IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 25-836

WEST VIRGINIA BOARD OF EDUCATION; NANCY J. WHITE, *in her official capacity as President of the Board of Education*; VICTOR GABRIEL, F. SCOTT ROTRUCK, L. PAUL HARDESTY, ROBERT W. DUNLEVY, CHRISTOPHER STANSBURY, DEBORAH SULLIVAN, GREGORY WOOTEN, SARAH ARMSTRONG TUCKER, and CATHY JUSTICE, *all in their official capacities as members of the West Virginia Board of Education;* MICHELE BLATT, *in her official capacity as State Superintendent of Schools*; RALEIGH COUNTY BOARD OF EDUCATION; LARRY FORD, RICHARD SNUFFER, CHARLOTTE HUTCHENS, MARIE HAMRICK, and MARSHA SMITH, *all in their official capacities as members of the Raleigh County Board of Education;* and SERENA L. STARCHER, *in her official capacity as Superintendent, Raleigh County Board of Education,*

Defendants Below, Appellants

AND

JANE DOE,

Intervenor-Defendant Below, Appellant

v.

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

Plaintiffs Below, Appellees.

Honorable Michael E. Froble, Judge
Circuit Court of Raleigh County
Civil Action No. CC-41-2025-C-230

Intermediate Court of Appeals
Case No. 25-ICA-476

APPELLANTS' BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred when it grafted an extratextual religious exemption onto West Virginia Code § 16-3-4.

2. The Circuit Court erred when it determined Appellees succeeded on the merits of their claims under West Virginia Code § 35-1A-1(a)(1).

3. The Circuit Court erred when it determined the Appellees succeeded on the merits of their claim under West Virginia Code § 35-1A-1(a)(2).

4. The Circuit Court erred when it admitted as an expert and relied on the testimony of Dr. Neuenschwander, a known anti-vaccination advocate whose testimony has repeatedly been rejected in tribunals across the United States.

5. The Circuit Court erred by denying Appellants their Due Process rights, foreclosing Appellants' ability develop and defend their case at trial.

6. The Circuit Court erred by certifying a class action that it lacked jurisdiction to certify and that did not satisfy West Virginia Rule of Civil Procedure 23(a).

STATEMENT OF THE CASE

I. Introduction

For nearly a century, West Virginia Code § 16-3-4 has served as a bulwark against disease. Section 16-3-4 (the "Vaccine Law") requires all students attending public school, except those to whom vaccination presents medical risk, to receive vaccines that protect against certain diseases. The Vaccine Law works: West Virginia's school children have the highest vaccination rate in the country and the State experiences few outbreaks of vaccine-preventable diseases as a result. The Legislature has repeatedly considered adding religious exemptions to the Vaccine Law. It hasn't. Recent events reveal the Legislature's wisdom. Measles proliferates in South Carolina, Utah, and Texas, claiming the lives of at least two children. A disease once deemed eliminated in the United

States has reawakened. But not in the Mountain State. This case threatens to change that.

In the proceedings below, the Circuit Court rewrote the Vaccine Law and added the religious exemptions the Legislature rejected. To achieve that result, the Circuit Court erroneously read the Equal Protection for Religion Act, W. Va. Code § 35-1A-1 ("EPRA"), to apply universally such that it grafts religious exemptions onto all statutes. But the Legislature considered a broader version of EPRA that supported the Circuit Court's reading and rejected it, instead adopting narrower statutory language. The Circuit Court erred by expanding EPRA. The effect of that error is drastic. Litigants could weaponize EPRA against the State, using it as a tool to legislate through litigation. The Circuit Court's error does not stop at the Vaccine Law. Any number of statutes, from tax laws to seatbelt laws, face existential threats under the Circuit Court's reading. This Court should reject that broad reading and apply EPRA as written.

The Circuit Court also erred when it determined the Vaccine Law did not survive strict scrutiny. Both this Court and the Fourth Circuit have indicated the Vaccine Law survives strict scrutiny. The Circuit Court not only diverged from this authority, but it also misapplied the law and facts along the way. It determined West Virginia's interest in public health was not sufficiently compelling to survive strict scrutiny. It held that the Vaccine Law was not the least restrictive means of achieving West Virginia's public health goals because the Vaccine Law doesn't regulate *more* conduct. It cast aside the testimony of nationally recognized health experts in favor of testimony from an anti-vaccination advocate. It systemically denied Appellants the opportunity to develop their case. Those errors demand correction. This Court should reverse the Circuit Court, uphold the Vaccine Law, and preserve the Legislature's goal of protecting public health.

II. The Vaccine Law, EPRA, and Implementation of Exemptions by Executive Order

A. The Vaccine Law

For nearly a century, West Virginia has required students enrolling in the public school system to be vaccinated against certain dangerous, vaccine-preventable diseases. On March 13, 1937, the West Virginia Legislature passed House Bill 277, which codified those vaccine requirements in West Virginia Code § 16-3-4. J.A.594-99. The Legislature passed the Vaccine Law "for the protection of the health of the people of this state" against outbreaks of smallpox and diphtheria in the 1930s. *Id.* The Legislature amended the Vaccine Law several times to add to the list of required vaccines. The Vaccine Law now requires students attending public school to become "immunized against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough." W. Va. Code § 16-3-4(b).

The Vaccine Law provides one narrow exception for children who cannot be vaccinated for medical reasons. Students and their families can request medical exemptions from the Vaccine Law "accompanied by the certification of a licensed physician stating that the physical condition of the child is such that immunization is contraindicated or there exists a specific precaution to a particular vaccine." W. Va. Code § 16-3-4(h)(1); *see also* J.A.3880-82. For example, children receiving cancer treatment cannot receive certain live virus vaccines because their immune system is weakened. *See, e.g.*, J.A.2764-67. Immunization officers with the West Virginia Bureau for Public Health ("BPH") review medical exemption requests, along with medical evidence supporting the request, based on objective, medical criteria established by the United States Centers for Disease Control ("CDC"). J.A.3880-82.[1] Medical exemptions are uncommon: during

[1] The Circuit Court's statement that the Vaccine Law "permits public health officials in the Health Department to grant discretionary secular medical exemptions" is incorrect. J.A.68. Medical exemptions are issued if objective medical criteria are satisfied—not based on discretion. J.A.3880-82.

the 2024 school year, the State Immunization Officer received 97 medical exemption requests. J.A.601-03. Of those requests, 23 were permanently granted, 43 were temporarily granted, and 30 were denied outright (one had an "Other" disposition). *Id.* Between 2015 and July 2025, 493 medical exemption requests were granted, and 289 of those were on a temporary basis. *Id.*

Over the years, the Legislature considered broadening exemptions to the Vaccine Law. In every legislative session from 2023 to 2026, the Legislature considered bills proposing adding religious exemptions to the Vaccine Law. *See, e.g.*, J.A.604-19. Each and every time, the Legislature, expressing the public's will, rejected religious exemptions.

B. The Equal Protection for Religion Act

In the same 2023 Legislative Session where it voted down a bill to add religious exemptions to the Vaccine Law, the Legislature passed EPRA. In material part, EPRA states:

> Notwithstanding any other provision of law, no state action may: (1) Substantially burden a person's exercise of religion unless applying the burden to that person's exercise of religion in a particular situation is essential to further a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest; nor (2) Treat religious conduct more restrictively than any conduct of reasonably comparable risk; . . . .

W. Va. Code § 35-1A-1(a). "A person whose exercise of religion has been substantially burdened" may assert that as "a claim or as a defense in any judicial or administrative proceeding," "*Provided*, That relief is limited to injunctive or declaratory relief and reimbursement of costs and reasonable attorney fees." *Id.* at § 35-1A-1(b).

The enacted EPRA statute is far narrower than the introduced version of EPRA, which included a provision stating: "This article applies to all state and local laws, and the implementation of those laws, whether statutory or otherwise, and whether adopted before or after the effective date of this article." *See* W. Va. H.B. 3042, Reg. Legis. Sess. (W. Va. 2023), https://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=hb3042%20intr.htm&yr=2023

&sesstype=RS&i=3042. That proposed part of the statute mirrored a provision of the federal Religious Freedom Restoration Act ("RFRA") that states RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). That language, and other proposed sections, were stricken from the EPRA bill passed by the Legislature. *See* W. Va. Code § 35-1A-1.

EPRA's title also does not state that the law was intended to alter or amend other provisions of the West Virginia Code. Rather, EPRA's title states its purpose as

> AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated § 35–1A–1, all relating to forbidding excessive government limitations on exercise of religion; forbidding government from treating religious conduct more restrictively than any conduct of reasonably comparable risk; forbidding government from treating religious conduct more restrictively than comparable conduct because of alleged economic need or benefit; ensuring that, in all cases where state action is alleged to substantially burden the exercise of religion, that a compelling interest test is mandated, and strict scrutiny is applied; providing remedies; and addressing applicability and construction.

J.A0062. In the same 2023 Regular Session, the Legislature considered and rejected a bill to expressly create religious exemption to the Vaccine Law. *See* J.A.626-38. The full House of Delegates voted to table a motion to force the bill to a vote and later rejected another motion to reconsider the same matter. *Id.*

C. The Executive Order

Amid the Legislature's refusal to create religious exemptions, on January 14, 2025, Governor Morrisey entered Executive Order 7-25 purporting to do just that. The Executive Order directed the Commissioner of the BPH and the State Health Officer to create a religious exemption process for the Vaccine Law. *See* J.A.640-43. In both the 2025 and 2026 Legislative Sessions, the Legislature considered and refused legislation creating religious exemptions to the Vaccine Law. But the Executive Order and its illegal process of granting exemptions remains, directing BPH to

disregard the Vaccine Law.

