No. 23-1887

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WEST VIRGINIA PARENTS FOR RELIGIOUS FREEDOM, *et al.*,

Plaintiffs-Appellants,

v.

DR. MATTHEW CHRISTIANSEN,
in his official capacity as the State Health Officer, *et al.*,

Defendants-Appellees.

On Appeal from the U.S. District Court for the
Northern District of West Virginia in
Case No. 5:23-cv-00158-JPB (Bailey, J.)

AMICUS CURIAE BRIEF OF THE STATES OF WEST VIRGINIA, ARKANSAS, IOWA, LOUISIANA, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND VIRGINIA SUPPORTING APPELLEES AND REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE AMICUS CURIAE

"Federalism, a fundamental principle under our Constitution, requires that federal courts respect the sovereignty of their state counterparts." *Air Evac EMS, Inc. v. McVey*, 37 F.4th 89, 93 (4th Cir. 2022). And "[o]ne way federal courts do this is through the doctrine of abstention." *Id.* Abstention reflects the commonsense reality that, sometimes, "principles of federalism and comity outweigh the federal interest in deciding a case." *Martin v. Stewart*, 499 F.3d 360, 363 (4th Cir. 2007) (cleaned up). Quite simply, "[t]he list of areas in which federal judicial interference would disregard the comity that Our Federalism requires is lengthy," so federal courts must sometimes step aside. *Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348, 352 (4th Cir. 2005) (cleaned up).

The States here file this amicus brief because the panel majority's decision critically weakens these federalism-focused protections. The panel majority ordered a federal district court to inject itself into a sensitive matter of state policy based on a cramped reading of one brand of abstention, *Pullman* abstention. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501-02 (1941). If allowed to stand, that decision will push more state-centered disputes into federal courts. Comity and mutual respect among sovereigns will fall by the wayside. And unnecessary constitutional decisions will become more common. The States have an obvious interest in seeing that their authority is not curtailed in such a troubling way.

INTRODUCTION

West Virginia law generally requires children who attend schools and state-regulated childcare centers to receive certain immunizations. *See* W. VA. CODE § 16-3-4(b). In this suit, Plaintiffs challenge that vaccination requirement under the First Amendment's Free Exercise Clause. But their claim also implicates a West Virginia statute passed just under two years ago, the Equal Protection for Religion Act. Under the EPRA, the vaccination requirement will not apply to persons if it "[s]ubstantially burden[s] [their] exercise of religion," unless it is both "essential to further a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." *Id.* § 35-1A-1(a)(1). In other words, if a genuine free-exercise problem exists here, then the EPRA would create an exception to the immunization requirement for affected religious observants, mooting any constitutional concern.

Recognizing that the new EPRA's meaning was necessarily at issue, the district court appropriately hit pause on Plaintiffs' federal suit. It applied *Pullman* abstention—a doctrine that "requires federal courts to abstain from deciding an unclear area of state law that raises constitutional issues because state court clarification might serve to avoid a federal constitutional ruling." *Nivens v. Gilchrist*, 444 F.3d 237, 245 (4th Cir. 2006). Plaintiffs would need to go to state court to find out if the EPRA already afforded them an exemption from the vaccination requirement before raising a federal constitutional challenge.

In a divided decision, though, the panel majority substantially narrowed *Pullman* abstention and then found the district court abused its discretion under this new standard. Now, *Pullman* abstention may be applied in the Fourth Circuit only when a plaintiff has chosen to "pursue a claim" under an unclear state law. *W. Va. Parents for Religious Freedom v. Christiansen*, No. 23-1887, slip op. at 12 (4th Cir. Dec. 31, 2024). Yet as the dissent well explained, "no federal court of appeals, including the Fourth Circuit, ha[d] [previously] conditioned the appropriateness of *Pullman* abstention on the affirmative invocation of a state law claim." *Id.* at 16-17 (Berner, J., dissenting).

The Court should grant rehearing en banc and affirm the district court. The panel majority's reasoning misunderstands *Pullman* abstention's essential elements and purposes. It also misunderstands West Virginia law. The consequences are bad enough just in this case; state courts could be deprived of the first shot at interpreting an important new law, and federal courts will be thrust into deciding a controversial and sensitive issue of public health policy. But the harms extend beyond this case. If allowed to stand, *Pullman* abstention—the "oldest and best-settled of the abstention doctrines"—will be distorted and improperly curtailed. 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4242 (3d ed. 2024). Plaintiffs will need only to plead their way around the problem, even when the comity and federalism concerns underlying the doctrine are present all the same. That can't be right. The Court should act to return *Pullman* abstention to its rightful place.

