
IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

West Virginia Board of Education, et al.

Petitioners,

v.

MIRANDA G., individually and on behalf of her minor child A.G.,
and Carley H., individually and on behalf of her minor E.G.

Respondents.

BRIEF OF *AMICUS CURIAE* STAND FOR HEALTH FREEDOM

*In Support of Respondents and Urging the Court to Affirm the Permanent Injunction
Issued by the Circuit Court of Raleigh County*

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Interest of Amicus Curiae¹

Stand for Health Freedom (“SHF”) is a national nonprofit organization dedicated to protecting informed consent in health decision-making and the constitutional structure that safeguards those freedoms. Central to SHF’s mission is the protection of parental rights and religious freedom.

Through education, civic engagement and public policy advocacy, SHF has mobilized more than one million Americans to participate in protecting informed consent, transparency, environmental stewardship, and governmental accountability. SHF represents the voices of West Virginians who actively engage with our tools to protect health freedom. Additionally, the outcome of this case will be felt nation-wide.

SHF is in a unique position to brief the court on the jurisprudence surrounding First Amendment freedom of religion because not only do we represent the voices of many West Virginians, but we engage in health freedom advocacy throughout the United States and on the federal level. SHF has been involved in efforts in many states to preserve the religious exemption to vaccine mandates. We have successfully defended the religious exemption in Massachusetts, Florida, Hawaii, and New Jersey. Most of the states that we serve have robust religious exemptions. We have educated on the First Amendment and how inseparable the stewardship of the human frame is from our relationship with God.

The legal question presented in this case, whether the state Board of Education has the legal authority to deny religious exemptions to state vaccine mandates despite the Equal

¹ Pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure, SHF states that no counsel for any party authored this brief in whole or in part; and no counsel for any party, nor any party, made a monetary contribution specifically intended to fund the preparation or submission of the brief.

Protection for Religion Act (“**EPRA**”) and the Governor’s Executive Order to the contrary, directly affects SHF’s mission and the interests of the Americans it represents. SHF firmly believes that the United States Constitution protects the “police power” of states to protect the health and welfare of its citizens. However that power is not unchecked—if a state can override religious rights in health care decision-making, the government is playing God, doctor, and parent.

SHF has no financial interest in the outcome of this case. It files this brief solely because of the implications the Court’s decision will have for informed consent and religious freedom across the country.

SHF submits this brief pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure. Moreover, on Tuesday, May 5, 2026, counsel for SHF sought consent to file the present brief from counsel for Petitioners who, on Wednesday, May 6, 2026, indicated such consent.

Introduction

SHF will explain herein that, under the First Amendment to the Constitution of the United States, the state may not treat religious activity more harshly than comparable secular activity unless such differential treatment can be justified under strict scrutiny. And it almost never can be. The Board of Education’s (“**Board**”) sweeping policy of refusing to honor religious exemptions (“**Religious Exemption Ban**” or “**Ban**”) from West Virginia’s Compulsory Vaccination Law (“**CVL**”), W. Va. Code § 16-3-4, plainly cannot be so justified. Therefore, although the relevant subsection of the EPRA does not permit such a legal regime to stand *regardless* of any purported justification, the Ban would not survive even under the EPRA section that does adopt First Amendment strict scrutiny analysis. This violation, which results in

severe consequences for children who, for religious reasons, are unvaccinated, as well as their parents—but permits others to engage in even more harmful activity consequence-free—should not be allowed to stand. It was properly enjoined.

Argument

I. The EPRA codifies federal standards for religious liberty.

Forty-five states and the District of Columbia allow religious exemptions to childhood vaccination requirements. J.A. 69–70 (Findings of Fact, Conclusions of Law, and Order Granting Permanent Injunctive and Declaratory Relief, *Guzman v. West Virginia Bd. of Educ.*, No. CC-41-2025-C-230, Findings of Fact (“**FOF**”) ¶ 2 and n.2 (Cir. Ct. Raleigh Cnty. Nov. 26, 2025)). This is in large part due to the United States Constitution’s protection of religious liberty. Under the First Amendment, laws that burden religious practice and are not “neutral and of general applicability” must be struck down unless they satisfy strict scrutiny, meaning that they “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). For example, laws that “prohibit[] religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way” (“**Comparable Activity**”) are not generally applicable—and are often non-neutral to boot—and are therefore subject to strict scrutiny. *Fulton v. City of Phila.*, 593 U.S. 522, 534 (2021) (stating rule concerning generality); *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 17 (2020) (finding that regulations imposing differing treatment for secular and religious activities were not “neutral because they single[d] out [religious activity] for especially harsh treatment”); *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (laws are not general if they “treat *any* comparable secular activity more favorably than religious exercise”).