The BPH does not develop vaccine policy; instead, it enforces the Vaccine Law as written. J.A.3865-66. West Virginia's State Epidemiologist, Shannon McBee, testified that when EPRA was passed in 2023, the BPH continued enforcing the Vaccine Law as written to further the government's "compelling interest in public health." J.A.3867-68. The BPH did not implement or create a religious exemption process until Executive Order 7-25 was issued. J.A.3869. After being directed to do so by Executive Order 7-25, Ms. McBee and her team at the BPH researched religious exemption processes used by other states and organizations. J.A.3870-76. Based on that research, the BPH proposed a process to assess the sincerity of the applicant's religious belief. *Id.* The Governor rejected that advice and directed BPH to grant an exemption to anyone who requests one, provides certain demographic information, and uses the word "religion" in the request. *Id.*

As directed by the Governor, the BPH disregarded the Vaccine Law and began informing those who requested religious exemptions that the BPH would no longer enforce the Vaccine Law. J.A.3876-78. Since Executive Order 7-25, the BPH has granted every request for a religious exemption it has received, and the BPH agreed that the system is, for all intents and purposes, an "opt-out" of the Vaccine Law. *Id.*; J.A.3891. By September 2025, the BPH issued 570 religious exemptions for the 2025-26 fall semester alone. J.A.2747. The 570 religious exemptions issued in that one semester exceeded the 493 medical exemptions the BPH issued over the prior decade.

The West Virginia Board of Education and the County Boards of Education enforce the Vaccine Law and ensure that students attending public school are vaccinated. J.A.3017. On June 11, 2025, the West Virginia Board of Education directed the County Boards of Education to comply with the Vaccine Law as written—without a religious exemption. J.A.548.

III. The Underlying Litigation

A. The Court grants Appellees' preliminary injunction, rewriting the Vaccine Law.

On June 24, 2025, Appellee Miranda G. filed this action. *See* J.A.136-76. She alleged the State Board Appellants[2] and County Board Appellants[3] violated EPRA by requiring proof of her child's vaccinations upon entering the Raleigh County School system. *Id.* She claimed that EPRA requires the State and County Board Appellants to recognize religious exemptions to the Vaccine Law and sought injunctive relief to compel them to accept her unvaccinated child in school.[4] *Id.* On July 12, 2025, Appellees added Carley H. as another plaintiff and asserted the same claim on behalf of her children.[5] J.A.320.

On July 15, 2025, before all of the State Board and County Board Appellants had been served with the Complaint, the Circuit Court *sua sponte* set a July 24, 2025, hearing on the Complaint's request for injunctive relief. J.A.514. The parties filed expedited briefing over the next week and a half.[6] J.A.564-696. At the hearing, the Circuit Court held that EPRA grafts a

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[2] The "State Board Appellants" are the West Virginia Board of Education (the "State Board"); Nancy J. White, in her official capacity as President of the State Board; Victor Gabriel, F. Scott Rotruck, L. Paul Hardesty, Robert W. Dunlevy, Christopher Stansbury, Deborah Sullivan, Gregory Wooten, Sarah Armstrong Tucker, and Cathy Justice, all in their official capacities as members of the State Board; and Michele Blatt, in her official capacity as State Superintendent of Schools.

[3] The "County Board Appellants" are the Raleigh County Board of Education (the "County Board"); Larry Ford, Richard Snuffer, Charlotte Hutchens, Marie Hamrick, and Marsha Smith, all in their official capacities as members of the County Board; and Serena L. Starcher, in her official capacity as Superintendent of the County Board.

[4] In the Complaint, Appellees relied heavily on *Perry v. Marteney*. *See, e.g.*, J.A.185-252. That case did not consider the facial validity of the Vaccine Law under EPRA; instead, Judge Kleeh considered only "an as-applied challenge with respect to W. Va. Code § 16-3-4 and specifically as to how Defendants have applied that statute to K.P. in refusing to enroll her in the Upshur County Virtual School program." That opinion—which is confined to the issue of a religious exemption for a single student attending virtual school—is not applicable here. "An 'as applied' challenge contends that a law's application to a particular person under particular circumstances deprives that person of a constitutional right. Thus, a successful 'as applied' challenge precludes the enforcement of a statute against a plaintiff alone." *Marcellus v. Virginia State Bd. of Elections*, 168 F. Supp. 3d 865, 872 n.8 (E.D. Va. 2016). Additionally, the decision on which Appellees rely has been fully briefed and argued and is pending decision at the Fourth Circuit.

[5] A third named plaintiff was later voluntarily dismissed when the parties discovered that the father of her children had them vaccinated in compliance with the Vaccine Law. J.A.2571-72.

[6] Jane Doe was not originally a party to this proceeding, but she moved to intervene to protect the interests

religious exemption onto the Vaccine Law, concluded without taking evidence that the Vaccine Law could not survive strict scrutiny, and granted a preliminary injunction prohibiting the State and County Board Appellants from enforcing the Vaccine Law as-applied to Appellee G.'s and H.'s children. J.A.755-59.

B. Appellants are denied discovery and any opportunity to examine Appellees.

On August 12, 2025, over Appellants' objections, the Circuit Court set a bench trial for September 10 and 11, 2025. *See* J.A.962-1277. The Court ordered parties to simultaneously disclose experts by August 29, 2025, with no rebuttal expert deadlines. J.A.1276-77. Appellants vigorously sought (and moved to compel) discovery into Appellees' claims—including, but not limited to, their claim that they have sincerely held religious beliefs that would be burdened by complying with the Vaccine Law. *See, e.g.*, J.A.1351-67, 1519–20, 3565-80. The Circuit Court denied Appellants' every attempt to obtain discovery.[7] *See* J.A.1476. Appellants subpoenaed witnesses to testify at trial, and the Court quashed the subpoenas during a telephonic status conference on Appellees' oral motion and with no opportunity to respond. J.A.2263, 2852. Appellants continued asking for discovery through trial to ensure the case was properly developed and they could effectively assert their affirmative defenses. *See, e.g.*, J.A.2572, 2871, 3096–97. The Circuit Court denied every request. *See, e.g.*, J.A.2573, 2873, 3096–97, 3104, 3759, 3764-65.

C. Experts offer testimony overwhelmingly supporting the Vaccine Law's efficacy.

On September 10 and 11, 2025, the bench trial on Appellees' individual requests for a permanent injunction began. *See* J.A.1046–365. Because the Circuit Court previously determined that EPRA applied to the Vaccine Law, the bench trial was aimed at determining whether the Vaccine Law survived strict scrutiny under EPRA, which required the Circuit Court to assess

of teachers in the Raleigh County school system. J.A.675-96, 1250–51.

[7] The Circuit Court required Jane Doe to produce discovery materials to Appellees. J.A.1276-77.

whether (a) the state has compelling interest in enforcing the Vaccine Law as written and (b) the Vaccine Law is the least restrictive means of furthering that compelling governmental interest. *See* W. Va. Code § 35-1A-1(a). At the outset, the Circuit Court found the Vaccine Law furthers a compelling state interest, stating, "[I]t is inescapable that the State does have a compelling interest to protect the children in the school." J.A.2590. Thus, the focus shifted to whether the Vaccine Law was the least restrictive means of furthering that interest.

The Court took the evidence backwards from the norm. Instead of requiring Appellees to present a case in chief, the Circuit Court directed the parties to present their expert witnesses simultaneously. J.A.1277; 3805-06. Appellees presented Dr. James Neuenschwander, a Michigan integrative medicine physician who is not certified in pediatrics, epidemiology, or immunology. J.A.2680. He operates a practice centered on "integrative principles" treating chronically ill patients, of which a "significant portion" are people he believes "are injured by vaccines or claim to be injured by vaccines." J.A.2610, 2617. He regularly presents on "the mechanisms of vaccine injury" and is one of Appellees' counsel's "referral physicians when they have a [vaccine injury] case." J.A.2617-18, 2699. Dr. Neuenschwander admitted that he "do[es]n't think that the government should be mandating vaccines," regardless of one's personal beliefs. J.A.2740. He suggested that Jane Doe and immunocompromised students, faculty, and staff simply stay out of public schools rather than rely on vaccination requirements for protection. J.A.2737-38. Appellants moved to exclude his testimony under West Virginia Rule of Evidence 702, but the Circuit Court denied that motion and later relied on his opinions. J.A.2069-207.

By contrast, Appellants presented five reliable experts establishing the necessity and efficacy of the Vaccine Law. First, Dr. Catherine C. Slemp, a former West Virginia State Health Officer with decades of public health experience, explained that the Vaccine Law serves the state's

"public health interest in maintaining healthy children and a healthy population," "help[s] to decrease disease and reduce outbreaks," and helps the state be a "wise steward[] of public resources." J.A.2893-95. Dr. Slemp testified that before widespread vaccination requirements, each year nationally there were "4 to 5 million cases of measles, 500 deaths," and thousands of derivative encephalitis cases; about 20,000 cases of paralytic polio; and rubella caused "11,000 miscarriages and 20,000 cases of birth defects a year." J.A.2897-98, 1855-60. Because of routine vaccinations, these figures have dropped "to almost zero." *Id.* West Virginia currently has about a 98% vaccination coverage rate for measles and pertussis, exceeding the national average and rates in surrounding states and achieving herd immunity. J.A.1877. She testified that "the average cost of a measles outbreak is $33,000 per case," while a measles vaccine costs about $3.00. J.A.2940.

