No. _____

In The Supreme Court of the United States

JENNIFER WORKMAN,

Petitioner,

v.

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Jennifer Workman requested a religious exemption from a state law requiring vaccinations for children entering public school. Although the statute allows for medical exemptions, Workman's request for a religious exemption was denied. Petitioner presents the following questions:

I. When the application of a law burdens an individual's rights under the Free Exercise Clause of the First Amendment and the law contains secular exemptions, must a reviewing court applying strict scrutiny evaluate the government's interest in passing the law or rather the government's interest in refusing to extend an exemption for religious reasons?

II. In evaluating Free Exercise claims in the context of vaccination requirements, may a court rely generally on this Court's precedents decided during disease epidemics, or must it instead evaluate the competing government and individual liberty interests in light of actual, current circumstances?

III. Should courts apply strict scrutiny to laws that burden "hybrid rights"—an individual's rights under the Free Exercise Clause of the First Amendment and other protected liberty interests?

PARTIES TO THE PROCEEDING

The Petitioner in this matter is Jennifer Workman, individually and as guardian and next friend of Infant M.W., whose date of birth is November 26, 2002.

The Respondents are 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; Mingo County Schools; State of West Virginia Department of Health and Human Resources.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners M.W. and Jennifer Workman respectfully petition for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals in *Workman, et al. v. Mingo County Board of Education, et al.*, 2011 U.S. App. LEXIS 5920 (4th Cir. 2011).

OPINIONS BELOW

The decision of the Fourth Circuit Court of Appeals is reported at 2011 U.S. App. LEXIS 5920 and is set out hereinafter as Appendix ("App.") A1. The district court's judgment, App. B1, is reported as *Workman v Mingo County Sch.*, 667 F.Supp. 2d 679.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 2011. See App. C1. Jennifer Workman's Petition for Rehearing and for Rehearing En Banc, was filed pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Fourth Circuit Rules 35 and 40 on April 5, 2011 and denied on April 19, 2011. See App. D1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case is brought under the First Amendment to the United States Constitution, which provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." This case also involves the Fourteenth Amendment to the United States Constitution, which provides in relevant part: "[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Petitioner Workman challenges the application of a West Virginia statute which provides, in relevant part:

> All children entering school for the first time in this state shall have been immunized against diphtheria, polio, rubeola, rubella, tetanus and whooping cough. Any person who cannot give satisfactory proof of having been immunized previously or a certificate from a reputable physician showing that an immunization for any or all diphtheria, polio, rubeola, rubella, tetanus and whooping cough is impossible or improper or sufficient reason why any or all immunizations should not be done, shall be immunized for diphtheria, polio, rubeola, rubella, tetanus and whooping cough prior to being admitted in any of the schools of the state. No child or person shall be admitted or received in any of the schools of the state until he or she has been immunized as hereinafter provided or produces a certificate

> from a reputable physician showing that an immunization for diphtheria, polio, rubeola, rubella, tetanus and whooping cough has been done or is impossible or improper or other sufficient reason why such immunizations have not been done.

W. Va. Code § 16-3-4. Said statute is set out in full in Appendix G.

STATEMENT OF THE CASE

A. Factual History

Petitioner Jennifer Workman is the mother and natural guardian of Infant Petitioner M.W., whose date of birth is November 26, 2002. M.W.'s older sister, SGW, suffers from serious health problems that Doctor John McCallum M.D. has found sufficient for him to certify a medical exemption from immunizations. 667 F.Supp.2d at 681-82; App. B5 Ms. Workman's faith as a member of the Bapticostal Church prohibits her from subjecting her daughter to any medical harm; it would violate her sincere and religious beliefs contrary to acting against sound medical advice, such as that of John MacCallum M.D. 667 F.Supp.2d at 684; App. B10-11.

On or about September 4, 2007, Dr. MacCullum drafted a medical exemption certificate from vaccines for M.W.. 667 F.Supp.2d at 682; App. B-6. Subsequently, on or about September 11, 2007, Dr. Marlo Tampoya, Mingo County Health Officer, approved this certificate and the application for the medical vaccine exemption. *Id.*

Nonetheless, on or about October 3, 2007, State Officer Catherine Slemp, M.D. recommended rejecting the medical exemption. *Id.* at 682; App. B7. Subsequently, Ms. Workman and M.W. received a letter notifying them that the exemption was now denied, and that without vaccines M.W. would be excluded from school starting on October 12, 2007. *Id.* at 683; App. B9-10.

Thus, M.W. has been unable to attend her local school. See *Id.* Her parents have sent her to a school in Kentucky at great expense. See *Id.* at 683; App. B10.

As a result, Petitioner Ms. Workman and M.W. asserted federal question jurisdiction and commenced an action in the United States District Court of West Virginia. *Id.* Ms. Workman and M.W. argue violation of their Free Exercise rights and Equal Protection as a result of the statutory application. West Virginia Code § 16-3-4. *Id.*

B. Proceedings in the District Court

On April 1, 2009, Ms. Workman and M.W. filed this action in the United States District Court of West Virginia. *Id.* Originally, Judge Faber was assigned; the matter was subsequently transferred to Judge Goodwin. Ms. Workman and M.W. also brought a motion for a Temporary Restraining Order. On April 24, 2009, the Court granted to Ms. Workman and M.W. said order against Superintendent Dials and West Virginia Department of Health and Human Resources.

West Virginia Department of Health and Human Resources moved to dismiss the claims against it; said motion was granted on or about May 27, 2009.

On or about May 11, 2009, Ms. Workman and M.W. filed and served an Amended Complaint, which added State Superintendent Dr. Paine, and renamed the school district as the "Mingo County Board of Education." All Respondents waived their right to service of a summons.

A Third Party Complaint named Dr. Catherine C. Slemp and Martha Yeager Walker as Third-party Defendants; State Superintendent Dr. Paine and Mingo County Board of Education sought a determination that state actions taken were proper.

All parties moved for summary judgment, with the final supporting papers being filed and served in September 2009. On November 3, 2009, the lower Court granted all Mingo County Board of Education, Superintendent Dials and State Superintendent Dr. Paine's Motions for Summary Judgment and denied Ms. Workman and M.W.'s Motion for Summary Judgment. *Id.*; Appendix B. It held that Eleventh Amendment immunity shielded Mingo County Board of Education, Superintendent Dials and State Superintendent Dr. Paine from damages claims, and that no constitutional right existed that Ms. Workman and M.W. could utilize to support their religious objections to vaccinating a child with a family history of adverse reactions to vaccines. *Id.*

Within thirty days, Ms. Workman and M.W. appealed. The parties had a settlement conference call with a mediator on or about January 7, 2010, but were unable to reach a settlement.

C. Proceedings in the Court of Appeals

On December 9, 2009 a Notice of Appellate Case Opening was filed by Ms. Workman and M.W. in the United States Court of Appeals for the Fourth Circuit. 2011 U.S. App. LEXIS 5920 (4th Cir. 2011); Appendix A. A panel of the Fourth Circuit concluded that Workman was not entitled to an accommodation under the Free Exercise Clause of the First Amendment to the United States Constitution and affirmed the District Court's summary judgment in favor of Respondents. *Id.*

The Court summarily concluded that the West Virginia law withstood strict scrutiny, citing no evidence that the state had a compelling interest in denying an accommodation to M.W. under any circumstances, nor citing any evidence that denial of the requested accommodation was the least restrictive means of furthering such a compelling government interest. *Id.* at *8; App. A9.

In counsel's judgment, the panel's decision involves (1) questions of exceptional importance; and (2) conflicts with decisions of the Supreme Court and of the Fourth Circuit Court.

REASONS FOR GRANTING THE PETITION

A. THE FOURTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT BY CREATING A NEW "STRICT SCRUTINY" ANALYSIS THAT IGNORES THE STATE'S SYSTEM OF INDIVIDUALIZED EXEMPTIONS

In ruling on this case, the Fourth Circuit did not question the sincerity of Workman's religious beliefs. In ostensibly applying the strict scrutiny analysis to Workman's Free Exercise claim, the Fourth Circuit balanced Workman's religious liberty interests against the state's interest in passing the vaccination requirement in the first instance. However, where state laws create systems of individualized exemptions such as that contained in the West Virginia statute, this Court's Free Exercise jurisprudence instructs lower courts to evaluate not the state's interest in passing the law as a whole, but rather in denying the exemption requested for religious reasons. *See Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418; 126 S. Ct. 1211 (2006); *Employment Div. v. Smith*, 494 U.S. 872; 110 S. Ct. 1595 (1990); *Bowen v. Roy*, 476 U.S. 693; 106 S. Ct. 2147 (1986); *United States v. Lee*, 455 U.S. 252 (1982).

While this Court's decision in *Smith* ushered in a new era of Free Exercise jurisprudence that would make it considerably more difficult for religious adherents to claim First Amendment

protection for their religious observances, the Court at least preserved this much: where laws that incidentally burden Free Exercise rights allow for secular exemptions, government officials must justify the denial of exemptions requested for religious reasons by demonstrating a compelling interest. *Smith*, *supra*, at 884.

Whatever doubts the Court then expressed in dicta as to the usefulness of that standard beyond the unemployment compensation scenario were resolved by the Court's 2006 decision in *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*. 546 U.S. 418, 126 S. Ct. 1211 (2006). For in *Gonzales*, the Court sustained a challenge to the government's denial of a religious exemption under the Controlled Substances Act for sacramental use of hoasca, a Schedule I substance. The Court held that the denial of the religious exemption could not withstand strict scrutiny.[1]

Gonzales stands for the proposition that where an individual's religious exercise is substantially burdened by a government policy that does admit some exemptions, the government must demonstrate a compelling interest in denying an exemption to that particular religious claimant. *Id.* at 431. The Court reviewed the seminal pre-*Smith* cases of *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205; 92

[1] While *Gonzales* was decided under the federal Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, the Court specifically noted that the strict scrutiny test employed in RFRA cases was one and the same as that used in evaluating constitutional claims. *Gonzales*, *supra*, at 430.