Similarly, a law is not generally applicable—and thus subject to strict scrutiny—when government officials have discretion to grant individualized exceptions to a law. *See Fulton*, 593 U.S. at 536; *see also id.* at 544 (Barrett, J., concurring, joined by Kavanaugh, J., and Breyer, J.) (“a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions”) (citations omitted).

“[T]he right to exercise the liberties safeguarded by the First Amendment lies at the foundation of free government by free men[.]” *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (internal quotation marks and citation omitted). Non-neutral and non-general laws are therefore ordinarily struck down as unconstitutional when challenged under the Free Exercise Clause—strict scrutiny is a high threshold that typically is not overcome. *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 478–79 (2020) (quoting *Lukumi*, 508 U.S. at 546) (“a law ‘target[ing] religious conduct for distinctive treatment or advanc[ing] legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases’”).

These principles are adopted by the EPRA, W. Va. Code § 35-1A-1, enacted by House Bill 3042 of the 2023 Regular Session (“**Bill**”). Doing so was, in fact, the EPRA’s purpose: in the words of one of its co-sponsors, the EPRA “simply codifies the existing U.S. Supreme Court caselaw . . . that this test [i.e., strict scrutiny] must be administered.” W. Va. House of Delegates Com. Sub. for H.B. 3042 (Feb. 27, 2023), Floor remarks on the passage of EPRA, <https://www.youtube.com/live/Ezccny9hW4I?t=3068s>, at 51:14 (co-sponsor Todd Kirby). To that end, it prohibits “state action” that “[t]reat[s] religious conduct more restrictively than any conduct of reasonably comparable risk,” W. Va. Code § 35-1A-1(a)(2). This provision is substantively the same as the First Amendment’s protection against Comparable Activity

discrimination (except that it is even more strict²). Indeed, the EPRA’s “comparable risk” language is a direct echo of Free Exercise Clause analysis, under which the comparability of “two activities . . . must be judged against the asserted government interest that justifies the regulation . . . [and] *the risks various activities pose*” to those interests, *Tandon*, 593 U.S. at 62 (emphasis added). That the Bill’s purpose is (at its most lenient, *supra* n.2) to impose the strict scrutiny standard is, moreover, stated explicitly in the Bill’s title: “AN ACT . . . ensuring that, in all cases where state action is alleged to substantially burden the exercise of religion, . . . strict scrutiny is applied.” Enrolled Comm. Sub. H.B. 3042, 2023 Reg. Sess., W. Va. Legislature (available at https://code.wvlegislature.gov/signed_bills/2023/2023-RS-HB3042-SUB%20ENR_signed.pdf).

Accordingly, federal case law analyzing laws that suppress religious activity will greatly benefit the Court. Because the tests imposed by the EPRA are well-trod ground in the federal arena, such cases provide state courts with a framework for how to analyze claims based on government interference with religious practice, providing a helpful supplement to state jurisprudence. In particular, they provide a view to why, in any jurisdiction that values religious freedom, laws that treat secular conduct more favorably than religious conduct cannot be tolerated. As explained below, such laws result in the imposition of negative effects on the

² Unlike the First Amendment, this prohibition does not provide *any* means for the government to justify such discrimination. Under the EPRA, state action that “[s]ubstantially burden[s] a person’s exercise of religion” is generally prohibited, but may be justified if the particular burden on religious exercise is the “least restrictive means” of “further[ing] a compelling governmental interest” and is “essential” to doing so. W. Va. Code § 35-1A-1(a)(1). The prohibition on Comparable Activity discrimination, by contrast, contains no such justification regime. *Id.* at § 35-1A-1(a)(2). Accordingly, on the face of the EPRA, Comparable Activity discrimination is flat-out prohibited—*nothing* can justify it, not even a compelling interest and a showing that the least restrictive means is employed. This is more strict than the First Amendment, which *does* permit Comparable Activity discrimination in the extraordinary situations in which strict scrutiny is satisfied.

religious while sparing everyone else—a result that is repugnant to any society that values religious freedom.