Dr. Slemp testified that quarantine is "not a substitute for vaccination" and gave a useful illustration: for measles, isolation alone reduces spread by about 18%; isolation plus quarantine of potentially exposed people reduces spread by about 49%; but isolation plus quarantine plus vaccination reduces spread by about 98%. J.A.2902, 1890. Dr. Slemp further testified that in states that allow nonmedical exemptions (unlike West Virginia), medical exemptions generally comprise around 0.1% to 0.3% of all exemptions granted. J.A.1871, 2906. When states begin allowing nonmedical exemptions, "the number of exemptions increases multifold; so anywhere from 10-, 20-fold, 50s," up to "60-fold." *Id.*, J.A.1875. In Kentucky and Ohio, states that allow nonmedical exemptions, measles vaccination rates have dipped to 90% and below. J.A.1901, 2911-13, 2919-21. She testified that in West Virginia specifically, there are about 50 medical exemptions per year on average, of which about 80% are approved, and that in the 2025-26 school year alone, there had already been 570 nonmedical exemptions applied for and granted. J.A.2907-08, 2918-19.

Dr. Jacob Kilgore, a pediatric infectious disease specialist at the Marshall University

School of Medicine, and Dr. John Fernald, a Raleigh County pediatrician, echoed Dr. Slemp's conclusions. Dr. Kilgore testified that to avoid outbreaks of measles (which can be introduced after travel, for example), the target is about 95% vaccination coverage for herd immunity. J.A.3039, 3050, 1832. Dr. Fernald opined that many of his patients are immunocompromised children in Raleigh County who rely on herd immunity to ensure their safety and that the only way to protect them at school "is to only allow medical exceptions for vaccinations." J.A.1914, 2771.

Dr. Jesse Hackell, lead author of the August 2025 American Academy of Pediatrics Policy Statement, "Medical vs. Nonmedical Immunization Exemptions for Child Care and School Attendance," explained that "there are few, if any, settings such as the school setting, where children are in as close contact for as prolonged a period of time" and that this "prolonged, close contact facilitates the spread of" disease. J.A.1589. Finally, Professor Lawrence Gostin explained that unlike nonmedical exemptions, medical exemptions "must exist" and "do not meaningfully affect herd immunity," whereas nonmedical exemptions are easily obtained and "can and do threaten herd immunity," as seen in other states. J.A.1636, 1901.

After hearing the expert testimony, the Circuit Court directed the parties to present fact witnesses on October 8 and 9. J.A.3092. The Circuit Court again refused Appellants' request to conduct discovery and quashed their subpoenas of certain fact witnesses. J.A.3512.

D. The Circuit Court grants class certification from the bench.

Days later, in the middle of the bench trial, and at the Circuit Court's invitation, Appellees filed both a motion to amend their complaint to include class allegations and a motion for class certification. J.A.3174-486. Without taking oral argument or evidence, and despite the points raised in Appellants' filed oppositions, the Circuit Court began the second phase of the bench trial by granting both the Motion to Amend and the Motion for Class Certification from the bench. J.A.3515-54, 3752-53. The Court entered an order on October 16, 2025, memorializing its

decision.[8] J.A.7718.

One of the reasons the Circuit Court previously offered for denying Appellants the opportunity to conduct fact discovery and depose Appellees was that Appellees would testify at trial. J.A.3096–98. But when the time came, the Court forbade any examination into whether Appellees' "religious beliefs are genuine or not genuine," effectively denying Appellants the opportunity to assert their sincerity defense. J.A.3759. Instead, the Court accepted the allegations in the verified complaint as "self-executing" evidence of the truth of those allegations. *Id.* The Court permitted Appellants' counsel's proffer of topics regarding their affirmative defenses upon which they would have inquired had the Circuit Court permitted them. J.A.4041-43, 7300-04. Shannon McBee, Appellant Paul Hardesty, and Mark McDaniel testified as fact witnesses.

E. The Circuit Court grants permanent injunctive and declaratory relief.

Following four days of evidentiary hearings, on November 26, 2025, the Circuit Court entered a 74-page order that granted Appellees' request for declaratory and permanent injunctive relief on a classwide basis. J.A.62. The Circuit Court found that directing local school boards to enforce the Vaccine Law as written and the refusal to recognize religious exemptions to the Vaccine Law, when no such exemption is provided in the statute, violates EPRA. J.A.71-75. It found that the State Board improperly rejected religious exemptions without evaluating the sincerity of any religious belief. *Id.* However, the order simultaneously recognized that BPH granted exemption requests without evaluating the sincerity of applicants' religious beliefs and without conducting any individualized review of the requests. J.A.96-97. The Circuit Court nonetheless concluded that the exemption requests were sufficient evidence of individuals' religious beliefs and declined to require any process to evaluate sincerity. J.A.65.

[8] Appellants previously filed a petition for writ of prohibition challenging that order, which is fully briefed and pending before this Court. *See W. Va. Bd. of Educ. v. Hon. Michael E. Froble*, No. 25-740.

The Court acknowledged that "it is inescapable that the State does have a compelling interest to protect the children in the school." J.A.95. Despite recognizing that compelling interest, the Circuit Court concluded that the Vaccine Law did not survive strict scrutiny, in part because West Virginia currently maintains approximately 98% vaccination coverage, so allowing religious exemptions would not immediately threaten herd immunity. J.A.118, 123. It found that the 570 religious exemptions issued statewide (so far) represent roughly 0.2% of the state's public school population. J.A.87-87, 93. Based on those figures, the Court concluded that allowing nonmedical exemptions would not materially reduce vaccination rates or significantly increase disease transmission. *Id.*

The Court also found that the Vaccine Law fails the least restrictive means test because other states "deploy a variety of alternative tactics, such as quarantine in the event of an outbreak, temporary exclusion from school, and other measures. . . ." J.A.124. While the Circuit Court recognized that the West Virginia Legislature created alternatives to public school, like the Hope Scholarship, it concluded that the Vaccine Law substantially burdened Plaintiffs' religious exercise by forcing parents to choose between vaccinating their children or sending them to public school. J.A.82, 115. The Circuit Court further found that Appellants permitted other circumstances that it characterized as creating comparable risks of disease transmission, including medical exemptions authorized by statute, unvaccinated students participating in homeschooling or microschools, and the absence of vaccination requirements for many adults working in schools and for attendance at school events. J.A.79-86. It relied on those circumstances in concluding that Appellants had not demonstrated that denying religious exemptions was necessary to achieve the State's public health objectives. J.A.89-90. In doing so, the Circuit Court acknowledged expert testimony from Appellants' witnesses emphasizing the public health importance of childhood

vaccination and herd immunity but concluded that recognizing the exemptions would not pose a material public health risk. J.A.92-94.

SUMMARY OF ARGUMENT

The Circuit Court committed six separate errors when it amended the Vaccine Law to add the religious exemption that the Legislature repeatedly rejected. *First*, the Vaccine Law contains no religious exemption, and the Circuit Court erred when it held that EPRA added one. EPRA's notwithstanding clause does not amend all other laws; instead, it only displaces statutes in conflict with EPRA. The Vaccine Law does not conflict with EPRA, thus it is unaffected.

Second, the Circuit Court erred when it determined that Appellees successfully proved their West Virginia Code § 35-1A-1(a)(1) claim. To prove that claim, Appellees were first required to show they hold sincere religious beliefs substantially burdened by the Vaccine Law. They didn't do that. The Circuit Court presumed—without evidence—that Appellees held sincere religious beliefs. Even assuming as much, the Supreme Court of the United States has long recognized that school vaccine laws do not burden any recognized religious right.

Despite the legal and evidentiary gaps in Appellees' case, the Circuit Court subjected the Vaccine Law to strict scrutiny under West Virginia Code § 35-1A-1(a)(1) and erred in applying that test. It both wrongly held that (1) West Virginia's compelling interest in protecting the health of its citizens was not compelling enough to survive strict scrutiny, and (2) that the Vaccine Law was not the *least* restrictive law because it fails to regulate *more* conduct.

Third, the Circuit Court erred when it held Appellees succeeded on their Section 35-1A-1(a)(2) claim. The Court baselessly determined that medical exemptions pose a similar risk to religious exemptions, despite the fact that the evidence conclusively established otherwise, and it relied upon a host of unrelated activities for which there was no evidence of comparable risk.

Fourth, the Circuit Court denied Appellants' Due Process rights by denying them the

opportunity to develop their case. Not only did the Circuit Court systemically deny Appellants discovery, but it also forbade Appellants from examining Appellees on the stand at trial and relieved Appellees of their burden to prove elements of their case.

Fifth, the Circuit Court erred by admitting and relying on the testimony of Dr. Neuenschwander. He is not an immunologist, other tribunals have repeatedly rejected his testimony, and, as Appellants argued below, he is unqualified to opine on vaccination policy and holds medical views that are not accepted within the medical community.

Sixth, the Circuit Court improperly certified a statewide injunctive relief class. West Virginia Code § 53-5-3 prohibits circuit courts from issuing injunctive relief beyond their circuit. Additionally, West Virginia Rule of Civil Procedure 23(a) factors are not satisfied in EPRA cases, where claims require an individualized analysis that defeats commonality and typicality.

This Court should reverse the lower court, remand this case, and direct the lower court to enter an order in Appellants' favor denying the permanent injunction.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Appellants request a Rule 20 oral argument. This petition is appropriate for oral argument under Rule 20(a)(1), (a)(2) and (a)(4). First, this case involves several issues of first impression, including whether EPRA overrides other statutes. Second, this issue is of fundamental public importance because it implicates public health and the safety of children in West Virginia's public schools. Finally, several state courts have considered whether EPRA rewrites the Vaccine Law. Their conclusions diverged. J.A.99-100. Appellants ask this Court to set this case for oral argument under Rule 20.

ARGUMENT

This Court reviews the Circuit Court's conclusions of law—which encompass Assignments of Error Numbers 1, 2, 3, 5, and the jurisdictional aspect of Error Number 6—*de*

novo. See, e.g., *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 140, 459 S.E.2d 415, 417 (1995); *MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 714, 715 S.E.2d 405, 412 (2011). This Court reviews decisions regarding the admissibility of expert testimony and class certification, Assignment of Error Number 2 and the non-jurisdictional aspects of Error Number 6, for abuse of discretion. *See, e.g.*, *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003); Syl. Pt. 6, *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700 (1991). This Court reviews the Circuit Court's findings of fact for clear error. *See Sandy M. v. Donald M.*, 250 W. Va. 606, 613, 906 S.E.2d 259, 266 (2023). The merits—not the balancing of equities—determine whether a permanent injunction should be issued, so reversal on the merits overturns the permanent injunction. *Cf. Tice v. Veach*, 250 W. Va. 482, 495, 904 S.E.2d 484, 497 n.18 (Ct. App. 2024).

I. The Circuit Court Erred by Grafting an Extratextual Religious Exemption onto the Vaccine Law.

The Vaccine Law's text contains one exemption—a medical exemption. *See* W. Va. Code § 16-3-4(h). The Circuit Court erred by rewriting the Vaccine Law to add an extratextual religious exemption via EPRA. J.A.102-10. This Court should reverse the Circuit Court's decision, enforce the Vaccine Law as written, and hold that it permits only medical exemptions.

Statutory interpretation starts with a simple proposition: The "legislature says in a statute what it means and means in a statute what it says." *Martin v. Randolph Cty. Bd. of Educ.*, 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995) (citation omitted). When statutory text is clear, courts are required to "read the relevant law according to its unvarnished meaning, without any judicial embroidery." Syl. Pt. 3, in part, *W. Va. Health Care Cost Rev. Auth. v. Boone Mem. Hosp.,* 196 W. Va. 326, 472 S.E.2d 411 (1996). "Courts are not free to read into the language what is not there, but rather should apply the statute as written." *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994).

Applying that principle, this case is an easy one. The Vaccine Law's text contains no religious exemption, and any reading of the Vaccine Law that adds one is error. The Circuit Court committed that error. It held EPRA's "notwithstanding any other provision of law" creates a religious exemption to any statute that otherwise "burdens religious exercise in the State." J.A.108-09. That conclusion ascribes far more power to EPRA than that found in its text or the legislative history animating it.

A. EPRA's "notwithstanding" clause does not create religious exemptions.

The Circuit Court's overexpansive reading of EPRA is grounded in a misinterpretation of EPRA's notwithstanding clause. Notwithstanding clauses "signal[] the Legislature's intent to supersede *conflicting* law." *State v. Schober*, 251 W. Va. 34, 41, 909 S.E.2d 69, 76 (2024) (emphasis added). Such clauses nullify "only those provisions of law that conflict with the act's provisions—not . . . every provision of law." *Arias v. Superior Ct.*, 46 Cal. 4th 969, 983, 209 P.3d 923, 931 (2009). Conflict arises when two statutes "are explicitly contrary to, or inconsistent with, each other." *Schober*, 251 W. Va. at 41, 909 S.E.2d at 76 (citation omitted). Whenever two statutes are silent on matters embraced by each other, a notwithstanding clause does not apply because "[t]here is no conflict through silence." *Liberty Glob., Inc. v. Comm'r of Internal Revenue*, 153 F.4th 966, 973 (10th Cir. 2025).

Conflict exists, and a notwithstanding clause determines which law controls, when two code sections are textually irreconcilable. *See State ex rel. W. Va. Dep't of Transp. v. Burnside*, 790 S.E.2d 265, 271 n.4 (W. Va. 2016) (finding conflict, and turning to "notwithstanding" language, when examining two mutually exclusive compensation payment schemes). But when two statutes do not conflict, the notwithstanding clause displaces neither code section. *See Schober*, 251 W. Va. at 41, 909 S.E.2d at 76. This Court's precedent illustrates that principle.

In *Schober*, this Court considered whether West Virginia Code § 16A-3-2 conflicted with

West Virginia Code § 62-12-9. Section 16A-3-2 creates a medical marijuana schema and begins by stating, "Notwithstanding any provision of law to the contrary, the use or possession of medical cannabis as set forth in this act is lawful within this state." Section 62-12-9 is silent on marijuana use and instead permits judges to create conditions governing a defendant's probation. Defendant Schober obtained a medical marijuana card, but the judge refused to alter the terms of his probation, which forbade him from using marijuana. *Schober*, 251 W. Va. at 37, 909 S.E.2d at 72. Mr. Schober claimed a conflict existed between the two statutes and argued that Section 16A-3-2's "notwithstanding" clause trumped Section 62-12-9's authority.

This Court rejected that argument and found no conflict between the two statutes. Section 62-12-9 is silent on marijuana use while on probation, and the Court found that its grant of authority to set probation conditions "does not criminalize the subject of the condition or otherwise conflict with statutes or even constitutional provisions providing that those activities are lawful." *Schober*, 251 W. Va. at 42, 909 S.E.2d at 77. This was true even though the terms of probation forbade conduct that, "notwithstanding any provision of law to the contrary," was made lawful by Section 16A-3-2. *Id.* Because Section 16A-3-2 and Section 62-12-9 contain no textual conflict, this Court determined the notwithstanding clause in Section 16A-3-2 does not limit a judge's ability to impose probation conditions under Section 62-12-9. *Id.*

In this case, the Circuit Court's analysis of EPRA's notwithstanding clause was error. Unlike the court in *Schober*, the Circuit Court never made the threshold finding of conflict. *See id.* at 251 W. Va. at 41, 909 S.E.2d at 76. Instead, its analysis presumed conflict and broadly held that "EPRA's reach extends to the [Vaccine Law] when it burdens religious exercise in the State." J.A.109. But without textual conflict, EPRA does not affect the Vaccine Law. *Schober*, 251 W. Va. at 42, 909 S.E.2d at 77 (noting that a notwithstanding clause does "not nullify a non-conflicting

statute") (citation omitted). And the Vaccine Law and EPRA do not conflict. On their face, the two statutes have nothing to do with one another. The Vaccine Law establishes the vaccines children must receive to attend public school. EPRA, on the other hand, bars state actions that burden individuals' religion unless those actions satisfy strict scrutiny. There is no textual overlap, and "[t]here is no conflict through silence." *Liberty Glob., Inc.*, 153 F.4th at 973. Because the text of these two statutes does not conflict, EPRA cannot displace or alter the Vaccine Law.

Instead of assessing conflict, the Circuit Court determined that the "any other provision of law" portion of the notwithstanding clause displaces the Vaccine Law—and any other law—when the effect of that law "burdens religious exercise in the State." J.A.109. But notwithstanding clauses do not affect "every provision of law," only those that conflict. *Arias*, 46 Cal. 4th at 983, 209 P.3d at 931. The Circuit Court's transmutation of EPRA's limited notwithstanding clause into a clause that grafts religious exemptions onto every statute, regardless of conflict, misreads EPRA and broadens it beyond the limitations the Legislature ascribed with the notwithstanding clause. The consequences of that holding do not stop at the Vaccine Law. If its position is affirmed, EPRA will add religious exemptions to tax statutes, drivers' license statutes, or any other provision of the West Virginia Code. The Legislature didn't do that; instead, it passed EPRA with a limited notwithstanding clause. The Circuit Court erred by broadening EPRA beyond its plain text.

B. Legislative history removes any doubt—EPRA does not create religious exemptions.

Not only does EPRA's plain text cut against the Circuit Court's overbroad reading, so too do three key pieces of legislative history. *First*, the Circuit Court determined, based on stray statements from legislators, that RFRA further supported its determination that EPRA grafted a religious exemption onto every other West Virginia statute. *See* J.A.109.

The opposite is true. EPRA's text diverges from RFRA's, and that divergence shows the Circuit Court's broad interpretation is wrong. Unlike EPRA, RFRA specifically states that it

"applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a). EPRA does not include that broad applicability provision; instead, EPRA's notwithstanding clause limits its application to those statutes that textually conflict with EPRA.[9] The Legislature could have mirrored RFRA's applicability provision. In fact, that language was included in the initial proposed version of EPRA. But the Legislature rejected that language and adopted the narrower notwithstanding clause. The Circuit Court should have given effect to those differences. *See, e.g.*, *Davis Mem'l Hosp. v. W. Va. State Tax Comm'r*, 222 W. Va. 677, 687–88, 671 S.E.2d 682, 692–93 (2008) (determining that adoption of a modified version of another jurisdiction's statute "creates a *presumption* that a change was intended"). It erred when it didn't do so.

Second, EPRA's statutory title cuts against the Circuit Court's reading. Under Article 6, Section 30 of the West Virginia Constitution ("Section 30"), the Legislature must identify the purpose of a bill in its title. This serves the dual purpose of "giv[ing] notice by way of the title of the contents of the act so that legislators and other interested parties may be informed of its purpose" and "prevent[ing] any attempt to surreptitiously insert in the body of the act matters foreign to its purpose." Syl. Pt. 1, in part, *State ex rel. Walton v. Casey*, 179 W. Va. 485, 485, 370 S.E.2d 141, 141 (1988). To ensure that a bill complies with Section 30, "A title must, at a minimum, furnish a 'pointer' to the challenged provision in the act." *Casey* at Syl. Pt. 2, in part. That "pointer" must "impart[] enough information to one interested in the subject matter to provoke a reading of the act." *Id.*

Nothing in EPRA's title indicates the Legislature intended the statute to have the sweeping

[9]Contrary to the Circuit Court's opinion, this reading of EPRA does not "render EPRA functionally meaningless in every circumstance where religious beliefs are burdened in the State by any government action." J.A.102. After all, many state actions are taken independent of specific statutory directives from the Legislature, and those actions are still governed by EPRA.

effects the Circuit Court gave it. "Repeal or amendment by implication is not favored by law." *Belknap v. Shock*, 125 W. Va. 385, 24 S.E.2d 457, 459 (1943) (citation omitted). Yet the Circuit Court's holding reads EPRA to amend every other provision of the West Virginia Code to include a religious exemption. That broad reading renders EPRA unconstitutional under Section 30.

