No. 25-1280

IN THE

Supreme Court of the United States

SARAH BOYSEN, *et al.*,
Petitioners,
v.

PEACEHEALTH, *et al.*,
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the right to a jury trial, to due process of law, and to have laws made by the nation's elected legislators through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, executive branch officials, administrative agencies, and even some courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints against the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type

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[1] No counsel for any party to this case authored this brief in whole or part, and no party or counsel other than *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* S. Ct. R. 37.6. Pursuant to S. Ct. R. 37.2, counsel for both parties were notified of NCLA's intent to file this *amicus curiae* brief by July 6, 2026. The Solicitor General of the U.S. also received courtesy notice.

that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA has defended the rights to medical choice and bodily autonomy, safeguarded by the Fourteenth Amendment's Due Process Clause, particularly in the context of Covid-19 vaccine mandates. NCLA was among the first organizations to bring cases challenging vaccine mandates for government employees, including in *Zywicki v. Washington, et al.*, No. 1:21-cv-00894 (E.D. Va. Aug. 20, 2021) (voluntarily dismissed after vaccine exemption granted) and *Norris v. Stanley*, No. 1:21-cv-756, 2022 WL 557306 (Feb. 22, 2022), *aff'd*, 73 F.4th 431 (6th Cir. 2023) (upholding a vaccine mandate for remote employee with demonstrated natural immunity via prior infection). NCLA also challenged former President Joseph Biden's executive orders requiring Covid-19 vaccines for federal contractors and employees, and millions of private company employees subject to the Occupational Safety and Health Act, through original litigation and *amicus* support. *See, e.g., Rodden v. Fauci*, 571 F. Supp. 3d 686 (S.D.Tex. 2021) (putative class action).

NCLA, and undersigned counsel, were also counsel of record for most individual petitioners in *Murthy v. Missouri*, 603 U.S. 43 (2024)[2] contending that the Government had silenced voices opposed to the type of Covid-19 policies at issue here on social media. That case recently ended with a consent decree admitting that what plaintiffs alleged there is

[2] NCLA also filed an earlier case along similar lines in *Changizi, et al. v. Department of Health and Human Services*, 82 F. 4th 492 (6th Cir. 2023).

exactly what happened. Consent Decree, *Missouri v. Biden*, 680 F. Supp. 3d 630 (W.D. La. 2023).[3]

NCLA is particularly concerned by aspects of the *en banc* Ninth Circuit's decision, following its other precedent, that incorrectly interpreted and applied *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in the context of Covid-19 vaccine mandates. Specifically, it held (1) that *Jacobson* requires courts to apply rational basis review to *any* vaccine mandate; (2) that *Jacobson* applies even where the vaccine is mandated *only* for the recipient's benefit; and (3) that later decisions by the Supreme Court protective of the right to deny unwanted medical care do not limit *Jacobson*. All three holdings are wrong.

For years, NCLA has taken the position that *Jacobson* does not mean courts should rubber-stamp anything a governmental entity labels a vaccine mandate. *See, e.g.*, *Stewart v. Walz*, No. 25-cv-01330, 2025 WL 3443570 (D. Minn. Dec. 1, 2025). Rather, NCLA has urged that *Jacobson* contains within it a limiting principle: that state actors may only mandate vaccination where that mandate is *necessary* to protect third parties. Only with this limit can *Jacobson* be reconciled with subsequent decisions by the Supreme Court protecting Americans' rights to decline unwanted medical care. Accordingly, NCLA has a strong, ongoing interest in this Court's granting certiorari and reversing the Ninth Circuit's continued plain misapplication of *Jacobson*.

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[3] Available at: https://nclalegal.org/filing/consent-decree/.

INTRODUCTION

This case represents at least the third in what amounts to a *matryoshka* doll[4] of erroneous Ninth Circuit cases, each inside of and reinforcing the others to deny Americans' civil liberty interests. The first is *Health Freedom Defense Fund, Inc., v. Carvalho*, 148 F.4th 1020 (9th Cir. 2025) (*en banc*) *certiorari denied*[5] No. 25-765, 2026 WL 1377038 (May 18, 2026) (reversing panel decision striking covid vaccine mandate on the basis of *Jacobson* and rational basis review for analyzing such measures). *See Curtis v. Inslee*, 154 F. 4th 678 (9th Cir. 2025) *cert. denied* No. 25-1119 (June 1, 2026) (same)[6] (also relying on *Carvalho*); *Boysen, et al. v. PeaceHealth, Inc., et al.*, No. 24-5204, 2025 WL 3470030 (9th Cir. Dec. 3, 2025) (affirming district court's 12(b)(6) dismissal and relying on *Curtis*) (unpublished). Unlike a *matryoshka* doll with each doll getting smaller as you go down, precedent makes them larger as cases build and time goes on. All of them rely on *Jacobson* to invent a "rational basis" analysis from a time before the tiers of scrutiny were even a spark in the judicial

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[4] Sometimes called "Russian Nesting Dolls." NCLA will refer to these three cases together as ("The Nesting Doll Cases") because as to *Jacobson* they are identical and two of them are before this Court on petitions for *certiorari*.

