No. 22-404

IN THE

Supreme Court of the United States

JANE GOE, SR., ON BEHALF OF HERSELF AND HER MINOR CHILD, *et al.*,

Petitioners,

v.

JAMES V. MCDONALD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

MARY HOLLAND
ROBERT KENNEDY, JR.
CHILDREN'S HEALTH DEFENSE
852 Franklin Avenue,
Suite 511
Franklin Lakes, NJ 07417

MICHAEL H. SUSSMAN
SUSSMAN & GOLDMAN
One Railroad Avenue
Goshen, NY 10924

SUJATA S. GIBSON
Counsel of Record
PHILIP FORNACI
GIBSON LAW FIRM, PLLC
832 Hanshaw Road, Suite A
Ithaca, NY 14850
(607) 327-4125
sujata@gibsonfirm.law

Counsel for Petitioners

318891

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

REPLY ARGUMENT SUMMARY. 1

ARGUMENT. 4

I. The Court should grant certiorari to clarify the contours of the right to a medical exemption after *Dobbs* 4

A. *Jacobson* requires the court to intervene if a child is at risk of harm 4

B. *Doe* requires discretion be given to treating physicians, not school principals 6

II. The Court should grant certiorari to address the widespread misapplication of *Jacobson* in the lower courts 8

A. *Jacobson* does not negate strict scrutiny. 9

B. *Jacobson* does not negate the unconstitutional conditions doctrine. 11

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

Cases

Ayotte v. Planned Parenthood of N. New England,
546 U.S. 320 (2006) 7, 8

Cassell v. Snyders,
458 F. Supp. 3d 981 (N.D. Ill. 2020) 10

Com. v. Pear,
183 Mass. 242 (1903), *aff'd sub nom.*, *Jacobson*,
197 U.S. 11. 11

Cruzan v. Director, Missouri Department of Health,
497 U.S. 261 (1990). 9

Dobbs v. Jackson Women's Health Org.,
597 U.S. __ (2022) 3, 8

Doe v. Bolton,
410 U.S. 179 (1973) 2, 3, 6, 7, 8

In re Abbott,
954 F.3d 772 (5th Cir. 2020), vacated as moot
sub nom. by *Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021). 10

Jacobson v. Massachusetts,
197 U.S. 11 (1905). 2, 3, 4, 5, 6, 8, 9, 10, 11, 12

Cited Authorities

Page

Lighthouse Fellowship Church v. Northam,
458 F. Supp. 3d 418 (E.D. Va. 2020) 10

Roman Catholic Diocese of Brooklyn v. Cuomo,
141 S. Ct. 63 (2020). 3, 10

S. Bay Pentecostal Church v. Newsom,
141 S. Ct. 716 (Feb. 5, 2021) 9

Stenberg v. Carhart,
530 U.S. 914 (2000). 7, 8

Troxel v. Granville,
530 U.S. 57 (2000). 9

Whalen v. Roe,
429 U.S. 589 (1977). 7

Statutues and Other Authorities

U.S. Const., amend. XIV 3, 8, 12

F.R.C.P. 12(b)(6). 2

REPLY ARGUMENT SUMMARY

Respondents ignore the questions presented and attempt to argue instead about whether states can impose vaccine mandates. That is not at issue. This case is about the right to a medical exemption for children who are at risk of serious harm from a vaccine requirement.

The challenged New York State Department of Health ("NYSDOH") regulation severely infringes Petitioner's fundamental rights and forces them and hundreds of other families to make a Hobson's choice between risking their child's life against medical advice or following their doctor's advice and losing the ability to send their children to any public or private school in the state.

The facts are appalling. The challenged regulation deputizes school principals to overrule treating physicians, and, as regularly applied by the NYSDOH and defendant school districts, artificially narrows allowable reasons for exemption to one of three "contraindications" enumerated in the "Best Practices Guideline" issued by the CDC's Advisory Committee on Immunization Practices "ACIP." Even ACIP acknowledges this limitation is unsafe, admitting that their guidelines are not exhaustive and should not be used to define medical exemptions. App. 103a. Indeed, Petitioners point out hundreds of additional reasons that a child might be at risk of serious harm, including known adverse reactions and precautions listed in manufacturers' inserts, severe vaccine injuries routinely compensated by the Vaccine Injury Compensation Program, and Institutes of Medicine Reports documenting known risk factors. *Id.* Moreover, school principals clearly are not qualified to overrule

treating physicians about what pharmaceutical products are safe for medically fragile children.

Respondents focus much of their briefs arguing that the regulation's standard are broader than petitioners concede and recognize "other nationally recognized evidence-based standards of care" as an alternative to ACIP guidelines. But, under F.R.C.P. 12(b)(6), the well-plead facts in the Complaint must be taken as true. Here each child presented credible evidence showing that he/she was at risk of harm and the schools applied only the narrow ACIP criteria in denying them an exemption. In short, the theoretical breadth of the regulation has no practical import.

