App. No. 21A_____

In the Supreme Court of the United States

TALISHA VALDEZ AND JENNIFER BLACKFORD
APPLICANTS,

v.

MICHELLE LUJAN GRISHAM AND DAVID SCRASE
RESPONDENTS.

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION
RELIEF REQUESTED AS SOON AS PRACTICABLE

To the Honorable Neil M. Gorsuch
Associate Justice of the Supreme Court of the United States and Acting Circuit Justice for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the Lower Courts holdings that Governor Michelle Lujan Grisham's public health orders mandating vaccinations for healthcare, congregate and penal system workers that infringe upon occupational freedom and bodily integrity only warrant rational basis review is in error?

2. Whether the complete impairment of employment contracts for healthcare, congregate and penal system workers by the vaccine mandates of the New Mexico Governor violates the Contract Clause?

3. Whether the Lower Courts erred in denying injunctive relief by applying the incorrect constitutional review inconsistent with the prior holdings of this Court?

PARTIES TO THE PROCEEDING

Applicant Jennifer Blackford, as well as many others similarly situated is a nurse, who with 10 years of medical training, along with her own independent research, is opposed to receiving the mRNA covid shots and was required to be terminated from her employment in order for her employer to be lawfully compliant with orders that are based off arbitrary and capacious data.

Applicant Talisha Valdez and her children also originally sought an injunction so that they could participate in the New Mexico State Fair, but the Fair has now passed mooting the need for injunctive relief and Valdez along with respective putative class members remaining claims are limited to damages, not to relief sought from this Court.

Respondent Michelle Lujan Grisham, in her capacity as Governor of New Mexico, was the defendant below in proceedings before both the Court of Appeals for the Tenth Circuit and the District Court for the District of New Mexico.

Respondent David Scrase, in his capacity as Acting Secretary of Health for the state of New Mexico, was the defendant below in proceedings before both the Court of Appeals for the Tenth Circuit and the District Court for the District of New Mexico.

RELATED PROCEEDINGS

The United States District Court for the District of New Mexico

- *Valdez v. Grisham* No. CIV 21-783 MV\JHR, 2021 WL 4145746, at *1 (D.N.M. Sept. 13, 2021) – the court entered an opinion denying Applicants' Motion for Temporary Restraining Order and Motion for Preliminary Injunction. Applicants filed an interlocutory appeal to the United States Court of Appeals for the Tenth Circuit on September 14, 2021. An Opposed Motion for Stay and Injunction Pending Appeal was made to the district court on September 14,

2021, and the Motion was denied following full briefing by the parties on October 7, 2021. A copy of the district court's order denying the relief sought is appended hereto.

The United States Court of Appeals for the Tenth Circuit

- Applicants' Motion for an Injunction and Stay of District Court Proceeding Pending Appeal was denied December 15, 2021.

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To the Honorable Neil M. Gorsuch,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Tenth Circuit:

Pursuant to Rule 22 of the Rules of this Court, and 28 U.S.C. § 1651(a), Applicants respectfully request an immediate, emergency writ of injunction barring enforcement of New Mexico's Public Health Order (PHO), App. 208-214, requiring that all workers in healthcare, congregate, and penal facilities be vaccinated to continue their employment in order to prevent further harm from being inflicted upon them. To the extent that the above-prohibited actions have already taken place, Applicants seek an injunction to restore the *status quo ante,* compelling Respondents to nullify any such actions already taken, until further order of this Court. Since August of this year the harms alleged continue to impact Applicant Blackford and the members of the putative class of workers directly implicated by the government's vaccine mandate. App. 55.

Applicants also ask the Court to consider this Application as a petition for certiorari, grant certiorari on the questions presented, treat the Application papers as merits briefing, and issue a merits decision as soon as practicable.

JURISDICTION

Applicants' Motion for Injunction and Stay pending the interlocutory appeal from the district court's denial of a preliminary injunction was denied by the 10th Circuit Court of Appeals on December 15, 2021. This Court has jurisdiction under 28 U.S.C. § 1651.

