2010

Brief for Amici Curiae Children's Healthcare is a Legal Duty, Inc., West Virginia Chapter, American Academy of Pediatrics, Inc., Center for Rural Health Development, Inc.; West Virginia Association of Local Health Departments; Immunication Action Coalition, Inc. In support of Affirming Summary Judgment Granted to Defendants by the United States District Court for the Southern District of West Virginia

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RECORD NO. 09-2352

In The
United States Court of Appeals
For The Fourth Circuit

JENNIFER WORKMAN, individually and as guardian of M.W., a minor; M.W., a minor,

Plaintiffs – Appellants,

v.

MINGO COUNTY BOARD OF EDUCATION; DR. STEVEN L. PAINE, State Superintendent of Schools; DWIGHT DIALS, Superintendent of Mingo County Schools; WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Defendants – Appellees,

and

MINGO COUNTY SCHOOLS;
STATE OF WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Defendants,

v.

MARTHA YEAGER WALKER, in her capacity as Secretary of the West Virginia Department of Health and Human Resources; DR. CATHERINE C. SLEMP, in her capacity as State Health Director for the West Virginia Department of Health and Human Resources,

Third Party Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

BRIEF FOR AMICI CURIAE CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC., WEST VIRGINIA CHAPTER, AMERICAN ACADEMY OF PEDIATRICS, INC., CENTER FOR RURAL HEALTH DEVELOPMENT, INC.; WEST VIRGINIA ASSOCIATION OF LOCAL HEALTH DEPARTMENTS; IMMUNIZATION ACTION COALITION, INC. IN SUPPORT OF AFFIRMING SUMMARY JUDGMENT GRANTED TO DEFENDANTS BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-2352 Caption: Jennifer Workman v Mingo County Board of Education, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Academy Pediatri (name of party/amicus) who is amicus (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

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I certify that on _____ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Braun A. Hamstead (signature) 5/24/2010 (date)

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No. 09-2352 Caption: Jennifer Workman v. Mingo County Board of Education, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Center For Rural Health Dev (name of party/amicus) who is Amicus (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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No. 09-2352 Caption: Jennifer Workman v. Mingo County Board of Education, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Child, Inc. (name of party/amicus) who is Amicus (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

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No. 09-2352 Caption: Jennifer Workman v Mingo County Board of Education, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Immunization Action Coalitio (name of party/amicus) who is amicus (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

OTHER AUTHORITIES

STATEMENT OF IDENTITY OF AMICUS CURIAE, THEIR INTEREST IN CASE AND SOURCE OF AUTHORITY TO FILE

Children's Healthcare Is a Legal Duty, Inc. (CHILD) is a tax-exempt educational organization with approximately 450 members in 45 states and four foreign countries. CHILD's mission is to stop child abuse and neglect related to cultural tradition, religious beliefs, and harmful secular belief systems. CHILD provides information to public officials, scholars, and others; supports research, publishes a newsletter, files lawsuits, files *amicus curiae* briefs, and does a limited amount of lobbying. Its officers and honorary members have won many awards for their child advocacy work, including the National Association of Counsel for Children's Child Advocacy Service Award and awards by several chapters of the American Academy of Pediatrics. CHILD is a member of the National Child Abuse Coalition. CHILD views the subject failure to permit an infant's compulsory school immunization based on a "genuine religious belief" as squarely within its mission to prevent child abuse and neglect related to harmful religious beliefs.

The **West Virginia Chapter, American Academy of Pediatrics, Inc.,** represents 170 pediatricians, pediatricians in training and allied health practitioners in West Virginia. Its mission is first and foremost to advocate for our children's health. Immunizations have been the single most important advance in children's health in the past century preventing deadly diseases and death for uncountable

numbers of children in the United States and the rest of the world. Any attempt to weaken our immunization system is a threat to this public health accomplishment. The Academy recognizes the currently licensed vaccines, which are the subject of this appeal, as safe and effective. The West Virginia Chapter of the American Academy of Pediatrics therefore has a direct interest in maintaining the integrity of the state immunization system.

The **Center for Rural Health Development, Inc.** (Center) serves as the lead agency for the West Virginia Immunization Network (WIN). WIN is a coalition of over 100 individual and organizational members dedicated to protecting all West Virginians from the consequences of vaccine-preventable diseases.

WIN works to accomplish its goals by identifying and removing barriers to immunization services; educating families, health care providers and community members about the importance of timely immunizations and the consequences of vaccine-preventable diseases; and raising awareness among policy makers and fostering effective public policies. The Center is a private, not-for-profit organization with the mission to strengthen the health care infrastructure in West Virginia and improve the health of our state's residents.

The **West Virginia Association of Local Health Departments** represents all 49 local health departments in the state whose jurisdiction extends to all 55

counties. It is the mission of Local Health Departments (LHD's) to protect the health of the public and prevent the spread of disease.

All the member LHD's provide childhood immunizations as a part of their services to the public. They are also likely to see children and adults with infectious diseases who are seeking treatment, as a part of their routine delivery of public health services or during an outbreak. The health care providers in West Virginia LHD's recognize the value of a strong mandatory immunization law and support every effort to maintain and enforce our law.

The Immunization Action Coalition, Inc. is a national organization that promotes immunization to prevent the spread of disease. The Coalition creates and distributes educational materials on vaccines and facilitates communication about the safety, efficacy, and use of vaccines within the broad immunization community of patients, parents, health care organizations, and government health agencies.

The source of authority for the filing of this *Amicus Curiae* Brief is the Motion For Leave which this Brief accompanies.

SUMMARY OF ARGUMENT

Appellants make no assertion as to any beliefs of M.W., the minor at issue in this case, nor as to any other facts that could form the basis for any constitutional objection on M.W.'s behalf to West Virginia's compulsory vaccination law. This Court must therefore reject all claims advanced on behalf of M.W. and treat the

case as what it really is – namely, a parent's demand for greater power over a child's life.

Appellant Jennifer Workman's free exercise and substantive due process claims rest on an implicit premise that is obviously untenable and legally unsupportable – namely, that she is entitled to greater constitutional protection in controlling a child's life than she is in directing her own life. The United States Supreme Court has held that states may compel adults to receive vaccinations, and it has stated in dictum the obvious implication that states may also require that children receive the protection of vaccinations.

Appellant Workman's free exercise claim further rests on the implicit, and equally untenable, proposition that every child welfare law infringes the First Amendment rights of any parents who disagrees with it and whose religion tells them to do what is best for their children. Her religious beliefs say nothing about vaccinations per se; they simply tell her to take good care of her daughter. This is not the stuff of free exercise jurisprudence.

Appellant Workman's equal protection claim rests on the implicit and obviously untenable premise that every law of general applicability is discriminatory. She asserts that the state has violated her right to equal protection by not treating her differently, a peculiar theory of equal protection. If her claim is one of disparate impact, it cannot be that the law burdens her religious beliefs more

than the religious beliefs of other parents, unless it is the case that other parents' religions do not command them to do what is best for their children, which is quite doubtful. The disparate impact would instead have to be on parents who disagree with the state as to what, on secular grounds, is best for their child, relative to parents who agree with the state. That theory would subject every child welfare law to equal protection challenge by any parent who does not like it. In any event, disparate impact claims have little or no purchase under current constitutional doctrine.

Even if Appellant could present a *prima facie* case that West Virginia's compulsory immunization law infringes her right to free exercise, substantive due process, or equal protection, the Court must apply rational basis review and uphold the law as a clearly reasonable child health measure. Indeed the immunization law would pass even strict scrutiny, because constitutional doctrine uniformly supports a conclusion that protecting children's health is a compelling state interest that justifies a generally applicable immunization mandate. This Court should therefore affirm the district court's conclusion that the law does not violate any right of Appellant.

ARGUMENT

The State of West Virginia has opted to be a leader in protecting children's health, rather than a follower of states whose legislators buckle under political pressure to leave some children unprotected from disease at the insistence of their parents. West Virginia has chosen to put the rights and needs of children first, recognizing that children are persons in their own right and have fundamental interests at stake in connection with their healthcare. Indeed, a state cannot constitutionally do otherwise; to allow some parents to withhold immunization from their children based on the parents' mere disagreement with the law or their religious beliefs would violate the right of those children to equal protection of the laws. See Brown v. Stone, 378 So.2d 218, 222 (Miss. 1979). West Virginia has responsibly created an exemption only for cases in which state officials verify that immunization would do more harm than good for a child, and Appellant simply fails to qualify for that exemption. The United States Constitution does not require the State to create any other exemption for Appellant.

