No. 09-2352

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JENNIFER WORKMAN, *et al.*,

Plaintiffs-Appellants,

v.

MINGO COUNTY BOARD OF EDUCATION, *et al.*,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

Patricia Finn
The Law Office of Patricia Finn Attorney, P.C.
450 Piermont Avenue
Piermont, New York 10968
(845) 875-4393
(845) 818-3690 *facsimile*
Counsel of Record

Stephen Wills Murphy
VSB No. 80733
St. John, Bowling, Lawrence & Quagliana, LLP
416 Park Street
Charlottesville, Virginia 22902
(434) 296-7138
(434) 296-1301 *facsimile*

John W. Whitehead
Rita M. Dunaway
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, Virginia 22901
(434) 978-3888
(434) 978-1789 *facsimile*

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PETITION FOR REHEARING AND REHEARING *EN BANC*

Plaintiff-Appellant Jennifer Workman and Plaintiff-Appellant M.W., by counsel, and pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rules 35 and 40 of the Fourth Circuit Rules, petitions the Court for rehearing and rehearing *en banc* of the decision entered by a panel of this Court on March 22, 2011.

INTRODUCTION

In this case, Jennifer Workman ("Workman") sought an accommodation from the Mingo County Board of Education ("Mingo County") for her daughter, M.W., from a West Virginia statute that required all children entering public school to be vaccinated against various diseases. The statute allowed for children to be exempt from the law's requirements when a physician certified that there was a good reason for such exemption. Workman's religious beliefs precluded her from allowing her daughter to receive the vaccination. The district court granted summary judgment for Mingo County and denied an accommodation for Workman, and a panel of the Fourth Circuit (the "panel") affirmed.

The panel concluded that Workman was not entitled to an accommodation under the Free Exercise Clause of the First Amendment to the United States Constitution. The panel assumed that strict scrutiny would apply to such a claim. It summarily concluded that the West Virginia law withstood strict scrutiny, citing no evidence that the state had a compelling interest in denying an accommodation to M.W. under the circumstances, nor citing any evidence that denial of the requested accommodation was the least restrictive means of furthering such a compelling government interest.

In counsel's judgment, the panel's decision: (1) involves questions of exceptional importance; and (2) conflicts with decisions of the Supreme Court and of this Court. Either of these reasons, by itself, is sufficient to warrant rehearing.

First, the panel decision involves the following questions of exceptional importance:

1. In evaluating laws for Free Exercise concerns under strict scrutiny, is the compelling interest test fact- and context-specific, or is it sufficient to rely on a compelling interest of a case from 1905, concerning a smallpox vaccine during an epidemic?

2. In evaluating laws for Free Exercise concerns under strict scrutiny, does the relevant "compelling interest" analysis apply to the denial of a particular accommodation, or rather to the government's interest in passing the law?

3. Given the individualized, fact- and context-specific inquiry required by strict scrutiny, is it proper for a court to assume that strict scrutiny applies, or should a court rather seek to resolve the case before applying strict scrutiny?

4. Does the Fourth Circuit apply strict scrutiny to laws affecting "hybrid rights" under the Free Exercise Clause?

5. Does a law's provision of non-religious exemptions but denial of religious exemptions remove it from the *Smith* neutrality paradigm and trigger strict scrutiny?

6. Can a court properly hold that a law survives strict scrutiny without conducting a focused, individualized, fact- and context-specific analysis of the stated compelling interest and whether less restrictive means of furthering that interest are available?

Second, the decision conflicts with decisions of the Supreme Court in several respects. Specifically, the panel misstated the "compelling interest" inquiry under the Free Exercise Clause. The Supreme Court has repeatedly emphasized the individualized and contextualized nature of this inquiry. Nevertheless, the panel assumed that the state would always have a compelling interest in any vaccination program. *Workman v. Mingo County Bd. of Educ.*, No. 09-2352 (4th Cir. Mar. 22, 2011), slip op., at *3–4. While the

panel relied on the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905), in finding a compelling interest for the West Virginia statute, it neglected to perform the same searching review of the particular circumstances of the vaccination requirement at issue that the Supreme Court undertook in that case.

Moreover, the Supreme Court has emphasized that under the Free Exercise Clause, the key inquiry is whether the state has a compelling interest in denying an accommodation to a particular individual seeking to exercise his or her Free Exercise rights. But in this case, the panel misstated the applicable test. The panel inquired only whether "the state's wish to prevent the spread of communicable diseases" constituted a compelling interest. *Workman*, slip op., at *4. The panel should have inquired whether the state had a compelling interest to deny Workman and M.W. this accommodation, in light of the circumstances of the need for the vaccine, the various benefits and risks of the vaccine, and the other exceptions present in the statute.