Third, the Legislature's actions since it passed EPRA show that EPRA did not create religious exemptions. After all, significant portions of the 2024, 2025, and 2026 Legislative Sessions were spent debating—and rejecting—the religious exemptions the Circuit Court created in this case. *See, e.g.*, J.A.604-19. The Circuit Court erred when it held otherwise.

II. The Circuit Court Erred by Holding the Appellees Succeeded on the Merits of Their Claim Under West Virginia Code § 35-1A-1(a)(1).

The Circuit Court also erred by holding the Appellees succeeded on the merits of their West Virginia Code § 35-1A-1(a)(1) claim. This Court has not decided a case involving EPRA; however, RFRA's statutory scheme, which applies strict scrutiny to government actions (albeit on a much broader basis than EPRA), is instructive. To prove a RFRA claim, plaintiffs must first establish a prima facie case showing that "the government's action is (1) a substantial burden on (2) a sincere (3) religious exercise." *Archdiocese of St. Louis v. Burwell*, 28 F. Supp. 3d 944, 952 (E.D. Mo. 2014) (citing *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013)). The burden then shifts to the government to show that its action "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* The Circuit Court erred at both stages of the test.

A. *The Circuit Court erred when it determined that Appellees' religious beliefs were substantially burdened.*

Appellees failed to establish a prima facie EPRA case because (1) the conduct that forms the basis of their claim is not protected religious exercise according to a century of Supreme Court precedent and (2) there is no record evidence showing Appellees hold sincere religious beliefs.

The Circuit Court erred when it held that Appellees proved their case without sufficient evidentiary or legal bases.

1. Opting out of the Vaccine Law is not a legally protected form of religious exercise that can be substantially burdened.

The right to freely exercise religion cannot be used to harm others. Consequently, the Supreme Court has held that parents "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). Over a century of Supreme Court precedent holds that individual religious rights yield to the state's compelling interest in preventing the spread of vaccine-preventable diseases. *See Jacobson v. Massachusetts*, 197 U.S. 11, 37–38 (1905) (concluding that creation of a minority privilege to defy mandatory vaccination for smallpox presents "the spectacle . . . of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population" and refusing to "hold it to be an element in the liberty secured by the Constitution of the United States that . . . a minority of persons . . . should have the power thus to dominate the majority when supported in their action by the authority of the State"). Courts have upheld school-entry vaccine requirements in particular, finding it "settled that it is within the police power of a state to provide for compulsory vaccination." *Zucht v. King*, 260 U.S. 174, 176 (1922).

Heeding the Supreme Court's longstanding precedent, lower courts have recognized that religious rights do not include the right to opt out of mandatory school vaccines, finding that "[t]he 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." *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002). The Fourth Circuit has also recognized the Vaccine

Law "does not unconstitutionally infringe [the] right to free exercise" of religion. *Workman v. Mingo County Bd. of Educ.*, 419 F. App'x 348, 354 (4th Cir. Mar. 22, 2011). While mandatory school vaccine laws may implicate a parent's religious beliefs, protected forms of religious exercise have never included "freedom from compulsory vaccination for the child more than for himself on religious grounds." *Prince*, 321 U.S. at 166.

The Circuit Court never squared up with that longstanding precedent. Instead, it relegated its discussion of that century-old Supreme Court precedent to a footnote and concluded they conflict with more recent Supreme Court First Amendment cases that don't address vaccine requirements. J.A.117. The Circuit Court's rejection of that precedent is itself unprecedented. To Appellants' knowledge, no appellate court in the United States has ever found that abstaining from compulsory school vaccination is a legally protected religious exercise. The Circuit Court cites no legal authority to support rejecting the Supreme Court's guidance on school vaccine laws.

According to the Circuit Court, the Vaccine Law substantially burdens Appellees' religious beliefs by "excluding children from school" and thereby denying Appellees "a government benefit." J.A.116. This profoundly misunderstands the *public* nature of West Virginia's public education system and runs headlong into prior decisions from this Court. In an unpublished decision, this Court has already held that the Vaccine Law does not deny objecting families their right to an education. *See D.J. v. Mercer Cnty. Bd. of Educ.*, No. 13-0237, 2013 WL 6152363, *4 (W. Va. Nov. 22, 2013) (unpublished). "[P]ublic education is a public right, not a private one subject to judicial enforcement." *Id.* Because public schools belong to the *public* and not any single individual, the State may condition school entry on compulsory vaccination. Indeed, "[t]here is a compelling state interest for the rules requiring proof of these vaccinations to attend public school in this state." *Id.* That makes good sense: West Virginia owes its citizens a safe public school

environment. Immunocompromised children who cannot receive vaccines have as much right to safely attend public school as any other child, despite Appellees' contentions to the contrary. J.A.2738-39. On the other hand, there is no legally cognizable religious right to attend public school unvaccinated. State and federal precedent treat the Vaccine Law as a valid condition on school attendance, and West Virginia has conditioned access to public school on vaccination since 1937. EPRA does not transmute vaccine requirements—long recognized as valid limitations on religious exercise—into a "substantial burden" on religious exercise. Thus, while "individuals who object to receiving the vaccines on religious grounds have a hard choice to make, they do have a choice." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 293–94 (2d Cir. 2021).

West Virginia does not deprive parents who object to the Vaccine Law of the opportunity to educate their children. The Circuit Court itself recognized that in addition to homeschooling, "West Virginia offers education alternatives through the Hope Scholarship, for those parents who oppose vaccination on religious grounds." J.A.81-82. The Vaccine Law thus neither forecloses parents' ability to exercise their religious beliefs nor parents' rights to educate their children. The Vaccine Law does not burden—let alone substantially burden—any recognized religious right.

2. <u>Plaintiffs asserting EPRA claims must produce evidence of sincerely held religious beliefs, and Appellees adduced none.</u>

At trial, Appellees relied on allegations in their verified complaint to show they held sincere religious beliefs. But "[w]here the material allegations of the bill are denied by the answer in a suit in equity, the effect of such denial is to put the plaintiff on satisfactory proof of such allegations." Syl. Pt. 1, *Bronson v. Vaughan*, 44 W. Va. 406, 29 S.E. 1022 (1898). Claims under RFRA or EPRA are no different: They require evidentiary proof. *See, e.g.*, *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) ("[A]ssessing a claimant's sincerity of belief demands a full exposition of facts and the opportunity for the factfinder to observe the claimant's demeanor during direct and cross-

examination."). The Circuit Court recognized as much, stating, "EPRA liability turns on individualized determinations of (1) whether a claimant holds a sincerely held belief and (2) whether that belief was substantially burdened." J.A.113.

In this case, Appellees offered no evidentiary proof to support the required prima facie showing of "(1) a substantial burden on (2) a sincere (3) religious exercise." *Burwell*, 28 F. Supp. 3d at 952. Appellees produced neither documentary evidence nor testimony showing they sincerely hold any religious belief. And the Circuit Court forbade Appellants from gathering any evidence regarding Appellees' sincerely held religious beliefs during discovery. Then it foreclosed Appellants from challenging those elements entirely when it quashed nearly every fact witness subpoena Appellants filed and barred Appellants from examining Appellees on the stand at trial. *See, e.g.*, J.A.2263, 2572-73, 2852, 2871-73, 3096–97, 3104, 3759, 3764-65. The Circuit Court found that Appellees held sincere religious beliefs substantially burdened by the Vaccine Law based on allegations in their verified complaint, which Appellants denied. J.A.78.

To reach that conclusion, the Circuit Court held that the "sincerity of a person's religious or moral beliefs is presumed and not subject to adversarial probing or judicial testing." J.A.7720. The Circuit Court cites no authority for the notion that plaintiffs bringing EPRA claims are relieved of their prima facie burden.[10] For good reason. No case has ever held that a plaintiff in an EPRA or RFRA case is relieved from establishing, through evidence, the elements of their claim, where contested. Instead, courts unanimously hold that EPRA or RFRA plaintiffs—like any other plaintiff under any other cause of action—bear an evidentiary burden of proof with respect to the

[10] The Court cited *State v. Riddle*, 168 W. Va. 429, 285 S.E.2d 359 (1981), and *State v. Everly*, 150 W. Va. 423, 146 S.E.2d 705 (1966) for the proposition that "religious" and "philosophical" are synonymous. That conclusion is wrong. More importantly, neither of those cases stand for the proposition that a plaintiff need not demonstrate a religious belief in an EPRA case. It could not because that holding is absurd. One cannot protect one's religious beliefs without first establishing what those beliefs are with evidence.

elements of their claim. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014); *LeFevre*, 745 F.2d at 157. If the opposite were true, plaintiffs in EPRA or RFRA cases could subject *any* government action to strict scrutiny by merely alleging, without evidence, that their religious beliefs were substantially burdened. That cannot be the law.

To support its flawed legal conclusion that EPRA plaintiffs do not have to adduce evidence of the religious belief driving their claim, the Circuit Court noted that "[b]oth [Appellees H. and G.] have submitted sworn declarations and statements in writing to state officials, that their religious beliefs and practices in conflict with vaccination have been severely burdened." J.A.115. The only "sworn declarations" on this record are the allegations in the verified complaints—but Appellants denied those allegations, and West Virginia law requires a plaintiff to come forward with proof of allegations denied by the defendant. Syl. Pt. 1, *Bronson*, 44 W. Va. 406, 29 S.E. 1022. Allegations don't prove cases—evidence does. Nor do Appellees' exemption certificates from BPH prove anything. The BPH issues a certificate to anyone who provides a "signed letter" with certain demographic information using the words "religious exemption." J.A.3880; J.A.7037. Nothing about the BPH process shows that any applicant—including Appellees—sincerely holds a religious belief.[11] Indeed, Ms. McBee conceded that the religious exemption process is little more than an "opt-out" of the Vaccine Law. J.A.3891.

To elevate the (unseen) exemption request letters to conclusive proof of sincerely held religious beliefs, the Circuit Court held that falsified exemption requests could expose the applicant to criminal liability for forgery of public records. J.A.115. That position fails, as

[11] The Circuit Court expanded this error to every single applicant for a religious exemption in West Virginia. The Circuit Court concluded that "[e]very member of the Class has submitted statements in writing to the state affirming that they have religious beliefs conflicting with vaccination that makes them potentially criminally liable under West Virginia law." J.A.115. There is no basis for that holding. Appellants don't even know what Appellees—*the class representatives*—affirmed in their exemption requests.

falsification is unnecessary to receive an exemption. The applicant only needs to provide basic demographic information and state, "I want a religious exemption." J.A.3880. That statement *cannot* be falsified, but it *can* elicit a religious exemption from BPH.

Like any cause of action, EPRA requires plaintiffs to produce affirmative evidence in support of their claim. The Circuit Court relieved Appellees of that burden and held they had successfully proved their case without evidence of sincerely held religious beliefs. That error demands reversal. Before plaintiffs can avail themselves of EPRA's protections, they must first establish they have a religious belief protected by that statute.

B. The Circuit Court erred when it held the Vaccine Law did not survive strict scrutiny.

If state action does trigger EPRA's protection by substantially burdening their exercise of sincere religious beliefs, the court then applies strict scrutiny. Both this Court and the Fourth Circuit determined the Vaccine Law survives scrutiny. Appellate courts around the county have upheld similar vaccine requirements in the face of religious freedom challenges. *Zucht v. King*, 260 U.S. 174 (1922); *We the Patriots USA, Inc. v. Ct. Off. of Early Childhood Dev.*, 76 F.4th 130 (2d Cir. 2023); *Workman*, 419 F. App'x 348; *D.J. v. Mercer Cty. Bd. of Educ.*, No. 13-0237, 2013 WL 6152363 (W. Va. Nov. 22, 2013). The Circuit Court erroneously diverged from that authority.

1. The Circuit Court erred when it determined the Vaccine Law was not essential in furthering West Virginia's compelling interest in protecting public health.

It is beyond dispute that West Virginia has a compelling interest in protecting the health and safety of its citizens by preventing the spread of disease. Both this Court and the Fourth Circuit have held as much. *D.J.*, 2013 WL 6152363, at *4 ("The protection of the health and safety of the public is one of the most important roles of the State, the requirement that the State's interest be compelling is satisfied."); *see Workman*, 419 F. App'x at 353. ("[T]he state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest."). The Circuit Court

itself repeatedly stated that West Virginia had a compelling reason to enact the Vaccine Law. *See, e.g.*, J.A.95. Despite these on-the-record statements, the Circuit Court incongruously held that the State's public health interests are not enough to satisfy EPRA.

That holding was based primarily on a myopic reading of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). According to the Circuit Court, the government can only prove a compelling interest in an EPRA case by showing that it has a compelling interest as it relates to a particular plaintiff. J.A.118. Broad, societal interests, like the health of students in public school, won't work in EPRA cases according to the Circuit Court.

That's wrong—*Gonzales* itself rejected that conclusion. In *Gonzales*, the Supreme Court held that certain state interests have "a need for uniformity" that defeats any to-the-plaintiff examination of the interest. 546 U.S. at 436. Consider taxes, for example. The "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *United States v. Lee*, 455 U.S. 252, 260 (1982). Therefore, the "Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Gonzales*, 546 U.S. at 435.

That is precisely the case with the Vaccine Law—as expert testimony clearly established. Vaccine-preventable diseases are prevented by widespread vaccination. *See, e.g.*, J.A.2893-98, 1855-60. States that have sacrificed the uniformity of their vaccine requirements by recognizing non-medical exemptions have seen the consequences: lower vaccination rates, higher incidence of vaccine-preventable disease, and, in some cases, outbreaks, quarantines, and adverse health consequences (including child mortality). J.A.1875, 1901, 2911-13, 2919-21. The Vaccine Law is a *public* health law, not a personal health law. Aggregate effect is the purpose of the Vaccine Law

and requiring individualized inquiry denies how, and why, the Vaccine Law works.

Beyond applying the wrong legal test, the Circuit Court misstated the evidence. The Court held that the BPH "determined the government's interest is not so compelling as to deny religious exemptions to 570 schoolchildren." J.A.118. But Ms. McBee testified that the Vaccine Law *did* further a compelling interest and that the BPH only began issuing religious exemptions when the Governor directed it to ignore the Vaccine Law.[12] J.A.3869. The Governor also rejected the BPH's attempts to assess religious exemption requests more stringently. J.A.3870-76. The Circuit Court's conclusion that the BPH "determine[ed] that religious freedom and disease prevention goals can co-exist in West Virginia" is fiction. J.A.118.

The Circuit Court held that the State did not have a compelling enough interest because the Vaccine Law "has also largely achieved the government's general interest in achieving high vaccination rates." *Id.* This conclusion ignores that the Vaccine Law works in an iterative,

[12] The Executive Order directing BPH to disregard the Vaccine Law is patently unconstitutional. *First*, the Governor lacks authority to create a religious exemption to the Vaccination Law through an Executive Order because it invades the constitutional powers reserved for the Legislature. *See State ex rel. Dodrill v. Scott*, 177 W. Va. 452, 457, 352 S.E.2d 741, 745 (1986) (striking down Executive Orders that conflicted with an existing statute because "until the legislature [] amends the statutory scheme," complying with the law as it exists "is the only permissible course of action open to the Governor."). *Second*, the Executive Order encroaches on the State Board's constitutional supervisory authority over West Virginia's public schools. Article XII, Section 2 of the West Virginia Constitution vests "the general supervision of the free schools of the State" exclusively in the State Board, empowering it to "perform such duties as may be prescribed by law." This power "cannot be derogated or eliminated by legislative or executive action." *W. Virginia Bd. of Educ. v. Bd. of Educ. of the Cnty. of Nicholas*, 239 W. Va. 705, 714, 806 S.E.2d 136, 145 (2017) (citation omitted). Any "attempt to impede" the State "Board's general supervisory powers" violates the separation of powers provision in Article V, Section 1 of the West Virginia Constitution. *See W. Virginia Bd. of Educ. v. Hechler*, 180 W. Va. 451, 454–56, 376 S.E.2d 839, 842, 843 (1988). The Executive Order implicitly acknowledges it does not and cannot require the State Board to take any action by directing only the BPH and the State Health Officer to establish an atextual exemption process. *Finally*, the power to interpret and reconcile potentially conflicting statutes is exclusively in the province of the judicial branch. In *Dadisman*, the Supreme Court explained that "[e]xecutive officers cannot usurp judicial functions, such as passing upon the constitutionality of legislation. . . ." 153 W. Va. at 781, 172 S.E.2d at 568 (citation omitted). The Executive Order encroaches on this core judicial role by attempting to reconcile the Vaccine Law and EPRA and grafting a religious exemption onto the former. Thus, Appellants are not bound by the Executive Order's religious exemption process and not following such a process does not violate EPRA.

cumulative fashion. Every year, the Vaccine Law requires children entering the school system to receive vaccines. Year after year, the Vaccine Law creates a critical mass of vaccinated West Virginians that protects against the spread of disease, ensures better public health outcomes, and conserves West Virginia's finite public health funds. J.A.2893-95, 2925-26. Effectiveness today does not support eroding its effectiveness in the future—after all, the state's compelling interest furthered by the Vaccine Law is maintaining a healthy population through *prevention* of diseases.

For similar reasons, the Circuit Court's conclusion that 570 religious exemptions do not pose a risk is short-sighted. This case is about far more than 570 religious exemptions (which itself is a snapshot figure from the earliest stage of the rollout of religious exemptions). It is about tomorrow's ever-increasing number of religious exemptions, which will certainly proliferate under an "opt-out" regime. The undisputed evidence shows that states permitting religious exemptions, over time, saw their unvaccinated student population increase by orders of magnitude. J.A.1871, 1875, 2906. Evidence in West Virginia bears that out—since BPH was directed to disregard the Vaccine Law over a year ago, it issued more religious exemptions in a school year than the number of medical exemptions it issued in the last *decade*. J.A.2747.

That's why certain states, like Connecticut, repealed their religious exemption laws—the unvaccinated population grew to the point where it threatened herd immunity. *See We the Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev.*, 76 F.4th 130, 138 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 2682 (2024). Specifically, "more than ten times as many students had religious exemptions than medical exemptions," drastically increasing the number of unvaccinated students in public schools and undercutting the goal of Connecticut's vaccine laws. *Id.* at 155; J.A.2941-42 The problem before the Circuit Court was far broader than the current crop of 570 religious

exemptions, and it erred when it closed its eyes to broader risks the Vaccine Law protects against.[13] One need look no further than Texas and South Carolina to see what happens after vaccination rates erode due to religious exemptions, but strict scrutiny does not require the State to wait until herd immunity is failing before it is permitted to act. *See* J.A.2933.