I. APPELLANT FAILS TO STATE A *PRIMA FACIE* CASE FOR A FREE EXERCISE OR EQUAL PROTECTION CLAIM

Appellant's factual allegations show neither a burden on her religious faith nor religiously-based discrimination. The Court should therefore dismiss both the free exercise claim and the equal protection claim for failure to state a claim.

A. A religious belief opposed to harming one's child cannot suffice to show infringement of the constitutional right to freedom of religion.

As a threshold requirement for a First Amendment free exercise claim, a plaintiff must allege a substantial burden on religious belief. A substantial burden "is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise … effectively impracticable." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003), cert. denied, 541 U.S. 1096 (2004). Thus, the state action complained of must directly, clearly, and substantially conflict with a central tenet of a person's religious faith, forcing a person to engage in specific conduct proscribed by a religious code or to refrain from specific conduct that is an element of religious practice.

Appellant alleges that she belongs to a church, but she does not allege that the church's tenets are opposed to immunization. As such, the immunization law *per se* does not burden her religious faith at all. What Appellant does allege is that her religion tells her not to harm her child, and that application of the immunization law in her case to her child would be medically harmful. State officials disagreed with her on that latter, non-religious factual question and therefore denied her a medical exemption to the state's immunization laws. Appellant thus in effect argues that her religious faith is burdened whenever a state official disagrees with her as to what, from a secular perspective, is best for her

child. Her free exercise argument therefore pertains not just to the state's application of its immunization law, but really to state officials' ever disagreeing with her as to any aspect of her child's welfare and attempting to enforce their conclusion. The exemption she seeks would therefore be the most sweeping religious exemption ever seen in the U.S., and finding a *prima facie* free exercise claim on the facts of this case would turn nearly every parental objection to any sort of child welfare law into a free exercise case.

This Court should hold that mere state disagreement on secular grounds with a parent's judgment on secular grounds of what is best for her child does not constitute a sufficient burden on religious belief to give rise to a free exercise claim. The connection with religious belief is far too tenuous. Denying Appellant's request for an exemption would not force her to do some specific act prohibited by her religion, nor would it inhibit in any way Appellant's worshipping or expressing her religious beliefs. The Court should not credit this stratagem for transforming a run-of-the-mill secular disagreement between a parent and state officials into a religious freedom case.

B. Appellant has experienced no discrimination on the basis of her religious beliefs.

As a threshold requirement for an equal protection claim, a plaintiff must allege state denial of some benefit or imposition of some cost in a situation where similarly situated persons have received the benefit or avoided the cost. Morrison

v. Garraghty, 239 F.3d 648, 654 (4th Cir. (Va.) 2001). The only hint of Appellant's religion-based equal protection theory on appeal is her statement that "[o]ther families can enroll their children in school and follow their religious beliefs." [Appellant's brief at 25] Of course, other parents in West Virginia cannot enroll their children in school unless they secure immunizations or qualify for the medical exemption, and as to parents who do one of those things Appellant is not similarly situated. All parents in West Virginia are subject to the same requirements under West Virginia law in order to enroll their children in school, without regard to religious belief. There is no *de jure* discrimination whatsoever among different parents based on their personal characteristics or beliefs, and therefore no basis for an equal protection claim.

What Appellant seems to suggest by her reference to religious belief in connection with an equal protection claim is that there is a disparate impact on parents with religious beliefs like hers. A law that specifically targets particular religious practices might be constitutionally problematic even if it is written in neutral terms. See Church of Lukumi Babalu Aye v. City Of Hialeah, 508 U.S. 520 (1993). But it would be absurd to suggest that West Virginia is aiming to suppress people with religious beliefs of the sort Appellant describes – that is, that she must do what is best for her child and follow "sound medical advice." [Appellant's brief at 6] Presumably the "other families" who can "enroll their children in school and

follow their religious beliefs" also believe that they should secure the best possible medical care for their children. Appellant differs from those families not in respect of religious belief, but rather in respect of secular beliefs about what is the best care for a child.

Appellant's equal protection argument therefore amounts to a disparate impact claim on behalf of a class of people characterized by a secular difference of opinion. To conclude that Appellant has stated a *prima facie* equal protection claim would thus open the door to equal protection challenges to every state law or action that some affected person believes to be misguided. Certainly this Court must reject such an argument.