S. Ct. 1526 (1972), and explained that:

> In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants. *Id.*

The Court went on to find that Congress' determination that the substance in question should be listed under Schedule I "simply [did] not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA." *Id.* at 432.

Similarly, in this case, the determination that vaccinations are helpful and important, generally speaking, simply does not relieve the state of its burden to demonstrate that the denial of an exemption requested for religious reasons is the least restrictive means of furthering a compelling government interest. In fact, as the Court noted in *Gonzales*, it would be "surprising" for the government to be able to meet this standard where exemptions are allowed for other, secular reasons. *Id.* at 436.

Yet the Fourth Circuit below performed exactly the analysis that was rejected by this Court in *Gonzales*. While purporting to analyze Petitioner Workman's claim under strict scrutiny, the Fourth Circuit merely inquired as to the gravity of the state's interest in mandating immunizations for

schoolchildren in a general sense. In so doing, the Fourth Circuit has created a strict scrutiny imposter, labeling as strict scrutiny what is essentially a very cursory review of the government's most general purposes in enacting a law. This analysis completely glosses over precisely that which must be scrutinized—the state's interest in denying an exemption for religious purposes.

If this specious form of "strict scrutiny" is allowed to stand, it will effectively obliterate what sparse and feeble teeth remain in the Free Exercise Clause after the advent of this Court's decision in *Smith* and effectively overrule the central holding of *Gonzales* announced only five years ago. The Fourth Circuit's holding implicitly rejects the Court's well-reasoned conclusion in *Gonzales*—that strict scrutiny requires the government to show a compelling interest in *denying a religious exemption* where other exemptions are allowed—in favor of an interpretation that would eliminate even this limited area of Free Exercise protection, requiring only that the government show a compelling interest in passing the law as a whole.

The *Gonzales* holding is built upon solid jurisprudential ground. As this Court pointed out in that decision, in pre-*Smith* cases where strict scrutiny was applied to evaluate state laws that substantially burdened an individual's religious exercise, it was never sufficient for the government to rely upon generalized compelling interests, but rather, the government was forced "to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an

exemption [to the particular claimant]." *Gonzales*, *supra*, at 431 (*quoting Wisconsin v. Yoder*, 406 U.S. 205, 236, 92 S. Ct. 1526 (1972)).

It is clear, then, that the holding below abrogates the Court's entire line of Free Exercise cases addressing laws admitting individualized exemptions, which have uniformly applied strict scrutiny to evaluate the government's interest in *denying* the requested religious exemption, as opposed to the government's general interest in passing the law. *See Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963) (where law admitted some exemptions from general requirement, exemption cannot be denied for religious reasons absent showing of compelling interest); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981) (applying strict scrutiny to denial of exemption in unemployment context); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 *U.S. 520, 537-38; 113 S. Ct. 2217* (1993) ("As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of "religious hardship" without compelling reason.")

Conversely, in the cases where this Court has refused to apply strict scrutiny, the Court has explained that strict scrutiny *would have applied* if the law had been one that lent itself to individualized exemptions. *See Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion explained that if a state creates a mechanism for individualized exemptions, it must show a

compelling interest justifying its refusal to extend an exemption to an instance of religious hardship). If the existence of a mechanism for individualized exemptions is itself the trigger of strict scrutiny, it is simply nonsensical for a lower court to apply a brand of strict scrutiny that completely disregards this statutory feature and looks beyond it to the general purpose behind the law itself. Rather, under these circumstances this Court's precedents clearly require courts to examine the state's reasons for admitting one type of exemption while refusing exemptions in cases of religious hardship.

In creating its own perfunctory Free Exercise analysis, neither applying intermediate scrutiny nor the type of strict scrutiny mandated by this Court for laws that contain individualized exemptions, the Fourth Circuit has departed from recognized Free Exercise analyses and charted its own path. Petitioner Workman respectfully submits that this path is one that has bypassed the proper regard for her First Amendment rights and left those of countless other religious Americans vulnerable to perpetual abuse.

B. THE FOURTH CIRCUIT'S RELIANCE ON CENTURY-OLD PRECEDENTS IN PLACE OF PERFORMING ANY ANALYSIS OF THE PARTICULAR FACTS AND CIRCUMSTANCES OF THIS CASE REPRESENTS SUCH A DEPARTURE FROM THE PROPER COURSE OF JUDICIAL PROCEEDINGS AS TO WARRANT THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

While the Fourth Circuit purported to apply strict scrutiny to the West Virginia law, its conclusion that the law withstood that analysis was based entirely on the fact that other vaccination laws, enacted during times of dangerous epidemic over a century ago, had withstood Supreme Court scrutiny. The court below failed to address current public and individual concerns about vaccinations and the ramifications of allowing exemptions to the same for religious reasons.

The Fourth Circuit stated, "prior decisions from the Supreme Court guide us to conclude that West Virginia's vaccination laws withstand strict scrutiny." *Id.* After a brief discussion of this Court's decisions in *Jacobsen v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905) and *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438 (1944), the court summarily concluded that "the statute requiring vaccinations as a condition of admission to school does not unconstitutionally infringe Workman's right to free exercise." 2011 U.S. App. LEXIS at *10-11.

The two cited precedents surely cannot bear anything approaching the weight the Fourth Circuit panel has laid upon them in this proceeding. Even a cursory review of those cases exposes them as readily distinguishable from the case at bar, for reasons of both factual context and statutory scheme. *Jacobsen* involved merely a generalized claim that the state's compulsory vaccination law violated the claimant's "liberty," and was not decided under the rubric of the Court's Free Exercise framework. Moreover, that case was decided during

a state of smallpox "emergency." *Prince*, on the other hand, did not involve vaccination requirements at all, but rather dealt with child labor laws that contained no system of individualized exemptions.

But beyond the impropriety of the Fourth Circuit panel's reliance upon inapposite precedents of this Court, one sees a glaring omission of *any* analysis of the state's interest in denying Workman's requested religious exemption, much less any juxtaposition of religious and medical exemptions.

The Court has been overwhelmingly clear in explaining that a proper strict scrutiny analysis requires a fact- and context-specific evaluation of each individual claim. Again, the language of *Gonzales* is instructive:

> In [*Sherbert v. Verner* and *Wisconsin v. Yoder*], this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.
>
> [...]
>
> Outside the Free Exercise area as well, the Court has noted that "context matters" in applying the compelling interest test, and has emphasized that "strict scrutiny *does* take "relevant differences" into account—indeed, that is its fundamental purpose.

Gonzales, *supra*, at 431-32 (*citing Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972); *Grutter v. Bollinger*, 539 U.S. 306, 327, 123 S. Ct. 2325 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228, 115 S. Ct. 2097 (1995) (internal citations omitted) (emphasis in original).

> And Justice O'Connor has noted:
> Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.

Smith, 494 U.S. at 899-900 (O'Connor, J., concurring in judgment) (internal citations omitted).

Petitioner Workman respectfully submits that the Fourth Circuit panel below has made a significant departure from the established First Amendment framework by purporting to apply strict scrutiny while failing to consider any of the particular facts and circumstances concerning the

state's denial of her requested religious exemption. In light of the grave effects of this error on her own religious freedom and the likelihood that it will similarly leave other religious adherents devoid of any substantive Free Exercise protections, Petitioner Workman accordingly requests that this Court grant certiorari to affirm its venerated First Amendment strict scrutiny analysis and return the Fourth Circuit to the proper course.

C. THERE EXISTS A SPLIT AMONG UNITED STATES CIRCUIT COURTS OF APPEALS AS TO WHETHER OR NOT STRICT SCRUTINY APPLIES TO LAWS THAT BURDEN "HYBRID RIGHTS"—BOTH AN INDIVIDUAL'S RIGHTS UNDER THE FREE EXERCISE CLAUSE AND OTHER PROTECTED LIBERTY INTERESTS, SUCH AS THE RIGHT OF PARENTS TO CONTROL THE EDUCATION AND UPBRINGING OF THEIR CHILDREN.

As explained above, while the Fourth Circuit panel below purported to apply strict scrutiny in this case, it in fact created its own perfunctory version of that analysis. Petitioner Workman submits that this was likely due to the general uncertainty surrounding the question of what level of scrutiny should be applied in cases where hybrid rights are asserted. A careful reading of the panel's opinion suggests that the court reasoned that a lax (at best) application of the strict scrutiny analysis was appropriate, or even generous, in light of the fact that there existed no clear mandate for the

application of strict scrutiny at all.

The opinion reads, in pertinent part:

> Workman argues that the laws requiring vaccination substantially burden the free exercise of her religion and therefore merit strict scrutiny. Defendants reply that the Supreme Court in *Employment Div., Dep't of Human Res. of Or. v. Smith*, abandoned the compelling interest test, and that the statute should be upheld under rational basis review. Workman counters that *Smith* preserved an exception for education-related laws that burden religion. We observe that there is a circuit split over the validity of this "hybrid-rights" exception. However, we do not need to decide this issue here because, even assuming for the sake of argument that strict scrutiny applies, prior decisions from the Supreme Court guide us to conclude that West Virginia's vaccination laws withstand such scrutiny.

2011 U.S. App. LEXIS at *8.

Based on dicta in *Smith*, the United States Circuit Courts of Appeals for the Ninth and Tenth Circuits have subjected laws implicating both Free Exercise rights and some companion right to strict scrutiny, even where the law is a neutral law of general applicability, provided the plaintiff can

establish a "colorable claim." *See San Jose Christian Coll. v. Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998).