ARGUMENT

I. The Panel Majority Misunderstood *Pullman* Abstention.

Pullman abstention can apply any time there's a "susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question" raised in federal court. *See Zwickler v. Koota*, 389 U.S. 241, 248-49 (1967). In a variety of cases, the Supreme Court has "sanctioned a federal court's postponement of the exercise of its jurisdiction in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Allegheny Cnty. v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959); *see also Meredith v. Talbot Cnty.*, 828 F.2d 228, 232 (4th Cir. 1987) ("*Pullman* abstention is appropriate where the case may be disposed of by a decision on questions of unsettled state law.").

Most often, *Pullman* abstention applies when a state law can be given a "limiting construction" that then erases any constitutional concern. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 237 (1984); *see also Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 569 (1987) (considering whether the relevant state law left "room for a narrowing construction" by state courts). But the "novel or unsettled" state-law issues need only be "germane" to the federal issues to justify restraint. *Pittman v. Cole*, 267 F.3d 1269, 1285 (11th Cir. 2001). As this Court has put it, "*Pullman* abstention [is] appropriate where the resolution of an issue concerning state delegation of authority"—such as whether the Legislature intended to permit

exemptions to compulsory vaccination—"would moot the constitutional questions presented." *Wise v. Circosta*, 978 F.3d 93, 102 (4th Cir. 2020).

Notice what's missing in these descriptions: any requirement that a plaintiff *expressly* invoke an unclear state law in the complaint before abstention can apply. It "is not always the case" that cases implicating *Pullman* involve "state laws that are premised on or more directly intertwined with a federal constitutional claim." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock*, 542 F. Supp. 3d 465, 490 (N.D. Tex. 2021) (cleaned up). Rather, *Pullman* calls for a practical approach, looking to the case as a whole to assess whether the federal court can "avoid resolving the federal question by encouraging a state-law determination"—that is, *any* state-law determination—"that may moot the federal controversy." *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 339 (2005). Considering that approach, "Plaintiffs cannot avoid abstention by excluding crucial state law issues from their pleadings." *Pustell v. Lynn Pub. Schs.*, 18 F.3d 50, 53 n.5 (1st Cir. 1994); *see also, e.g.*, *Robert E. v. Lane*, 530 F. Supp. 930, 936 (N.D. Ill. 1981) (collecting authorities showing that "[a] plaintiff's unilateral decision to forego potential state law claims does not … automatically bar a federal court from abstaining").

But the panel majority added a new express pleading requirement. Rather than considering the case's full context, it remained narrowly focused on how Plaintiffs characterized their claims and what citations they invoked in their complaint. Plaintiffs are the masters of their own complaint, but they

don't get to dictate jurisdictional questions in this way. The district court did not abuse its discretion in recognizing state law was in play.

The purposes behind *Pullman* abstention also matter. The doctrine recognizes that "an erroneous construction of state law by the federal court would disrupt important state policies." *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 149-50 (3d Cir. 2000) (cleaned up). That's an especially big problem when the case "touches a sensitive issue of social policy." *Gearing v. City of Half Moon Bay*, 54 F.4th 1144, 1150 (9th Cir. 2022). So "[t]he main purpose of the *Pullman* doctrine is to avoid, if possible, declaring a state statute unconstitutional, by giving the state courts a chance to interpret it narrowly." *Mazanec v. N. Judson-San Pierre Sch. Corp.*, 763 F.2d 845, 847 (7th Cir. 1985). By recognizing these complications, federal courts show "scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary." *Pullman*, 312 U.S. at 501 (cleaned up). What's more, federal courts serve their own interests by "avoid[ing] … premature constitutional adjudication," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979), and minimizing the risk of rendering advisory opinions, *Moore v. Sims*, 442 U.S. 415, 428 (1979).

But here again, these important purposes earn nary a mention in the panel majority's opinion. Instead, the panel majority preferred to force the district court to tackle the constitutional question first, with no state-court help. The panel majority also assumed that the compulsory vaccination statute would be interpreted only one way even though no state court has construed

the statute post-EPRA. And the majority opinion will compel the district court to dive into an exceptionally sensitive issue—vaccination—that States typically control. *See Kentucky v. Biden*, 23 F.4th 585, 610 (6th Cir. 2022) ("States … have a traditional interest in regulating public health and, specifically, in determining whether to impose compulsory vaccination on the public at large."). In fact, the opinion forces the district court to involve itself in *two* areas of special concern for West Virginia: vaccination and religious liberty. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 164 (2018) (describing West Virginia's uniquely longstanding tradition of religious liberty).

Rather than focus on abstention's essential purposes, the majority instead highlighted principles that aren't relevant here. For instance, it said abstention's aims wouldn't be served by allowing West Virginia courts "the first opportunity to vindicate the federal claim." *W. Va. Parents for Religious Freedom*, slip op. at 12 (cleaned up). But no one is asking for the West Virginia courts to decide the *federal* claim; the concern lies with the EPRA. Likewise, no one is arguing that Plaintiffs should have "sought relief under a similar provision of the state constitution." *Id.* The abstention question is about the interplay between the EPRA and the original compulsory vaccination statute. *Id.* at 18 (Berner, J., dissenting). So it was the panel majority, not the State Defendants, that was chasing geese. *Id.* at 12.