Furthermore, in light of this fact- and context-specific analysis required by law, the panel should have taken pains to determine whether the hybrid nature of the rights at issue or the system of exemptions in the statute triggered strict scrutiny at all.

Finally, the panel failed to perform any analysis whatsoever to determine whether the denial of the requested accommodation was the least restrictive means of furthering the state's alleged compelling interest. The Supreme Court clearly requires this analysis as part of its strict scrutiny test. *See, e.g.*, *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718, 101 S. Ct. 1425 (1981); *Wisconsin v. Yoder*, 406 U.S.

205, 215, 92 S. Ct. 1526 (1972). Thus, having treated the West Virginia statute under strict scrutiny, the panel erred in omitting this analysis.

ARGUMENT

I. The Court should grant rehearing to determine whether the compelling interest test is fact- and context-specific, or whether it is proper to rely on a compelling interest from a case of a vaccine law from 1905, during a smallpox epidemic.

The West Virginia statute at issue requires that children entering school be immunized against "diphtheria, polio, rubeola, rubella, tetanus and whooping cough." W. Va. Code § 16-3-4.

The panel invoked two cases from the Supreme Court to quickly conclude that "the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest." *Workman*, slip op., at *4.

However, the cases cited by the panel do not stand for such a broad proposition. In *Jacobson*, the Supreme Court did not grant the state a blanket power to require vaccinations of any and all communicable diseases. *See* 197 U.S. at 27–28, 25 S. Ct. at 361–62. Instead, in *Jacobson* the Court emphasized that the law at issue was passed during a state of "emergency," in which smallpox "was prevalent to some extent in the city of Cambridge, and the disease was increasing." *Id.* at 27–28, 25 S. Ct. at 361–62 (see also *id.* at 28, 25 S. Ct. at 362 (stating that the law was passed pursuant to the act of the "community to protect itself against an epidemic threatening the safety of all")).

To buttress its citation of *Jacobson*, the panel relied on dicta in *Prince v. Massachusetts*, a Supreme Court case from four decades later. 321 U.S. 158, 64 S. Ct. 438 (1944). In *Prince*, a parent challenged a child labor law that put some restrictions on

a child's involvement in religious activities with her mother. The Supreme Court upheld that child labor law's restriction at issue. But in so doing, the Court explained, by way of example, that an individual "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds," because "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince*, 321 U.S. at 166–67 & n.12, 64 S. Ct. at 442 & n.12 (citing *Jacobson, supra*). But clearly, in that case the Court's interpretation of *Jacobson* was dicta, and is not binding on this Court.

In fact, in *Jacobson*, the plaintiff did not raise any religious argument in favor of an accommodation. Instead, the plaintiff mostly invoked medical opinions to challenge the law, and only two of his arguments concerned "matters depending upon his personal opinion." *Jacobson*, 197 U.S. at 23, 25 S. Ct. at 360. Indeed, then, the panel incorrectly read *Jacobson* when it interpreted that case to address Free Exercise challenges to a law. Instead, *Jacobson* concerned only a citizen's right to generally object to a law on the basis of expediency, efficiency, or his mere opinion.

Contrary to the panel's reading of *Jacobson*, that case requires a court to undertake a focused inquiry into a particular vaccination law. The Supreme Court's comments in *Prince* are dicta and are not binding on this Court. Therefore, the Court should grant rehearing to properly apply *Jacobson* and to evaluate the requested accommodation to the West Virginia vaccination law under current case law and under the specific facts and circumstances of the West Virginia statute at issue.

II. The Court should grant rehearing to properly apply the compelling interest standard by considering whether the state has a compelling interest in denying this particular accommodation.

The panel's opinion evaluated the gravity of the state's interest in passing the statute as a whole. However, the proper inquiry under the Free Exercise Clause is whether the state has a compelling interest in *denying* an accommodation to a given law.

The Supreme Court's opinion in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* is instructive on this point. 546 U.S. 418, 126 S. Ct. 1211 (2006) (applying the "compelling interest" test under the Religious Freedom Restoration Act of 1993). In that case, the Supreme Court addressed religious practitioners' request for an accommodation from federal drug laws that prohibited the use and possession of *hoasca*, a Schedule I hallucinogen, which the practitioners used for sacramental purposes. The federal government argued that it had a sufficient compelling interest to reject the accommodation; it posited that the federal government had an interest in uniformly prohibiting *all* Schedule I substances. *Id.* at 430, 126 S. Ct. at 1220.

But the Supreme Court held that the denial of the particular accommodation in question did not pass strict scrutiny. Despite the federal government's argument that it had an interest in denying all accommodations for Schedule I substances, the Court reasoned that the government had not demonstrated a compelling interest in denying an accommodation to this particular drug, which did not have a regular market. *Id.* at 432, 126 S. Ct. at 1221.