Meanwhile, the Second, Third and Sixth Circuits have refused to apply strict scrutiny to laws that burden "hybrid rights." *See Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003); *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008); *Kissinger v. Bd. of Trs. Of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180 (6th Cir. 1993).

The United States Courts of Appeals for the D.C. Circuit and the First Circuit appear to be in a general state of confusion on the point, apparently considering hybrid rights claims only where each claim is found to be independently meritorious under a more lenient analysis. *See Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (rejecting the "hybrid claim" as an argument that "the combination of two untenable claims equals a tenable one"); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (rejecting hybrid rights claim because parental rights claim was not meritorious). As Justice Souter has noted, this approach effectively renders the Free Exercise claim superfluous. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567, 113 S. Ct. 2217, 2244-45 (1993) (Souter, J., concurring).

Petitioner Workman respectfully submits that this Court should resolve this active split among the Circuits so that Circuit Courts of Appeals might

henceforth apply the appropriate level of scrutiny properly and confidently, rather than short-circuiting the real factual and legal analysis by resorting to ill-conceived reliance upon precedents of this Court in dissimilar scenarios.

CONCLUSION

For the reasons set forth hereinabove, Petitioner respectfully requests that this Honorable Court grant her Petition and issue a writ of certiorari to the Fourth Circuit to review the issues raised herein.

Respectfully submitted,

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APPENDIX

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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 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. CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INCORPORATED; AMERICAN ACADEMY OF PEDIATRICS, INCORPORATED, West Virginia Chapter; CENTER FOR RURAL HEALTH DEVELOPMENT, INCORPORATED; WEST VIRGINIA ASSOCIATION OF LOCAL HEALTH DEPARTMENTS; IMMUNIZATION ACTION COALITION, INCORPORATED, Amici Supporting Appellees.

No. 09-2352

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2011 U.S. App. LEXIS 5920

December 9, 2010, Argued
March 22, 2011, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. (2:09-cv-00325). Joseph R. Goodwin, Chief District Judge.

Workman v. Mingo County Sch., 667 F. Supp. 2d 679, 2009 U.S. Dist. LEXIS 102662 (S.D. W. Va., 2009)

DISPOSITION: AFFIRMED.

COUNSEL: ARGUED: Patricia Ann Finn, PATRICIA FINN, ATTORNEY, PC, Piermont, New York, for Appellants.

Charlene Ann Vaughan, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia; Joanna Irene Tabit, STEPTOE & JOHNSON, LLP, Charleston, West Virginia, for Appellees.

ON BRIEF: Michelle E. Piziak, J. A. Curia III, STEPTOE & JOHNSON, LLP, Charleston, West Virginia, for Appellees Mingo County Board of Education and Dr. Steven L. Paine; Silas B. Taylor, Managing Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL, Charleston, West Virginia, for Appellee Dwight Dials.

Braun A. Hamstead, HAMSTEAD & ASSOCIATES, LC, Martinsburg, West Virginia; James G. Dwyer, Professor of Law, MARSHALL WYTHE SCHOOL OF LAW, College of William & Mary, Williamsburg, Virginia, for Amici Supporting Appellees.

JUDGES: Before AGEE and WYNN, Circuit Judges, and Patrick Michael DUFFY, Senior United States District Judge for the District of South Carolina, sitting by designation. Judge Wynn wrote the opinion, in which Judge Agee and Senior Judge Duffy [*2] concurred.

OPINION BY: WYNN

OPINION
WYNN, Circuit Judge:

Plaintiff Jennifer Workman filed this 42 U.S.C. § 1983 action against various West Virginia state and county officials, alleging that Defendants violated her constitutional rights in refusing to admit her daughter to public school without the immunizations required by state law. The district court granted summary judgment to Defendants. We now affirm.

I.

Workman is the mother of two school-aged children: M.W. and S.W. S.W. suffers from health problems that appeared around the time she began receiving vaccinations. In light of S.W.'s health problems, Workman chose not to vaccinate M.W. Workman's decision not to allow vaccination of M.W. ran afoul of West Virginia law, which provides that no child shall be admitted to any of the schools of the state until the child has been immunized for diphtheria, polio, rubeola, rubella, tetanus, and whooping cough. W. Va. Code § 16-3-4. However, Workman sought to take advantage of an exception under the statute, which exempts a person who presents a certificate from a reputable physician showing that immunization for these diseases "is impossible or improper or other sufficient reason why such immunizations have not [*3] been done." *Id.* Thus, in an effort to enroll M.W. in the Mingo County, West Virginia, school system without the required immunizations, Workman obtained a Permanent Medical Exemption ("the certificate") from Dr. John MacCallum, a child psychiatrist.

Dr. MacCallum recommended against vaccinating M.W. due to S.W.'s condition. Mingo County Health Officer, Dr. Manolo Tampoya approved the certificate and indicated that it satisfied the requirements for M.W. to attend school in Mingo County. M.W. attended the pre-kindergarten program at Lenore Grade School in Lenore, West Virginia for approximately one month in September 2007.

On September 21, 2007, the Superintendant of Mingo County Schools, Defendant Dwight Dials, sent a letter to Dr. Cathy Slemp, the acting head of the West Virginia Department of Health and Human Resources, stating that a school nurse had challenged Workman's certificate. Dr. Slemp responded by letter dated October 3, 2007, recommending Workman's request for medical exemption be denied. On October 12, 2007, Rita Ward, the Mingo County Pre-K Contact, sent Workman a letter notifying her that "as of October 12, 2007 [M.W.] will no longer be attending the Preschool Head Start [*4] Program at Lenore Pre--k--8 School in Mingo County."

M.W. did not attend school again until 2008, when she was admitted into a Head Start Program that accepted Dr. MacCallum's certificate. However, when M.W. aged out of that program, Mingo County Schools would not admit her; accordingly, Workman home-schooled M.W.

Workman brought suit individually and as parent and guardian of her minor child, M.W. She filed an amended complaint on May 11, 2009 against the Mingo County Board of Education; Dr. Steven L. Paine, State Superintendant of Schools; Dwight Dials, Superintendant of Mingo County Schools; and the West Virginia Department of Health and Human Resources ("Defendants").

In her complaint, Workman raised constitutional and statutory claims, and sought a declaratory judgment, injunctive relief, and damages.

Specifically, she alleged that Defendants' denial of her application for a medical exemption violated her First Amendment rights. She further alleged that Defendants' denial of her application for a medical exemption constituted a denial of Equal Protection and Due Process. In addition, Workman alleged that Defendants violated West Virginia Code Section 16-3-4 by refusing to accept Dr. [*5] MacCallum's certificate.

In a memorandum opinion and order of November 3, 2009, the district court determined that the Mingo County Board of Education and the West Virginia Department of Health and Human Services were entitled to Eleventh Amendment immunity from Workman's claims. The district court further concluded that Workman's constitutional claims lacked merit. Finally, the district court ruled that, after dismissing all federal claims, it lacked jurisdiction to hear Workman's remaining state law claim for injunctive relief and it could discern no statutory basis for a damage claim. The district court therefore granted Defendants summary judgment. Workman appeals.

II.

We first address Workman's argument that this case presents issues of material fact precluding summary judgment. Summary judgment is appropriate only where there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Workman argues that this case presents two material issues of fact: (1)

whether Defendants acted "properly" [*6] in overturning Workman's medical exemption pursuant to state law; and (2) whether Workman's religious beliefs are sincere and genuine.

Workman frames the first issue as "whether or not the Mingo County Board of Education, Superintendent Dials, and State Superintendent Dr. Paine's rejection of the medical exemption was legal." Brief of Appellant at 14 (emphasis added). The district court ruled that it lacked jurisdiction to hear Workman's state law claim for injunctive relief and saw no indication that state law provided a cause of action for damages. Workman does not explain how such purely legal determinations raised any triable issue of fact. Accordingly, we hold that the district court did not err in ruling that this issue did not preclude summary judgment. *See United States v. West Virginia*, 339 F.3d 212, 214 (4th Cir. 2003) ("Because this dispute ultimately turns entirely on a question of statutory interpretation, the district court properly proceeded to resolve the case on summary judgment.").

Regarding the second issue, the district court stated: "Since it is not necessary for me to resolve this issue, I decline the opportunity to evaluate the nature of Ms. Workman's beliefs." [*7] Indeed, the district court a-pears to have assumed the sincerity of Workman's religious beliefs but ruled that those "beliefs do not exempt her from complying with West Virginia's mandatory immunization program." Because a different resolution of this issue would not

change the outcome of the case, it, too, did not preclude summary judgment. *See JKC Holding Co. LLC v. Washington Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001) ("The existence of an alleged factual dispute between the parties will not defeat a properly supported motion for summary judgment, unless the disputed fact is one that might affect the outcome of the litigation.").

In sum, the district court did not err in finding that no genuine issues of material fact precluded summary judgment.

III.

Workman next argues that West Virginia's mandatory immunization program violates her right to the free exercise of her religion. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The First Amendment has been made applicable to the states by incorporation into the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

Preliminarily, [*8] we note that the parties disagree about the applicable level of scrutiny. Workman argues that the laws requiring vaccination substantially burden the free exercise of her religion and therefore merit strict scrutiny. Defendants reply that the Supreme Court in *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), abandoned the compelling interest test, and that the statute should be upheld under rational basis review. Workman

counters that Smith preserved an exception for education-related laws that burden religion. We observe that there is a circuit split over the validity of this "hybrid-rights" exception. *See Combs v. Homer--Center School Dist.*, 540 F.3d 231, 244-47 (3rd Cir. 2008) (discussing circuit split and concluding exception was dicta). However, we do not need to decide this issue here because, even assuming for the sake of argument that strict scrutiny applies, prior decisions from the Supreme Court guide us to conclude that West Virginia's vaccination laws withstand such scrutiny.