INTRODUCTION

Father of the Bill of Rights and fourth U.S. President, James Madison, famously stated that "crisis is the rallying cry of tyrants." Even today in modern day New Mexico, the last public health orders pronounced by the Governor through her Acting Secretary of Health prove that statement is as true today as it was for the revolutionary period of our Republic's history. Not since the Japanese internment camps that so darkly cloud our modern history, set out by President Franklin Roosevelt and upheld by the U.S. Supreme Court in *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944) does anything resembling the punitive tyrannical efforts contained in the public health orders at issue in this case even remotely arrive on the horizon of our American Liberty. Yet here, a tyrannical governor is willing to punish children and destroy livelihoods to punish adults that would dare to refuse her orders that advance her agenda of violating the right to bodily integrity. We stand at the precipice of losing the liberty that is foundational to our Country and these brave Applicants, in the complaint, respectfully begged the lower Court to stop that destruction of liberty. Thomas Paine in American Crisis stated that: "tyranny, like hell, is not easily conquered, yet, we have this consolation with us, that the harder the conflict, the more glorious the triumph."

The Complaint in this matter was filed in the United States District Court for the District of New Mexico on August 19, 2021, App. 183, with an emergency request for a temporary restraining order, and a request for preliminary injunction and

permanent injunctive relief. App. 197, 204. The district court, after ordering expedited briefing, denied Applicants' request for temporary restraining order and preliminary injunction on September 13, 2021. App. 6. Applicants timely filed an interlocutory appeal on September 13, 2021. App. 376. Concurrent with the filing of the Appeal Applicants filed a Motion for an Injunction and Stay of District Court Proceedings pending interlocutory appeal, App. 423, which was denied by the Tenth Circuit on December 15, 2021. App. 1. The continued loss of fundamental liberties of occupational choice and bodily integrity at the hands of the government of New Mexico remains even today warranting the immediate action of this Court to stem that loss.

BACKGROUND AND PROCEDURAL HISTORY

On August 17, 2021 Acting Cabinet Secretary David R. Scrase, M.D. issued the Public Health Emergency Order Requiring Congregate Care Facility Workers and Hospital Workers be fully vaccinated. App. 185, 423. As a result of the Order, Applicant Blackford and other Congregate Care Facility Workers and Hospital Workers similarly situated who are not currently vaccinated had to receive their first experimental EUA shot within ten days of the effective date or were required to be terminated from their employment in order for the employers to be lawfully compliant (at the time of filing the FDA had not approved any of the vaccines.) Applicant Blackford, based upon her medical training as well as experience as a nurse for 10 years, along with her own independent research, remains opposed to receiving the covid vaccines. The Public Health Order does not give an exemption for those in the

affected professions to abstain from being vaccinated without falling under one of the prescribed exemptions.

Applicants brought the suit in the lower court as a class action pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2), proposing two (2) classes seeking declaratory and injunctive relief as well as damages. Applicants claim that the actions of the Governor and her Secretary of Health are depriving them of equal protection, due process of law and of constitutional protections for their preexisting contracts. The lower court denied Applicants' request for Temporary Restraining Order and Preliminary Injunction. App. 6. In denying the requested relief the District Court relied heavily, in consistent fashion with the times, on *Jacobson* to find that the collective good trumps individual liberty concerns of bodily integrity and engaging in one's chosen profession indefinitely during a pandemic even after the emergency has passed. In so doing, the District Court and the Tenth Circuit ignored the abrogation of *Jacobson* by this Court when it stated that:

> *Roe,* however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261, 278, 110 S.Ct. 2841, 2851, 111 L.Ed.2d 224 (1990); cf., *e.g., Riggins v. Nevada,* 504 U.S. 127, 135, 112 S.Ct. 1810, 1815, 118 L.Ed.2d 479 (1992); *Washington v. Harper,* 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990); see also, *e.g., Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); *Jacobson v. Massachusetts,* 197 U.S. 11, 24–30, 25 S.Ct. 358, 360–363, 49 L.Ed. 643 (1905).

Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 857, 112 S. Ct. 2791,

2810, 120 L. Ed. 2d 674 (1992). And only by ignoring that limitation against the plenary override individual liberty claims of the Applicants here, was the District Court able to determine that Applicants lacked the ability to satisfy a likelihood of success on the merits test for a preliminary injunction.

Following the denial of the preliminary injunction and the filing of the interlocutory appeal Applicant sought to have the District Court stay the underlying matter as well as injunction pending appeal and was denied by the District Court and the Tenth Circuit. (Appx XX). It is also worth noting during the pendency of this interlocutory appeal that the Fifth Circuit has issued a nationwide stay of the Biden OSHA Mandate, that is by any account a similar attack on individual liberty in favor of plenary override to the Public Health Order at issue in this case citing that "because the petitions give cause to believe there are grave statutory and constitutional issues with the Mandate, the Mandate is hereby STAYED pending further action by this court. *BST Holdings, L.L.C., et al., v. OSHA, et al.,* No. 21-60845 (November 6, 2021).

REASONS FOR GRANTING THE APPLICATION

In cases of "exigent circumstances," the All Writs Act, 28 U.S.C. § 1651(a), authorizes either an individual Justice or the Court to issue an injunction when the "legal rights at issue are indisputably clear" and relief is "necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). In such cases, this Court exercises broad discretion: it may issue an injunction pending

appellate review "based on all the circumstances of the case . . . [without] express[ing] . . . the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver v. Sebelius*, 134 S. Ct. 1022, 1022 (2014). Here, had the District Court and the Tenth Circuit correctly applied the law concerning infringements on fundamental liberties to perform its constitutional review to evaluate the likelihood of success, Applicants would satisfy the factors necessary for a preliminary injunction to issue. Importantly, the Tenth Circuit also dodged the bodily integrity question on the degree of briefing in the District Court and two-stepped it away stating it was "inadequately presented to the district court". App. 3. While the Tenth Circuit acknowledged that it was preserved and presented to the District Court, if refused to apply the law and therein, to uphold the Constitution or the jurisprudence of this Court.

I. The Lower Courts Should Have Applied Strict Scrutiny

The Mandatory COVID-19 Vaccination Directive issued by Respondents is in direct violation of the constitutional rights to bodily integrity and to engage in one's chosen profession. Because these rights are fundamental to Applicants and putative class members, the proper constitutional measuring stick is whether when examined under strict scrutiny the PHO is narrowly tailored. Applicant respectfully, offers that had the District Court and the Tenth Circuit applied this standard of constitutional review based upon the jurisprudence of this Court that Applicants are likely to prevail on the merits and have suffered an irreparable injury of being required to choose between a vaccine that irreversibly violates their bodily integrity or their employer being mandated by the government to terminate them from their chosen

profession for an indefinite period statewide that has now stretched into months, despite the fact that the Equal Protection Clause requires governments to act in a rational and nonarbitrary fashion.

Respondents' actions create a class of individuals who, though they were exempted by federal law from being required to receive the vaccine at the time of the PHO, App. 210, cannot be deprived of their fundamental liberty interest to engage in their chosen profession and enjoy a fundamental right to bodily integrity that the state cannot deprive them of without due process of law. Moreover, they are punished for being unvaccinated and discriminated against without any real justifiable basis and without providing them any alternative. The PHO is not rationally related to achieving a compelling government purpose much less narrowly tailored to the realities of a pandemic eighteen (18) months after it began. Respondents' actions are and have been therefore a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Substantive Due Process prevents the government from engaging in conduct that "shocks the conscious" or that interferes with fundamental liberty without narrowly tailoring such interference to achieve a compelling government interest which must withstand strict scrutiny. Respondents' actions constitute official policy, custom and practice of the State of New Mexico. Respondents' actions are not narrowly tailored as many individuals similarly situated to Applicants are covid-recovered and the actions ignore that measures such as masking, testing and social distance have been adopted as sufficient to achieve the compelling government

interest for vaccinated individuals that remain just as likely to continue the spread of Covid-19. Respondents' actions do not comport with the traditional ideas of fair play and decency. Applicants have the right to pursue lawful employment as they shall determine and be free of unreasonable governmental interference. The PHO imposed by the Respondents will cause Applicants and other similarly situation citizens of New Mexico to lose their livelihoods or to suffer the loss of their bodily integrity.

