemption option. On March 29, 2024, Governor Jim Justice vetoed a bill that would have allowed for religious exemptions in the Virtual Academy. Conclusively demonstrating its non-neutrality and animus towards any possibility of religious observance in the compelled vaccination arena, the government made the deliberate choice that non-vaccination for religious reasons, even in virtual learning settings, cannot be tolerated, while continuing to allow for secular exemptions to the CVL for in-person students.

241. The CVL also fails the general applicability and neutrality tests on alternative grounds because West Virginia treats non-vaccination for secular reasons more favorably than non-vaccination for religious reasons.

242. Government regulations “are not neutral and generally applicable, and therefore trigger strict

scrutiny under the free exercise clause of the First Amendment, whenever they treat *any* comparable secular activity more favorably than religious exercise.” *Tandon*, 593 U.S. at 62 (emphasis in original).

243. Whether two activities are comparable for purposes of the free exercise clause depends on “the asserted government interest that justifies the regulation at issue.” *Id.*

244. Here, with regard to regulating the conduct of its secular and religious citizens, the government holds the same interest in mitigating against infectious disease in school settings. Further, the secular and religious activities at issue are not only comparable, but they are also exactly the same (non-vaccination).

245. A law “lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Fulton*, 593 U.S. at 534 (cleaned up).

246. Whatever interest West Virginia may have in promoting childhood vaccination, its interests are not so extraordinary as to prohibit an exemption for secular reasons, and hence can similarly provide an exemption for religious reasons, particularly for students who only attend online classes. Further, West Virginia liberally allows functional exemptions through non-enforcement of the CVL, and it does not prohibit unvaccinated children from visiting public libraries or museums, or from interacting with their peers in any other way. Nor does West Virginia require that teachers, staff members, or school

visitors provide proof of vaccination. West Virginia also allows unvaccinated students to be educated in learning pods in unlimited numbers.

247. These activities in which West Virginia permits non-vaccination for secular reasons, each in isolation pose a greater threat to its infectious disease-related goals than would permitting K.P. to be educated with a religious exemption. Collectively, these activities pose a dramatically greater threat under the *Tandon* framework and thus invoke strict scrutiny under the First Amendment on additional grounds.

The CVL Infringes on Other Constitutionally Protected Rights and also Triggers Strict Scrutiny because it Implicates Hybrid Rights

248. In *Yoder*, 406 US at 234-35, the Supreme Court acknowledged that Free Exercise rights can overlap with and can be inherently intertwined with the right to make decisions regarding the upbringing of one's child as recognized in *Pierce v. Socy. of Sisters*, 268 U.S. 510 (1925). There, the Court reached this conclusion due to the Amish's "religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of ... Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others." *Id.* at 235.

249. In such circumstances, "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a reasonable relation to some purpose within the competency of the State is

required to sustain the validity of the State's requirement under the First Amendment" (i.e., requires the application of strict scrutiny). *Yoder*, 406 U.S. at 233. *See also Smith*, 494 U.S. at 881-81 (acknowledging hybrid rights that triggered strict scrutiny).

250. Here, the CVL implicates Plaintiffs' right to free exercise as well as their right to free speech, to associate, and to regulate the upbringing and education of K.P. These provide independent reasons for applying strict scrutiny to the CVL in Plaintiffs' specific case.

The CVL Fails Strict Scrutiny

251. For the reasons detailed throughout, West Virginia lacks a sufficiently compelling interest to enforce the CVL against Plaintiffs specifically.

252. Whatever interests West Virginia may advance in support of its law, its interests are not so compelling as to prohibit secular exceptions. As applied to Plaintiffs, the government lacks a sufficiently compelling interest to restrict Plaintiffs' religious freedoms because this case involves a student attending a course of instruction that occurs online in which the child is physically located in their own home.

253. A law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited (e.g., here, granting medical exemptions for students physically attending school, permitting functional exemptions through lax enforcement, and

by allowing adults out of compliance with the CVL to work in the educational system).