Over a century ago, in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), the Supreme Court considered the constitutionality of a statute that authorized a municipal board of health [*9] to require and enforce vaccination. *Id. at 12*. Proceeding under the statute, the board of health of Cambridge, Massachusetts, in response to an epidemic, adopted a regulation requiring its inhabitants to be vaccinated against smallpox. *Id.* Upon review, the Supreme Court held that the legislation represented a valid exercise of the state's police power, concluding "we do not perceive that this legislation has invaded any right secured by the Federal Constitution." *Id. at 38.*

In *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), the Supreme Court considered a parent's challenge to a child labor regulation on the basis of the Free Exercise Clause. *Id. at 164*. The Court explained that the state's

"authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds." *Id. at 166* (footnote omitted). The Court concluded that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id. at 166-67*.

In [*10] this appeal, Workman argues that *Jacobson* dealt only with the outbreak of an epidemic, and in any event should be overruled as it "set forth an unconstitutional holding." Brief of Appellant at 11. Workman's attempt to confine *Jacobson* to its facts is unavailing. As noted by one district court, "[t]he Supreme Court did not limit its holding in *Jacobson* to diseases presenting a clear and present danger." *Boone v. Boozman*, 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002) (footnote omitted). Additionally, we reject Workman's request that we overrule *Jacobson* because we are bound by the precedents of our Supreme Court. *Hutto v. Davis*, 454 U.S. 370, 375, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982) (per curiam) ("[A] precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.")

Workman also argues that because West Virginia law requires vaccination against diseases that are not very prevalent, no compelling state interest can exist. On the contrary, the state's wish to

prevent the spread of communicable diseases clearly constitutes a compelling interest.

In sum, following the reasoning of *Jacobson* and *Prince*, we conclude that the West Virginia statute requiring [*11] vaccinations as a condition of admission to school does not unconstitutionally infringe Workman's right to free exercise. This conclusion is buttressed by the opinions of numerous federal and state courts that have reached similar conclusions in comparable cases. *See, e.g., McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) ("The constitutional right to freely practice one's religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children."); *Sherr v. Northport--East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987) ("[I]t has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs."); *Davis v. State*, 294 Md. 370, 379 n.8, 451 A.2d 107, 112 n.8 (Md. 1982) ("Maryland's compulsory immunization program clearly furthers the important governmental objective of eliminating and preventing certain communicable diseases."); *Cude v. State*, 237 Ark. 927, 932, 377 S.W.2d 816, 819 (Ark. 1964) ("According to the great weight of authority, it is within the [*12] police power of the State to require that school children be vaccinated against smallpox, and that such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise.").

IV.

Workman next argues that West Virginia's immunization requirement violates her right to equal protection. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). Here, Workman's equal protection claim challenges the West Virginia statute as-applied and facially.

Regarding her as-applied challenge, Workman argues that the school system discriminated against her when Defendant Dials inquired into the validity of her exemption. The district court found, however, that Workman presented "no evidence of unequal treatment resulting from [*13] intentional or purposeful discrimination to support her claim." Indeed, Dials submitted an affidavit in which he stated that "we had never dealt with a request for a medical exemption during my tenure as Superintendant...." Although Workman asserts that Dials and Paine used the statute and accompanying regulations improperly, she points to no evidence of unequal treatment, and we see none. Consequently, the district court did not err in ruling Workman's as-

applied challenge was without merit. See *Hanton v. Gilbert*, 36 F.3d 4, 8 (4th Cir. 1994) (rejecting equal protection challenge when record revealed no evidence of discrimination).

Regarding her facial challenge, Workman notes that the statute does not provide an exemption for those with sincere religious beliefs contrary to vaccination. She argues that the statute therefore discriminates on the basis of religion. The district court ruled that, although a state may provide a religious exemption to mandatory vaccination, it need not do so.

The Supreme Court held as much in *Zucht v. King*, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922), where it considered an equal protection and due process challenge to ordinances in San Antonio, Texas, that prohibited a child [*14] from attending school without a certificate of vaccination. *Id. at 175*. The Court stated that *Jacobson* "settled that it is within the police power of a State to provide for compulsory vaccination." *Id. at 176*. "A long line of decisions by this court . . . also settled that in the exercise of the police power reasonable classification may be freely applied, and that regulation is not violative of the equal protection clause merely because it is not all-embracing." *Id. at 176-77*.

Further, in *Prince*, a mother argued that her religion made the street her church and that denying her child access to the street to sell religious magazines violated her right to equal protection. 321

U.S. at 170. The Supreme Court explained that the public highways do not become religious property merely by the assertion of a religious person. *Id. at 170-71.* "And there is no denial of equal protection in excluding [Jehovah's Witnesses'] children from doing [on the streets] what no other children may do." *Id. at 171.*

Here, Workman does not explain how the statute at issue is facially discriminatory; indeed, her complaint is not that it targets a particular religious belief but that it provides no exception from [*15] general coverage for hers. n1 Following the Supreme Court's decisions in *Zucht* and *Prince*, we reject Workman's contention that the statute is facially invalid under the Equal Protection Clause.

> n1 Several courts have declared unconstitutional religious exemptions from mandatory vaccination statutes. *See, e.g., McCarthy*, 212 F. Supp. 2d at 948-49 (invalidating religious exemption from Arkansas compulsory immunization statute); *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (invalidating religious exemption from Mississippi compulsory immunization statute).

V.

Workman next argues that denying her a religious exemption from the mandatory vaccination statute violates her substantive due process right to do what she reasonably believes is best for her child. Workman asserts that, because the statute infringes

upon a fundamental right it must withstand strict scrutiny. She contends that the statute fails strict scrutiny because West Virginia has no compelling interest to justify vaccinating M.W.

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). To determine [*16] whether an asserted right is a fundamental right subject to strict scrutiny under the Due Process Clause, a court must (1) consider whether the asserted right is deeply rooted in the Nation's history and tradition; and (2) require a careful description of the asserted liberty interest. *Id. at 720-21.* Where a fundamental right is not implicated, the state law need only be rationally related to a legitimate government interest. *Id. at 728.*

As in *Boone*, "the question presented by the facts of this case is whether the special protection of the Due Process Clause includes a parent's right to refuse to have her child immunized before attending public or private school where immunization is a precondition to attending school." *Boone*, 217 F. Supp. 2d at 956 (footnote omitted). We agree with other courts that have considered this question in holding that Workman has no such fundamental right. *See Zucht*, 260 U.S. at 176-77; *Boone*, 217 F. Supp. 2d at 956; *Bd. of Educ. of Mountain Lakes v. Maas*, 56 N.J. Super. 245, 264, 152 A. 2d 394, 404 (N.J. Super. Ct. App. Div. 1959).

Indeed, the Supreme Court has consistently recognized that a state may constitutionally require school children to be immunized. [*17] *See Prince*, 321 U.S. at 166-67; *Zucht*, 260 U.S. at 176; *cf. Jacobson*, 197 U.S. at 31-32 (noting that "the principle of vaccination as a means to prevent the spread of [disease] has been enforced in many States by statutes making the vaccination of children a condition to their right to enter or remain in public schools."). This is not surprising given "the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs." *Sherr*, 672 F. Supp. at 88. Accordingly, we conclude that Workman has failed to demonstrate that the statute violates her Due Process rights.

VI.

Workman also argues that the district court erred in ruling that certain Defendants were protected by the Eleventh Amendment. The District court ruled that only Defendants Mingo County Board of Education and the West Virginia Department of Health and Human Resources were entitled to Eleventh Amendment immunity. "While we ordinarily would decide an immunity claim before reaching the merits of the underlying claim, when the complaint alleges no claim against which immunity would attach, we need not decide the immunity issue." *Jackson v. Long*, 102 F.3d 722, 731 (4th Cir. 1996) [*18] (citation omitted). Because Workman's constitutional claims against all Defendants fail, we need not determine whether the district court erred in applying Eleventh Amendment immunity to some of

them.

VII.

Finally, Workman argues that subject matter jurisdiction exists over her state law claims. The district court ruled that, after dismissing all of Workman's federal claims, it lacked jurisdiction to hear her state law claim for injunctive relief. The district court also saw no indication that West Virginia law permits a private cause of action for damages against Defendants Paine and Dials.

Workman contends that the district court "can retain jurisdiction over [state law claims] even if it dismisses the federal claims." Brief of Appellant at 35. In general, this is a correct statement of supplemental jurisdiction. See 28 U.S.C. § 1367; but see *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (holding Eleventh Amendment prohibits federal courts from instructing state officials on how to conform their conduct to state law). Yet "district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over [*19] which it has original jurisdiction." 28 U.S.C. § 1367(c)(3) And "trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished." *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995). There is no indication that the district court abused its discretion in dismissing Workman's state law claims. n2

n2 In her reply brief, Workman makes additional arguments regarding the district court's ruling on her state law claims. Because Workman failed to raise those arguments in her opening brief, we consider the arguments waived. Fed. R. App. P. 28(a)(9)(A); *Yousefi v. U.S. I.N.S.*, 260 F.3d 318, 326 (4th Cir. 2001) (per curiam).

VIII.

In sum, we hold that the district court did not err in awarding summary judgment where there were no genuine issues of material fact. Workman's constitutional challenges to the West Virginia statute requiring mandatory vaccination as a condition of attending school are without merit. Finally, the district court did not abuse its discretion in declining to exercise jurisdiction over Workman's remaining state law claims.

AFFIRMED

JENNIFER WORKMAN, et al., Plaintiffs, v. MINGO COUNTY SCHOOLS, et al., Defendants.

CIVIL ACTION NO. 2:09-cv-00325cc

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, CHARLESTON DIVISION

667 F. Supp. 2d 679; 2009 U.S. Dist. LEXIS 102662

November 3, 2009, Decided
November 3, 2009, Filed

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For Mingo County Board of Education, Defendant: J. A. Curia, III, Joanna I. Tabit, LEAD ATTORNEYS, STEPTOE & JOHNSON, Charleston, WV; Silas B. Taylor, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL, Charleston, WV.