No due process protections have been afforded to Applicants, or any citizen of New Mexico, as required by the United States Constitution of a pre-deprivation or post deprivation process that allows for any opportunity, much less a meaningful opportunity, to be heard and address the propriety of the government's actions. All fundamental rights comprised within the term liberty, including but not limited to, the rights to be free from bodily restraint, the right to contract and engage in the common occupations of life, the right to acquire useful knowledge, to worship God according to the dictates of one's own conscience, and to generally enjoy the privileges long associated with the rights of free people are guaranteed substantive due process rights under the Fourteenth Amendment. The August 17, 2021 Order, App. 208, deprives Applicants, and many residents of New Mexico, of fundamental liberties without due process of law, based solely upon discretion of the Respondents in favor of exercising plenary power for the collective with no respect for the individual liberties fundamental to Applicant Blackford and other putative class members. Finally, the actions of Respondents to require the termination of unvaccinated

individuals that do not meet or request an exemption impair Applicant Blackford's employment contract and others similarly situated.

Applicants enjoyed a right to bodily integrity under the Fourteenth Amendment and Article II Section 10 of the New Mexico Constitution. Respondents' actions to unreasonably require that the EUA vaccine injection be mandatory in order to maintain employment or enjoy the benefits of an existing contract violates Art. II Sec. 10. Applicants also enjoy a right to due process and equal protection under Article II Section 18 of the New Mexico Constitution. Respondents' actions to unreasonably and contrary to federal law require that the vaccine injection is mandatory in order to maintain employment or enjoy the benefits of an existing contract deprived Applicants of their owing due process and discriminated against them on the basis of the individual choice to vaccinate themselves. Applicants enjoy a right to contract free from government impairment pursuant to Article II Section 19 of the New Mexico Constitution. Applicants' actions to unreasonably impair the existing employment contracts of Applicant Blackford and others similarly situated have violated those rights.

To determine whether a government act violates the substantive component of the Due Process Clause or the Equal Protection Clause, courts begin by determining the proper level of scrutiny to apply for review. "Even though citizens of statutory counties are not a suspect class, we will still apply strict scrutiny if the state's classification burdens the exercise of a fundamental right guaranteed by the U.S. Constitution. *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002).

An act passes strict scrutiny only if it is "narrowly tailored to further a compelling government interest." *Id.* "If no heightened scrutiny applies, the statute need only be rationally related to a legitimate government purpose." *Id.* "In deciding whether to recognize additional classifications as suspect, courts traditionally look to see if the classification is 'based on characteristics beyond an individual's control,'[] and whether the class is 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Id.* (citations omitted).

II. The Lower Courts Are Wrong, There is a Recognized Fundamental Liberty Interest in Engaging in One's Chosen Profession That Invokes Strict Scrutiny Review

Respondents have never, because they cannot, explain how the Public Health Order outlawing nurses from working as nurses in New Mexico does not implicate the long recognized fundamental liberty to engage in one's chosen profession as protected by the Fourteenth Amendment, nor how conditioning that fundamental liberty upon surrendering another fundamental right to bodily integrity does not implicate a violation of the right in favor of the plenary exercise of the collective power.

Here, Applicant Blackford has plausibly alleged and verified that she has protected property interest to engage in her chosen profession and that if the government's PHO mandate is enforced, she is prohibited from working as a nurse only here in New Mexico as long as the order is in effect, and she is

unvaccinated. It is important to note that her employer has implemented a policy in order to comply with the PHO mandate that has now resulted in her being placed on leave without pay for at least 4 months but had not done so prior to the issuance of the PHO.

