UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CIVIL CASE NO. 2:09-CV-00325

JENNIFER WORKMAN, Individually and as Guardian of MW, a minor

PLAINTIFF

vs.

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

DEFENDANTS.

BRIEF FOR AMICI CURIAE CHILDREN'S HEALTHCARE IS A LEGAL DUTY

WEST VIRGINIA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS

CENTER FOR RURAL HEALTH DEVELOPMENT, Inc.

WEST VIRGINIA ASSOCIATION OF LOCAL HEALTH DEPARTMENTS

VOICES FOR VACCINES

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ARGUMENT

The State of West Virginia has opted to be a leader in protecting children's health, rather than a follower of those 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. 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 Plaintiff simply fails to qualify for that exemption. The federal Constitution does not require the State to create any other exemption for Plaintiff.

In fact, the religion-based exemption Plaintiff effectively seeks would be the most sweeping religious exemption ever seen in the U.S.. Plaintiff does not allege that her religion is opposed to immunization, but rather that her religion is opposed to doing what she thinks is bad for her child. Were the Court to accept a free exercise claim based merely on that sort of religious belief, it would implicitly turn nearly every parental objection to any sort of child welfare law into a free exercise case. The Court should instead conclude that Plaintiff fails to satisfy the threshold free exercise claim requirement of showing a burden on religious faith.

Even if Plaintiff did have a religious objection to immunization *per se* or could on other grounds show a *prima facie* infringement of a constitutional right, constitutional doctrine uniformly supports a conclusion that protecting children's health is a compelling state interest that justifies a generally applicable immunization mandate with no religious exemption.

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

Plaintiff's factual allegations show neither a burden on her religious faith nor 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.

Plaintiff 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 Plaintiff 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. Plaintiff 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 challenge is therefore

not to the immunization law, but to state officials' ever disagreeing with her about what is best for her children's healthcare and attempting to enforce their conclusion.

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 support a free exercise claim. The connection with religious belief is tenuous at best. At a minimum, a plaintiff should have to show that her religion requires or prohibits specific conduct, and that the state is directly interfering with her ability to comply with that mandate. Denying Plaintiff'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 Plaintiff's worshipping or expressing her religious beliefs. Plaintiff has fabricated a free exercise claim in the hope of convincing the Court to apply a higher level of scrutiny than a mere substantive due process claim would require. 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. Alleging merely that others are receiving an exemption one has been denied does not suffice to show discrimination for equal protection purposes.

Plaintiff alleges that the state's denial of her exemption request violates her Fourteenth Amendment right to equal protection of the laws. 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). Yet Plaintiff's singular allegation relevant to her equal protection allegation is that "there are now students in attendance in the public, private, and parochial schools, who are not immunized based upon their receiving exemptions from immunization." Amended Complaint at 7. Plaintiff does not allege that her

child is similarly situated to those other students. Presumably, state officials concluded that those other students presented sufficient documentation of medical contra-indication for immunization, whereas they concluded that Plaintiff had not done so. Plaintiff does not allege that she provided the same documentation or that her child's medical condition is similar to that of any student who has received the exemption. As such, Plaintiff's Complaint is also facially deficient with respect to her equal protection claim and the Court must reject that claim as well.

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

At best, Plaintiff 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 Plaintiff 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 plaintiff an exemption to immunization requirements does not violate her substantive due process rights.

A parental substantive due process claim demands less of a plaintiff as an initial matter than does a free exercise or equal protection claim; a parent need only show that the state is making her do something she does not want to do or preventing her from doing something she wants to do with respect to her child. Plaintiff can thus state a *prima facie* case for infringement of her substantive due process parental right. However, the substantive due process right also

affords parents less protection of their child-rearing preferences; it 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 Plaintiff bears the burden of showing that the state action bears no reasonable relationship to a legitimate state action.

The state's obvious interest with respect to its immunization law is to protect children from disease, and Plaintiff 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. As discussed in Part III below, even children who have received vaccinations are at some risk of contracting disease from an unimmunized carrier.