II. Supreme Court cases show that Comparable Activity discrimination is almost never justifiable.

The question of whether religious liberty includes a right to make vaccination choices based on religious belief and, if so, whether that right must, in certain circumstances, give way to governmental interests of sufficient weight, has lengthy history in United States jurisprudence. The United States Supreme Court first substantially addressed the question over a century ago in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), recently addressed it again in a number of cases addressing COVID-era laws that sought to impose mandatory safety measures, and continues to address the overarching question of whether non-general or non-neutral laws must give way to religious liberty to this day, in opinions such as the recent *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission* decision, 605 U.S. 238 (2025).

A. *Jacobson* provides limited guidance in religious liberty cases.

Given Defendants’ reliance on *Jacobson*, see J.A. 117 (Findings of Fact, Conclusions of Law, and Order Granting Permanent Injunctive and Declaratory Relief, *Guzman*, No. CC-41-2025-C-230, 56 n.14), it should be briefly noted first that the only aspect of *Jacobson* that is applicable to this case is its affirmation that courts must strike down vaccine laws that infringe on religious liberty. The main substance of *Jacobson*, however, concerned a challenge that has nothing to do with the challenge at bar. *Jacobson* dealt with claims under the Fourteenth Amendment. 197 U.S. at 13–14; see also *Roman Catholic Diocese*, 592 U.S. at 24 (Gorsuch, J., concurring) (citing same); *Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. 1042, 1049 n.3 (2020) (briefly detailing all claims in *Jacobson*). Religious liberty was not asserted. See generally 197 U.S. 11. So *Jacobson*’s guidance here is limited. As noted, however, it does affirm one

principle at issue, carefully explaining that *if* a religious liberty interest *had* been at stake, then the court would have been bound by “duty . . . [to] give effect to the Constitution.” *Id.* at 31 (citations omitted) (such duty applies when “a statute purporting to . . . protect the public health” plainly burdens “rights secured by the fundamental law”).³

Even if *Jacobson*’s guidance concerning laws affecting fundamental rights is set aside and the case is interpreted to stand for the general proposition that the state has sweeping authority in matters of public health no matter the constitutional harm alleged, it does not change the analysis to be applied today. The simple fact is that the modern analysis is well-established—and it is not *Jacobson*’s analysis. The Supreme Court has made clear, in a variety of cases concerning COVID-era safety regulations, that state measures to stem a pandemic, if non-neutral or non-general, must satisfy *strict scrutiny*. *E.g.*, *Roman Catholic Diocese*, 592 U.S. at 18; *see also id.* at 23–24 (Gorsuch, J., concurring) (noting that although “*Jacobson* pre-dated the modern tiers of scrutiny,” the analysis applied there was “essentially . . . rational basis review,” the test that “*normally* applies to Fourteenth Amendment challenges,” meaning that *Jacobson* did not hold that “normal legal rules [change] during a pandemic,” but instead “applied what would become the traditional legal test associated with the right at issue—exactly what the [Supreme] Court d[id]” in *Roman Catholic Diocese* by applying strict scrutiny). As Justice Gorsuch noted, “no Justice now disputes any of these points”—i.e., the fact that *Jacobson* was a “modest” decision that did not even substantively address “intrusions into settled constitutional rights.” *Id.* at 24–25 (Gorsuch, J., concurring). Thus, even if *Jacobson*’s pandemic context were applicable

³Also noteworthy is *Jacobson*’s counsel that courts may properly intervene to protect people in matters of laws designed to guard the public health in times of pandemic when that state power is “exercised in . . . an arbitrary, unreasonable manner, or” goes “beyond what [i]s reasonably required for the safety of the public[.]” *Id.* at 28.

to analysis of a general state mandate like that at issue here (and it is not), that would change nothing. Today, strict scrutiny is unquestionably the analysis that must be applied to non-neutral and non-general laws burdening religious liberty—even in the face of a pandemic.