Applicant Blackford has identified a liberty interest warranting due process of law, Respondents disagree because otherwise their actions most certainly would run afoul of the Due Process Clause's protections by depriving Applicant Blackford her ability to earn a livelihood in the occupation of their choosing.[1] For example, this Court in *Barry v. Barchi* has opined as to the constitutionally protected property interest in engaging in one's chosen profession of horse racing, stating "Applicants have a liberty interest in pursuing their profession of horse racing and are entitled to due process of law if they are to be lawfully denied an opportunity to do so." *Barry v. Barchi,* 443 U.S. 55, 64, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979).

Thus, the right of citizens to support themselves by engaging in a chosen occupation is deeply rooted in our nation's legal and cultural history and has long been recognized as a component of the liberties protected by the Fourteenth

[1] "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson · in his essay on Politics, 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man." *Barsky v. Board of Regents of University of State of New York,* 347 U.S. 442, 472 (1954) (Douglas, J, dissenting).

Amendment. Over a century ago, this Court recognized that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915) (holding that a state anti-alien labor statute violated both equal protection and due process). Later, in striking down a law banning the teaching of foreign languages in school, this Court observed that the Fourteenth Amendment guaranteed the right, *inter alia*, "to engage in any of the common occupations of life ...." *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Despite later jurisprudence following the *Lochner* era, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), de-emphasizing economic substantive due process, this Court has never repudiated the recognition that a citizen has the right to work for a living and pursue his or her chosen occupation.

The Third Circuit has recognized "[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the 'liberty' and the 'property' concepts of the Fifth and Fourteenth Amendments." *Piecknick v. Comm. of Pa.*, 36 F.3d 1250, 1259 (3d. Cir. 1994) (citing *Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); *Truax*, 239 U.S. at 41, 36 S.Ct. 7). However,

> [t]he Constitution only protects this liberty from state actions that threaten to deprive persons of the right to pursue their chosen occupation. State actions that exclude a person from one particular job are not actionable in suits ... brought directly under the due process

> clause. It is the liberty to pursue a calling or occupation, and not the right to a specific job, that is secured by the Fourteenth Amendment.

Id. (internal citations and quotation marks omitted). Thus, the District Court was flat wrong and the Tenth Circuit's holding in *Guttman v. Khalsa*, 669 F.3d 1101, 1118 (10th Cir. 2012) relied upon by the Circuit to deny the Motion represents a split with the Third Circuit that is inconsistent with this Court's prior decisions relied upon by the Third Circuit in *Piecknick*. App. 210. Applicant Blackford, and the many others similarly situated, most certainly have a right to engage in their chosen professions of nursing, other healthcare employees, congregate caregivers or detention officers do as well. There is no question, then, that the Fourteenth Amendment recognizes a fundament liberty interest in citizens—the Applicants here—to pursue their chosen occupation. The dispositive question is not whether such a right exists, but rather, the level of infringement upon the right that may be tolerated.

III. There is a Recognized Fundamental Liberty Interest to Bodily Integrity That *Jacobson* No Longer Overrides 18 Months After the Pandemic Began.

It is supremely troubling that these Respondents do not recognize the fundamental liberty interest of the individual to decide what should be injected into their body, otherwise recognized as the common law right to bodily integrity. This Court has recognized that "no right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 11

S. Ct. 1000, 1001, 35 L. Ed. 734 (1891). Moreover, this Court has clearly held that "[T]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty. *Washington v. Harper*, 494 U.S. 210, 229, 110 S. Ct. 1028, 1041, 108 L. Ed. 2d 178 (1990).