Finally, the Circuit Court identifies other instances where it claims the Vaccine Law does not require vaccination—from medical exemptions and noncompliant students, to homeschooling and microschools, to adults in schools, school events, and out-of-state travel—to show West Virginia does not have a compelling interest in ensuring high vaccination levels in public schools.[14] Essentially, the Circuit Court held West Virginia's interest in preventing the spread of contagious disease cannot be compelling because the State *could* take harsher and more restrictive measures.

Even so, as discussed below, the Circuit Court's evaluation of the comparative risk of other behaviors lacks evidentiary support. Medical exemptions are not comparable because those children cannot safely vaccinate. As for noncompliant students, the Circuit Court improperly relied on disputed FOIA numbers,[15] and at any rate, failure to follow a law does not make a law invalid.

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[13] The Circuit Court's invocation of *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 803 n.9 (2011) does not save its flawed analysis. In that case, the Supreme Court held that California did not have a compelling interest sufficient to defeat a First Amendment challenge to a videogame labeling law. According to the Supreme Court, marginally reducing the percentage of non-compliance with videogame age restrictions wasn't a compelling interest. *Id.* The Vaccine Law, of course, functions differently. It relies on percentage points—even marginal ones—to protect herd immunity, and *Brown* is inapposite.

[14] Again, the Circuit Court misstates the evidence in arriving at this conclusion. For example, it stated that "West Virginia has funded $22,000,000 for West Virginians to send their children out of state to be educated in a manner that avoids vaccination requirements, and then to return home and readily interact with other children and adults." J.A.120. The record doesn't say that. Instead, President Hardesty testified that West Virginia parents expended $22,000,000 in Hope Scholarship funds in 2024. J.A.3783.

[15] There is no evidence on this record of widespread noncompliance with the Vaccine Law in West Virginia schools. CDC data shows that West Virginia schools have some of the highest vaccination rates in the United States. J.A.1865, 3001. Appellees' FOIA numbers include students provisionally enrolled in school while catching up on their required vaccines—a form of temporary enrollment that complies with the Vaccine Law. *See* W. Va. Code St. R. § 64-95-5.

The Vaccine Law does not govern homeschooling (or arguably microschools), and attendance for these alternatives is not comparable to attendance in the public school system, the regulated environment at issue. The fact that adults in schools are not required to show proof of vaccination at the door does not make childhood vaccination requirements underinclusive. Likewise, even if disease transmission can also occur outside school or in another state, that does not take away the fact that schools' environments are uniquely apt for spread of disease. Schoolchildren are in close, prolonged contact in ways unlike sporadic attendance at public gatherings, and many adults were vaccinated under earlier rules or developed natural immunity. J.A.1589, 2926.

Evidence-free "what if" scenarios do not override the overwhelming public health record in this case. The record evidence shows that religious exemptions pose a unique risk to public health—every nearby state that has enacted religious exemptions has seen their unvaccinated population jump substantially. J.A.1901, 2911-13, 2919-21. This Court should reverse, enforce the Vaccine Law as written, and uphold the Legislature's compelling interest in protecting the health of public school children and West Virginia communities.

2. The Circuit Court erred when it held that the Vaccine Law did not satisfy the least restrictive means test.

The Circuit Court erred in its least restrictive means analysis by holding that the Vaccine Law was fatally underinclusive. J.A.122-25. That conclusion answers the wrong question. Under the strict scrutiny test, "least restrictive means is a relative term that implies a comparison with other means." *Faver v. Clarke*, 24 F.4th 954, 960 (4th Cir. 2022) (cleaned up). Therefore, the test necessarily examines whether Appellees' alternative "might be *equally as successful* as the [challenged law] in furthering the identified compelling interests." *Id.* In other words, properly understood, an analysis of purported underinclusiveness examines whether "the proffered state interest actually underlies the law," *i.e.*, whether the law "can[] fairly be said to advance *any*

genuinely substantial governmental interest." *Trans Union Corp. v. FTC*, 267 F.3d 1138, 1143 (D.C. Cir. 2001) (quoting *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995)) (emphasis added). That formulation makes sense. Gutting a law will always be less restrictive than enforcing it—but will it advance the government's compelling interest?

The answer here is, "No." The trial court mistook the existence of conceivable alternatives for proof that those alternatives are effective and less restrictive. But there is no equally effective substitute for the Vaccine Law. Under it, West Virginia has the highest school vaccination rate in the country. J.A.1865, 3001. True, other states' laws permit religious exemptions. But those vaccine laws are not "equally as successful" as West Virginia's, so they aren't less restrictive alternatives. *See Faver*, 24 F.4th at 960. For example, the Circuit Court found that "forty-five states with a religious exemption process deploy a variety of alternative tactics, such as quarantine . . . to effectively control vaccine preventable diseases while simultaneously respecting religious freedoms." J.A.124. No evidence in the case supports that conclusion. It shows the opposite. Dr. Slemp testified that quarantining is dramatically less effective than vaccination than stopping the spread of disease. In the case of measles, quarantining is only 49% effective at stopping the spread of disease. J.A.2902. Vaccination, on the other hand, is 98% effective. *Id.* No evidence shows that any of the alternatives the Circuit Court considered are as effective as the Vaccine Law.

Contrary to the Circuit Court's conclusions, a law need not regulate every imaginable risk to survive constitutional challenges. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015) ("A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns."). And a law cannot fail the *least* restrictive means test because it doesn't regulate *more* conduct.[16] That makes good sense: Regulation is not an all-or-nothing proposition.

[16] The Circuit Court also held the law was not the least restrictive means because "the State Board Defendants did not contact or communicate with their board of education counterparts in Ohio,

Nothing in EPRA requires the state to take the most restrictive approach. Instead of assessing whether the challenged law regulates every imaginable risk, courts must examine whether the regulation as-is advances a compelling government interest. *Trans Union Corp.*, 267 F.3d at 1143.

Appellees' proposed alternatives are only better at one thing: Lowering vaccination rates and increasing the risk of disease. States with religious exemptions experience dramatic increases in the unvaccinated student community. J.A.1875. West Virginia's unvaccinated student population, on the other hand, remained steady between 0.1% and 0.3%. J.A.1871. Religious exemption laws are not less restrictive alternatives—they are less effective laws. The evidence is undeniable. West Virginia's Vaccine Law works, and its alternatives are not nearly as effective.

III. The Circuit Court Erred by Holding the Vaccine Law Treats Religious Conduct More Restrictively Than Conduct of Reasonably Comparable Risk.

West Virginia Code § 35-1A-1(a)(2) limits government action that "[t]reat[s] religious conduct more restrictively than any conduct of reasonably comparable risk." For the same reasons as those laid out above, the record shows that isn't the case. As stated, medical exemptions to a vaccine requirement are not comparable to religious exemptions. Federal appellate courts agree. *See, e.g.*, *Spivack v. City of Phila.*, 109 F.4th 158, 175–76 (3d. Cir. 2024); *We the Patriots USA, Inc.*, 76 F.4th at 153; *Does 1-6 v. Mills*, 16 F.4th 20, 33–34 (1st Cir. 2021); *Doe v. San Diego Unif. Sch. Dist.*, 19 F.4th 1173, 1178 (9th Cir. 2021). That such exemptions are incomparable is readily evident: Medical exemptions are consistent with the public health purpose of the Vaccine Law, while religious exemptions compromise it. Religious exemptions are granted at a far greater rate and undermine the herd immunity threshold. J.A.1901, 2911-13, 2919-21. Medical exemptions,

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Pennsylvania, Maryland, Virginia. or Kentucky regarding their experiences with religious exemptions or quarantine protocols." J.A.125. Of course, the West Virginia Board of Education didn't contact Ohio to ask whether it should follow Ohio's vaccine laws instead of West Virginia's. The State Board follows duly-enacted, constitutional laws in West Virginia—not Ohio.

on the other hand, are granted at a significantly lesser rate to a population disproportionately at-risk because they cannot receive vaccines. As the Second Circuit recognized,

> The absence of a religious exemption decreases the risk that unvaccinated students will acquire a vaccine-preventable disease by lowering the number of unvaccinated peers they will encounter at school, but the medical exemption also allows the small proportion of students who cannot be vaccinated for medical reasons to avoid the harms that taking a particular vaccine would inflict on them.

We the Patriots USA, Inc., 76 F.4th at 153.

The Circuit Court also considered other noncomparable conduct to bolster its opinion and concluded that the Vaccine Law allows behaviors that "pose a greater threat to West Virginia's claimed goals than would permitting Plaintiffs' children to attend school with a religious exemption." J.A.123. For example, the Circuit Court determined that "members of the general public who have not received vaccines required under the law but who regularly intermingle on school campuses and mass gatherings throughout the State" present a comparable risk to religious exemptions. J.A.128. The Circuit Court cited other behaviors like students attending school while "willfully out of compliance with the [Vaccine Law],"[17] and the existence of homeschooled children or other undervaccinated members of the public.

Yet again, neither the Circuit Court nor Appellees point to any admissible evidence of any alleged public health risks in any of these hypothetical scenarios. For instance, Appellees adduced no evidence whatsoever of the vaccination rates (or widespread non-vaccination) in its cited circumstances. Absent evidence, the Circuit Court was in no position to hold that that hodgepodge of behaviors poses a greater risk to public health than religious exemptions. These comparisons were unsupported by evidence, and the Circuit Court erred by crediting them.

[17] *See supra* at n.16.