Any parent might contend that his or her child has little need for immunizations and poses little danger of spreading diseases, because nearly all other children in the school are immunized, and so that the state could still serve its aim while allowing that any parent who wishes to may opt out. As explained in Part III below, the factual assumptions underlying that

line of reasoning are false. But in any event, under rational basis review, the state is not required to fine tune its regulations to minimize impact on potential dissenters, nor to impose its requirement to the minimal extent necessary to serve its aim sufficiently. West Virginia already provides individualized assessment of each claim for a medical exemption, in order to limit application of its law to cases in which it would in fact benefit children medically. Plaintiff has no constitutional right to force the state to go further and simply defer to whatever parents think best or to parents' religious objections. Cf. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (rejecting an objection to compulsory immunization of adults based on constitutionally-protected liberty and on disagreement with the state as to the efficacy of vaccines). Significantly, Plaintiff 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.

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

The United States Supreme Court decision in 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.

Plaintiff does not contend that West Virginia's immunization law, or even the denial of

an exemption in her case, targets her religious faith for discriminatory treatment. Clearly the law is neutral as to religion, addressed to all parents without regard to religious belief, and containing an exemption that is entirely unrelated to religious belief. Plaintiff does claim discrimination, as noted in Part I above, but not on the basis of religious belief; rather, she alleges only different treatment relative to other parents or students who claimed a medical exemption.

Plaintiffs frustrated by the Smith rule routinely attempt a "hybrid rights" argument for strict scrutiny. The Plaintiff in this case will no doubt do the same. However, the only support for such an argument is some dictum in Smith suggesting that constitutional rights claims might have some additive effect. 494 U.S. at 881-82. Such dictum does not amount to a statement or holding of the Court, but rather constitutes simply the musings of one Justice and has no precedential value. Subsequent to Smith, the Court has never adopted the hybrid rights idea.

Most lower courts adjudicating free exercise cases after Smith have rejected the hybrid rights theory of strict scrutiny, in parents' rights cases and in other contexts. See Combs v. Homer-Center School District, 540 F.3d 231, 244-47 (3rd Cir. 2008) (rejecting the theory and citing similar decisions of the Second and Sixth Circuits). The Sixth Circuit, in explaining why it rejected the very idea of a higher standard of review for so-called "hybrid-rights claims," stated: "Such an outcome is completely illogical; therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in Smith to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (rights to free speech and free press). Other courts have required that the supplemental constitutional right itself be an adequate basis for the plaintiff succeeding. See Combs, 540 F.3d at 245-46 (citing decisions of

the 1st Circuit and the D.C. Circuit Courts of Appeals). As explained above, Plaintiff's substantive due process claim clearly is not sufficient itself to compel the state to make an exemption for her. And the Ninth and Tenth Circuit Courts of Appeals have said they will apply strict scrutiny in a free exercise case if the plaintiff would have a "fair probability or likelihood of success on the merits" if they asserted only the companion right. *Id*. Again, as discussed above, Plaintiff would have no chance of success on solely a substantive due process claim.

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

Prior to Smith, the Supreme Court did apply some form of heightened review in all free exercise cases, including those, like Wisconsin v. Yoder, 406 U.S. 205 (1972), involving parental religious objections to religiously-neutral state child welfare laws. Notably, however, in no case has the United States Supreme Court ever held that parents have a right under the First or Fourteenth Amendment, or the two amendments in combination, to an exemption from state laws that would benefit their children. In Yoder, the seminal pre-Smith parental free exercise case, 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, or have a potential for significant social burdens. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society. *Id*. at 233-34.

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 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.

Significantly, the Court in Prince referred specifically and favorably to state compulsory immunization laws, which require a preventive measure for children who are not presently manifesting disease or impairment. *Id*. at 166. And numerous lower court rulings since Prince have in fact 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).