In *Harper*, the Court was not dealing with a free person, but rather an incarcerated person, and, as of yet, citizens of New Mexico should not be treated with less care than prisoners. Justice Stevens dissented in *Harper*, arguing that the majority had "virtually ignore[d] the several dimensions" of the liberty interest it recognized. *Id.* at 237. He noted that a forced administration of medication is especially troubling if it "creates a substantial risk of permanent injury and premature death." *Id.* He also recognized that such intrusions are "degrading" when performed against the will of a competent person. *Id.*

In *Riggins v. Nevada*, 504 U.S. 127 (1992), the Court applied the test from *Harper*, finding that the state did not meet its burden to establish both the need for the drug and its medical appropriateness for the Defendant specifically finding that the state was obligated to show that the medication was the least intrusive means of achieving an "essential" state purpose. *Id.* at 138. In *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261 (1990), the Court unequivocally acknowledged that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Id.* at 278.

Respondent Governor Michelle Lujan Grisham's hypocrisy regarding a

fundamental right to choose medical procedures for one's own body cannot be overstated. Tellingly of this hypocrisy, earlier this year, before she began telling nurses like Applicant Blackford what medical procedures they must receive into their bodies in order to remain employed anywhere in the state of New Mexico in their chosen profession, Governor Lujan Grisham equivocally stated regarding the recently passed pro-choice abortion bill, that she signed in to law that provides that an abortion may be performed up to the delivery of that child thereby ending a life, that **"[a]nyone who seeks to violate bodily integrity, or to criminalize womanhood, is in the business of dehumanization. New Mexico is not in that business — not anymore. Our state statutes now reflect this inviolable recognition of humanity and dignity."** And yet, despite a clear acknowledgment that the state's right to protect life is abrogated by a woman's choice for her body in relation to pregnancy; the Respondents' responses on appeal do not even mention the abrogation of *Jacobson v. Massachusetts,* 197 U.S. 11(1905), in *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). In fact, not only does the Governor's briefing not mention *Casey*, no explanation is offered to square the premise that requiring a vaccine with known risks for adverse reactions to the point of death is acceptable as a plenary override of individual liberty claims; but banning abortions up to delivery are out of bounds for a state that wishes to protect the lives of the unborn when weighed against a woman's right to choose.

IV. The Failure to Recognize Clearly Articulated Fundamental Liberty Interests Was Clear Error by the District Court and the Tenth Circuit Should Have Granted the Injunction and the Stay.

The District Court's failure to apply the correct constitutional analysis to

Respondents' vaccine mandate as to why it satisfies strict scrutiny to be narrowly tailored to meet the government's compelling or essential purpose led to clear error in determining the likelihood of success on the merits and to be blunt, the Tenth Circuit's denial of the Motion just dodges the issues. As demonstrated above, this Court does not even need to perform another *Washington v. Glucksberg*, 521 U.S. 702, analysis to the alleged liberty interests because they have already been recognized as fundamental by this Court. There is no real debate that the right to engage in ones chose profession (*Barchi*) or the right to bodily integrity (*Casey, Cruzan, Riggins, Harper, Rochin*) are not already fundamental rights recognized previously by this Court. Moreover, to argue that the most sacred right as recognized as such by the Supreme Court to bodily integrity is not fundamental is tragically disappointing in our Republic; but more importantly it means that it is at least quasi-fundamental interest and not subject to a rational basis test, rather a right subject to intermediate scrutiny. It is well settled that, under *Plyler v. Doe,* "infringements on certain 'quasi-fundamental' rights, [*like bodily integrity*], also mandate a heightened level of scrutiny." *United States v. Harding*, 971 F.2d 410, 412 n.1 (9th Cir. 1992) (emphasis added).

Thus, because the District Court and the Tenth Circuit operated on the belief that indefinite crisis mandates an indefinite *Jacobson* deferential review they fail to take steps to protect liberty while addressing whether the PHO can withstand either strict or intermediate scrutiny, thus, requiring this Court should step in to protect those Constitutional Liberties.

V. The Respondents' Power from the State to Impair Contracts for Public Welfare is Limited, and Applicant Blackford was Also Likely to Succeed on the Merits of that Claim.