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JUDGES: Joseph R. Goodwin, Chief Judge.

OPINION BY: Joseph R. Goodwin

OPINION

[*681] MEMORANDUM OPINION & ORDER

Pending before the court are the plaintiff Jennifer Workman's Motion for Summary Judgment [Docket 62], defendants Mingo County Board of Education and Dr. Steven L. Paine's Motion for Summary Judgment [Docket 98], and defendant Dwight Dials' Motion for Summary Judgment [Docket 102]. For the reasons explained below, the plaintiff's Motion is DENIED, and the defendants' Motions are GRANTED. All other pending motions [Dockets [**3] 2, 73, 97, 118] are DENIED as moot.

I. Background

The case concerns the legality of West Virginia's mandatory immunization program for schoolchildren. This topic is a sensitive one. An increasing number of parents across the country question the safety of vaccinations–particularly the purported relationship between vaccinations and autism. See, e.g., Alice Park, How Safe Are Vaccines?, TIME, May 21, 2008, available at http://www.time.com/time/health/article/0,8599,18084

38,00.html. A parent's concern for her children's health and well-being is understandable. However, little evidence supports the claim that standard vaccinations are unsafe, *see id.*, and the plaintiff does not contest the safety and efficacy of vaccines in this case. (See Pl.'s Mem. Supp. Mot. Preclude Med. Test. & Evidence 1 (arguing that "medical issues are irrelevant") [Docket 119].) Others oppose vaccinations on religious or philosophical grounds. Currently, West Virginia is one of only two states that do not permit a religious exemption from mandatory vaccinations.
Jennifer Workman brings this suit individually and as the parent and guardian of her minor child, M.W. 1 Ms. Workman is the mother of two school-aged children: [**4] M.W., age six, and S.W., age thirteen. S.W. suffers from serious health problems, which manifested around the time she began receiving vaccinations. (Compl., Ex. 1 P 4 [Docket 1].) Specifically, S.W. has been diagnosed with pervasive developmental disorder, not otherwise specified, severe sleep disorders and other behavioral problems. 2 (*Id.* P 5.) These health issues have caused behavioral problems that require that S.W. be home-schooled. (*Id.* P 6.) In light of S.W.'s health issues, Ms. Workman has chosen not to vaccinate M.W. (*Id.* at P 7).

1 For the sake of simplicity, this Order refers to "the plaintiff" in the singular, as do many of the pleadings.

2 Pervasive developmental disorder, not otherwise specified, describes "cases where there is marked impairment of social interaction,

communication, and/or stereotyped behavior patterns or interest, but when full features for autism or another explicitly defined PDD are not met." Yale School of Medicine, Yale Child Study Center, Autism, Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS), available at http://www.med.yale.edu/chldstdy /autism/pddnos.html (last visited on October 26, 2009).

For the purpose of enrolling M.W. in [**5] the Mingo County school system without the required immunizations, pursuant to West Virginia Code section 16-3-4, 3 Ms. Workman obtained a Permanent Medical Exemption [*682] ("the certificate") for M.W. from Dr. John MacCallum, M.D., a child psychiatrist. 4 Dr. MacCallum recommended against vaccinating M.W. due to S.W.'s condition. (Pl.'s Application, Ex. A.) Mingo County Health Officer, Dr. Manolo Tampoya, M.D., approved the certificate and indicated that it satisfied the requirements for M.W. to attend school in Mingo County, West Virginia. 5 M.W. subsequently attended the pre-kindergarten program at Lenore K-8 School in Lenore, West Virginia, for approximately one month in the fall of 2007. (Compl., Ex. 1 P 10.)

3 Section 16-3-4 provides that, although immunizations against diphtheria, polio, rubeola, rubella, tetanus, and whooping cough are compulsory for children entering school for the first time in this state, a non-immunized child may at-tend school if he or she "produces a certificate from a reputable physician showing that an immunization for [those

diseases] has been done or is impossible or improper or other sufficient reason why such immunizations have not been done." W. Va. Code § 16-3-4.

4 My [**6] best efforts at interpreting the handwritten note from Dr. MacCallum are as follows:

> I have examined [M.W.], age 7, and I have also examined her sister [S.W.], age 11–who is clearly autistic and likely because her (unintelligible) at age 2. Because of the sister's problems, it is likely that Madison's immune response would parallel those of her sister. I therefore recommend that she NOT be given ANY vaccines. She also has speech/language delays, (unintelligible) future concern (unintelligible) vaccines.

(Pl.'s Application [Docket 2], Ex. A (emphasis in original).)

5 Dr. Tampoya's handwritten memorandum, dated September 11, 2007, reads:

> According to State Code 16-3-4 a certificate is present from a reputable physician and I have viewed this certificate. I accept the certificate from the reputable physician for this child to attend school in Mingo Co.

(Pl.'s Application, Ex. C.)

On September 21, 2007, the Superintendent of Mingo County Schools, defendant Dwight Dials, sent a letter to Dr. Cathy Slemp, the Acting Head of the West Virginia Department of Health and Human Resources, noting that a school nurse had challenged the plaintiff's certificate. His letter reads, in relevant part:

> We have [**7] concerns about [the decision to allow M.W. to attend school] due to the precedence [sic] it will set for our county and possibly for the state. We feel it would be remiss to not have our concerns clarified for future reference and decision making in similar matters. The county has been consistent in all approaches and decisions concerning immunizations and this situation is new to our county.
>
> All protocols have been completed in Mingo Co. concerning this and we would appreciate your thoughts on this issue.

(Dep't Health & Human Res. Opp'n Pl.'s Application & Mot. Dismiss [Docket 10], Ex. A.)

Dr. Slemp responded to Mr. Dials by letter dated October 3, 2007, in which she recommended denying the certificate and, therefore, the plaintiff's application for an exemption from the compulsory immunizations. (Pl.'s Application, Ex. B.) Dr. Slemp

noted that Dr. Mac-Callum apparently issued the certificate based on the fact that S.W. had been diagnosed with autism and because M.W. herself has speech and language delays. (*Id.*) Dr. Slemp explained:

> In accordance with current recommendations on immunization practice issued by the American Academy of Pediatrics, American Academy of Family Physicians, and [**8] the Advisory Committee for Immunization Practices, autism in a family member is not a contraindication to administration of any of the immunizations required under WV Code Chapter 16-3-4 (school entry immunizations). In addition, speech and language delays, in and of themselves, are not defined contraindications to any of these vaccines.
>
> To be as fair and consistent as possible in evaluating medical exemptions and most important, to assure our evaluations [*683] are based on current standards of medical practice and the preponderance of current scientific knowledge, it is the guidance of these organizations that the West Virginia Bureau for Public Health regularly utilizes in evaluating the sufficiency of medical exemption requests.

(*Id.*) Dr. Slemp concluded: "[E]xamining the facts presented in light of current medical guidance on immunization practices, I recommend that this request for medical exemption be denied, assuming immunization requirements apply to the situation at hand. I make this recommendation considering both the safety of this child and other children in the school setting." (*Id.*) She left "to [Mr. Dials] and the Department of Education [to determine] the applicability of this [**9] information to the specific preschool setting involved, based on applicable Department of Education and other laws and regulations." (*Id.*)

Subsequently, on October 10, 2007, Mingo County school nurse Sandy Chapman emailed Rebecca King, the West Virginia Department of Education School Health Services Coordinator, asking for guidance on how to proceed. (Def. Dwight Dials' Memo. Opp'n Pls.' Mot. Summ. J. & Supp. Dwight Dials' Mot. Summ. J. ("Dials Memo") [Docket 103], Ex. 1.) Ms. King responded by email on October 11, 2007, advising that the Workmans be notified "of the need for compliance with [Pre-k] immunizations" and that M.W. be removed from public school at the end of the day on October 12. (*Id.*) Rita Ward, the Mingo County Pre-k Contact, sent the Workmans a letter on October 12, 2007, and carbon copied Sabrina Runyon, the Lenore Pre-k Principal. In her letter, Ms. Ward informed the Workmans about Dr. Slemp's recommendation to Mr. Dials. (Pl.'s Application, Ex. D.) She further stated: "Also, Mingo County Schools

was informed to disseminate the information to you and our preschool program at Lenore. Therefore, as of October 12, 2007, [M.W.] will no longer be attending the Preschool [**10] Head Start Program at Lenore Pre-k-8 School in Mingo County." (*Id.*)

M.W. did not attend school again until 2008, when she was admitted into a Head Start Program in Lenore which accepted Dr. MacCallum's certificate. (Resp. Opp'n Defs. Mingo County Bd. Educ. & Dr. Steven L. Paine Pl.'s Mot. Summ. J. ("Mingo Defs.' Resp.") [Docket 100], Ex. B at 26.) M.W. is now too old to attend that program, and Mingo County schools will not admit her. (Compl., Ex. 1 PP 13-14.) Ms. Workman alleges that M.W. was home-schooled as a result. (*Id.* P 14.) 6

6 It appears, however, that after considering home schooling, Ms. Workman decided to enroll M.W. in Kentucky public schools, which accepted her claim of religious exemption from vaccination requirements. (Mingo Defs.' Resp., Ex. B at 45.)