254. Further, Defendants cannot rely on a broad policy goal, but must demonstrate a compelling interest in denying a religious exemption to K.P. specifically – a remote student who was enrolled in Virtual Academy for more than seventeen months before she was excluded.

255. In reviewing refusal of a religious exemption, courts cannot “rely on ‘broadly formulated interests’”; instead “courts must ‘scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.’” *Fulton*, 593 U.S. at 541 (cleaned up).

256. Thus, the “question, then, is not whether the [West Virginia] has a compelling interest in enforcing its” vaccination “policies generally, but whether it has such an interest in denying an exception to” Plaintiffs. *Id.*

257. Even if West Virginia could substantiate a sufficiently compelling interest to enforce the CVL specifically against Plaintiffs and specifically to exclude K.P. from the Virtual Academy, the law still fails strict scrutiny.

258. For the reasons detailed throughout, CVL Policy also is not narrowly tailored, is overinclusive, and substantially underinclusive, and therefore fails strict scrutiny on these additional grounds.

259. West Virginia’s CVL cannot withstand strict scrutiny because it is not narrowly tailored. In the context of government regulations targeting infectious disease, “narrow tailoring requires the

government to show that measures less restrictive of the First Amendment activity could not address its interest.” *Tandon*, 593 U.S. at 63. Where utilization of such less restrictive means is required, the government “may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal.” *Lukumi*, 508 U.S. at 578.

260. Regarding under-inclusivity, where the government permits secular activities, such as a medical exemption, “it must show that the religious exercise at issue is more dangerous.” *Tandon*, 593 U.S. at 63.

261. When a law is over-inclusive, its “broad scope . . . is unnecessary to serve the interest, and the statute fails for that reason.” *Lukumi*, 508 U.S. at 578.

262. West Virginia’s CVL cannot withstand heightened scrutiny because it is both overinclusive and under-inclusive relative to the state interests it purportedly attempts to achieve. Instead of regulating with the precision necessary to avoid conflict with its citizens’ free exercise rights, West Virginia eliminated every possibility for religious observance in the mandatory vaccination arena.

263. West Virginia’s compulsory vaccination scheme is under-inclusive because it only applies to children in a school setting. The mandate does not apply to non-school attending children (who regularly interact with their peers) nor to adults in the state,

who comprise over 80 percent of West Virginia's population.

264. The CVL is also under-inclusive because children possessing a religious exemption would pose no greater threat than their secular peers with a medical exemption. Moreover, the immunization requirements do not apply to adults who are employed in West Virginia's school system, or to school visitors.

265. Further, the existence of a religious exemption for attending school would have an immaterial impact in the number of individuals vaccinated in West Virginia. Nor would the existence of a religious exemption materially impact the overall percentage of vaccinated school children.

266. Given that West Virginia boasts one of the highest vaccination rates in the country, allowing a religious exemption for a handful of students, just as secular medical exceptions are permitted, would constitute an actual attempt at narrow tailoring.

267. Because West Virginia's CVL is simultaneously too narrow and too broad to fulfill the government interests it supposedly attempts to accomplish, and considering that forty-five other states have religious exemption options, the regulation lacks the narrow tailoring necessary to survive strict scrutiny review.

268. Accordingly, the CVL fails strict scrutiny and, at least as applied to online students such as K.P., would fail even rational basis review.

269. Therefore, as applied specifically to Plaintiffs, the CVL violates Plaintiffs' right to free exercise of religion.

Plaintiffs Have Suffered and Continue to Suffer Irreparable Harm

270. “The loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Because of Defendants’ actions, Plaintiffs have suffered and continue to suffer irreparable harm.

271. Absent injunctive and declaratory relief against the CVL and injunctive relief against Defendants, Plaintiffs will have been and will continue to be harmed.

272. Plaintiffs are entitled to a declaration that Defendants violated and continue to violate their First Amendment rights to free exercise of religion and an injunction against Defendants’ actions as they relate to West Virginia’s CVL.