Respondents offer little response to the legal issues. Even Respondents agree that under *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), medical exemptions are constitutionally required, and the court must intervene if a child is at risk of harm. And this Court already held in *Doe v. Bolton,* 410 U.S. 179 (1973) that, beyond requiring that the certification be signed by a state-licensed doctor, the state cannot interfere in the determination of need for a medical exemption.

Yet, the lower courts dismissed the children's claims on the pleadings. They reasoned that *Jacobson* requires enormous deference whenever vaccines are involved, and, since the state was only conditioning access to school on a parents' willingness to forego their fundamental right to follow medical advice, not actually shoving a needle into the children's arms, the numerous infringements on acknowledged fundamental rights do not need to be strictly scrutinized. *See,* App. 22a-23a n. 14.

Tellingly, Respondents entirely ignore the petition's third question - whether *Jacobson* allows courts to avoid strictly scrutinizing infringements on fundamental rights whenever vaccines or public health are involved. Despite the clear guidance given by Justice Gorsuch in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), lower courts across the nation continue to "mistake this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution" in such times. *Id.* at 71. Both lower courts here so erred, and this case presents an opportunity for this Court to clarify the mistake in a majority holding before the Constitution takes another beating during the next pandemic.

Moreover, there is another open question, acknowledged by the Second Circuit and Respondents' brief: does this Court's decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. __ (2022) abrogate *Doe* and other medical exemption cases decided in the abortion context? Indeed, the dissenting members of this Court pointed out in the *Dobbs* decision that vital questions remain: "Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendments' protection of life kicks in?" *Dobbs*, 597 U.S. __ __ (2022) (BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting). The same questions are just as urgent when applied to the disabled children seeking medical exemptions here.

This case presents an ideal vehicle for resolution of these important issues. The facts are resolved by operation of law, and the legal questions have great nationwide significance. The lives and well-being of thousands of

vulnerable children are at stake, and in truth, so is the fate of our democracy.

ARGUMENT

I. The Court should grant certiorari to clarify the contours of the right to a medical exemption after *Dobbs*.

This petition asks – do children have a fundamental right to a medical exemption from a vaccine requirement that may place them at serious risk of harm? Even Respondents acknowledge that the answer is yes, recognizing that even before fundamental rights were defined, or tiers of scrutiny adopted, this Court articulated a constitutional right to a medical exemption from vaccine mandates. *See,* State Respondent's Brief ("State Br.") at 11, citing *Jacobson,* 197 U.S. at 39.

A. *Jacobson* requires the court to intervene if a child is at risk of harm.

Respondents assert that *Jacobson* only safeguards the right to a medical exemption where "it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death." *Id.* at 39. They argue: "The Court thus endorsed the principle that a State may require evidentiary support for a medical exemption from compulsory vaccination." But they also admit: "Of course, if an individual could marshal that evidence, the Court noted, the judiciary would 'be competent to interfere and protect the health and life of the individual concerned.'" State Br. at 12.

Here, each Petitioner did marshal evidence that vaccination could seriously impair their health, as certified by their licensed doctors and specialists. Even under *Jacobson's* undefined standard, these children doubtless presented a *prima facie* case that they are at risk. In the statute at issue in *Jacobson* "children who present a certificate, signed by a registered physician, that they are unfit subjects for vaccination" were exempt from the vaccine requirement. *Jacobson,* 197 U.S. at 12. The children here have far exceeded that showing and, by Respondents' own admission, the judiciary should have intervened to protect the life and health of these children, or, at the very least, refrained from dismissing their cases on the pleadings out of "deference" to the state.

But the lower courts did not assess whether the children are at risk of harm or intervene to protect them. Consider for example the case of Jane Boe, who was up to date on all vaccines other than her last dose of meningococcal vaccine. Jane is severely ill, with multiple serious diagnosed conditions, including autoimmune encephalitis, which causes progressive neurological injury. App. 57a. Jane and her siblings have each suffered severe reactions to the meningococcal vaccine. One of them died. Three different licensed physicians certified that Jane cannot safely take this last dose of vaccine. The school principal denied each certification on the grounds that the reasons did not appear to be one of the three ACIP contraindications.

State Respondent Dr. Rausch-Phung "recommended the school deny" the second request because "the death of Jane's sibling, even if it was from an adverse reaction to the vaccine, was not a sufficient reason to grant an exemption." FAC ECF No. 93-2 at ¶ 147. Dr. Rausch-

Phung cited nothing to support her reckless conclusion. And even she recommended that the school district grant the child's third request for medical exemption. But the school district persisted in denying the child relief. And, applying deference, the district court dismissed Jane's case, holding that "the school officials' decision to accept the recommendation of the Director of the Bureau of Immunizations at the DOJ [*sic*] over that of Boe's treating physicians, and their consequent denial of the request cannot be called outrageous or conscience shocking" App. 199a-120a. At no time did the district court assess whether Jane or any of the children showed they are at risk of harm or intervene to protect them. Even under *Jacobson*, these dismissals are unconstitutional.

B. *Doe* requires discretion be given to treating physicians, not school principals.

This Court's medical exemption jurisprudence did not end in 1905. Since *Jacobson,* this Court has clarified the standards for determining whether a person is at risk of harm sufficient to trigger constitutional protection. In *Doe*, this Court carefully balanced the important rights at stake, and determined that while the state has important interests in limiting medical exemptions to otherwise permissible state regulations, it violates a patient's fundamental rights for the state to predefine what may cause harm or deputize third-parties to second-guess the determination of their chosen state-licensed physician. *Doe*, 410 U.S. at 193. Under this precedent, the challenged regulations squarely violate these children's rights.

Respondents' argument against the application of *Doe* makes no sense. They acknowledge that this Court

already held that *Doe* is not limited to abortion-related cases and prohibits similar state interference in all medical decision-making. *Whalen v. Roe,* 429 U.S. 589, 603 & n.31 (1977). But they assert that *Doe* is inapplicable because "parents retain the ample ability under the 2019 regulation to protect the life and health of their children by obtaining medical exemptions…This case therefore does not implicate the 'unnecessary risk of tragic health consequences' driving medical exemption jurisprudence in the abortion context…Thus there is no conflict…much less any occasion in this case to consider the continuing vitality of *Doe v. Bolton* and its progeny." State Br. at 16 (citing *Stenberg v. Carhart,* 530 U.S. 914 (2000)).

Clearly this is wrong. First, we are before this court because Petitioners *did not* retain the ability to protect the life and health of their children by obtaining a medical exemption. Even though the children's physicians certified that they are at risk of harm, they were denied medical exemptions.

Second, *Stenberg* supports the children's case. In *Stenberg*, this Court held that the word "necessary" as used to determine the sufficiency of a medical exemption, "cannot refer to an absolute necessity or to absolute proof." The Court further cautioned that medical necessity determinations cannot require "unanimity of medical opinion." "Doctors often differ in their estimation of comparative health risks and appropriate treatment." Thus, "'appropriate medical judgment' must embody the judicial need to tolerate differences of medical opinion." *Stenberg,* 530 U.S. 914 at 937. In *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006), the Court further held that "it would be unconstitutional

to apply [a statute] in a manner that subjects minors to significant health risks" even if the statute only impacted a "very small percentage" of cases. *Id.* at 328. Why don't these same principles apply here? Respondents do not say.

Third, *Doe* had nothing to do with whether there was a mechanism for medical exemption, as Respondents suggest. There was a medical exemption available in that case too. Rather, *Doe* decided the open question left by *Jacobson*: who gets to decide whether a person is at risk of harm? This Court properly held that state cannot interfere other than to require that the determination be supported by a state-licensed physician. "If a physician is licensed by the state, he is recognized by the State as capable of exercising acceptable clinical judgment." *Doe,* 410 U.S. at 199.

To the extent that *Dobbs* abrogates any portion of *Doe*, *Stenberg* or *Ayotte*, this Court must swiftly clarify a new standard for who decides whether a child is at risk of harm and, to the extent *Doe* is overruled, how much certainty a treating physician needs to show to prove a child is at risk or harm or death before the Fourteenth Amendment's protection of the right to life triggers strict scrutiny.

II. The Court should grant certiorari to address the widespread misapplication of *Jacobson* in the lower courts.

Here, the lower courts elected to avoid any analysis of risk to these children altogether, in large part, due to a misreading of *Jacobson*, which was misapplied in at least two ways.

A. *Jacobson* does not negate strict scrutiny.

Assessing the nature of the rights at issue, the lower court acknowledged that "the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." App. 92a (citing *Troxel v. Granville,* 530 U.S. 57, 66 (2000)); and "a person has a constitutionally protected liberty interest in refusing unwanted medical treatment." App. 93a (citing *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278 (1990)).

Yet, the district court held that strict scrutiny of the infringements on these and other fundamental rights could be avoided pursuant to Chief Justice Roberts' concurrence in *S. Bay Pentecostal Church v. Newsom,* 141 S. Ct. 716 (Feb. 5, 2021), in which His Honor cited *Jacobson* for the proposition that "federal courts owe significant deference to politically accountable officials with the 'background, competence and expertise to assess public health.'" App. 95a. The district court "therefore conclude[d] that it is within the legislature's authority to pass regulations defining the conditions under which a medical exemption to school vaccination requirements is to be issued, and placing the discretion for deciding medical exemptions in the hands of state and local officials, including school principals." App. 96a. Under this standard, the Court held that strict scrutiny need not apply even where such regulations infringe fundamental rights. *Id.*

The Second Circuit upheld this determination, stating: "Finally…no court appears ever to have held that *Jacobson* requires strict scrutiny to be applied to immunization mandates. To be sure, courts have consistently rejected

substantive due process challenges to vaccination requirements without applying strict scrutiny." App. 22a. (cleaned up, internal citations omitted).

The Second Circuit's mistake is all too common. In 2020, the Fifth Circuit similarly held that "Jacobson instructs that all constitutional rights may be reasonably restricted [without strict scrutiny] to combat a public health emergency." *In re Abbott,* 954 F.3d 772 (5th Cir. 2020), vacated as moot sub nom. by *Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021). The Fifth Circuit held that all rights may be so constrained, stating: "*Jacobson* governs a state's emergency restriction of any individual right, not only the right to an abortion." *Id.* at 778 n.1.

Other courts found that *Jacobson* limits the First Amendment, which they asserted "is not absolute." *See, e.g., Lighthouse Fellowship Church v. Northam,* 458 F. Supp. 3d 418, 428 (E.D. Va. 2020). One court stated that in times of crisis, *Jacobson* trumps all constitutional law, holding: "During an epidemic, the *Jacobson* court explained, the traditional tiers of constitutional scrutiny do not apply." *Cassell v. Snyders*, 458 F. Supp. 3d 981, 993 (N.D. Ill. 2020).

Despite the clear instruction in the concurrence of *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 71, courts continue to misapply *Jacobson's* deference holdings in a manner that threatens to eviscerate our constitution. This question must be taken up directly.

B. *Jacobson* does not negate the unconstitutional conditions doctrine.

Misapplication of *Jacobson* is also the root of the unconstitutional conditions problem in the lower court decisions here. In *Jacobson,* the Massachusetts Supreme Judicial Court justified the reasonableness of the decision, holding: "If a person should deem it important that vaccination should not be performed in his case, and the authorities should think otherwise, it is not in their power to vaccinate him by force, and the worst that could happen to him under the statute would be the payment of the penalty of $5." *Com. v. Pear,* 183 Mass. 242, 248 (1903), *aff'd sub nom., Jacobson,* 197 U.S. 11. The Supreme Court's proportionality requirement in *Jacobson* reflects this same principle.

Unfortunately, courts now routinely apply *Jacobson* to hold that so long as vaccines are not forcibly injected, any escape hatch, no matter how draconian, will allow the government to avoid strict scrutiny of the infringement on fundamental rights. This is wrong.

Total deprivation of access to public or private school is nothing like a $5 fine. Yet, in this case, the Second Circuit rejected application of strict scrutiny to Petitioners' claims of infringement on fundamental rights to health and life, parental rights, bodily autonomy, and to rely on the judgment of their treating physicians, stating: "the State is not compelling Plaintiffs to vaccinate their children, but merely requiring them to be vaccinated or to obtain a medical exemption from the immunization – *if* they wish to attend a school in the state. The choice to vaccinate a child remains with the parent and her treating physician."

App. 22a-23a n. 14. As argued in the opening brief, modern tiers of scrutiny do not countenance this holding, as states are not permitted to coerce people to waive fundamental rights without strict scrutiny under the unconstitutional conditions doctrine.

Respondents do not address the vast differences between Fourteenth Amendment jurisprudence in 1905, when states were not bound by the Bill of Rights, and there were no tiers of scrutiny, or differentiation between fundamental and non-fundamental rights, and today. What they ask this Court to do is to read *Jacobson* as a complete bar to judicial review whenever vaccination is involved, even in cases, such as here, where the state is infringing on fundamental rights and children's safety, so long as the state is not physically injecting a child with a vaccine against their will and their doctor's advice.

To avoid continuing irreparable harm, to these vulnerable children, and thousands of others, this Court must intervene.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

MARY HOLLAND
ROBERT KENNEDY, JR.
CHILDREN'S HEALTH DEFENSE
852 Franklin Avenue,
Suite 511
Franklin Lakes, NJ 07417

MICHAEL H. SUSSMAN
SUSSMAN & GOLDMAN
One Railroad Avenue
Goshen, NY 10924

SUJATA S. GIBSON
Counsel of Record
PHILIP FORNACI
GIBSON LAW FIRM, PLLC
832 Hanshaw Road, Suite A
Ithaca, NY 14850
(607) 327-4125
sujata@gibsonfirm.law

Counsel for Petitioners

February 21, 2023