

No. 21-854

IN THE
Supreme Court of the United States

RACHEL MANISCALCO, et al.,

Petitioners,

against

NEW YORK CITY DEPARTMENT OF EDUCATION, et al.,

Respondents.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Beginning with the 2021-2022 school year, New York City made COVID-19 vaccination a condition of employment for public school employees, with religious and medical exemptions available. Petitioners do not allege that they were wrongfully denied an exemption or raise any argument under the Bill of Rights. Instead, they claim that the vaccination requirement offends substantive due process, ostensibly by foreclosing employees who object to vaccination on non-religious and non-medical grounds from pursuing their chosen professions. Nearly six months ago, petitioners sought a preliminary injunction prohibiting enforcement of the vaccination requirement, which was denied. With no injunction in place, three petitioners have since been discharged and the fourth has been able to retain her position and remain unvaccinated by taking extended leave while she actively litigates a parallel state-court case. The question presented is:

Did the court of appeals correctly determine that the district court acted within its discretion in denying petitioners a preliminary injunction?

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INTRODUCTION

In the fall of 2021, New York City made COVID-19 vaccination a condition of employment for public school employees, subject to religious and medical exemptions. For more than a year and a half, the pandemic had upended the education of the city's roughly one million public school students, as public health concerns forced a retreat from in-person instruction. The availability of safe and effective vaccines, including one with full federal regulatory approval, allowed the New York City Department of Education to turn the tide.

The four petitioners claim that the vaccination requirement offends substantive due process, on the misguided premise that it forecloses them from pursuing their chosen professions. Almost half a year ago, they asked the district court to preliminarily enjoin the Department from enforcing the requirement against all of its nearly 150,000 employees. Despite the sweep of the requested relief, petitioners' moving papers were threadbare in every way, offering neither a meaningful legal argument based in substantive due process nor a factual showing that the requirement actually foreclosed them (or anyone else) from pursuing their chosen professions.

In an exercise of discretion, the district court denied petitioners' motion for a preliminary injunction. Before the court of appeals could even fully resolve the appeal from that interlocutory order, petitioners unsuccessfully sought an extraordinary writ of injunction from this Court. The court of appeals later affirmed the district court's order denying petitioners' motion for a preliminary injunction, in a non-precedential order adopting the district court's reasoning and remanding for further proceedings. Rather than return to the district court to try to prove up their case, petitioners petitioned for certiorari. They waited nearly two months after the court of appeals had ruled to take that step, though their petition presumes an urgent need for relief.

Certiorari should be denied. There is no compelling reason for this Court to intervene at this early stage of the case, and petitioners have certainly identified none. Interlocutory review is generally disfavored, and petitioners have only made the matter worse here by delaying in seeking certiorari, allowing the on-the-ground facts to change while no injunction was in place. Since the court of appeals ruled, three of the four petitioners have been discharged for failing to comply with the vaccination requirement; if there is a path forward for them in this litigation, it lies in seeking the usual retrospective relief, like damages, available in employment

disputes. The fourth petitioner, for her part, has been able to retain her position with the Department and remain unvaccinated by taking extended leave with healthcare coverage while she actively litigates a parallel state-court proceeding.

As things stand today, therefore, it is not even clear how preliminary relief would have much, if any, practical effect on the parties. But at the very least, there is every reason to hold petitioners to the ordinary litigation course, returning to the district court to crystallize their legal theories and to build out a factual record that would better enable further review. Of course, if petitioners obtain less than complete relief upon final judgment, they are always free to petition the Court for certiorari then.

But to be candid, this case will likely never present a cert-worthy issue. Principles of substantive due process are no obstacle to a public employer like the Department of Education requiring vaccination as a condition of employment, subject to religious and medical exemptions, in response to an ongoing pandemic. Petitioners cite no authority for their position, identify no circuit split, and fail to grapple with the precedent of this Court against them.

On a more basic level, this Court has been reluctant to expand the contours of substantive due

process beyond those rights that are so deeply rooted in tradition to be considered essential to liberty. But if anything, our nation has a centuries-long tradition of using mandatory vaccination to safeguard public health, especially in the public education setting. Those measures have been upheld against substantive due process violations time and again, by this Court and others. It is only more clear that substantive due process has no bearing here, where the vaccination requirement was not imposed on the public at large, but rather made a condition of public employment in the midst of a pandemic to ensure the health of schoolchildren and educators and to promote continuity in learning.

In any case, petitioners' legal theory fails on its own terms. The premise of their claim is that a state actor violates substantive due process by completely—or at least nearly—foreclosing someone from pursuing their chosen profession, even when the challenged action is taken for legitimate public health reasons. Even accepting that dubious premise, petitioners did not come close to establishing the factual predicate for it. There are millions of public school teachers in this country. Petitioners can seek employment elsewhere, whether it be at one of the hundreds of other public school districts in the State, at any number of private schools in the State, or at other places in the metro area. The notion that

finding another job may require some effort, or that other employers also require vaccination, does not support a substantive due process claim.

STATEMENT

1. For the 2021-2022 school year, New York City made vaccination against COVID-19 a condition of employment for public school employees (Pet. App'x D-1-18). At the time, hundreds of thousands of schoolchildren were ineligible for vaccination (*id.* at D-3). And according to the Centers for Disease Control and Prevention, teachers and staff should be “vaccinated as soon as possible” because vaccination is “the most critical strategy to help schools safely resume full operations” (*id.*).

Though petitioners describe the vaccination requirement as “one-size fits all” (Pet. 4), the reality is quite different. As an initial matter, employees were able to request religious and medical exemptions, and many secured them (Pet. App'x E-8-18). Under an arbitration award sought by petitioners' union representatives, employees who were neither vaccinated nor granted an exemption were placed on unpaid leave with healthcare coverage (*id.* at E-18-20). But they were also offered two special options: (a) they could choose to leave their job and receive an enhanced payment for accrued leave; or (b) they

could elect to take extended unpaid leave with healthcare coverage for nearly a year, retaining their positions while remaining unvaccinated (*id.*). Employees who chose the latter option could submit proof of vaccination at any time until September 5, 2022 and return to work (*id.* at E-19-20). And employees who chose neither option were subject to termination beginning December 1, 2021 (*id.* at E-20).

2. Petitioners are one current and three former employees of the Department of Education, trained as teachers and paraprofessionals, who evidently object to COVID-19 vaccination on non-religious and non-medical grounds since none claims to have been wrongfully denied an exemption (Pet. App'x G-7). Three petitioners claim to have “natural immunity” to the virus from a past infection (*id.* at G-7), though this allegation does not figure into their arguments to this Court in any meaningful way.

Petitioners brought this lawsuit challenging the vaccination requirement mainly on substantive due process and equal protection grounds (Pet. App'x G13-16).¹ They moved the district court for a preliminary injunction that would prohibit the Department

¹ Although petitioners purport to represent a class of public-school teachers (Pet. 2), they have never moved for class certification and no class has been certified.

from enforcing the vaccination requirement against any of its nearly 150,000 employees, claiming that the requirement offends substantive due process (as well as principles of equal protection, an argument abandoned in their petition). Petitioners' moving papers addressed their substantive due process claim in a single paragraph, citing no supporting legal authority while asserting that the vaccination requirement shocks the conscience because it interferes with their property interest in their employment and a fundamental right to pursue their chosen calling (EDNY 21-cv-5055 ECF No. 2-1 at 4-5). And the two declarations that petitioners submitted in support of their motion made no attempt to explain how the vaccination requirement either prevented—or even impaired—their ability to work as teachers or paraprofessionals for another employer (EDNY 21-cv-505 ECF Nos. 2-2, 2-3).

3. The district court exercised its discretion to deny petitioners' motion, finding that petitioners were unlikely to succeed on the merits and that the equities weighed against them (Pet. App'x B-1-15). On petitioners' substantive due process claim, the court concluded that petitioners have no constitutional right to work for the Department of Education in particular, let alone to do so unvaccinated (*id.* at B-4-9). The court explained that, to the extent that the due process clause protects a right to pursue

one's profession, it does not protect the right to a specific job (*id.* at B-6). And a right to continued public employment has not been recognized as a fundamental property interest entitled to substantive due process protection (*id.* at B-7). Even setting that aside, the court found, the vaccination requirement did not shock the conscience (*id.* at B-7-9).

In addressing the equities, the district court found that petitioners' concerns about being able to find other employment were outweighed by the advantages of vaccination in schools (*id.* at B-91-11). The court found that social distancing, mask wearing, and testing may not adequately protect unvaccinated children, and recognized scientific evidence suggesting that any protection that may be afforded to some of the plaintiffs through past infections may not be as strong as that of vaccination (*id.*). And in weighing the parties' competing concerns, the court concluded that deference was due to the actions undertaken by local government to advance public health interests (*id.*).

4. Petitioners noticed an appeal and moved for an injunction pending appeal. A single judge of the court of appeals granted a temporary restraining order, but it was dissolved by a motions panel the following court day (2d Cir. 21-2343 ECF No. 28). Petitioners then sought a writ of injunction from this

Court, which Justice Sotomayor denied on October 1, 2021 (S. Ct. 21A50). The vaccination requirement went into effect on October 4, 2021, and petitioners were then placed on unpaid leave with healthcare coverage.

After hearing oral argument, the court of appeals resolved petitioners' appeal on October 15, 2021, through a non-precedential summary order (Pet. App'x A-1-3). The court of appeals adopted the reasoning of the district court and remanded for further proceedings (*id.* at A-3).

Petitioners filed their petition for a writ of certiorari on December 6, 2021—nearly two months after the court of appeals ruled. All proceedings in the district court have been stayed. On February 11, 2022, with no injunction in place, the Department terminated the employment of three petitioners—Evelyn Arancio, Corine Lynch, and Diana Salomon—who are of course free to seek other employment elsewhere. Petitioner Rachel Maniscalco has elected to maintain her position with the Department by taking extended unpaid leave while she litigates her state-court proceeding where she similarly seeks to prevent the Department from terminating her for failing to comply with the vaccination requirement. *See* Sup. Ct. N.Y. Cnty. Index No. 160725/2021.

REASONS FOR DENYING THE PETITION

A. Several factors—the procedural posture, the sparse record, and changed circumstances—make this a poor vehicle.

The petition should be denied because this case, in its current posture in particular, is an exceptionally poor vehicle to resolve any question about how substantive due process bears, if at all, on the City’s vaccination requirement. This Court routinely denies petitions for certiorari seeking to challenge interlocutory orders. *See, e.g., Va. Mil. Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari). Petitioners identify no reason to depart from that sound practice here.

On the contrary, if this Court is ever inclined to hear this case, every indication is that its review would be greatly improved by allowing the case to develop further below. In moving for a preliminary injunction, petitioners made the most perfunctory of legal arguments, addressing the merits of their substantive due process claim in a single paragraph that cited no supporting authority and rested on entirely conclusory assertions (EDNY 21-cv-5055 ECF No. 2-1 at 4-5). Their factual submissions were similarly wanting, comprised of two declarations that did not even attempt to satisfy what is now the premise of their claim: that they have been entirely,

or nearly, foreclosed from practicing their professions by some action attributable to the Department (EDNY 21-cv-505 ECF Nos. 2-2, 2-3). This Court would be better served by awaiting a case where the parties have fully aired the relevant legal arguments and created a factual record illuminating them.

The posture also cuts against certiorari in another way. While petitioners pretend as if this case presents an abstract legal question about substantive due process, the truth is that the court of appeals upheld the district court's discretionary determination to deny a preliminary injunction. And that determination turned on more than just a finding that petitioners were unlikely to succeed on the merits of their substantive due process claim. It also involved a balancing of the equities. So even if petitioners' substantive due process claim presented a cert-worthy question (and it does not), it would make far more sense to confront the question without filtering it through the abuse-of-discretion standard that applies at this stage. *See Brown v. Chote*, 411 U.S. 452, 457 (1973) (“[T]his Court may only consider whether issuance of the injunction constituted an abuse of discretion.”).

And by delaying the filing of their 15-page petition for nearly two months, petitioners have only made the case for returning this litigation to the

district court stronger. The facts on the ground have changed, in ways that are best explored below. At this juncture, three petitioners have been discharged for failing to comply with the vaccination requirement, leaving them to seek the kind of retrospective relief, like damages, that are most common in employment disputes. The fourth petitioner has been able to retain her position and remain unvaccinated by taking extended leave while she actively litigates a parallel state-court case. And that related case may very well conclude—leading to petitioner securing relief or, more likely, the termination of her employment—before this Court has a chance to review the interlocutory order in this case. Circumstances have changed, and the proper venue to explore the implications of the changed landscape is the district court, not the highest court in the land.

The downsides of withholding review are minimal given the changed circumstances. The upsides are substantial given the early posture and the absence of a serious legal or factual showing below.