II. PARENTS HAVE NO CONSTITUTIONAL RIGHT TO ENDANGER THEIR CHILDREN'S HEALTH.

At best, Appellant states a *prima facie* case for infringement of the basic Fourteenth Amendment substantive due process right of parents to some child-rearing authority. However, West Virginia can easily satisfy the rational basis test that a substantive due process parents' rights claim triggers. Moreover, even if Appellant did adequately allege infringement of her free exercise right, the rational basis test would still be the appropriate level of judicial scrutiny. Further, even if the Court did apply heightened scrutiny to this case, it would still have to find the state's application of its immunization law in this case constitutional, because it is

necessary to serve the state's compelling interest in ensuring that children receive proper health care.

A. Denying Appellant an exemption to immunization requirements does not violate her substantive due process rights.

Contrary to Appellant's suggestion, a parental substantive due process right is not a fundamental right triggering strict scrutiny. Rather, that right triggers only rational basis review, requiring that the court find merely that the challenged state action is reasonably related to a legitimate state interest. Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 178 (4th Cir. (N.C.) 1996). See also Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (noting that the other Justices who joined in the Court's plurality decision did not conclude that heightened scrutiny applies in parental substantive due process cases). Under the rational basis test, the Court must presume the challenged state action is constitutional, and the Appellant bears the burden of showing that the state action bears no reasonable relationship to a legitimate state purpose.

The state's obvious interest with respect to its immunization law is to protect children from disease, and Appellant has not alleged that her child is already immune from disease or does not have an interest in avoiding disease. Requiring that all children attending school receive the immunizations, unless there is documented reason to believe the immunizations would be medically harmful, is certainly a reasonable approach to serving the state's aim in protecting children

from disease. Entry into school is an opportune time and setting for enforcement of the requirement, because children are then leaving the home and entering into the temporary custody of non-parents. In addition, congregation of children in schools presents the danger of rapid spread of communicable diseases. West Virginia provides individualized assessment of each claim for a medical exemption, using qualified medical professionals. Appellant has no constitutional right to force the state to go further and simply defer to whatever parents think best or to parents' religious objections. Significantly, Appellant suggests no limiting principle for the holding she urges; in effect, she is arguing that the Constitution requires states to make immunization optional rather than mandatory. No precedents support that argument.

Indeed, it would be ironic if the law conferred on a parent such as Appellant Workman greater constitutional protection for her desire that her child not be vaccinated than for a desire on her part not to receive a vaccination herself, should a state decide to compel it. The Supreme Court has held that states constitutionally may require adults to be vaccinated, including adults who disagree with the state as to the health benefits of vaccination. See Jacobson v. Massachusetts, 197 U.S. 11 (1905). On Appellant's theory of parental rights, if West Virginia made a swine flu vaccine mandatory for all residents, she could not successfully object on constitutional grounds to being forced to get vaccinated herself, but she could

successfully block the state's effort to immunize her child if she thought it undesirable. The United States Supreme Court has rejected that proposition even in the context of parental religious objection to child welfare legislation. In dictum, the Court in Prince v. Massachusetts, 321 U.S. 158, 166 (1944), stated that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself."

B. Even if Appellant adequately stated a free exercise claim, rational basis review would apply.

Remarkably, Appellant fails to cite the leading precedent of the United States Supreme Court on free exercise rights. Employment Division v. Smith, 494 U.S. 872 (1990), established as a general rule for free exercise cases that strict scrutiny does not apply unless plaintiffs demonstrate that challenged state action is discriminatorily targeted against their religious faith. The Court stated: "The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id*. at 879. After Smith, laws that are religiously neutral and generally applicable are subject only to rational basis review. Thus, federal Courts of Appeals have, following Smith, rejected arguments for strict scrutiny in cases involving parental free exercise challenges to generally applicable child welfare laws. See, e.g., Combs v. Homer-Center School District, 540 F.3d 231, 244-47 (3d Cir. 2008). West

Virginia's immunization law is neutral as to religion on its face and in its substantive design. It is addressed to all parents without regard to religious belief, and contains an exemption that is entirely unrelated to religious belief.

C. Even if heightened scrutiny applied, state officials acted constitutionally in denying Appellant an exemption to immunization requirements.

Even if a court were to apply strict scrutiny to West Virginia's immunization law and its application to Appellant, it would have to reject Appellant's constitutional claims. Under strict scrutiny, the state would need to show that its law and actions were necessary to serve a compelling state interest. The Supreme Court and lower courts have consistently recognized that protecting the welfare of children is a compelling state interest, sufficient to justify even removing a child altogether from a parent's custody if the parent fails to protect the child's health. See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 134 (1989) (prohibition on obscene interstate commercial telephone messages); Coy v. Iowa, 487 U.S. 1012, 1025 (1988) (O'Connor, J., concurring) (protection of child witnesses); Jordan by Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. (Va.) 1994) (removal of child from parental custody); Swipies v. Kofka, 348 F.3d 701, 703 (8th Cir. 2003) (same); Tower v. Leslie-Brown, 326 F.3d 290, 297 (1st Cir. 2003) (same); Nicholson v. Scoppetta, 344 F.3d 154, 180 (2d Cir. 2003) (same); J.B. v. Washington County, 127 F.3d 919, 925 (10th Cir. 1997) (same); U.S. v. Moore,

215 F.3d 681, 686 (7th Cir. 2000) (prosecution for possession of child pornography); Blair v. Supreme Court of State of Wyo., 671 F.2d 389, 390 (10th Cir. 1982) (termination of parental rights).

In every decision upholding a parental rights objection to state law or action, the Supreme Court has found that the state failed to demonstrate an adverse impact on children from letting parents decide. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court rested its decision on a supposition that compelling Amish children to attend school beyond the eighth grade would not benefit them, and therefore that recognizing a right of Amish parents to a partial exemption from the compulsory education laws would have no adverse effect on the children. 406 U.S. at 229-30. The Court stated: "This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Id*. at 230. Importantly, the Court suggested that it would have reached an opposite decision if any danger to the children's interests were shown: "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child." *Id.* at 233.

Importantly, in the two free exercise cases in which the Supreme Court believed the challenged state laws *did* serve to protect the health interests of

children, the Court held in favor of the state. In Jehovah's Witnesses v. King County Hospital, 390 U.S. 598 (1968), the Court affirmed a lower court decision ordering highly intrusive blood transfusions for a child needing surgery, over the free exercise objection of Jehovah's Witness parents. In Prince v. Massachusetts, 321 U.S. 158 (1944), which remains the controlling Supreme Court precedent on conflicts between parental religious beliefs and state measures to protect children's health, the Court upheld a state law prohibiting parents from involving their children in distribution of leaflets on the streets after dark, against a claim that this law interfered with parents' free exercise of religion. Avoiding potential harm to children was all the justification the state needed to survive heightened judicial scrutiny in that case. After articulating the free exercise interests of parents, the Court stated:

> Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. *Id*. at 165.

The Court justified its holding by explaining: "Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control … ," and "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Id*. at 166-67.

Appellant can point to no explicit statement by any legislature or court that immunizations do not serve a compelling state interest. Moreover, there is today no reasonable alternative to immunization, so the mandatory immunization law is narrowly tailored to serve the compelling state interest of protecting children's health. The Court would therefore have to uphold West Virginia's immunization law as written and applied even if strict scrutiny were appropriate. It is true that other states include a religious exemption in their immunization laws, but it does not follow from the prevalence of exemptions that they are appropriate, let alone that they are constitutionally required. States decide not to do many things that they could do to protect people's welfare, especially when those they might protect are politically powerless and when there is a vocal group of people who want to deny that protection. West Virginia has instead decided to protect politically powerless children, even over the objection of some insistent parents. West Virginia is certainly constitutionally free to do so.

Significantly, the Court in Prince referred specifically and favorably to state compulsory immunization laws, *id*. at 166, and numerous lower court rulings since Prince have upheld state immunization laws in the face of parental religious objections. See, e.g., Boone v. Boozman, 217 F. Supp. 2d 938 (E.D. Ark. 2002); McCarthy v. Boozman, 212 F. Supp. 2d 945 (W.D. Ark. 2002); Davis v. State, 451 A.2d 107 (Md. 1982); Brown v. Stone, 378 So.2d 218 (Miss. 1979); Anderson v.

Georgia, 65 S.E.2d 848 (Ga. 1951); Wright v. DeWitt Sch. Dist., 385 S.W.2d 644 (Ark. 1965); Cude v. State, 377 S.W.2d 816 (Ark. 1964); Mosier v. Barren County Bd. of Health, 215 S.W.2d 967 (Ky. 1948); Sadlock v. Board of Education, 58 A.2d 218 (N.J. 1948). In his opinion for the Supreme Court in Smith, Justice Scalia favorably cited one of these decisions, in listing various kinds of general "civil obligations" from which he believed individuals have no right to an exemption under the Free Exercise Clause. 494 U.S. at 888-89 (citing Cude v. State, 377 S.W.2d 816 (Ark. 1964)). Courts have also upheld newborn metabolic screening requirements against religious objections by parents. See Spiering v. Heineman, 448 F. Supp. 2d 1129 (D. Neb. 2006); Douglas County v. Anaya, 694 N.W.2d 601 (Neb. 2005), cert. denied, 546 U.S. 826 (2005).

III. IMMUNIZATION IS AN IMPORTANT COMPONENT OF HEALTH CARE FOR ALL CHILDREN.

Vaccines are among the greatest achievements of medical science, saving millions of lives and millions of dollars in medical costs and public health expenditures. Despite the great reduction in contagious diseases as a result of vaccination, unvaccinated children today are still at high risk for contracting diseases that can cause them great suffering and even death.

A. Currently required immunizations are highly effective.

All the vaccines required for children in West Virginia law have data proving their effectiveness. A peer-reviewed study in the *Journal of the American*

Medical Association (*JAMA*) compared current mortality and morbidity for vaccine-preventable diseases to mortality and morbidity in the decade before the vaccines became widely available. For diphtheria, the decline in both was 100%. For measles the decline in morbidity was 99.9% and in mortality it was 100%. Mumps cases have declined by 95.9% and deaths by 100%. Polio morbidity and mortality have declined by 100%. Rubella morbidity has declined by 99.9% and mortality by 100%. Tetanus cases have declined by 92.9% and mortality by 99.2%. Cases of acute hepatitis B and mortality have declined by 80.1 and 80.2% respectively. Both mortality and morbidity from Haemophilus influenzae, type b (Hib) disease have declined by more than 99% since the Hib vaccine was introduced. The incidence of pertussis has declined by 92.2% and deaths from the disease have declined by 99.3% since the pertussis vaccine was introduced. There used to be over 4 million U.S. cases of chickenpox a year that caused over 10,000 hospitalizations and 100 deaths every year. After the introduction of the varicella vaccine, the incidence of chickenpox declined by 85%, hospitalizations by 88%, and deaths by 81.9%.[1]

The decline in numbers is as impressive as the percentile decline. In the decade before the measles vaccine became available, there were an average of

[1] SW Roush *et al*., "Historical comparisons of morbidity and mortality for vaccine-preventable diseases in the United States," 298 *Journal of the American Medical Association* (Nov. 14, 2007):2156, 2158.

530,217 cases of measles and 440 deaths due to measles complications in the U.S. each year. In 2006 there were only 55 cases of measles and no deaths in the entire country.[2]

B. Belief exemptions increase risks to all children.

Though immunizations have dramatically reduced incidence of many contagious diseases in the U.S., unvaccinated children in West Virginia remain at significant risk. Society is much more mobile today than in previous centuries. Diseases can be imported from anywhere to anywhere. For example, in 2008 measles was imported to San Diego from Switzerland and spread through a charter school with a high percentage of personal belief exemptions from immunizations. All twelve children confirmed with measles were unvaccinated, either because of their parents' beliefs or because they were under a year old.[3]

Studies confirm that children whose parents claim a personal belief exemption from immunizations are at far higher risk of contracting vaccine-preventable diseases. For example, Daniel Salmon *et al*. found that those with belief exemptions were 35 times more likely to contract measles than vaccinated

[2] Roush, *supra:*2156.

[3] R Lin and S Poindexter, "California schools' risk rise as vaccinations drop," *Los Angeles Times* (March 29, 2009).

persons.[4] Daniel Feikin *et al*. found that exemptors were 5.9 times more likely to contract pertussis than vaccinated children.[5] The country's largest measles outbreak since 1992 occurred at a school for Christian Science children with religious exemptions from immunizations. It spread to 247 persons, almost all of them children and including many in public schools.[6] In a 1985 outbreak at Christian Science schools, three young people died.[7] A compilation of some cases and outbreaks of vaccine-preventable disease among groups with religious or philosophical exemptions from immunizations is at CHILD's webpage, www.childrenshealthcare.org.