As is typical for Governor Lujan Grisham, she has found a blank check with unlimited power everywhere in the law and in every jurisprudence under the umbrella of public health during the COVID pandemic. This quite simply is not the case, as with *Jacobson* (even before it was limited by *Casey*), when it comes to impairment of contracts, this Court has set limits stating that "the states' inherent power to protect the public welfare may be validly exercised under the Contract Clause even if it impairs a contractual obligation **so long as it does not destroy it**." *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 26, 97 S. Ct. 1505, 1520, 52 L. Ed. 2d 92 (1977)(emphasis added); *citing* 134 N.J.Super., at 190, 338 A.2d, at 870-871. Here the Respondents' PHO unequivocally destroys Applicant Blackford and putative class members' employment contracts. It destroys the employment contract of Ms. Blackford by requiring her employer terminate her employment or prevent her from working to remain compliant with the PHO. It is worth noting that when Congress does this, they are still required to pay damages to any harmed party under the Fifth Amendment.

Here, because the destruction of the contracts is fully realized, this Court must examine the limit of state's actions to impair a contract as to the reasonableness of the conditions and of a character appropriate to the public purpose as this Court has warned "private contracts are not subject to unlimited modification under the police power." *U.S. Tr. Co. of New York*, 431 U.S. at 22. Thus, courts must evaluate that

limit, "[a]ssuming that this stated interest is a 'broad and general social or economic problem,' and therefore, a legitimate public purpose, the Court must then address the reasonableness and necessity of the regulation. *Universal Ins. Co. v. Dep't of Justice*, 866 F. Supp. 2d 49, 69 (D.P.R. 2012), *on reconsideration in part* (June 22, 2012). Essentially, a review as to reasonableness of this particular measure should have been performed by the District Court, and this Court should therefore conduct some review of the tailoring of the PHO's actions.

As to the destruction of the employment contracts of healthcare workers like Ms. Blackford (despite the disingenuous and unsubstantiated argument that the employers would have imposed that condition on those contracts regardless of the requirement of the PHO that they do so), Applicants provided examples to District Court of the well understood fact that the vaccinated are as susceptible to contracting the disease and spreading the disease as the unvaccinated. There is no documentation that unvaccinated workers in the affected industries were being infected at any greater rate or severity than the vaccinated workers, that they were responsible for a greater rate of spread, that masking and other physical measures were not working, or that other treatments were not available short injection of gene modification therapies that work to treat Covid and slow its spread.

It is simply not a reasonable condition to place the workers in such a position, who by all accounts serve as no greater threat for spread of the disease, to require employers to terminate them from their chosen professions and given the character of the government actions should still be evaluated under strict scrutiny for

reasonableness and necessity.

VI. The Circumstances Are Critical And Exigent

Absent temporary relief, the Respondents' vaccine mandate is causing immediate, massive, and irreparable harm to Applicant Blackford and others similarly situated, making it impossible for them to work in their chosen professions without sacrificing bodily integrity. By contrast, allowing Applicants to resume their employment subject reasonably tailored restrictions serves the public by getting additional workers serving the public in already taxed and short staffed services without requiring the surrender of a liberty interest in bodily integrity. In such circumstances, interim relief is proper. *See, e.g., Williams v. Rhodes*, 89 S. Ct. 1, 2 (1968))).

VII. The Applicants Will Suffer Irreparable Injury if Injunctive Relief Is Denied

"The loss of [constitutional] freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (emphasis added); As Applicants explained to the District Court, the PHO requires that Applicant Blackford and the putative class members must suffer one irreparable harm or another. They must permanently lose their bodily integrity by receiving a vaccine they do not wish to have inside their bodies, or they must be indefinitely terminated from their chosen profession in New Mexico by their employer.

The fact that Due Process and Equal Protection rights are burdened if not outright denied, as they are in this case, establishes the preliminary injunctions'

"irreparable harm" standard. Thus, under the Tenth Circuit Court of Appeals' jurisprudence, irreparable injury has occurred and will continue to occur until an injunction issues.