[5] NCLA filed an *amicus* brief in support of a grant of *certiorari* in this case. Brief of the New Civil Liberties Alliance in Support of Petitioner, *Health Freedom Def. Fund v. Carvalho*, No. 25-765, 2026 WL 1377038 (Jan. 29, 2026).

[6] *Certiorari* in *Curtis* was denied after the filing of the Petition for a Writ of *Certiorari* in this case.

eye, and the Nesting Doll Cases and the Ninth Circuit use it to approve "vaccine mandates" in myriad cases that differ not only in degree but in kind. Squaring *Jacobson* with *Cruzan by Cruzan v. Dir., MO Dep't of Health*, 497 U.S. 261 (1990) is difficult and can only be essayed effectively by this Court.

Finally, almost all Covid-19 cases challenging vaccine mandates emerged at the height of the pandemic when fear was foremost. Many of these cases were finally adjudicated after the panic (and the disease) subsided. This led to numerous cases being dismissed or settled on threatened grounds of mootness as the challenged actions were withdrawn. The liberty violations were never corrected nor even addressed by this Court. This Court should accept *certiorari* in this case or in *Roberts v. Ferguson*, which is still pending, or both. But it must grant at least one of them so that it can address the question of whether *Jacobson* applies to drugs that do not stop transmission in an epidemic and whether, in any event, rational basis is the proper tier of scrutiny under the Court's modern jurisprudence. It can do so not on the "emergency docket" or in a time of extreme fear and public unrest but in repose with the reflection and serious analysis the question deserves.

BACKGROUND

The facts of the case are ably laid out in the Petition for a Writ of *Certiorari*'s Statement of the Case, pp. 2-7. Briefly, both the State of Oregon and

PeaceHealth issued mandates within two weeks of each other requiring healthcare workers to take the Pfizer-BioNtech Covid 19 Vaccine ("Pfizer Vaccine"). The State of Oregon did not have the legislature issue a new law. Instead, operating on general laws already in place, acting governor Kate Brown and the then-director of the Oregon Health Authority ("OHA") Patrick Allen issued orders mandating Pfizer Vaccination within 20 days of one another, PeaceHealth on August 5th, and the Governor and OHA on August 20th. Appx. B. 7a. When the Petitioners refused to obey, they were terminated. By then, had PeaceHealth not terminated them, it would have been in violation of the administrative decrees. While NCLA entirely agrees with Petitioner that the Pfizer Vaccine is not a vaccine as traditionally understood and that the laws allowing F.D.A. Emergency Use Authorizations explicitly permit noncoerced use of an otherwise unavailable drug—but do not allow any entity to *require* use of such emergency-use drugs—this brief focuses purely on the question of what *Jacobson* requires as a matter of judicial review of medical mandates by the States. The Nesting Doll Cases have made Ninth Circuit law extremely insouciant to rights of bodily integrity and to the right to refuse medical treatment.

SUMMARY OF ARGUMENT

Throughout the pandemic, courts mistakenly held—with little, no, or misguided analyses—that under *Jacobson v. Massachusetts*, virtually all public-health measures adopted during the pandemic need receive only rational basis review. These holdings rubber-stamped vaccine mandates, *see e.g.*, *Kheriaty v. Regents of the Univ. of Cal.*, No. 22-55001, 2022 WL

17175070 (9th Cir. Nov. 23, 2022), and read *Jacobson* as authorization by this Court to disregard countless other constitutional guarantees. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 25 (2020) (Gorsuch, J., concurring) ("Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic?"). This is also true of each of the Nesting Doll Cases. But even a cursory examination of *Jacobson* shows that the overly broad reading espoused by lower courts nationwide was always erroneous.

This is true for three reasons. First, *Jacobson* did not apply rational basis review to Massachusetts's smallpox vaccine mandate. It applied a heightened standard of review, one that weighed the plaintiff's substantial liberty interest in declining an unwanted vaccine against the government's interest in preventing the *spread* of smallpox. *See* 197 U.S. at 26. Second, *Jacobson* does not apply where the medical intervention at issue does not protect third parties. *See id*. at 28. Finally, *Jacobson*—a more than century-old decision—has been clarified by this Court's later decisions. Since *Jacobson*, this Court has consistently explained that individuals have a substantial liberty interest in being free from unwanted medical care. These decisions did not overrule *Jacobson*, but they make plain that the decision only applies where the medical intervention at issue protects third parties. Tolerating too broad a reading of *Jacobson* risks heinous future applications, akin to this Court's dreadful decision in *Buck v. Bell*, 274 U.S. 200 (1927), which relied exclusively on the *Jacobson* precedent.

The Ninth Circuit approving the district court opinion below exemplified the widespread misapplication of *Jacobson* by applying rational basis review and not requiring any third-party benefit of the drug. These are not novel mistakes. They are the same errors that courts nationwide have made when misinterpreting *Jacobson*. Hence, this Court must restore the decision to its proper bounds and *Jacobson*'s dross must be removed in light of multiple examples of refining precedent.

This case is a good vehicle for this Court to correct the widespread misunderstanding of *Jacobson* which allows the infringement of Americans' rights when the government labels some medicine a "vaccine" whether it protects third parties or not. This is particularly true if the Court grants the petition for *certiorari* in both *Boysen* and *Roberts* (*Curtis* having been denied certiorari) and combines the cases for review as requested by Petitioner.

The Court should grant the Petition for a Writ of Certiorari.

ARGUMENT

I. THE NESTING DOLL CASES OF THE NINTH CIRCUIT COURT OF APPEALS MISAPPLIED *JACOBSON V. MASSACHUSETTS*

A. The *Boysen* Court, Relying on *Carvalho* and *Curtis*, Erroneously Held that *Jacobson* Applied Rational Basis Review to Massachusetts's Smallpox Vaccine Mandate

The Supreme Court decided *Jacobson* before it adopted the modern tiers of review. *See Roman Cath. Diocese*, 592 U.S. at 23 (2020) (Gorsuch, J., concurring) (observing that "*Jacobson* pre-dated the modern tiers of scrutiny"); *see also* Josh Blackman, *The Irrepressible Myth of* Jacobson v. Massachusetts, 70 Buff. L. Rev. 131, 141 (2022) ("At the time [*Jacobson* was decided], there were no tiers of scrutiny, the Supreme Court did not distinguish between fundamental and nonfundamental rights, and the Bill of Rights had not yet been incorporated.").

But if one were to overlay the modern tiers of scrutiny on *Jacobson*, it is apparent that this Court engaged in something more stringent than rational basis review.[7] *Jacobson* required the government to

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[7] Holding that *Jacobson* engaged in a higher level of scrutiny for the right to refuse an unwanted, unnecessary vaccine would not necessitate a higher level of review for other claims related to bodily autonomy. Decisions by this Court counsel against a one-size-fits-all approach. *See Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) ("we have a tradition of carefully formulating the interest at stake in substantive-due-process cases."). The right to refuse medical treatment is "entirely consistent with this Nation's history and constitutional traditions" and "not simply

demonstrate a "substantial relation" between its articulated goal and the law in question and recognized the "inherent right of every freeman to care for his own body and health in such a way as to him seems best[.]" 197 U.S. at 26, 31. This standard is far more demanding than rational basis review, which merely requires the government to show a rational connection between the challenged law and a purported interest. *See generally FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993); *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

Rational basis review also entails no assessment of the individual's liberty interests. But *Jacobson* considered the significant liberty interests at stake when it weighed the plaintiff's interest in declining an unwanted vaccine against the government's interest in preventing smallpox's spread. 197 U.S. at 38. It was only because "the spread of smallpox" "imperiled an entire population," that the government's interest in "stamp[ing] out the disease of smallpox" outweighed Jacobson's liberty interests. *Id*. at 30-32; *see In re Cincinnati Radiation Litigation*, 874 F. Supp. 796, 813 (S.D. Ohio 1995)

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deduced from abstract concepts of personal autonomy." *Id*. at 725; *see Cruzan by Cruzan v. Dir., Missouri Dept. of Health*, 497 U.S. 261, 277-78 (1990) ("the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment" and that "liberty interest … may be inferred from our prior decisions"); Blackman, *The Irrepressible Myth of* Jacobson, at 144 ("The unenumerated right at issue in *Jacobson* had deep roots. There is a longstanding, common-law right to be free from arbitrary governmental restraint."). The same is not true of other purported rights based on bodily autonomy, like assisted suicide. *Glucksberg*, 521 U.S. at 723.

(explaining that, although *Jacobson* upheld compulsory vaccination, it had done so while "acknowledg[ing] that an aspect of fundamental liberty was at stake and that the government's burden was to provide more than minimal justification for its action."). *Jacobson* thus did not employ the equivalent of rational basis review.

The Court below (and the Ninth Circuit in all the Nesting Doll Cases) erred when it held that *Jacobson* required rational basis review of LAUSD's vaccine mandate. *Boysen, et al. v. PeaceHealth, Inc. et al.*, Appx. 4a ("… their constitutional claims do not survive under rational basis review") and citing *Curtis v Inslee*, 154 F.4th 678 (9th Cir. 2025), *id.* at 4a); *and see Health Freedom Def. Fund*, 148 F. 4th at 1023 (holding that *Jacobson* necessitates rational basis review). *Jacobson* requires—at a minimum—that the government articulate a "substantial relation" (rather than merely a "rational" one) between the Covid vaccine mandate and "protection of the public health and the public safety." Inexplicably, the Ninth Circuit continues to hold otherwise both below and in all Nesting Doll Cases. *See Health Freedom Def. Fund*, 148 F. 4th at 1031, 1033. That holding ignored *Jacobson*'s precise language. *See Jacobson*, 197 U.S. at 31 (holding that the vaccine mandate must bear a "real or *substantial* relation" to the end sought by the legislature) (emphasis added).

B. The *Boysen* Court, Relying on Erroneous Prior Decisions, Ignored that *Jacobson* Is Inapplicable When the Medical Intervention at Issue Does Not Protect Third Parties

Jacobson's vaccine mandate was constitutional only because the government had the "power to mandate prophylactic measures aimed at preventing the recipient from *spreading disease to others*." *Health Freedom Def. Fund v. Carvalho*, 104 F.4th 715, 725 (9th Cir. 2024), *rev'd on reh'g*, 148 F.4th 1020 (9th Cir. 2025) (emphasis added). That holding is inseparable from the decision's emphasis that the mandate at issue compelled inoculation that "*prevented the transmission*" of smallpox. *See Health Freedom Def. Fund*, 148 F.4th at 1038 (Lee, J., dissenting in part) (explaining that the Supreme Court "upheld Massachusetts' vaccine requirement against smallpox precisely because the vaccine prevented the transmission and contraction of smallpox").

Jacobson did not vindicate every subsequent vaccine mandate. Rather, the Court explained that:

> [I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the

> courts to interfere for the protection of such persons.

Jacobson, 197 U.S. at 28. Similarly, the Court wrote that it was "decid[ing] only that the statute covers the present case" and that the statute was constitutional as applied to the particular plaintiff. *Id.* at 39. The Court in *Jacobson* plainly foresaw that its holding might be abused. It thus rejected a broad reading of its holding that threatened to render all subsequent vaccine mandates permissible.

The Ninth Circuit below, and in all the Nesting Doll Cases, ignored *Jacobson*'s carefully crafted limits, endorsing the broad reading the decision rejected. The Ninth Circuit has held, for example, that *Jacobson* permits government actors to mandate vaccination *carte blanche*, even where mandates benefit *only* the recipient—whenever "policymakers could reasonably conclude" the mandate would improve the "public's health." *Health Freedom Def. Fund*, 148 F.4th at 1032. This expansive reading of *Jacobson* lacks a limiting principle, and it would appear to allow the government to mandate *any* health intervention. *See id.* at 1036 (Lee, J., dissenting in part) (the majority's view "comes perilously close" to allowing the government "to require a vaccine or even medical treatment against people's will so long as it asserts—even if incorrectly—that it would promote 'health and safety'"). After all, if the government's mere *ipse dixit* representation that it needs to mandate a medical treatment for recipients' *own benefit* sufficed to show a substantial state interest, it follows that the government could force anyone to submit to *any* preventative medical intervention.

Thankfully, this is not and never has been the law. As discussed, *Jacobson* limited its applicability to vaccines that prevent the *transmission* of a particularly deadly contagious disease. A brief description of what the *Jacobson* court knew, all of which differs from the Pfizer mandate here, is useful. Smallpox's devastation, extreme transmissibility and lethality, as well as the steps to prevent it were well known by 1905. It was not an experimental drug.

Famously, General George Washington had inoculated his troops. *Perry v. Marteney*, 172 F.4th 315, 320 (4th Cir. 2026) ("During the Revolutionary War, General George Washington ordered the mandatory inoculation of the Continental Army against smallpox"); *see also* Letter from George Washington to William Shippen, Jr. (Feb. 6, 1777), in 8 The Papers of George Washington, Revolutionary War Series, 6 January 1777–27 March 1777, at 264 (Frank E. Grizzard, Jr. ed., 1998) ("Finding the small pox to be spreading much and fearing that no precaution can prevent it from running thro' the whole of our Army, I have determined that the Troops shall be inoculated."). In his autobiography, Ben Franklin expressed regret at not inoculating his child:

> In 1736 I lost one of my sons, a fine boy of four years old, by the small-pox, *taken in the common way*. I long regretted bitterly, and still regret that I had not given it to him by inoculation. This I mention for the sake of the parents who

> omit that operation, on the supposition that they should never forgive themselves if a child died under it; my example showing that the regret may be the same either way, and that, therefore, the safer should be chosen.

Benjamin Franklin, *Autobiography* 105 (Houghton Mifflin & Co. 1906) (emphasis added). Further, its effects on the American population (including Native Americans) prior to the vaccine was well known. *See Halgren v. City of Naperville*, 577 F. Supp. 3d 700, 722 (N.D. Ill. 2021) ("the smallpox pandemic killed tens of millions with an infection fatality rate of 30 percent, exceeding the death toll of World War I and II combined, and leaving even its survivors permanently scarred, blind or disabled"); *E. Cherokees v. United States*, 45 Ct. Cl. 229, 237 (1910) (citing the Bureau of Ethnology report on the deadly impact of smallpox on Indians); *see also Rice v. Cayetano*, 528 U.S. 495, 506 (2000) (thousands of native Hawaiians killed by the disease).

In the face of these epidemics the smallpox vaccine was known to be "sterilizing," that is, it prevented transmission by the inoculated person to others. *Halgren*, 577 F. Supp. 3d at 723 ("the [smallpox vaccine] was, in fact, a sterilizing vaccine that affirmatively killed the virus and prevented transmission within the community at large"); *see also* Vernuccio Riccardo & Guardado-Calvo Pablo, *Neutralizing Determinants on Poxviruses*, 15 VIRUSES

2396, at 12 (2023) ("The smallpox vaccine marked a significant milestone in medicine by eradicating smallpox. Its success is largely due to its ability to generate long-lasting, sterilizing immunity, setting a standard in vaccinology."). *Jacobson v. Massachusetts* went through the history of the vaccine to show that it prevented the transmission of smallpox to others.

The Covid-19 vaccines are not sterilizing vaccines, so they do not stop transmission to third parties, and they lack the long history of efficacy described in *Jacobson*. *Jacobson* thus may not be read to allow government to require health measures that benefit only the recipient. *See Jacobson*, 197 U.S. at 35 ("[T]he legislature has the right to pass laws which, according to the common belief of the people, are adapted to *prevent the spread of contagious diseases*") (emphasis added); *id.* (noting that "vaccination [is] a means of *protecting a community* against smallpox") (emphasis added); *id.* at 31-32 ("vaccination [is] a means to *prevent the spread* of smallpox") (emphasis added).

The Ninth Circuit should have adhered to *Jacobson*'s limiting principle: government may mandate vaccination only where doing so provides a significant benefit to third parties. *See Health Freedom Def. Fund*, 148 F.4th at 1036 (Lee, J., dissenting in part) (*Jacobson* applies "only if a vaccine prevents transmission and contraction of a disease."). As was true in *Jacobson*, the disease in question must also be particularly dangerous, and the vaccine must be effective in preventing transmission to others. Whatever may be said of the danger Covid presents, Covid vaccines do not prevent transmission.

There was nearly universal agreement that the smallpox vaccine effectively stopped the spread of smallpox. *See Jacobson*, 197 U.S. at 31 (recounting "experience of this and other countries whose authorities have dealt with the disease of smallpox"). The same is not true of the Covid vaccine.[8] Because the Covid vaccines do not prevent transmission to third parties, *Jacobson* does not control here.

C. The Ninth Circuit Failed to Reconcile *Jacobson* with This Court's Decisions Subsequently Protecting a Right to Decline Unwanted Medical Care

Though *Jacobson* permitted Massachusetts to impose a vaccination requirement, it also recognized one's right "to care for his own body and health in such way as to him seems best." 197 U.S. at 26. This right is rooted in the common law and pre-dates the Constitution. *See, e.g.*, John Locke, *The Two Treatises of Government* § 27 (Hollis ed., 1689) ("[E]very man has a property in his own *person*: this no body has any right to but himself"); *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the

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[8] *See* