NO. 24-_____

In the Supreme Court of the United States

KATHLEEN WRIGHT-GOTTSHALL, ET AL.,

Petitioners,

v.

STATE OF NEW JERSEY, ET AL.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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AUGUST 26, 2024 *COUNSEL FOR PETITIONERS*

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QUESTIONS PRESENTED

On August 6, 2021, New Jersey Supreme Court Justice Stuart Rabner and Judge Glenn Grant, in their administrative capacities as the heads of the New Jersey judicial branch of government, issued a policy requiring judiciary employees who had not taken a complete series of the Covid-19 shots to begin weekly Covid-19 medical testing as a condition of continued employment. App.48a, App.52a. On August 23, 2021, Governor Murphy issued a similar policy that applied to public and private school and preschool workers who had not provided proof that they had taken a complete series of the Covid-19 shots. App.38a On September 20, 2021, the Head of Human Resources of the Office of Legislative Services ("OLS") issued a similar policy for legislative branch employees. App.58a All the testing mandates went into effect between August and October 2021 and remained in effect until August 2022. Petitioners filed this action pursuant to 42 U.S.C. § 1983 against Chief Justice Rabner, Judge Glenn Grant, and Governor Murphy in their official and personal capacities. Petitioners challenged the constitutionality of the medical testing under the Fourth Amendment and the substantive due process clause of the Fourteenth Amendment. The District Court dismissed the official capacity claims as moot and held that the individual defendants had qualified immunity for the personal capacity claims. The Third Circuit affirmed.

THE QUESTIONS PRESENTED ARE:

1. Whether the mandated weekly medical testing and reporting under these policies violated Petitioners' Fourth Amendment right to be free from unreasonable

search and seizure and, if so, whether the right to be free from such testing is clearly established under the Fourth Amendment.

2. Whether Petitioners' claims were properly dismissed as moot when the government actors responsible for the medical testing mandate evaded judicial review of Petitioners' request for a preliminary injunction by seeking and obtaining repeated extensions from the Court on the motion's return date so that the mandates could be withdrawn while the motion was pending and, upon withdrawing the mandates, made no representation that they would not be reinstated.

3. If the Third Circuit properly dismissed the Amended Complaint based on the doctrines of qualified immunity and mootness, whether the combination of those doctrines, as applied, violates Petitioners' right to petition the government for redress of grievances.

4. Whether the medical test mandates violated Petitioners' Fourteenth Amendment rights to privacy and bodily integrity.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

- Kathleen Wright-Gottshall
- Melani Borodziuk
- Jill Matthews
- Jill Skinner
- Sandra Givas
- Donna Antoniello
- Jenell Decotiis
- Jennifer Dougherty
- Melissa Farrell
- Alyson Stout
- Heather Hicks
- Chrisha Kirk
- David Tarabocchia
- Deborah Aldiero
- Gina Zimecki
- Keri Wilkes
- Michele Pelliccio
- Natalie Gricko
- Patricia Kissam
- Roseanne Hazlet
- Vincenia Annuzzi
- Jason Marasco
- Jennifer Mess
- Kimberly Koppenaal

Respondents and Defendants-Appellees below

- State of New Jersey
- Philip Dunton Murphy, in His Official Capacity as Governor of the State of New Jersey
- Hon. Stuart Rabner, in His Official Capacity as Chief Justice of the New Jersey Supreme Court
- Hon. Glenn Grant, in His Official Capacity as Court Administrator
- New Jersey Office of Legislative Services

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Third Circuit

No. 23-1990

Kathleen Wright-Gottshall; Melani Borodziuk; Jill Matthews; Jill Skinner; Sandra Givas; Donna Antoniello; Jenell Decotiis; Jennifer Dougherty; Melissa Farrell; Alyson Stout; Heather Hicks; Chrisha Kirk; David Tarabocchia; Deborah Aldiero; Gina Zimecki; Keri Wilkes; Michele Pelliccio; Natalie Ricko; Patricia Kissam; Roseanne Hazlet; Vincenia Annuzzi; Jason Marasco; Jennifer Mess; Kimberly Koppenaal, *Appellants*, v. State of New Jersey; Philip Dunton Murphy, in His Official Capacity as Governor of the State of New Jersey; Hon. Stuart Rabner, (in His Official Capacity as Chief Justice of the New Jersey Supreme Court); Hon. Glenn Grant, in His Official Capacity as Court Administrator; New Jersey Office of Legislative Services; Supreme Court of New Jersey.

Date of Final Opinion: April 26, 2024

U.S. District Court for the District of New Jersey

No. 3:21-cv-18954-PGS-DEA

Wright-Gottshall, et al., *Plaintiffs*, v. State of New Jersey, et al., *Defendants*.

Date of Final Opinion: May 1, 2023

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OPINIONS BELOW

The District Court's dismissal of Petitioners' Amended Complaint is unpublished. App.14a.

The Third Circuit Court of Appeal's opinion affirming the dismissal is unpublished. App.1a

JURISDICTION

The Third Circuit entered an order affirming the District Court's dismissal of Petitioners' Amended Complaint on April 26, 2024. App.12a. The Honorable Samuel A. Alito, Jr. granted Petitioners' application for an extension of time to submit a petition for certiorari to August 26, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV, § 1

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Other Applicable Laws and Policies

Executive Order 253 is lengthy and is set out in the appendix. (App.38a).

The judiciary policy is lengthy and is set out in the appendix (App.48a, 52a).

The OLS policy is lengthy and is set out in the appendix (App.58a).

STATEMENT OF THE CASE

1. Factual Background

Three government Covid-19 testing mandates are challenged in this case, one from each branch of the New Jersey Government. The executive and judiciary mandates were promulgated by policy makers at the top of that branch of government, Governor Murphy in the case of Executive Order 253 and Chief Justice Rabner and Judge Glenn Grant in the case of the judiciary mandate. App.3a-4a. The Office of Legislative Services ("OLS") mandate was announced by the OLS HR Director Christin Knox. *Id.*

The judiciary medical testing mandate was announced first and went into effect on August 6, 2021. It applied to all judicial branch employees who had not taken a full series of the authorized Covid-19 shots. App.48a. Petitioner Roseanne Hazlet is a probation officer employed by the judiciary who worked in person through the entire pandemic, including all of 2020. App.83a. She was not subject to testing until August 2021. *Id*. Executive Order 253 was announced on August 23, 2021 and required all covered workers who had not taken the Covid-19 shots to begin weekly medical testing two months later on October 18, 2021. App.43a The OLS mandate was announced on September 20, 2021. App.58a.

The three mandates shared many important features in common. They all began 17 months or

more into the pandemic. All were all indefinite in nature. None had any covid-related metrics by which testing could end or lessen; testing was required no matter how low the community levels of covid and only the government official who enacted the mandate could end the mandate. Under all the mandates, the only way for covered workers to end the unwanted medical testing was to take the covid shots or leave their jobs. Each mandate had a lag of several days, sometimes up to a week, between when a person underwent a medical test and when they received the results. Under the judiciary policy, a minimum of five days passed between when the worker took the test and when they reported to work based on that test being negative. App.54a-55a .

The Judiciary Medical Test Mandate required medical testing by "an approved testing facility, such as a pharmacy or healthcare facility" between Saturday morning and Wednesday night of each week. App.54a Workers were required to submit the medical tests to Human Resources by 11am Friday morning. If the test results were delayed, the worker was prohibited from working the next scheduled workday and up to 24 hours *after* they had submitted the negative test. The Judiciary provided an example: "if the employee submits negative test results on Monday morning, they may not be permitted to return to the work location until Tuesday morning." App.55a Thus, if a worker took a test on Wednesday, but results did not come by Friday, the person would be excluded from work all of Monday even if the test was negative. A worker excluded from work because of a delayed result from their medical test had to take administrative, sick, or vacation time. App.56a If the Worker had no more

administrative, sick, or vacation time, "the absence [was] considered unauthorized and unpaid." *Id.*

In addition to mandating a minimum of once-weekly medical testing, EO 253 also required that all results of Petitioners' medical tests be reported to their local government-employer (if a public school worker) as well as the local health board and, if DOH requested, the State of New Jersey. App.44a, 45a-46a. Petitioners' personal medical information was shared with these three government entities as well as a number of private entities, including the testing companies and laboratories selected by the government. All of Petitioners' test results were to be reported to the local health board, regardless of whether they were negative or positive. App.44a In addition, Petitioners were required to sign waivers with the private companies, which means their personal medical information may have been shared with other unknown parties as well. *See e.g.*, App.86a. (Petitioner custodian required to download testing company phone application); App.81a (Petitioner Vincenia Anuzzi, a French teacher, was required to sign consent forms for the disclosure of her medical information in order to take the mandated medical tests) App.80a-81a. (Petitioner Alison Stout, a speech therapist, was required to share private information with contracted testing companies).

Petitioners' Verified Amended Complaint contains many sworn facts and supporting declarations concerning the unreasonableness of the mandates because of their effect on Petitioners, including the unreasonable frequency of the mandated tests, the fact that the tests were done on Petitioners' own time, difficulty in finding places to test, the degradation of being treated as though presumptively sick, the

degradation of having to submit to the testing, the physical effects of the testing and more. *See e.g.,* App.46a (judiciary mandate originally stated that the "preference is for testing to be conducted outside of working hours" but was then updated to allow workers to request time for "covid testing" from their supervisor); App.48a (Petitioner Melani Borodziuk had to test on her own time and at her own expense); App.73a (Petitioner Jill Matthews developed headaches after starting to take the mandated medical tests); App.74a-75a (Petitioner Alison Stout had to leave her stepdaughter's birthday party to test because it was the only appointment she could get); App.87a (Petitioner Jason Marasco was required to test two times a week, which necessitated leaving his house 20 minutes early and had to leave his children on Columbus Day, a day both he and his children had off of school, to go test).

2. District Court Proceedings

Petitioners initiated the action in the District Court on October 18, 2021. Defendants filed a motion to dismiss on January 18, 2022. DKT 10. The motion was fully briefed on March 7, 2022. DKT 17. On August 5, 2022, Petitioners filed a motion for a preliminary injunction to stop the testing. DKT 19. Ten days later, on August 15, 2022, Governor Murphy signed Executive Order 302, which withdrew EO 253. That same day, Defendants filed a letter under L. Civ. R. 7.1(d)(5) seeking an automatic one cycle adjournment of the motion for a TRO on the basis that it was a dispositive motion. DKT 20. Petitioners' counsel filed a letter objecting to the request to extend the return date. DKT 21. On August 16, 2022, the District Court judge ordered the Defendants to file their opposition to Petitioners' request for a Temporary Restraining

Order by August 23, 2022. DKT 22. On August 18, 2022, Defendants wrote to the court asking for an extension of the preliminary injunction deadlines, informing the court that EO 253 had been withdrawn and stating that the other branches were reviewing their mandates. DKT 23. Petitioners objected. DKT 24. Ultimately, the District Court gave Defendants until September 6, 2022 to file their opposition to Petitioners' request for a temporary restraining order. DKT 26. On August 26, 2022, Defendants wrote to the Court reporting that all the Mandates had been withdrawn. DKT 29. Petitioners subsequently withdrew the motion for a preliminary injunction as it had become moot. DKT 30.

On September 23, 2022, Petitioners filed an Amended Verified Complaint with updated declarations containing factual assertions demonstrating the unreasonableness of the mandates. App.63a (Verified Amended Complaint without declarations). Defendants filed a motion to dismiss the Amended Complaint. On May 1, 2023, the District Court dismissed the Amended Complaint with prejudice. App.13a. The official capacity claims seeking prospective relief were dismissed as moot. The personal capacity claims seeking damages were dismissed based on Defendants' affirmative defense of qualified immunity. App.24a, App.34a.

3. Proceedings at the Third Circuit Court of Appeals

The Third Circuit Court of Appeals affirmed the dismissal on the same grounds as the District Court, but remanded with instructions that the claims for prospective relief should be dismissed without prejudice. App.11a.

REASONS FOR GRANTING THE PETITION

I. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT.

There is no legal or historical precedent for the medical testing mandates that New Jersey government officials put in place more than 17 months after the beginning of the covid pandemic. The medical test mandates targeted workers based on their personal medical decisions, singling them out for indefinite weekly medical testing. The state actors justified the mandates based on the apparent threat of covid, but did not tie the mandates to any actual covid metric, just their individual discretion. For nearly a year (more for judiciary workers), thousands of healthy New Jersey teachers, school nurses, probation officers, office workers, legislative aides and other unvaccinated workers were required by the government, as a condition of employment, to spend their time, at least once a week, drooling into tubes in front of strangers on zoom or letting strangers stick cotton swabs up their noses. App.76a (Petitioner Jill Skinner had to "get on a zoom call with a stranger [and] [w]hile the stranger watches she is required to open the test and then drip/spit saliva into the test tube until it reaches the proper line"); App.88a (Petitioner Jason Marasco "suffered from two nosebleeds and the process is painful. He has to pull away and it makes his eyes water"); App.75a (Petitioner Jill Matthews also suffered nosebleeds after testing).