Nor, as explained in the following section, was *Roman Catholic Diocese* an anomaly. The Supreme Court applied strict scrutiny to COVID-era regulations alleged to infringe religious liberty in numerous similar cases, exemplifying its modern framework for such cases.

B. The Supreme Court’s modern jurisprudence of religious liberty is clear.

Modern jurisprudence concerning differential treatment of religious activity and secular activity demonstrates that it is impermissible for government to impose consequences on the former for certain activities while allowing the latter to engage consequence-free in activity with similar risks. Such laws typically cannot satisfy strict scrutiny; they will generally fail the narrow tailoring analysis for the same reason they are subjected to strict scrutiny in the first place. That is, if a state permits activity entailing certain risks, it cannot claim that laws prohibiting individuals from engaging in Comparable Activity for religious reasons are narrowly tailored to preventing that same risk. *See Lukumi*, 508 U.S. at 546.

Church of the Lukumi Babalu Aye, Inc. v. Hialeah was a seminal case concerning these religious freedom precepts. In *Lukumi*, the Supreme Court found a law non-general for barring animal sacrifice based on an alleged public-health interest concerning animal carcass disposal that logically applied to exempted hunters and restaurants. *Id.* at 543–46. Indeed, the conduct permitted by the exemptions endangered the asserted interest to “a similar or greater degree” than the prohibited conduct itself would. *Id.* at 543. Moreover, in that analysis, *Lukumi* provides a helpful analytical rubric for laws that are “underinclusive.” *E.g., id.* at 543, 545, 547.

Underinclusivity refers to a law’s failure to prohibit activities that harm the government’s alleged

interest. *Id.* at 543. The concept of underinclusivity is therefore essential to the generality and neutrality analysis: as explained, if a law is underinclusive as to secular activity, but not religious activity that poses comparable risks, strict scrutiny applies. *See id.* at 545–46.

However, such underinclusivity is problematic for the state on additional levels in religious freedom challenges because, as referenced above, in addition to *triggering* strict scrutiny, it typically *also* results in a law’s failure to satisfy strict scrutiny. *See id.* at 546. The government’s failure to pursue its “proffered objectives . . . with respect to analogous nonreligious conduct” shows that those objectives are achievable through “narrower ordinances that burden[] religion to a far lesser degree,” and “[t]he absence of narrow tailoring suffices to establish” a law’s invalidity. *Id.* And, were that problem not grave enough, underinclusivity results in a law’s demise for yet another reason: “It is established . . . that a law cannot be regarded as protecting an interest of the highest order [i.e., a compelling interest] when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Id.* at 546–47 (cleaned up; citation omitted) (“Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing . . . harm of the same sort, the interest given in justification of the restriction is not compelling.”). In short, *Lukumi*’s analysis concerning underinclusivity reveals that laws favoring secular conduct over comparable religious conduct are, with virtual certainty, doomed from the outset.

Applying these principles, the Supreme Court has recently made it even more clear that religious liberty will not tolerate unjustified differential treatment of religious activity.

For example, the regulations at issue in *Roman Catholic Diocese* prohibited houses of worship in a “red zone” from “admit[ting] more than 10 persons” at a time, while businesses “such as acupuncture facilities, camp grounds, [and] garages” were allowed to admit as many

people as they wished; similarly, houses of worship in an “orange zone” were prohibited from admitting more than 25 persons, while “even non-essential businesses [could] decide for themselves how many persons to admit.” 592 U.S. at 17. That was a violation of the neutrality requirement, *id.*, and caused “irreparable harm”—“[t]he loss of First Amendment freedoms”—in the form of “the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat” being barred from doing so. *Id.* at 19 (citation omitted). No harm befell anyone who wished to visit one of the many secular businesses in the same zones. While the Court opted to resolve the question on neutrality grounds, rather than generality, the two concepts are closely related, *Lukumi*, 508 U.S. at 531 (“failure to satisfy one requirement is a likely indication that the other has not been satisfied”), and the comparative harm caused by the regulations’ explicit differential treatment is a prime example of the exact harm that the First Amendment’s prohibition on Comparable Activity discrimination guards against.