Unvaccinated children are not only at higher risk for disease themselves, but also increase the risk to the general public. Vaccines do not always confer 100% immunity, so it is possible for a properly vaccinated child to contract a disease from an unvaccinated carrier. Importantly, some vaccines cannot be given until

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[4] DA Salmon *et al*., "Health consequences of religious and philosophical exemptions from immunization laws: individual and societal risk of measles," 282 JAMA (July 7, 1999):47-53.

[5] DR Feikin *et al*., "Individual and community risks of measles and pertussis associated with personal exemptions to immunization," 284 JAMA (Dec. 27, 2000):3145-3150.

[6] "Outbreak of measles among Christian Science students—Missouri and Illinois 1994," 43 MMWR (July 1, 1994):463-465.

[7] T Novotny *et al*., "Measles outbreaks in religious groups exempt from immunization laws," 103 *Public Health Report* (Jan.-Feb. 1988):49-54.

children reach a certain age, leaving younger children vulnerable in the meantime to contagion by older, unvaccinated children. For example, the measles vaccine cannot be given until a baby is a year old, yet measles is a highly contagious, airborne virus. From 1999 to 2004, 91 U.S. babies under one year old died of pertussis. More than half of them were under two months and therefore too young to be immunized against pertussis.[8]

Outbreaks of diseases targeted by West Virginia's immunization law happen every year. In 2008 five Minnesota children contracted Hib disease and one died. Three of the children, including the child who died, were unvaccinated because of their parents' beliefs against immunizations. A fourth child had not completed the series of three shots. The fifth child, Julieanna Metcalf, contracted Hib meningitis at 15 months old even though she had had the recommended doses of Hib vaccine. The toddler had seizures, required emergency brain surgery, and was hospitalized for three weeks. She had to relearn how to swallow, walk, crawl, and talk.[9] Later, physicians found she had hypogammaglobulinemia, a rare immune deficiency

[8]J Glanz *et al*., "Parental refusal of pertussis vaccination is associated with an increased risk of pertussis infection in children," 123 *Pediatrics* (June 2009):1446-1451.

[9] E Carlyle, "Rare Hib disease increases in Minnesota," *City Pages*, June 3, 2009; www.citypages.com/2009-06-03.

disorder, which made her vulnerable to infectious disease despite being vaccinated.[10]

In the United Kingdom two teenagers died of measles complications in 2006 and 2008 respectively. In 2004 two London boys were permanently disabled by measles complications. One is blind and paralyzed; his friend is partially paralyzed and speech-impaired. All four youths had medical problems that prevented them from being vaccinated.[11] Like Julieanna Metcalf, they were dependent on the society around them for protection.

C. Outbreaks of preventable diseases are extremely costly.

The staggering cost of vaccine-preventable disease outbreaks is another good reason to require immunizations. Just two measles cases in 2007 cost Oregon, Lane County, and a hospital $170,000.[12] When contagious disease strikes, Public Health Departments must track down everyone who may have been in contact with the patient. Sometimes that includes hundreds of people across continents. When four babies in California who were too young to be vaccinated

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[10] E Carlyle, *supra*.

[11] R Smith, "Teenager dies of measles as cases continue to rise, government officials say," *The Telegraph*, June 21, 2008; Nina Goswami and Jon Ungoed-Thomas, "Human cost of MMR scare," *The Sunday Times*, April 4, 2004; "First measles death for 14 years," BBC News, April 3, 2006.

[12] P Parker, "Oregon's low vaccination rate causes health concerns," *The Oregonian* (Aug. 27, 2008).

contracted measles in 2008, one had to be hospitalized for two days, and another traveled by plane to Hawaii, which meant that health officials had to locate the 250 people who were on the plane and who could therefore have been exposed to the disease by the baby.[13]

In addition, keeping a child in quarantine may pose great inconvenience for today's parents because of the high percentage of women in the workforce and single households. In 2008 seventy children had to be quarantined for two weeks or more during the San Diego measles outbreak and their health "continuously monitored by the County Public Health staff."[14] Many of them had to be quarantined not because of their parents' beliefs but because they were under a year old or were medically fragile.

In sum, parents who refuse to have their children immunized put their own children at significant risk of serious disease, and they also risk imposing a huge cost on other members of society and on the public fisc.

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[13] www.sdcounty.ca.gov/hhsa/docs/PHS-02198-MeaslesUpdate-Final; CDC, "Update: measles-United States, January-July 2008, 57 MMWR (Aug. 22, 2008):893-96.