B. The non-precedential ruling below implicates no circuit split, and in fact honors this Court's controlling precedent.

Certiorari is also unwarranted because the ruling of the court of appeals is non-precedential. Not only that, but the ruling simply adopts the reasoning of the district court, so it is unlikely to have much persuasive value in future litigation. In any case, if this Court is ever inclined to consider how substantive due process bears on public employer vaccination requirements, it would be best served by awaiting a case where the court of appeals has fully grappled with the question. This is not such a case, and unsurprisingly so because the cursory and unsubstantiated nature of petitioners' arguments made them well-suited to disposition through a non-precedential summary order.

That aside, review is also unwarranted because the ruling below does not conflict with any precedent from this Court or of any other court of appeals, as petitioners implicitly acknowledge (Pet. 14-15). Petitioners assert that certiorari is nonetheless warranted because this case raises a critical constitutional issue concerning the right of public school teachers to practice their profession.

It does not. Petitioners recognize, as they must, that there is no fundamental right to public employment (Pet. 7). See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (“This Court’s decisions give no support to the proposition that a right of governmental employment per se is fundamental”).² And, as they also acknowledge (Pet. 7), the circuits are in agreement that substantive due process—at most—protects a right to pursue an entire profession, not the right to a particular job.³ So even if petitioners have a right to pursue their professions, substantive due process does not give them a right to work for the Department specifically, much less unconditionally.

The Department, acting as an employer, has merely implemented a condition of employment for

² See also *Nicholas v. Penn. State Univ.*, 227 F.3d 133, 142 (3d Cir. 2000); *Huang v. Bd. of Governors of Univ. of N. Carolina*, 902 F.2d 1134, 1142 n.10 (4th Cir. 1990); *Hilliard v. Ferguson*, 30 F.3d 649, 652 (5th Cir. 1994); *Zielasko v. Ohio*, 873 F.2d 957, 961-62 (6th Cir. 1989); *Palka v. Shelton*, 623 F.3d 447, 453 (7th Cir. 2010); *Singleton v. Cecil*, 176 F.3d 419, 425-26 (8th Cir. 1999); *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994).

³ See, e.g., *Engquist v. Or. Dep’t of Agric.*, 478 F.3d 985, 998 (9th Cir. 2007); *Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (7th Cir. 1992); *Piecknick v. Penn.*, 36 F.3d 1250, 1259 (3d Cir. 1994).

its own employees, much like residency requirements upheld by this Court. *See, e.g., McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, 646 (1975) (upholding residency requirement for city employees). Any right to pursue one's livelihood is subject to reasonable government regulation, *see Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999), and in the context of public employment, the government has particular latitude to regulate, *see Engquist v. Or. Dep't of Agric*, 553 U.S. 591, 598-600 (2008) (recognizing government's broader powers to regulate when acting as an employer).

Petitioners' argument also defies common sense. The Department is far from the "sole" employer of public school teachers in New York (Pet. 7). There are more than 700 public school districts in the State where petitioners are already licensed to teach,⁴ not to mention all public and private school across the country offering opportunities for employment. There is zero evidence in this record indicating that the Department has foreclosed the four petitioners from pursuing their professions.

⁴ *See* Pet. 7 (acknowledging the requirement for a state-wide teaching certification); *see also* New York State Education at a Glance (visited Mar. 4, 2022), <https://perma.cc/D97C-ZKRF>.

Similarly, petitioners are misguided in suggesting that this case is a good vehicle for providing guidance on vaccination requirements generally (Pet. 14). This Court has offered ample guidance on what substantive due process has to say on the subject, and the answer is very little. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), this Court held that a vaccination mandate compelling all competent adults to submit to smallpox vaccination did not invade “any right given, or secured, by the Constitution.” *Id.* at 25-31. And in *Zucht v. King*, 260 U.S. 174, 177 (1922), this Court found that the authority to require vaccination for public school attendance presented no substantial constitutional question. *Id.* at 175-76. Petitioners confronted neither precedent when moving in the district court. And in the court of appeals, they acknowledged *Jacobson* only on reply, and even then made no meaningful attempt to explain how their claim survives it.

Although petitioners now assert without explanation that *Jacobson* is “inapposite to today” (Pet. 14-15), it has never been overruled and remains binding precedent. *See Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (citing *Jacobson* and holding that there is no “freedom from compulsory vaccination”); *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (Easterbrook, J.) (“Given *Jacobson*[,] ... there can’t be a constitutional problem with

vaccination against [COVID-19].” (citations omitted)). Here, where *Jacobson*’s continued authority was not squarely challenged, fully briefed, or directly ruled on below, this case provides no occasion to reconsider the precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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