Shortly after issuing the *Roman Catholic Diocese* opinion, the Supreme Court dealt once again with a state’s COVID measures that “openly imposed more stringent regulations on religious institutions than on many businesses,” forbidding indoor worship *entirely* but permitting “most retail operations to proceed indoors with 25% occupancy, and other businesses to operate at 50% occupancy or more.” *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (Gorsuch, J., concurring, joined by Thomas, J., and Alito, J.).⁴ Despite California’s clear choice to single out religious activity for harsher treatment, it could not show how the religious activity in question was more dangerous than the permitted secular activity, nor why the safety measures permitted in secular settings would not work in religious settings. *Id.* at

⁴ Justices Barrett and Kavanaugh also joined this concurrence in relevant part, *id.* at 717, rendering it controlling as having the assent of five Justices.

718–19. As in *Roman Catholic Diocese*, then, this neutrality violation therefore arose from the state’s Comparable Activity discrimination.

In *Tandon v. Newsom*, the Court, with apparent exasperation with states’ infringements on religious liberty in the name of health safety, enjoined enforcement of yet another subset of California’s COVID regulations, stating, “This is the fifth time the Court has summarily rejected the Ninth Circuit’s analysis of California’s COVID restrictions on religious exercise. . . . It is unsurprising that such litigants are entitled to relief.” 593 U.S. 61, 64 (2021) (citations omitted). This time, the Court addressed the state’s restrictions on religious worship gatherings in the home, which treated “some comparable secular activities more favorably” than such home gatherings, “permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more” people at a time. *Id.* at 63. There had been no showing that “those activities pose[d] a lesser risk of transmission than applicants’ proposed religious exercise at home,” and the Ninth Circuit erred by “reject[ing] the[] comparators simply because this Court’s previous decisions involved public buildings as opposed to private buildings,” *id.* at 63–64, since the proper question is whether the risks, not the settings, are comparable, *id.* at 62. It also erred by simply *assuming* greater risks might be present in home worship: “The State cannot assume the worst when people go to worship but assume the best when people go to work.” *Id.* at 64 (internal quotation marks and citation omitted). As a result of these numerous problems, the Court simply stated that the regulations were “not neutral and generally applicable[.]” *Id.* at 62.

In short, the Supreme Court’s COVID-era cases show, with crystalline clarity, the precept with which the Court concluded *Tandon*: the First Amendment’s demanding “standard is not watered down; it really means what it says.” *Id.* at 65 (cleaned up; citation omitted).

Although this line of cases shows that First Amendment jurisprudence is alive and well in the specific context of public health—and is not diminished even by a harrowing national pandemic—more recent cases continue to affirm the same general principles. In one recent example, *Catholic Charities*, the Supreme Court considered a Wisconsin law exempting “nonprofits ‘operated primarily for religious purposes’” from certain taxes. 605 U.S. at 241 (quoting Wis. Stat. § 108.02(15)(h)(2)). The matter, brought by various nonprofit entities affiliated with the Roman Catholic Church, appealed a decision of the Wisconsin Supreme Court, *id.* at 241, 243, which had found that the “religious purposes” criterion of the exemption turned largely on “whether an organization participated in worship services, religious outreach, ceremony or religious education,” *id.* at 245 (quoting 411 Wis. 2d 1, 34–35 (Wis. 2024)). The High Court determined that that constituted the “paradigmatic form of denominational discrimination” and held that the law was subject to strict scrutiny. *Id.* at 249, 252. Although the case therefore concerned discrimination between religion and religion, rather than religion and secular activity, it reaffirms the First Amendment’s requirement of neutrality when it comes to religion. *See id.* at 247. Indeed, *Epperson v. Arkansas*, cited in the *Catholic Charities* opinion for neutrality doctrine, *id.*, makes plain that neutrality means “neutrality between religion and religion, and between religion and nonreligion,” 393 U.S. 97, 104 (1968).