[14] *Loc. cit.*

IV. M.W. HAS A CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF HER INTEREST IN AVOIDING PREVENTABLE DISEASES.

What many litigants and some courts overlook in state-parent conflicts over children's health care is that children themselves have constitutional rights at stake. To grant a religious exemption to some parents would amount to denying the children of those parents an important welfare protection that the state ensures for other children. It would thus constitute a denial of equal protection to the children who go unimmunized. It is MW's health and the health of other children in a similar position in West Virginia that are ultimately at issue in this case. The state's immunization law is designed for the children's protection, and the ultimate issue in this case is whether all who would benefit from immunization will in fact receive this protection that the legislature decided they should have.

For this Court to empower Appellant to countermand the legislature and prevent MW from receiving the protection of the state's immunization law would be effectively to treat MW as less deserving than other children of the protections afforded by state child welfare laws. Such judicial action would constitute a *prima facie* violation of the Fourteenth Amendment Equal Protection Clause of the United States Constitution, which prohibits state actors, including courts, from denying the law's protections to particular citizens without strong justification. And there is no support in constitutional precedent for the proposition that

someone else's wishes can supply such justification, even if the someone else is a parent of the person denied the protection.

The Mississippi Supreme Court, in Brown v. Stone, 378 So.2d 218 (Miss. 1979), recognized that parental religious claims to exemption from a compulsory immunization law amount to a demand that the state deny certain children the equal protection of the law. "A child," wrote the Court, "is indeed himself an individual, although under certain disabilities until majority, with rights in his own person which must be respected and may be enforced." The Court further held that "innocent children, too young to decide for themselves" should not "be denied the protection against crippling and death that immunization provides because of [their parents'] religious belief." Accordingly, the Court struck down a religious exemption in the State's compulsory immunization laws, because it violated the Fourteenth Amendment's guarantee of equal protection. 378 So.2d at 222.

Similarly, in State v. Miskimens, 490 N.E.2d 931 (Ohio Com. Pl. 1984), an Ohio court held that the religious defense in the State's felony child endangerment law violated the equal protection rights of children whose parents relied on it after being charged with failure to secure medical care that their children needed. The court stated:

> This special protection [of medical care] should be guaranteed to all such children until they have their own opportunity to make life's important religious decisions for themselves upon attainment of the age of reason. After all, given the opportunity when grown up, a child

> may someday choose to reject the most sincerely held of his parents' religious beliefs, just as the parents on trial here have apparently grown to reject some beliefs of their parents. Equal protection should not be denied to innocent babies, whether under the label of "religious freedom" or otherwise. 490 N.E.2d at 935-36.

Debilitating illness or death could rob MW of the opportunity to become an autonomous person, to make her own decisions about religious belief and about the kind of life she will lead. The immunization that West Virginia requires can prevent such a profound loss, and no one has a right to take that protection away from MW or from any other child.

CONCLUSION

This is not an exceptional case. Any aspect of any state's child welfare laws can conflict with some parents' religious beliefs or with their own judgment about what is best for their child, given the infinite variety of religious beliefs and personal views about medical care that people can adopt. The West Virginia legislature has wisely refused to enact a religious exemption from its immunization requirement, and state officials are responsibly applying the law's exemption for medical contra-indication. This Court should not establish a precedent that parents are entitled to an exemption from any child welfare laws to which they claim to have a religious objection or that they believe will harm their child, against the judgment of public officials after careful review of the matter.

Such a precedent would greatly complicate state efforts to promote the welfare of children. It would also result in suffering, disease, bodily damage, and death to some children. The State of West Virginia unquestionably has a compelling interest in preventing this. It has acted to serve this interest by requiring immunization, and the state legislature has made a considered judgment that a religious exemption would be contrary to this compelling interest. Parents have no legal or moral entitlement to override this legislative judgment or to subject any child to the danger of such harm. On the contrary, MW has a right not to be denied this important protection that other children receive.

The *Amici* child welfare organizations do not question the good intentions of parents like Appellant, but no one's good intentions entitle him or her to deny other persons legal protections that the state has granted. Although Ms. Workman might not appreciate it, laws like that mandating immunization of children actually benefit parents as well – all parents – by increasing the likelihood that they can share with their children in a long and healthy life.

Respectfully Submitted,

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Dated: May 24, 2010

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 24th day of May, 2010, I caused this Brief of Amici Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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