IV. The Circuit Court Erred by Considering the Expert of Dr. Neuenschwander, An Anti-Vaccination Advocate Whose Opinions Have Been Rejected by Other Tribunals.

Pseudoscience has no place in West Virginia's court system. The Circuit Court not only admitted a pseudoscientific expert, but it built its Order on his testimony. That is an abuse of discretion, and this Court should reverse.

Under West Virginia Rule of Evidence 702, experts may only testify if they possess sufficient expertise, and they may only testify regarding their area of expertise. *See, e.g.*, *State v. Noe*, 160 W. Va. 10, 16–17, 230 S.E.2d 826, 830 (1976). Not only must experts be qualified, but their testimony must also be the product of reliable methodologies. *Harris v. CSX Transp., Inc.*, 232 W.Va. 617, 753 S.E.2d 275 (W. Va. 2013).

Dr. Neuenschwander is not qualified to opine on vaccines or the effectiveness of the Vaccine Law. He has no residency training, having left a surgical residency after three years to work in emergency rooms. J.A.2678-79. He became board certified in emergency medicine when permitted to test based on "practice eligibility." *Id.* He allowed that certification to lapse. J.A.2614-15. He is "not board certified in pediatrics, epidemiology, virology or immunology." J.A.2680. His certification in "integrative medicine" came from continuing medical education which "[d]idn't result in any extra degrees or diplomas or certifications or anything." *Id.* He has authored no studies in epidemiology, pediatrics, or immunology, and the one study he published is not in a peer-reviewed journal because "you'll never get an article published like that in any of those journals. They just don't publish negative vaccine articles." J.A.2683.

And contrary to Dr. Neuenschwander's answer of "no" to the question "[h]as anyone ever proffered you as an expert with regards to vaccines and it has not been granted?" J.A.2615, at least three courts rejected his testimony because he is not qualified to testified about vaccines. In *Acton v. Sec'y of Health & Hum. Servs.*, No. 19-647V, 2024 WL 5290861, at *29 (Fed. Cl. Dec. 12,

2024), the Court noted that while Dr. Neuenschwander "is at least minimally qualified to opine on medical matters," he "is not a neurologist, immunologist, or metabolic specialist, and is therefore not qualified to offer opinions with regard to the fields that are implicated by his causal theories." That court found his opinions related to vaccines and vaccine injuries unreliable and unpersuasive.

The court in *Acton* was not alone. In *Ruzicka v. Sec'y of Health & Hum. Servs.*, No. 17-109V, 2023 WL 8352496, at *17 (Fed. Cl. Nov. 13, 2023), the Federal Court of Claims determined that Dr. Neuenschwander's testimony was not persuasive, in part, because Dr. Neuenschwander "espouse[s] anti-vaccine views." In *Ruzicka*, the Court specifically noted that Dr. Neuenschwander "is a board member of the Informed Consent Action Network," a known anti-vaccine group with which Appellees' counsel is affiliated. *Id.* at *17 n.9. *See also* J.A.2095, *In the Matter of Kenneth Stoller, M.D.* at ¶¶ 73-75 (determining that Mr. Neuenschwander's testimony was "entitled to little or no weight" and noting that Mr. Neuenschwander conceded "his views concerning the risks of vaccines are not generally accepted in the general medical community"); J.A.2143, *In the Matter of the Accusation Against: Mary Kelly Sutton, M.D.* at ¶ 41 (determining that Mr. Neuenschwander was "biased and hold[s] extreme views" and his "testimony regarding the standard of care and reasonableness of Appellee's conduct was not persuasive"); J.A.7989.

Not only is Dr. Neuenschwander unqualified, but he is also biased. He admitted he serves on the board of the Informed Consent Action Network, which is known for "opposing vaccine mandates." J.A.2689. He testified that no state should mandate vaccines. J.A.2740.

Dr. Neuenschwander's opinions also fail the reliability prong of Rule 702. While Dr. Neuenschwander testified about his views on vaccines, he relied on his observations and not peer reviewed literature. Despite his claim that religious exemptions were not a problem in Michigan, he admittedly did not cite any peer reviewed studies about Michigan—or any other state. J.A.2736.

He performed no analysis of West Virginia or its laws, and he couldn't identify the states surrounding West Virginia. J.A.2700-01; 2711-12; 2723. He admitted he had not performed an analysis of the public health impact if nearly 500 religious exemptions were recognized. J.A.2719. Even though he purported to testify that certain vaccines do not help stop the spread of disease, he testified that he did not know whether vaccines "slow transmission." J.A.2719-20.[18] Despite Appellees' claim that he did an "individualized analysis" which other experts did not do, he never treated or examined any of the children in the case. J.A.2721. At trial, Dr. Neuenschwander testified that he believes certain unspecified studies show that fever from measles can treat cancer and that there is a benefit to contracting measles. J.A.2661, 2668-69, 2697-98. It is not particularly surprising, then, that at least one tribunal has found that his views are not accepted within the medical community. J.A.2095. The Circuit Court abused its discretion when it credited Dr. Neuenschwander's opinions and used those opinions as the cornerstone of its Order.

V. The Circuit Court Deprived the Board Appellants of Their Due Process Rights.

Both the United States and West Virginia Constitutions protect litigants' right to due process of law. Due Process bars courts from "preclud[ing] a party from litigating an issue central to his case." *G.M. v. R.G.*, 211 W. Va. 528, 531, 566 S.E.2d 887, 890 (2002) Due Process also protects a party's "right to adduce evidence in a legal proceeding" as "a fundamental right." *Clay v. City of Huntington*, 184 W. Va. 708, 711, 403 S.E.2d 725, 728 (1991).

At every turn, the Circuit Court deprived Appellants of their Due Process right to develop and adduce evidence in their defense. Appellants sought a regimented schedule that permitted discovery. J.A.1044. The Circuit Court peremptorily denied that request and set the trial before State Board Defendants' answer deadline with no discovery. J.A.1276-77. Appellants sought both

[18] They do. That's part of why vaccines are so effective at building herd immunity. J.A.1587-88.

written discovery and deposition testimony. *See, e.g.*, J.A.1351-67, 1519–20, 3565-80. The Circuit Court denied Appellants' requests and held the Appellees need only produce whatever discovery that they agree to provide. J.A.1476. *See also* J.A.2573, 2873, 3096–97, 3104, 3759, 3764-65. The Appellants subpoenaed witnesses for the bench trial, and most of those subpoenas were quashed on oral motion days before the first day of the trial. J.A.2263, 2852. At trial, the Appellants attempted to take the testimony of Appellees. J.A.3758-64. The Circuit Court refused to allow the Appellees to take the stand. *Id.* The Circuit Court's actions trampled Appellants' Due Process right to develop their case. *Clay*, 184 W. Va. at 711, 403 S.E.2d at 728.

Not only did the Circuit Court strip Appellants of their Due Process right to develop evidence in their case, but the Circuit Court also both relieved the Appellees of their burden to establish a substantial burden on their religious exercise and prevented Appellants from presenting their sincerity defense. J.A.3759. Under EPRA, Appellees are required to establish a substantial burden on their religion, and all parties agreed that Appellants could assert an affirmative defense challenging the sincerity of Appellees' religious beliefs. But the Circuit Court refused to allow the parties to adduce evidence of either a substantial burden or sincerity, relieving Appellees of their burden to prove their claims and stripping Appellants of their affirmative defense.

The Circuit Court also foreclosed Appellants from exploring whether Appellees had standing to bring their claims. For example, two of the minors in this case were 17, and West Virginia law establishes that "mature minors" can participate in their health care. *Belcher v. Charleston Area Med. Ctr.*, 188 W. Va. 105, 107, 422 S.E.2d 827, 829 (1992). It's entirely possible those minors may want to be vaccinated or already are vaccinated. After all, one party was dismissed after it was discovered the party's children were vaccinated. J.A.2571-72. Much like *G.M.*, the Circuit Court "refus[ed] to allow [Appellants] to develop evidence on" the claims in the

case and foreclosed Appellants from presenting a defense. *G.M.*, 211 W. Va. at 531, 566 S.E.2d at 890. That demands reversal—every litigant in West Virginia is entitled to Due Process.

VI. The Circuit Court Erred by Certifying an Extrajurisdictional Class That Cannot Satisfy Several of West Virginia Rule of Civil Procedure 23's Requirements.

As the Appellants argued in their separate Petition for Writ of Prohibition, the Circuit Court improperly certified an extrajurisdictional class in violation of West Virginia Code § 53-5-3, which limits circuit courts' ability to enter injunctive relief to their circuit. The Circuit Court also erred in entering the permanent injunction on a classwide basis because it improperly granted class certification on a bare evidentiary record where none of the Rule 23(a) factors were met. "A class action may only be certified if the trial court is satisfied, after a thorough analysis, that the prerequisites of Rule 23(a) . . . have been satisfied." *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 244 W. Va. 248, 256–57, 852 S.E.2d 748, 756–57 (2020). Here, the Circuit Court insulated Appellees' credibility, motivations, typicality, and adequacy from any adversarial testing. The Circuit Court had no evidentiary basis to conclude that no conflicts exist between Appellees and the class and that they are adequate representatives. The Circuit Court did not meaningfully address these factors before granting class certification. Similarly, the commonality requirement is not met because the legal questions as to the EPRA claim at issue cannot be answered as to all putative class members without individualized fact-finding. *See* J.A.113; Syl. Pt. 8, *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 248 W. Va. 138, 887 S.E.2d 571, 575 (2022).

CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court's order granting a permanent injunction and remand this case with directions to enter judgment in favor of the Appellants. Alternatively, this Court should vacate the Circuit Court's order granting a permanent injunction and remand this case for proper evidentiary development.

Respectfully Submitted,

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