The Court should grant rehearing to reaffirm what matters and what doesn't when it comes to *Pullman* abstention.

II. The Panel Majority Misunderstood West Virginia Law.

In treating the EPRA and the compulsory vaccination law as two statutes operating in isolation, the panel majority also misunderstood West Virginia law.

Start with the basics. In West Virginia, "statutes are not to be construed in a vacuum, but must be read in the context of the general system of law of which the Legislature intended it to be a part." *In re Donald M.*, 758 S.E.2d 769, 774 (W. Va. 2014). "Statutes relating to the same subject matter must be read and applied together, whether passed at the same or different times." *Chesapeake & Potomac Tel. Co. of W. Va. v. City of Morgantown*, 107 S.E.2d 489, 496 (W. Va. 1959). When there is tension or conflict between two statutes, West Virginia courts must, "if reasonably possible, construe such statutes so as to give effect to each." *State v. Schober*, 909 S.E.2d 69, 76 n.21 (W. Va. 2024). But in the end, "[i]f several statutory provisions cannot be harmonized, controlling effect must be given to the last enactment of the Legislature." *State ex rel. Dep't of Health & Hum. Res. v. W. Va. Pub. Emps. Ret. Sys.*, 393 S.E.2d 677, 680 (W. Va. 1990).

Now apply those concepts here. The compulsory vaccination statute might be clear enough on its face—it applies to all students and daycare attendees except for those who receive a specified medical exemption. W. VA. CODE § 16-3-4(b). But the EPRA—the later enactment—then suggests that the vaccination requirement may not apply to those for whom it presents an unjustified religious burden. In essence, the EPRA has effectively amended

all statutes in West Virginia, the compulsory vaccination statute included. And it's that *amended* statute that the district court was being asked to evaluate. With no guidance at all from West Virginia courts on the constructive amendment, *W. Va. Parents for Religious Freedom*, slip op. at 6 n.5, this case was a quintessential example of one warranting *Pullman* abstention.

It also helps to consider how federal courts have characterized the EPRA's close cousin, the federal Religious Freedom Restoration Act. *See Stone v. St. Joseph's Hosp. of Parkersburg*, 538 S.E.2d 389, 410 (W. Va. 2000) (McGraw, J., concurring in part and dissenting in part) ("[W]e must presume that the Legislature, by incorporating the language of analogous federal statutes into the [state law], intended that such language should be interpreted consistent with pre-existing federal case law."). Federal courts have said RFRA functions as a constructive amendment that likewise writes exceptions into all manner of laws. It "necessarily puts courts in the position of crafting religious exemptions to federal laws that burden religious exercise without sufficient justification." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1020 (10th Cir. 2004) (McConnell, J., concurring); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726-27 (2014) (describing how courts applying RFRA must evaluate whether to grant "specific exemptions to particular religious claimants"); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 691 (2020) (Alito, J., concurring) (noting how a federal statute must "conform" to RFRA). In other words, "[j]udges are assigned the task of mediating … conflicts"

between RFRA and other federal statutes. *Korte v. Sebelius*, 735 F.3d 654, 673 (7th Cir. 2013). For that reason, federal courts have described RFRA as having "amended all federal laws." *United States v. Anderson*, 854 F.3d 1033, 1035 (8th Cir. 2017) (cleaned up); *see also, e.g.*, *Hankins v. Lyght*, 441 F.3d 96, 109 (2d Cir. 2006) ("The RFRA is an amendment to the [Age Discrimination in Employment Act]."). The same logic applies to the EPRA—the district court *must* construe the EPRA because it necessarily affects the meaning of the vaccination requirement. *Cf. Baker v. Crossroads Acad.-Cent. St.*, 648 S.W.3d 790, 805 (Mo. Ct. App. 2022) (applying state RFRA analogue's provisions to vaccine requirement).

So in assuming that the district court could put the EPRA aside merely because Plaintiffs have not expressly invoked it, the panel majority misunderstood West Virginia law. The district court will necessarily evaluate what the EPRA permits and what it doesn't when religious exercise is involved. Only once the court has done that assessment can it in turn evaluate whether the resultant scope of the immunization requirement is consistent with the Free Exercise Clause. And the district court will now risk doing exactly what *Pullman* abstention is designed to avoid: "place itself in the position of holding the statute unconstitutional by giving it [one] construction only to discover that the state courts would give it [another]." *Ziegler v. Ziegler*, 632 F.2d 535, 538 (5th Cir. 1980).

The Court should rehear the case so as not to put the district court in this untenable position.

CONCLUSION

The Court should grant the petition for rehearing en banc and affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This response brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 2,600 words.

2. This response brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), as required by Fed. R. App. 27(d)(1)(E), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point CenturyExpd BT font.

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