Catholic Charities also reaffirmed the problem with underinclusive laws in the narrow tailoring analysis. The Court noted that “Wisconsin’s regime . . . [was] vastly underinclusive,” exempting numerous entities that were comparable to the petitioners. 605 U.S. at 253. “That underinclusiveness,” said the Court, meant that the government left “appreciable damage” to its purported interest “unprohibited,” thus “bel[ying] the State’s claim of narrow tailoring.” *Id.* (cleaned up) (citing *Reed v. Town of Gilbert*, 576 U. S. 155, 172 (2015)).

III. The Religious Exemption Ban tramples these standards.

Because the EPRA codifies First Amendment standards, the foregoing First Amendment principles apply to EPRA analysis. Applying those principles, the ways in which the Religious Exemption Ban falls short are numerous and striking.

A. The Religious Exemption Ban must be struck down due to its non-generality alone.

1. The Religious Exemption Ban is not generally applicable.

First, the Religious Exemption Ban is not generally applicable. The Board exercises broad discretion to grant individualized exemptions to the CVL. “[T]here is a degree of CVL non-compliance permitted by Defendants.” J.A. 80 (FOF ¶ 31 n.5). The term “degree,” however, truly does not capture in full the non-compliance that is permitted. “In the 2024 school year, . . . for just [three] of West Virginia’s counties, 604 children lacked vaccines required by the CVL but were allowed to attend school” for more than 30 days. J.A. 89–90 (FOF ¶ 61) (quoted material), J.A. 79–80 (FOF ¶ 28) (referencing the same statistics and noting over-30-day enrollment). This number references actual non-compliance—“hundreds of unvaccinated children lacking medical or religious reasons for non-vaccination but who are allowed to attend school”—not medical exemptions. J.A. 89–90 (FOR ¶ 61). The Board’s apparently absolute discretion to grant these hundreds of effective exemptions, in itself, renders the Ban non-general. *See supra* Part I.

Even as to medical exemptions, the state enjoys broad discretion: state officials “stringently review medical exemption requests and then decide whether to grant or deny them,” J.A. 96 (FOF ¶ 81), though it is unclear whether the state maintains any list of objective criteria that guide the determination of whether to grant such an exemption, without which (for that reason alone) the CVL would be non-general. *See Fulton*, 593 U.S. at 533 (“A law is not

generally applicable if it invites the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions” (cleaned up; citation omitted)); *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 688 (9th Cir. 2023) (noting that without a “written list of [] approved criteria” to determine whether an exemption should be granted, government officials are forced to rely on subjective “common sense” in “delv[ing] into the specific facts and circumstances or to ‘consider the particular reasons’ for such ‘individualized exemptions,’” rendering the law non-general (quoting *Fulton*, 593 U.S. at 533)).

Even without the apparent discretion exercised by the government in granting medical exemptions, the existence of such exemptions, on its own, renders the CVL underinclusive and thus non-general as a result of the Religious Exemption Ban, which prohibits religious activity (declining vaccination for religious reasons and attending school) that is *less* harmful than the permitted secular activity (declining vaccination for medical reasons and attending school). J.A. 81 (FOF ¶ 32) (noting that the theory of the state’s expert witness on the harmfulness of religious exemptions did not reflect “the outcome or actual experience in West Virginia”), J.A. 88 (FOF ¶¶ 54–55) (noting that the “risk” resulting from honoring the religious exemptions at issue would be far below even the state expert’s “cutoff for risk,” thus posing “no material risk” to the state’s asserted interests).

To boot, a remarkable degree of underinclusivity is present in a variety of other forms. In West Virginia’s “learning pods” and “microschools,” “an unlimited number of children” are permitted to congregate with no proof of vaccination. J.A. 81 (FOF ¶ 34). Nor does the state require homeschooled students to be vaccinated, although such students—of which there are approximately 24,000—“are permitted to be educated in large group settings.” *Id.* (FOF ¶ 35).