Ms. Workman filed this action on April 1, 2009, against Mingo County Schools, Dwight Dials, and the State of West Virginia Department of Health and Human Resources. 7 She raises both constitutional and statutory claims, and seeks declaratory judgment, injunctive relief, and money damages. She alleges that the defendants' denial of M.W.'s application for a medical exemption violates her First, Fifth and Fourteenth Amendment [**11] rights--that [*684] is, her free exercise rights and rights to due process and

equal protection of the laws. Specifically, she states that her Christian Bapticostal religious beliefs require that she honor God by protecting her child from harm and illness, and that immunizing M.W. in this instance would violate those sincerely held beliefs. (Am. Compl. PP 7, 23 [Docket 38].) She further argues that the defendants' denial of M.W.'s application for medical exemption was "arbitrary, capricious, and unreasonable," and discriminates against her and her family for no valid reason, and thus denies them procedural due process, substantive due process parenting rights, and equal protection of law. (Pl.'s Mem. Supp. Mot. Preclude Med. Test. & Evidence 5.) With regards to her statutory claims, Ms. Workman argues that the defendants violated West Virginia Code section 16-3-4 by refusing to accept Dr. MacCallum's certificate.

7 On May 11, 2009, this court granted the plaintiff's Motion to Amend Complaint [Docket 37]. The Amended Complaint clarified that the proper names of the defendants are Mingo County Board of Education and the West Virginia Department of Health and Human Resources, and added Dr. Steven [**12] L. Paine [Docket 38]. On June 5, 2009, I dismissed the Department of Health and Human Resources on Eleventh Amendment grounds [Docket 52].

II. Standard of Review

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some "concrete evidence from which a reasonable juror could return a verdict in his [or her] favor." *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after [**13] adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere "scintilla of evidence" in support of his or her position. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or unsupported speculation, without more, are insufficient to preclude the granting of a summary judgment motion. *See Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987); *Ross v. Comm'ns Satellite Corp.*, 759 F.2d 355, 364-65 (4th Cir. 1985), *abrogated on other grounds*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d

268 (1989).

III. Analysis

A. Eleventh Amendment Immunity

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This amendment precludes suits by a citizen of a state against that state. *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890). It also precludes naming an arm of the state as a defendant. *See, e.g., Westinghouse Elec. Corp. v. W. Va. Dep't of Highways*, 845 F.2d 468, 469 (4th Cir. 1988) [**14] ("[A] claim against the West Virginia Department of Highways is, for eleventh amendment purposes, properly considered [*685] one against the state itself."). As explained in this court's May 27, 2009 Order granting the Motion to Dismiss by the Department of Health and Human Resources, "[a]gencies of the state are arms of the state and therefore, the Eleventh Amendment bars suits against them." (Ord. at 5 [Docket 52].) However, counties are not arms of the state and thus do not fall within the ambit of the Eleventh Amendment. *Cf. N. Ins. Co. of N. Y. v. Chatham County, Ga.*, 547 U.S. 189, 193, 126 S. Ct. 1689, 164 L. Ed. 2d 367 (2006) ("[T]his Court has repeatedly refused to extend sovereign immunity to counties.").

1. Mingo County Board of Education

Whether the Eleventh Amendment bars the plaintiff's claims against the Mingo County Board of Education (the "Mingo Board") turns on whether the Mingo Board is a county or state entity and thus whether it is an arm of the state. State boards of educations are widely recognized as entitled to Eleventh Amendment protection. *See, e.g., Cullens v. Bemis*, 1992 U.S. App. LEXIS 30892, 1992 WL 337688, *1 (6th Cir. Nov. 18, 1992) (noting that the Michigan Department of Education is "absolutely immune under the Eleventh Amendment"); [**15] see also John W. Borkowki & Alexander E. Dreier, The 1996-97 Term of the United States Supreme Court and Its Impact on Public Schools, 122 Ed. Law Rep. 361, 377 (1998) (noting that "[u]nder the Eleventh Amendment, subject to some exceptions . . . state boards of education [] cannot be sued in federal court without the express consent of the state").

Generally speaking, county boards of education in West Virginia are probably not entitled to Eleventh Amendment protection. 8 Importantly, however, the West Virginia Board of Education (the "State Board") has intervened in the operations of the Mingo County school system. Minutes, Special Meeting of the West Virginia Board of Education (Feb. 15, 2005), available at http://wvde.state.wv.us/boe-minutes/2005/wvbeminutes021505.html. This action, taken pursuant to West Virginia Code section 18-2E-5(p)(4)(C), significantly limited the power of the Mingo Board and delegated authority to the state

superintendent. This intervention may have rendered the Mingo Board an arm of the state. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123-24, 104 S. Ct. 900, 79 L. Ed. 2d 67 & n.34 (1984) (recognizing that Eleventh Amendment protection can extend to arms of local [**16] government when the state is extensively involved in the locality's action so [*686] that relief, in essence, runs against the state).

8 While *Burkey v. Marshall County Bd. of Education*, 513 F. Supp. 1084, 1095 (N.D. W. Va. 1981), held that West Virginia county boards of education are entitled to Eleventh Amendment protection, *Burkey* does not resolve this issue, as its conclusion on this point was based on a state court decision, *Boggs v. Bd. of Educ. of Clay County*, 161 W. Va. 471, 244 S.E.2d 799 (W. Va. 1978), that was later overruled, *Ohio Valley Con-tractors v. Bd. of Educ. of Wetzel County*, 170 W. Va. 240, 293 S.E.2d 437, 438 (W. Va. 1982). *Boggs* held that a county board of education was entitled to assert the sovereign immunity provided in the West Virginia Constitution's article VI, section 35, which states: "The State of West Virginia shall never be made defendant in any court of law or equity." *Boggs*, 244 S.E.2d at 805. Ohio then held that county boards of education are entitled to neither state constitutional immunity nor common law governmental immunity. 293 S.E.2d at 440-42. Since then, the state legislature has codified immunity provisions for state employees and "political subdivisions," including county boards [**17] of education. See, e.g., W. Va. Code. §§ 29-12A-1, 29-12A-

3. Although the analysis and conclusions are context-specific, "[m]ost courts to address the issue of whether a school district is a state entity have found that it is not." *Eldeco, Inc. v. Skanska USA Bldg., Inc.*, 447 F. Supp. 2d 521, 524 (D.S.C. 2006) (citing decisions from various jurisdictions).

The Fourth Circuit has enumerated a list of factors to determine whether an entity is an arm of the state. *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001). While emphasizing that the most important factor "is whether a judgment against the governmental entity would have to be paid from the State's treasury," 9 this factor is not necessarily dispositive:

> To examine the nature of the entity and its relationship with the State, we keep the State treasury factor in the calculus and look to three additional factors: (1) the degree of control that the State exercises over the entity or the degree of autonomy from the State that the entity enjoys; (2) the scope of the entity's concerns--whether local or statewide--with which the entity is involved; and (3) the manner in which State law treats the entity. Under this "sovereign [**18] dignity" inquiry, a court must, in the end, determine whether the governmental entity is so connected to the State that the legal action against the entity would . . .

> amount to "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."

Id. at 223-24 (internal citations omitted).

9 Without citing any authority, Ms. Workman asserts that "Defendant Mingo County Board of Education would likely be responsible for paying its own judgment for damages." (Pl.'s Resp. Mingo. Defs. 9.) The defendants counter: "As a matter of law, given the intervention by the State, the State Board is authorized to control the expenditure of funds." (Repl. Defs. Mingo County. Bd. Educ. & Dr. Steven L. Paine Pl.'s Mem. Resp. Defs.' Mot. Summ. J. ("Repl. Mingo Defs.") 6 (citing W. Va. Code. § 18-2E-5(p)(4)(C)) [Docket 112].)

The State Board effectively has total control over the Mingo County school system. The takeover was conducted pursuant to West Virginia Code section 18-2E-5(p)(4)(C), which provides:

> Whenever nonapproval status is given to a school system, the state board shall declare a state of emergency in the school system . . . If progress in correcting [**19] the emergency, as determined by the state board, is not made within six months . . . the state board shall intervene in the operation of the school system to cause improvements to be made that will provide assurances that a thorough and efficient system of schools will be provided. This intervention may include, but is not limited to, the following:

(i) Limiting the authority of the county superintendent and county board as to the expenditure of funds, the employment and dismissal of personnel, the establishment and operation of the school calendar, the establishment of instructional programs and rules and any other areas designated by the state board by rule, which may include delegating decision-making authority regarding these matters to the state superintendent;
(ii) Declaring that the office of the county superintendent is vacant;
(iii) Delegating to the state superintendent both the authority to conduct hearings on personnel matters and school closure or consolidation matters and, subsequently, to render the resulting decisions...,

(v) Taking any direct action necessary to correct the emergency including, but not limited to, the following:

(I) Delegating to the state superintendent [**20] the authority to re-place administrators and principals in low performing schools and to transfer them into alternate [*687] professional positions within the county at his or her discretion; and

(II) Delegating to the state superintendent the authority to fill positions of administrators and principals with individuals determined by the state superintendent to be the most qualified for the positions...

The powers enumerated in the statute are

impressive. Yet the State Board's powers exceed even these, since the statute itself declares that the State Board's intervention need not be limited to the listed powers.

With respect to the first *Cash* factor, the "degree of control that the State exercises over the entity" is immense; the "degree of autonomy from the State that the entity enjoys" is negligible. *Cash*, 242 F.3d at 224. For example, the statute empowers the State Board to "[l]imit the authority of the county superintendent and county board" in "any . . . area[] designated by the [S]tate [B]oard." W. Va. Code § 18-2E-5(p)(4)(C)(i). The second *Cash* factor, "the scope of the entity's concerns," is arguably more ambiguous; while the focus of the Mingo Board remains education in Mingo County, [**21] its takeover was conducted pursuant to a "process for improving education . . . to provide assurances that . . . high quality standards are, at a minimum, being met and that a thorough and efficient system of schools is being provided for all West Virginia public school students." W. Va. Code § 18-2E-5 (a)(4). But the third *Cash* factor strongly suggests that the Mingo Board is an arm of the state. A consideration of "the manner in which State law treats the entity" reveals that the Mingo Board, after the takeover, has little to no rights of autonomy and self-control. Instead, the State Board is empowered to manage the schools in Mingo County and accordingly control the Mingo Board. State law subjects the Mingo Board to the State Board's authority in seemingly all spheres.

The State Board is an arm of the state of West Virginia and protected under the Eleventh Amendment. Because the State Board now effectively controls the Mingo Board, the plaintiff's claims against the Mingo Board are constitutionally barred. The Mingo Board's Motion for Summary Judgment is GRANTED.

2. Dr. Steven L. Paine and Dwight Dials

While a plaintiff may not sue agencies of the state that are protected by the Eleventh Amendment, [**22] she may still pursue damages claims against individual state officers by suing them in their personal capacities. *Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). Personal-capacity suits "seek to impose individual liability upon a government officer for actions taken under color of state law." *Id.* at 25. Moreover, plaintiffs may generally seek prospective injunctive relief from state officers under a judicially recognized exception to the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332, 346-49, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979); *Edelman v. Jordan*, 415 U.S. 651, 665-69, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *Ex parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Federal courts nevertheless lack jurisdiction to enjoin state officers from violating state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (concluding that "Young and Edelman are inapplicable in a suit against state officials on the basis of state law," noting "it is difficult to think of a greater intrusion on state

sovereignty than when a federal court instructs state officials on how to conform their conduct to state law").

[*688] Dr. Paine, the State Superintendent of Schools, is a state officer. Dwight Dials, Superintendent of Mingo County Schools, was hired by Dr. Steven L. Paine [**23] to manage Mingo County schools. (See Dials Memo, Ex. 3 (employment contract of Dwight Dials).) Local officers, depending on the particular circumstances, may be entitled to Eleventh Amendment protection as agents of the state. *Cf. McMillian v. Monroe County*, Al., 520 U.S. 781, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997) (holding that for purposes of applying 42 U.S.C. § 1983, Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama rather than their counties). Although Mr. Dials occupies the position of a county officer, he was hired by a state officer, to enact state policy. Thus, he is an agent of the state and also entitled to the same Eleventh Amendment protections as Dr. Paine.

Ms. Workman may pursue her claims for damages against the individual defendants only by suing them in their personal capacities. In response to the argument that she seeks relief against Dr. Paine in his official rather than personal capacity, the plaintiff states, "Dr. Paine is named as a defendant in this lawsuit primarily to compel him to require the Mingo County Board of Education and Superintendent Dwight Dials either to accept the medical vaccine exemption or to abstain from applying the West

Virginia [**24] Statute requiring vaccines to Plaintiffs." (Pl.'s Resp. Mingo. Defs. 10.) *Hafer* counsels that the terminology referring to official-capacity and personal-capacity suits "is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." 502 U.S. at 26. At least ostensibly, Ms. Workman has sued Dr. Paine in his personal capacity. I also accept that Ms. Workman has sued Dwight Dials in his personal capacity. Thus, Ms. Workman's claims against Dr. Paine and Mr. Dials for damages, *Hafer*, 502 U.S. at 31, and for prospective injunctive relief of her federal claims, *Ex parte Young*, 209 U.S. at 159-60, survive Eleventh Amendment analysis. As such, I must address the merits of her claims.

B. Constitutional Claims

The plaintiff alleges that the defendants' actions violate her freedom of religion, due process, and equal protection rights. As explained below, these claims lack merit. Thus, summary judgment is GRANTED for the defendants on the plaintiff's constitutional claims.

1. Freedom of Religion Claim

The plaintiff argues that West Virginia's mandatory immunization program violates her freedom of religion. West [**25] Virginia, unlike most states, does not have a religious exemption to its immunization requirements for schoolchildren. Ms.

Workman contends that her sincere religious beliefs prohibit her from having M.W. vaccinated. 10 She asserts that "[t]he U.S. Constitution guarantees the free exercise of religion. This allows parents as of right to opt their children out of vaccines, should they go against their genuine, sincerely-held religious beliefs." (Pl.'s Mot. Summ J. P 3.)

10 The parties contest whether Ms. Workman's beliefs regarding vaccination are religious. Since it is not necessary for me to resolve this issue, I decline the opportunity to evaluate the nature of Ms. Workman's beliefs.

Ms. Workman's freedom of religion claim fails. Her beliefs do not exempt her from complying with West Virginia's mandatory immunization program. It has long been recognized that local authorities [*689] may constitutionally mandate vaccinations. *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (affirming guilty judgment in prosecution under state compulsory vaccination law, noting that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person [**26] to use his own . . . regardless of the injury that may be done to others"). Furthermore, a parent "cannot claim freedom from compulsory vaccination for [his] child more than for himself on religious grounds." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944); see also id. at 166-67 ("The right to practice religion freely does not include [parental] liberty to expose the community or the child to communicable disease...").

Although most states have chosen to provide a religious exemption from compulsory immunization, a state need not do so. *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987) ("[I]t has been settled law for many years that claims of religious freedom must give way [to] the compelling interest of society in fighting . . . contagious diseases through mandatory inoculation programs. . . . The legislature's creation of a statutory exception . . . goes beyond what the Supreme Court has declared the First Amendment [] require[s] ...."); *Davis v. State*, 294 Md. 370, 451 A.2d 107, 112 (Md. 1982) (noting that a state need not "provide a religious exemption from its immunization program" (citing *Prince*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645)); *Wright v. DeWitt Sch. Dist. No. 1*, 238 Ark. 906, 385 S.W.2d 644, 648 (Ark. 1965) [**27] (finding that smallpox vaccination requirement does not violate free exercise of religion, because individuals' "freedom to act according to their religious beliefs is subject to a reasonable regulation for the benefit of society as a whole"); *Bd. of Ed. of Mountain Lakes v. Maas*, 56 N.J. Super. 245, 152 A.2d 394, 405-06 (N.J. Super. Ct. App. Div. 1959) (upholding compulsory vaccination requirement, noting "'the constitutional guaranty of religious freedom was not intended to prohibit legislation with respect to the general public welfare'" (quoting *Sadlock v. Bd. of Ed. of Borough of Carlstadt*, 137 N.J.L. 85, 58 A.2d 218, 222 (N.J. 1948))); see also *Baer v. City of Bend*, 206 Ore. 221, 292 P.2d 134 (Or. 1956) (city fluoridation ordinance does not violate religious liberty); *State ex rel. Holcomb v. Armstrong*,

39 Wn.2d 860, 239 P.2d 545 (Wash. 1952) (mandatory x-ray examination to detect tuberculosis does not violate students' religious freedom rights); *Rice v. Commonwealth*, 188 Va. 224, 49 S.E.2d 342, 347 (Va. 1948) ("The individual cannot be permitted, on religious grounds, to be the judge of his duty to obey the regulatory laws enacted by the State in the interests of the public welfare."); Steve P. Calandrillo, Vanishing Vaccinations: Why Are So Many Americans [**28] Opting Out of Vaccinating Their Children?, 37 U. Mich. J.L. Reform 353, 358 n.20 (2004) ("[N]o case . . . holds that [religious] exemptions [to vaccination requirements] must be provided by states.").

West Virginia's mandatory immunization program does not violate Ms. Workman's free exercise rights. Therefore, summary judgment is GRANTED to the defendants on Ms. Workman's First Amendment claims.

2. Equal Protection and Due Process Claims

Ms. Workman argues that her equal protection rights were violated because the "[d]efendants' purported denial of the valid exemption was arbitrary, capricious, and unreasonable." (Pl.'s Reply Resp. Opp'n Defs. Mingo County Bd. Educ. & Dr. Steven L. Paine Mot. Summ. J. ("Pl.'s Reply Mingo Defs.") 14 [Docket 109].) She also seems to argue that the defendants violated [*690] her equal protection rights by not allowing her to simultaneously enroll her children in school and follow her religious beliefs, while parents with different or no religious beliefs

may conceivably do so. (*Id.* at 16.) Furthermore, she asserts that the procedures used by the defendants violate her procedural due process rights, and that the denial of M.W.'s application for exemption violates [**29] her substantive due process rights. Ms. Workman's equal protection claims and due process claims fail.

There are two aspects of Ms. Workman's equal protection claim: an as-applied challenge and a facial challenge to the mandatory immunization program. With regards to her as-applied challenge, the plaintiff argues that the school system discriminated against her and her family. But she presents no evidence of unequal treatment resulting from intentional or purposeful discrimination to support her claim; instead, all of the evidence is to the contrary.
Defendant Dwight D. Dials has submitted an affidavit from Acting State Health Officer Catherine C. Slemp stating:

I have never granted a medical exemption from the state immunization laws based on the reason being that the subject child or a relative has autism, or based on a posited connection between autism and vaccines, because neither reason is a recognized medical contraindication to these vaccines.
I am not aware of any instance in which the [West Virginia Board of Public Health] or any of its prior State Health Officers have ever granted a medical exemption to the immunization requirements applicable to school students based on a child [**30] or relative having autism, or based on a posited connection

between autism and vaccines.

(Repl. Mem. Supp. Dwight Dials' Mot. Summ. J. ("Dials Repl. Mem.") [Docket 114], Ex. 8 PP 5-6.) Mr. Dials also submitted an affidavit from himself stating that "[a]t the time of th[e] request [for medical exemption], and to this day, I do not recall having ever met any member of the Workman family" and "I do not recall being informed or otherwise aware of any other issues concerning the Workman children." (*Id.*, Ex. 7 PP 4-5.) Mr. Dials states that the medical exemption request constitutes the sole basis of his knowledge of the Workman family, and was of concern to him because he had never before dealt with a request for medical exemption during his tenure as Superintendent, and he "wanted to be sure that [he] handled it correctly and responsibly." (*Id.* P 6.) Conversely, Ms. Workman has presented no evidence that she has been treated differently from others with respect to this issue.