VIII. The Balance of Harms Favors Issuance of Injunctive Relief

Applicants have established both likelihood of success on the merits as well as a clear irreparable injury. In addition, the balance of harms tips decidedly in favor of Applicants. In the Tenth Circuit, "the [government's] potential harm must be weighed against [Applicants'] actual [constitutional] injury." *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1056 (10th Cir. 2007) *rvs'd other grounds by* 555 U.S. 460 (2009). Where the government's perception of harm is speculative and when the state permits the same speculative harm in other places, as it is here, such speculative harm cannot outweigh an injury to the Due Process, Equal Protection and contractual rights of Applicants, who have established a substantial likelihood of success on the merits.

If injunctive relief is not granted, and the Court later finds that the challenged laws impermissibly infringe constitutional rights, the Applicants will have suffered irreparable harm. After the fact, this Court will be unable to make things right again. By contrast, if this Court grants injunctive relief and the Court later finds against the Applicants, the Respondents will not have suffered any hardship that the Respondents do not currently countenance by allowing the vaccinated to work under conditions of masking, and social distancing. Because the Respondents will not suffer more than speculative harm if an injunction is granted, and the Applicants will suffer certain harm in the absence of injunctive relief, the balance of hardships favors the

Applicants. When Applicants establish that a case raises constitutional issues, as the Applicants have in this case, the courts should presume that the balance of harms tips in their favor. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002).

IX. An Injunction is in the Public Interest

Finally, Applicants established that issuance of a injunction is in the public interest. The Tenth Circuit Court of Appeals recognizes "it is always in the public interest to prevent the violation of a party's constitutional rights." *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016); *citing Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *see also Utah Licensed Bev.*, 256 F.3d at 1076; *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir.1997)). As discussed in *Casey* the right to bodily integrity is sacrosanct, just as the right to engage in one's chose profession is fundamental requiring that the actions of the government to interfere with those rights should be limited, not simply allowed as a plenary override in favor of the collective good of public health. Thus, an injunction is in the public interest and this Court should grant it.

X. In The Alternative, The Court Should Also Grant Certiorari Before Judgment

In the alternative to entering an injunction pending appeal, the Court should grant certiorari before judgment in the Court of Appeals and enjoin the Governor's actions pending disposition by this Court. See 28 U.S.C. § 2101(e). Vaccine mandates by states that invade bodily integrity and disruption occupational freedom are an ongoing problem of nationwide scope— yet without prompt action the Court will be

unable to give additional guidance on these issues until at least the next Term. More to the point, the Governor's targeted attacked on healthcare, congregate and penal system workers, some of the most necessary workers during the pandemic, is itself an issue of "imperative public importance," S. Ct. R. 11—fundamentally contradicting the two the most fundamental and sacrosanct liberties held by free people.

Certiorari is further warranted given the conflicts between the Tenth Circuit's Decision, the decisions of other Circuits and of this Court regarding occupational liberty. The Tenth Circuit declined to apply heightened scrutiny on the infringement of engaging in one's chosen profession cased upon its holding in *Guttman* even though the other Circuits, such as the Third Circuit in *Piecknick*, have consistently determined that based upon this Court's holdings that the right to engage in a chosen profession is fundamental and protected by the Fourteenth Amendment.

Moreover, the Tenth Circuit's refusal to apply strict scrutiny to an order targeted at coercing the invasion of bodily integrity runs afoul of this Court's well-settled precedent, as explained above. This case—in which the targeting is not just obvious but admitted—is the proper vehicle to resolve these conflicts.

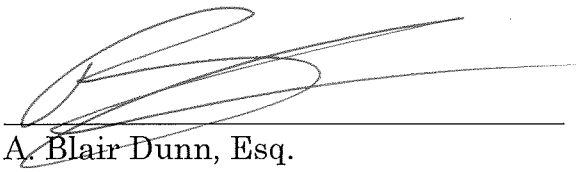
SPECIFICS OF PRELIMINARY RELIEF REQUESTED

Applicants request that the Respondents be prevented from enforcing the PHO order (App XX) in this matter during the pendency of the matter before this Court.

CONCLUSION

This Court should issue the requested injunction.

Respectfully submitted,



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