The state provides scholarship money for “parents to send their children out of state to be educated” in schools that do not require vaccination. J.A. 82 (FOF ¶¶ 36–37). However, as an expert noted, if the required “vaccines . . . are effective, then [unvaccinated] children pose no danger to vaccinated children in school.” J.A. 87 (FOF ¶ 51); *see also* J.A. 90–91 (FOF ¶ 63) (noting the expert’s additional testimony that many of the CVL vaccines “do not contribute to herd immunity” and “vaccines that do not contribute to herd immunity operate largely as personal protection devices for the recipient”). Accordingly, to the extent the CVL supports the state’s interest in protecting students’ health by keeping certain students separated, it is the health of *unvaccinated* children to which this interest applies, as vaccinated children are already protected. All of the exemptions and other forms of underinclusivity discussed above, which put unvaccinated children in large groups of other unvaccinated children, only *increase* the very harm to the unvaccinated that the state asserts an interest in curtailing, thus representing the precise sort of underinclusivity that renders a legal regime non-general.

Even to the extent the state’s asserted interest applies to those who are already vaccinated, it is still underinclusive. The state permits students to travel out of state—indeed, it *fosters* such travel by permitting it for “school-sponsored events” such as sporting events. J.A. 84 (FOF ¶ 42). This stunning form of underinclusivity, which sees the Board actively fostering student travel to “areas with low vaccination coverage,” *id.*, plainly renders the vaccination regime non-general. Nor can the Board convincingly claim that it is pursuing an interest in protecting students through vaccination and separation all while actively fostering student travel to such areas, much less that is doing so in a narrowly (or even rationally) tailored way.

On top of all of this, perhaps even more strikingly, the state also *simply permits unvaccinated individuals to be in the schools for extended periods of time*. Already discussed

above is the fact that, counting just three counties, hundreds of children have been permitted to attend school for more than 30 days while non-compliant. Beyond that, the state allows the thousands of adults who work regularly in the school system and “interact in close proximity to schoolchildren” “to altogether disregard the CVL’s vaccination requirements” for any reason whatsoever, despite their “frequent interactions” with students. J.A. 82–84 (FOF ¶¶ 37–41); *see also* J.A. 121 (Findings of Fact, Conclusions of Law, and Order Granting Permanent Injunctive and Declaratory Relief, *Guzman*, No. CC-41-2025-C-230, 60) (citing state testimony that such unvaccinated adults “regularly interact with children”). And “unlimited numbers” of members of the public who are unvaccinated may “freely access school campuses throughout the State,” including “high-density events.” J.A. 85 (FOF ¶ 44). The secular conduct permitted by the state in these instances—and indeed actively fostered thereby, since the state (for one example) hires its adult employees, but does not check their vaccination status—plainly creates precisely the harm that the state purports to have an interest in curtailing, and does so on a large scale.

The FOF goes into careful detail concerning the fact that, even considering the state’s own expert testimony, honoring the religious exemptions at issue would not harm the state’s interest *at all*. For example, the degree of risk that would result from honoring “[t]he current [religious] exemption rate” would be “less than one quarter of even [state expert] Dr. Slemph’s cutoff for risk.” J.A. 88 (FOF ¶ 55). Because “no material risk” would result from honoring the religious exemptions, it could not be more clear that the state permits and indeed actively fosters secular activity—all of those activities listed above—“that endangers [its] interests in a similar or greater degree than” the religious activity it prohibits. *Lukumi*, 508 U.S. at 543. In this case, the permitted activities plainly cause an even greater degree of harm. The Religious Exemption Ban is underinclusive, rendering the state’s regime non-general.

2. This non-generality, alone, violates the EPRA.

Because the EPRA simply does not permit Comparable Activity discrimination, as it provides no means (not even strict scrutiny) to justify same, W. Va. Code § 35-1A-1(a)(2), this non-generality, which arises from the numerous forms of Comparable Activity discrimination described above, should end the inquiry. The conclusion is simple: the Religious Exemption Ban is rife with Comparable Activity discrimination and therefore violates the EPRA.

B. The Religious Exemption Ban fails for numerous additional reasons.

Even under W. Va. Code § 35-1A-1(a)(1), which *does* permit the government to attempt to justify a legal regime under strict scrutiny, the Religious Exemption Ban still fails, since (in addition to its non-generality) it is not neutral and cannot satisfy strict scrutiny. As in *Roman Catholic Diocese*, it singles out religious exercise for “especially harsh treatment,” 592 U.S. at 17. This is plain, first, because the many permitted forms of secular activity discussed above result in much greater harm than the non-permitted religious activity would, since the latter is not harmful at all. *Supra* Part III.A.1. That constitutes “especially harsh treatment” of the *unharmful* but still prohibited religious activity. *See* 592 U.S. at 17. Second, like the law at issue in *Catholic Charities*, the Ban’s differential treatment is not merely incidental; instead, it results from the fact that it was adopted for the express and sole purpose of categorically denying *religious* exemptions, no questions asked, J.A. 71–74 (FOF ¶¶ 8–15), and thus “facially differentiates,” *see* 605 U.S. at 251. That facial differentiation renders the Ban non-neutral. *See id.*

Nor can the Ban survive strict scrutiny. It is underinclusive in a great many ways, causing its demise. First, the Ban “cannot be regarded as protecting an interest of the highest order” since “it leaves appreciable damage to that supposedly vital interest unprohibited.” *Lukumi*, 508 U.S. at 546–47 (cleaned up; citation omitted) (underinclusivity means “the interest given in justification

of the restriction is not compelling.”). Second, the Ban’s underinclusivity shows that it is not narrowly tailored for the same reasons that it is not general. *See id.* at 546 (“the ordinances are not drawn in narrow terms to accomplish th[e] [state’s] interests. As we have discussed [in determining non-generality], . . . [the] ordinances are . . . underinclusive in substantial respects.”); *see also Catholic Charities*, 605 U.S. at 253 (underinclusive legal regime was not narrowly tailored). So the Ban cannot satisfy the EPRA even under the less demanding § 35-1A-1(a)(1) subsection.

IV. The consequences are severe and result directly from the Religious Exemption Ban.

The Religious Exemption Ban violates the core principles of all peoples who value government that treats religiously-motivated conduct with the same basic respect it treats comparable secular conduct. It bears noting that, in this case, this is not merely an esoteric, abstract, or attenuated concern. Instead, the results of the Board’s Comparable Activity discrimination are direct, obvious, and alarming. Parents and students are forced to choose between forsaking their religious beliefs or facing grave consequences—consequences that those who do not have religious convictions against vaccinations need not worry about. Those consequences include the obvious diminished educational opportunities for children—which is an injury of the highest order, since education is a fundamental right enshrined in West Virginia’s constitution. They also include diminished social opportunities. Moreover, such children will presumably be unable to enjoy the organized sports provided by public schools and the opportunities that arise from same, such as potential scholarships. These consequences extend beyond the children, of course. They also include increased burdens on working parents, who are

forced to find costly educational alternatives for their children and will likely be forced to alter their schedules or change jobs in order to accommodate same.⁵

Meanwhile, those who do not have religious convictions against vaccination, including the hundreds of students who are permitted to attend school for lengthy periods despite plain non-compliance, students who have medical exemptions, adult employees who are permitted to be in close proximity with students throughout the week, and so forth, do not have to worry about such consequences. And that is true despite the fact that the state permits them to engage in even more harmful activity, and even *encourages* them to do so and *facilitates* doing so by (for example) sponsoring activities that take students and school employees to high-capacity events in low-vaccination areas outside of West Virginia.

This is precisely the sort of state action that the prohibition against Comparable Activity discrimination is meant to prevent. Such plain discrimination against those with religious belief cannot be tolerated. This Court should affirm the circuit court.

V. Conclusion

For all of the foregoing reasons, the Religious Exemption Ban plainly violates the EPRA. The violation arises from Comparable Activity discrimination and therefore causes the Ban to fall under the EPRA with no further questions asked. However, even if strict scrutiny is applied, the Ban plainly cannot satisfy same and, accordingly, fails either way. This Court should affirm the Order of the circuit court.

⁵ Additionally, the potential clustering of unvaccinated children “in learning pods and microschoools with hundreds of children, may pose more of a public health risk [] than if they were spread out,” J.A. 86 (FOF ¶ 47), thus creating a consequence extending to the public at large.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 11, 2026, a copy of the foregoing *Brief of Amicus Curiae Stand for Health Freedom* was served on all counsel of record via the Court's E-Filing system.

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