In the second Supreme Court decision upholding state action aimed at ensuring health care for a child, Jehovah's Witnesses v. King County Hospital, 390 U.S. 598 (1968), the Court affirmed a lower court decision that applied Prince in ordering blood transfusions for a child needing surgery, over the free exercise objection of Jehovah's Witness parents. The health danger for the child in that case was immediate and severe, but the intrusiveness of court action in that case was also much more severe than is mandatory immunization.

In these and other cases, 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. 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 (2nd 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). Plaintiff 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.

Plaintiff will no doubt point to the fact that most states include a religious exemption in their immunization laws. However, 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. It is certainly constitutionally free to do so. Moreover, Plaintiff can point to no immunization exemption provision in any state that is predicated simply on a religious belief against harming one's child. Rather, states that have religious exemptions require parents to affirm that their religious faith prohibits immunization specifically. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 76, § 15 (2009) ("In the absence of an emergency or epidemic of disease declared by the department of public health, no child whose parent or guardian states in writing that vaccination or immunization conflicts with his sincere religious beliefs shall be required to present said physician's certificate in order to be admitted to school."). As noted above, an exemption of the sort Plaintiff seeks would effectively make immunization voluntary rather than mandatory and severely undermine the state's public health aims. Any parents who adhere to any religious faith whatsoever could truthfully state that their religion commands them not to harm their children.

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 530,217 cases of measles and

[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.

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 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

[2] Roush, *supra:*2156.
[3] R Lin and S Poindexter, "California schools' risk rise as vaccinations drop," *Los Angeles Times* (March 29, 2009).
[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.

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 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, airborn virus. From 1999 to 2004, 91 U.S. babies under one year 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,

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

and talk.[9] Later, physicians found she had hypogammaglobulinemia, a rare immune deficiency 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 on across continents. When four babies in California who were too young to be vaccinated contracted measles, 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 a San Diego measles

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

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.

IV. MW 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 Plaintiff 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

[14] *Loc. cit.*

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 decisions for herself 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 Plaintiff, 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.

APPENDIX A: DESCRIPTION OF AMICI CURIAE

Children's Healthcare Is a Legal Duty (CHILD) is a tax-exempt educational organization with approximately 450 members in 42 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.

The **West Virginia Chapter of the American Academy of Pediatrics** represents 170 pediatricians, pediatricians in training and allied health practitioners in West Virginia. Our 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 currently licensed vaccines are safe and effective.

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. Vaccines have reduced and, in some cases, eliminated many diseases that in past generations killed or severely disabled people in the United States and in West Virginia. Before vaccines, parents in the United States could expect that every year:

- Polio would paralyze 10,000 children.
- Measles would infect about 4 million children, killing 3,000.
- Diphtheria would be one of the most common causes of death in school-aged children.
- A bacterium called Haemophilus influenzae type b (Hib) would cause meningitis in 15,000 children, leaving many with permanent brain damage.

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 Center works through public/private partnerships to accomplish its mission.

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 of 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 nurses, doctors, and hard-working staff of LHD's in West Virginia recognize the value of a strong mandatory immunization law and support every effort to maintain and enforce our law.

Voices for Vaccines is a national membership organization that distributes scientific information on the value of immunizations. It accepts no support from industry or government. It is an independent program supported logistically by the Task Force for Child Survival and Development, a tax-exempt charity.

JENNIFER WORKMAN, Individually and as Guardian of MW, a minor PLAINTIFF	)	
vs.	)	AFFIDAVIT OF MAILING AND PROOF OF SERVICE
MINGO COUNTRY BOARD OF EDUCATION, DR. STEVEN PAINE, State Superintendent of Schools, DWIGHT DIALS, Superintendent Mingo County Schools, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, DEFENDANTS.	)	

After first being duly sworn under oath, affiant states that on August ___, 2009, he deposited in the United States mail, ___ copies of the foregoing *amicus curiae* brief to …

FURTHER AFFIANT SAYETH NOT.

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SUBSCRIBED, SWORN and acknowledged to before me on this ___ day of August, 2009.

Notary Public