INJUNCTIVE RELIEF ALLEGATIONS

273. Plaintiffs incorporate the allegations in the foregoing paragraphs as if set forth fully herein.

274. Plaintiffs allege that, as applied, the CVL violates their First Amendment rights and her right to be free from unlawful statutes.

275. Plaintiffs are being and will continue to be irreparably harmed unless this Court enjoins Defendants from enforcing the CVL against K.P.

276. Plaintiffs have no plain, speedy, and adequate remedy at law to prevent Defendants from enforcing the CVL against K.P.

277. If not enjoined by this Court, Defendants will continue to implement and enforce the CVL in violation of Plaintiffs' constitutional rights.

278. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

279. Plaintiffs incorporate the allegations in the foregoing paragraphs as if set forth fully herein.

280. Plaintiffs are entitled to a declaratory judgment pursuant to 28 U.S.C. § 2201. An actual and substantial controversy exists between Plaintiffs and Defendants as to their legal rights and duties with respect to whether West Virginia's CVL, which allows for secular but not religious exemptions to the Virtual Academy, violates the United States Constitution.

281. The case is presently justiciable because the CVL and absence of any religious exemption to the same applies to Plaintiffs and K.P., who is currently harmed by being excluded from the Virtual Academy.

282. Declaratory relief is therefore appropriate to resolve this controversy.

PRAYER FOR RELIEF

283. Pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983, it is appropriate and proper that a declaratory judgment be issued by this Court, declaring that the CVL is unconstitutional as applied to Plaintiffs.

284. Pursuant to 28 U.S.C. § 2202 and Fed. R. Civ. P. 65, and 42 U.S.C. § 1983 it is appropriate and hereby requested that the Court issue preliminary and permanent injunctions prohibiting Defendants

from enforcing the CVL against Plaintiffs, unless the government allows for religious exemption option for Plaintiffs.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter judgment against Defendants and provide Plaintiffs with the following relief:

- A. Declare the “no religious accommodation” policy to the CVL, as applied specifically to Plaintiffs, unconstitutional;
- B. Issue a preliminary and permanent injunction prohibiting Defendants, their agents, servants, employees and any other persons acting on their behalf from enforcing W. VA. CODE § 16-3-4 against Plaintiffs, unless the government provides an option for Plaintiffs to request a religious exemption to the Virtual Academy;
- C. Declare that W. VA. CODE § 16-3-4 is unconstitutional as applied specifically to Plaintiffs;
- D. Declare that W. VA. CODE § 16-3-4, as applied specifically to Plaintiffs, has violated and continues to violate Plaintiffs’ First Amendment right to free exercise of religion;
- E. Grant Plaintiffs reasonable attorneys’ fees and costs under 42 U.S.C. § 1988 and any other applicable authority; and
- F. For any such other and further relief as the Court deems equitable and just under the circumstances.

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Dated: July 5, 2024.

Respectfully submitted,

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submitted

VERIFICATION

I, Krystle Perry, a citizen of the United States and of West Virginia, have read the foregoing Complaint and know the contents thereof as to myself and my minor child, K.P., and that the facts therein that relate to me and K.P., are true to my knowledge and as to all other matters on information and belief and I believe them to be true.

I verify under penalty of perjury that the foregoing is true and correct.

Executed on July 4, 2024, in Oak Hill, West Virginia.

s/ Krystle Perry
Krystle Perry

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VERIFICATION

I, Anthony Perry, a citizen of the United States and of West Virginia, have read the foregoing Complaint and know the contents thereof as to myself and my minor child, K.P., and that the facts therein that relate to me and K.P., are true to my knowledge and as to all other matters on information and belief and I believe them to be true.

I verify under penalty of perjury that the foregoing is true and correct.

Executed on July 4, 2024, in Oak Hill, West Virginia.

s/ Anthony Perry
Anthony Perry