Ms. Workman also challenges the mandatory immunization program on its face. The mere fact that a state or municipality mandates vaccinations, however, is not enough to support an equal protection or due process claim. [**31] In *Zucht v. King*, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922), the plaintiff claimed that city ordinances requiring vaccination for admission to educational institutions violated her Fourteenth Amendment rights of due process and equal protection. Writing for the Court, Justice Brandies noted that *Jacobson* had long ago "settled that it is within the police power of a

State to provide for compulsory vaccination." *Id.* at 176; see also *Boone v. Boozman*, 217 F. Supp. 2d 938, 956 (E.D. Ark. 2002) ("[T]he question presented . . . is whether . . .the Due Process Clause [protects] a parent's right to refuse to have her child immunized . . . where immunization is a precondition to attending school. The Nation's history, legal traditions, and practices answer with a resounding 'no.'"); Maas, 152 A.2d at 404 ("A requirement that a child must be vaccinated and immunized before [*691] it can attend the local public schools violates neither due process nor . . . the equal protection clause of the Constitution.").

Ms. Workman also alleges that the administration of the mandatory immunization program violates her procedural due process rights. Assuming M.W.'s application for exemption is entitled to procedural due process protection, [**32] three factors determine whether the procedures followed by the state are constitutionally sufficient: the private interest at stake; the risk of erroneous deprivation through the procedures used and the probable value of additional procedures; and the government's interest. *Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 252 (4th Cir. 2005) (*citing Mathews v. Eldridge*, 424 U.S., 319 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).
As explained above, states and localities may constitutionally exclude children from school because of their lack of immunizations, and that is precisely what the defendants did here. West Virginia provides administrative remedies for "[a]ny person adversely affected by the enforcement of [the immunization

requirements] desiring a contested case hearing to determine any rights, duties, interests or privileges." W. Va. C.S.R. § 64-95-10. A post-deprivation hearing can be sufficient when pre-deprivation procedures would risk endangering the public health. *Cf. N. Am. Cold Storage Co v. City of Chicago*, 211 U.S. 306, 315, 29 S. Ct. 101, 53 L. Ed. 195, 6 Ohio L. Rep. 665 (1908). Ms. Workman argues that the administrative remedies, which she declined to utilize, offer her no relief because West Virginia "fails to allow for a religious exemption, making [**33] [the immunization program] unconstitutional." (Pl.'s Reply Mingo Defs. 14.) But West Virginia is not obligated to provide such an exemption; its mandatory immunization program is consistent with the United States constitution. Ms. Workman's procedural due process rights were not violated by the defendants' administration of West Virginia's mandatory immunization program.

In sum, Ms. Workman's First Amendment claim, along with her as-applied and facial equal protection claims and her substantive and procedural due process claims, fails. Summary judgment is thus GRANTED to the defendants on the plaintiff's constitutional claims.

C. Statutory Claims

After dismissing all federal claims, this court lacks jurisdiction to hear pendent state law claims for injunctive relief against Dr. Paine and Mr. Dials. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S.

89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Furthermore, although state law damages claims against state government officers in their personal capacities survive *Pennhurst*, *see, e.g., id. at* 110 n.19, 111 n.21, I see no indication that West Virginia Code section 16-3-4 permits a private cause of action for damages against Dr. Paine and Mr. Dials. Therefore, the defendants' [**34] motions for summary judgment on the plaintiff's statutory claims are GRANTED.

IV. Conclusion

In conclusion, the Mingo Board of Education is completely immune from suit under the Eleventh Amendment. Although some of the plaintiff's claims seeking relief from the individual defendants survive Eleventh Amendment analysis, these claims fail on the merits. Therefore, the plaintiff's Motion for Summary Judgment [Docket 62] is DENIED and the defendants' Motions for Summary Judgment [Dockets 98 & 102] are GRANTED. All other pending motions [Dockets 2, 73, 97, 118] are DENIED as moot.

The court DIRECTS the Clerk to send a copy of this Order to counsel of record [*692] and any unrepresented party. The court further DIRECTS the Clerk to post a copy of this published opinion on the court's web-site, www.wvsd.uscourts.gov.

ENTER: November 3, 2009

/s/ Joseph R. Goodwin

Joseph R. Goodwin, Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

JENNIFER WORKMAN, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 2:09-cv-00325

MINGO COUNTY SCHOOLS, et al.,

Defendants.

JUDGMENT ORDER

In accordance with the accompanying Memorandum Opinion and Order granting the defendants' motions for summary judgment, the court **ORDERS** that judgment be entered in favor of the defendants Mingo County Board of Education, Dr. Steven L. Paine, and Dwight Dials, that the Third-Party Complaint [Docket 82] be dismissed as moot and that this case be dismissed and stricken from the docket of this Court.

The Court **DIRECTS** the Clerk to send a certified copy of this Judgment Order to counsel of record and any unrepresented parties.

ENTER: November 3, 2009

JOSEPH R. GOODWIN
Joseph R. Goodwin, Chief Judge

FILED: April 19, 2011

UNITED STATES COURT OF APPEALS
FOUR THE FOURTH CIRCUIT

No. 09-2352
(2:09-cv-00325)

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 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

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INCORPORATED; AMERICAN ACADEMY OF PEDIATRICS, INCORPORATED, West Virginia Chapter; CENTER FOR RURAL HEALTH DEVELOPMENT, INCORPORATED; WEST VIRGINIA ASSOCIATION OF LOCAL HEALTH DEPARTMENTS; IMMUNICATION ACTION COALITION, INCORPORATED,

Amici Supporting Appellees

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing *en banc*.

Entered at the direction of the panel: Judge Agee, Judge Wynn and Senior Judge Duffy.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: March 22, 2011

UNITED STATES COURT OF APPEALS
FOUR THE FOURTH CIRCUIT

No. 09-2352
(2:09-cv-00325)

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

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v.

MINGO COUNTY BOARD OF EDUCATION; DR. STEVEN L. PAINE, State Superintendent of Schools; DWIGHT DIALS, Superintendent 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

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INCORPORATED; AMERICAN ACADEMY OF PEDIATRICS, INCORPORATED, West Virginia Chapter; CENTER FOR RURAL HEALTH DEVELOPMENT, INCORPORATED; WEST VIRGINIA ASSOCIATION OF LOCAL HEALTH DEPARTMENTS; IMMUNICATION ACTION COALITION, INCORPORATED,

Amici Supporting Appellees

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

W. Va. Code § 16-3-4

*** Text Current Through 2011 Regular Session ***
*** Annotations Current Through February 11, 2011 ***

Chapter 16. Public Health.
Article 3. Prevention And Control Of Communicable And Other Infectious Diseases.

W. Va. Code § 16-3-4 (2011)

§ 16-3-4. Compulsory immunization of school children; information disseminated; offenses; penalties.

Whenever a resident birth occurs, the state director of health shall promptly provide parents of the newborn child with information on immunizations mandated by this state or required for admission to a public school in this state.

All children entering school for the first time in this state shall have been immunized against diphtheria, polio, rubeola, rubella, tetanus and whooping cough. Any person who cannot give satisfactory proof of

having been immunized previously or a certificate from a reputable physician showing that an immunization for any or all diphtheria, polio, rubeola, rubella, tetanus and whooping cough is impossible or improper or sufficient reason why any or all immunizations should not be done, shall be immunized for diphtheria, polio, rubeola, rubella, tetanus and whooping cough prior to being admitted in any of the schools of the state. No child or person shall be admitted or received in any of the schools of the state until he or she has been immunized as hereinafter provided or produces a certificate from a reputable physician showing that an immunization for diphtheria, polio, rubeola, rubella, tetanus and whooping cough has been done or is impossible or improper or other sufficient reason why such immunizations have not been done. Any teacher having information concerning any person who attempts to enter school for the first time without having been immunized against diphtheria, polio, rubeola, rubella, tetanus and whooping cough shall report the names of all such persons to the county health officer. It shall be the duty of the health officer in counties having a full-time health officer to see that such persons are immunized before entering school: Provided, That persons enrolling from schools outside of the state may be provisionally enrolled under minimum criteria established by the Director of the Department of Health so that the person's immunization may be completed while missing a minimum amount of school: Provided, however, That no person shall be allowed to enter school without at least one dose of each required vaccine.

In counties where there is no full-time health officer or district health officer, the county commission or municipal council shall appoint competent physicians to do the immunizations and fix their compensation. County health departments shall furnish the biologicals for this immunization free of charge.

Health officers and physicians who shall do this immunization work shall give to all persons and children a certificate free of charge showing that they have been immunized against diphtheria, polio, rubeola, rubella, tetanus and whooping cough, or he or she may give the certificate to any person or child whom he or she knows to have been immunized against diphtheria, polio, rubeola, rubella, tetanus and whooping cough. If any physician shall give any person a false certificate of immunization against diphtheria, polio, rubeola, rubella, tetanus and whooping cough, he or she shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty-five nor more than one hundred dollars.

Any parent or guardian who refuses to permit his or her child to be immunized against diphtheria, polio, rubeola, rubella, tetanus and whooping cough, who cannot give satisfactory proof that the child or person has been immunized against diphtheria, polio, rubeola, rubella, tetanus and whooping cough previously, or a certificate from a reputable physician showing that immunization for any or all is impossible or improper, or sufficient reason why any or all

immunizations should not be done, shall be guilty of a misdemeanor, and except as herein otherwise provided, shall, upon conviction, be punished by a fine of not less than ten nor more than fifty dollars for each offense.

HISTORY: 1887, c. 64, § 21; 1905, c. 58, § 21; Code 1923, c. 150, § 21; 1937, c. 129; 1967, c. 86; 1971, c. 69; 1973, c. 55; 1985, c. 93; 1987, c. 42.