In the instant case, Workman submits that it is this analysis of the government's interest in denying her requested accommodation—and not an analysis of the government's interest in passing the statute—that the panel was required to undertake.

III. Given the fact- and context-specific inquiry required by strict scrutiny, the Court should grant rehearing to determine whether the laborious strict scrutiny inquiry must be undertaken.

The panel acknowledged that it is unclear whether laws affecting "hybrid rights," such as those implicating both religion and educational or parenting choices, are subject to strict scrutiny. Indeed, the panel noted a circuit split on this issue of whether part of the Supreme Court's opinion in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), is binding precedent. *Workman*, slip op., at *3.

Nevertheless, the panel assumed "for the sake of argument that strict scrutiny applies." *Id.* at *3. As noted above, the panel then went on to cite two Supreme Court cases, from 1905 and 1944, respectively, to summarily conclude that the West Virginia law passed strict scrutiny. *Id.*

But given that strict scrutiny requires the state to demonstrate that the denial of this particular accommodation constitutes the least restrictive means of furthering a compelling interest, and given the different circumstances that existed in a twenty-first century statute vaccinating against six illnesses and a statute from a century earlier vaccinating against a smallpox outbreak, strict scrutiny in this case would be no light task for the Court.

Accordingly, the panel should not have glossed over the issue of whether strict scrutiny applies. The Court should rehear the case to take a position on a live circuit split and determine whether this vaccination law is subject to strict scrutiny at all.

IV. Given that a true strict scrutiny analysis would likely change the outcome of this case, the Court should order rehearing to determine whether the Fourth Circuit applies strict scrutiny to laws affecting "hybrid" rights under *Smith*.

In *Smith*, the Supreme Court held for the first time that neutral laws of general applicability do not implicate the Free Exercise Clause, and thus such laws are not subject to strict scrutiny, even if they burden an individual's religion. *Smith*, 494 U.S. 872, 110 S. Ct. 1595.

When it announced that new test in *Smith*, the Supreme Court reconciled the *Smith* regime with prior case law, and it referred to prior cases of "hybrid" rights in which strict scrutiny had applied:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, ... *see Wisconsin v. Yoder*, [406 U.S. 205, 92 S. Ct. 1526 (1972)] (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).... The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.

Id. at 881–82, 110 S. Ct. at 1601–02 (citations omitted).

But as the panel correctly acknowledged, the circuits have split over the following issue: whether laws that implicate these "hybrid" rights are subject to strict scrutiny, or whether the concept of "hybrid" rights in *Smith* is mere dicta, in which case a burden on those rights does not give rise to strict scrutiny.[1] The panel even referenced the

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[1] In addition to these circuits that embrace or reject hybrid rights, the D.C. Circuit and the First Circuit have held that laws that implicate hybrid rights undergo strict scrutiny, but only if the plaintiff can demonstrate that the Free Exercise claim is joined

exhaustive summary of current case law provided by the Third Circuit in *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 243–47 (3d Cir. 2008).

The Ninth and Tenth Circuits have held that a law that implicates both the Free Exercise Clause and a companion right is subject to strict scrutiny, even if the law is a neutral law of general applicability, so long as the plaintiff establishes a "colorable claim." *See San Jose Christian Coll. v. Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998).

Meanwhile, the Second, Third, and Sixth Circuits have held that the above-cited language in *Smith* is dicta, and thus a neutral law that burdens Free Exercise rights and another constitutional right does not undergo strict scrutiny. *See Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir.2003) (citation omitted); *Combs*, 540 F.3d at 247; *Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180 (6th Cir.1993).

The Fourth Circuit should grant rehearing to determine what level of scrutiny the Fourth Circuit will apply to "hybrid" rights claims.

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with a second, *independent* right. *See Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (rejecting the "hybrid claim" argument that "the combination of two untenable claims equals a tenable one"); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (rejecting a hybrid-rights claim because "[plaintiff's] free exercise challenge is ... not conjoined with an independently protected constitutional protection"). This approach has been criticized for making the Free Exercise claim superfluous. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567, 113 S. Ct. 2217, 2244–45 (1993) (Souter, J., concurring).

V. The Court should order rehearing to determine whether a law's provision of non-religious exemptions but denial of religious exemptions removes it from the *Smith* neutrality paradigm and triggers strict scrutiny.

Under *Smith*, a neutral, generally applicable state law does not implicate the Free Exercise Clause, and thus such a law does not come under strict scrutiny. However, case law suggests that a statute that includes exemptions for non-religious purposes, but not for religious purposes, is not truly "neutral," and thus can come under strict scrutiny.

In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court invalidated a city ordinance that banned ritual animal slaughter. 508 U.S. 520, 527–28, 113 S. Ct. 2217, 2223–24 (1993). In that case, a Santeria church that performed animal sacrifices announced a plan to open a church in Hialeah, Florida. The city council promptly passed ordinances that prohibited the killing of animals in rituals, but allowed the killing of animals for food and for scientific and other purposes. The Supreme Court held that the law was not "neutral" or one of "general applicability" because the objective law applied only to religious practice. *Id.* Put differently, the law contained exceptions for non-religious practices, but not for religious and ritual practices, and therefore the law could not be one of general applicability.

Similarly, the Third Circuit has held that a law that allows secular exemptions, but not religious ones, is not a neutral law of general applicability. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, Muslim police officers whose religion required them to wear beards challenged a requirement that police officers shave their beards. 170 F.3d 359 (3d Cir. 1999). The Third Circuit held that the law was not neutral, and thus it must undergo a heightened scrutiny. *Id.* at 366.

In evaluating the police regulation at issue in that case, the Third Circuit paid particular attention to the existing exemptions under the law. The Third Circuit noted that while no religious exemptions were available, medical exemptions were available under the regulation, even though these medical exemptions undercut the law's stated purpose of encouraging an appearance of a uniform and disciplined police force.[2] The Court reasoned, "when the government makes a value judgment in favor of secular motivations, but not religious motivations," then the law cannot be considered neutral, and the law must undergo "heightened scrutiny." *Newark*, 170 F.3d at 366.

In the instant case, the West Virginia statue in question requires all children to be vaccinated from the listed illnesses, but it provides an exception for students who can provide "a certificate from a reputable physician showing that an immunization ... is impossible or improper or sufficient reason why any or all immunizations should not be done." W. Va. Code § 16-3-4.

Because the West Virginia law at issue allows for physician-approved exemptions, but not religious ones, it is not a neutral law of general applicability. Thus, the Court should rehear the instant case to determine whether this system of exemptions removes the law from the *Smith* neutrality paradigm and triggers strict scrutiny.

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[2] In this analysis, the Third Circuit ignored the exemption for undercover police officers, since that exception did not cut against the stated purpose of the law to encourage an appearance of discipline and uniformity. *Newark*, 170 F.3d at 366.

VI. The Court should order rehearing to ensure that strict scrutiny is actually applied to the facts and circumstances of this case.

Again, strict scrutiny requires the state to demonstrate that the denial of the particular accommodation requested constitutes the least restrictive means of furthering a compelling interest. While the panel purported to apply strict scrutiny in this case, its opinion reveals no meaningful, substantive analysis under this standard, but rather a hijacking of the analysis of other courts in other cases involving different facts and circumstances. In particular, none of the cases upon which the court relied appears to have involved the provision of a medical exemption but denial of a religious exemption. Thus, in the event that the Court finds strict scrutiny to be the appropriate standard in this case, the Court should order rehearing to properly apply this standard.

CONCLUSION

For the reasons set forth above, Plaintiffs-Appellants' Petition for Rehearing and Rehearing *En Banc* should be **GRANTED**. If Rehearing or Rehearing *En Banc* is granted, Plaintiffs-Appellants request supplemental briefing.

Respectfully submitted,

April 5, 2011

/s/ Patricia Finn
Patricia Finn
The Law Office of Patricia Finn Attorney, P.C.
450 Piermont Avenue
Piermont, New York 10968
(845) 875-4393
(845) 818-3690 *facsimile*
Counsel of Record

Stephen Wills Murphy
VSB No. 80733
St. John, Bowling, Lawrence & Quagliana, LLP
416 Park Street
Charlottesville, Virginia 22902
(434) 296-7138
(434) 296-1301 *facsimile*

John W. Whitehead
Rita M. Dunaway
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, Virginia 22901
(434) 978-3888
(434) 978-1789 *facsimile*

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2011, I electronically filed the foregoing Petition for Rehearing and Rehearing *En Banc* with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF Users:

Joanna Irene Tabit
STEPTOE & JOHNSON, LLP
8th Floor
Chase Tower
707 Virginia Street, East
P. O. Box 1588
Charleston, WV 25326-1588

Silas B. Taylor
OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA
Room E-26
State Capitol Complex
1900 Kanawha Boulevard, East
Charleston, WV 25305-0000

Charlene Ann Vaughan, Esq., Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA
Building3, Room 210
State Capitol Complex
1900 Kanawha Boulevard, East
Charleston, WV 25305-0000

James Dwyer (for amici supporting appellees)
COLLEGE OF WILLIAM & MARY
Marshall-Wythe School of Law
P. O. Box 8795
Williamsburg, VA 23187-8795

Braun A. Hamstead, Attorney (for amici supporting appellees)
HAMSTEAD & ASSOCIATES, LC
113 Fairfax Boulevard
Charles Town, WV 25414

/s/ Patricia Finn