This Court's precedent is clear that every one of these tests and analysis of body fluids constituted two

separate searches and seizures, one in the taking of the bodily product and one in its analysis. *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 616-17 (1989). Moreover, it is a "basic rule of Fourth Amendment jurisprudence" that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Horton v. California*, 496 U.S. 128, 133 at n4. (1990). Because each medical test constituted two warrantless searches and seizures, under this Court's clearly established precedent these searches were presumptively unconstitutional unless they fell within a specifically delineated exception. Here, the Third Circuit held that these testing mandates did not violate clearly established rights, but also did not identify any exception that these mandates would meet. Instead, the right asserted by Petitioners, "the right to be free from unreasonable search and seizure," was reframed by the Court to "the right to be free from government-mandated workplace testing of an infectious disease." App.7a. With this framing, the search for a clearly established right shifted away from the text of the Constitution and toward case law. Specifically, the Third Circuit looked for "binding precedent or a meaningful consensus of out-of-circuit authority recogniz[ing] the right at issue." App.7a. The Third Circuit noted that Petitioners could have overcome the defense of qualified immunity "by showing that the challenged conduct was 'so patently violative of the constitutional right that reasonable officials would know without guidance'," but did not consider whether Petitioners had demonstrated that here despite submitting two dozen

declarations testifying to specific facts that made these searches patently unreasonable.

The most closely analogous cases to the testing mandates challenged here are this Court's line of cases concerning drug testing of government employees in sensitive jobs, which testing, when it is allowed, falls within the special needs doctrine. This Court has stated that the Fourth Amendment "generally bars officials from undertaking a search or seizure absent individualized suspicion," that exceptions are permitted only in "certain limited circumstances" and that the special needs doctrine is a "closely guarded" exception to the Fourth Amendment. *Chandler v. Miller*, 520 U.S. 305, 308 (1997). In this case, the Third Circuit did not decide, or even discuss, whether the indefinite weekly medical testing falls within the special needs doctrine, but distinguished the special needs doctrine line of cases because "where testing was at issue, it was not for an airborne communicable disease and occurred outside the context of a global pandemic." App.9a. However, if the testing mandates do not fall within an exception to the Fourth Amendment, then this Court's precedent establishes that the mandated tests are presumptively unconstitutional. Consequently, a two-step qualified immunity analysis under *Saucier v. Katz*, 533 U.S. 194 (2001), regardless of the order of inquiry, should have come down in Petitioners' favor because each test was a presumptively unconstitutional search and seizure, the right to be free from unreasonable search and seizure is clearly established, and no exception applies. The context of a global pandemic does not obviate the Fourth Amendment and, despite many pandemics through the nation's history, this Court

has never carved out a pandemic or public health exception to the Fourth Amendment.

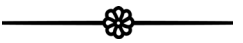
As permitted by *Pearson v. Callahan*, 555 U.S. 223 (2009), in evaluating the Defendants' affirmative defense of qualified immunity, the Third Circuit first analyzed whether the right at issue, as framed by the Court, was clearly established and, finding that it was not, did not reach the issue of whether there was a constitutional violation. App.9a. On the claims for prospective relief the Court found that it lacked jurisdiction because, in the Court's view, "fundamental changes to the landscape of medical understanding of the disease make it absolutely clear that the same legal controversy will not recur." App.10a.

Petitioners petitioned the judicial branch of government to vindicate their constitutional rights. Petitioners briefed opposition to two motions to dismiss on the merits, argued the merits in a motion for a preliminary injunction, and briefed the merits on appeal, but due to the judicial doctrines of mootness and qualified immunity, the judiciary did not rule on the constitutional questions. The Third Circuit held, as a matter of law, that the testing mandates did not violate a clearly established right while also holding that it lacked jurisdiction to determine whether the mandates violated a constitutional right. This combination of holdings created persuasive legal precedent that government-imposed medical testing mandates like the ones challenged here are constitutionally permissible searches and seizures because the only ruling that came out of the case is that the mandates violated no clearly established right. Certiorari should be granted because this holding constitutes either a

massive expansion of the special needs doctrine or a newly-created exception to the presumption that warrantless searches are seizures are unconstitutional. This is an important issue of liberty that should be decided by this Court.

II. THIS CASE IS A VERY GOOD VEHICLE TO DECIDE THESE ISSUES.

The record in this case is well-developed with sworn testimonial evidence concerning the reasonableness of the mandates. The Complaint and Amended Complaint are both verified and supported by two dozen Declarations that detail the many ways these mandates intruded upon Petitioners' minds, bodies, and personal time.



CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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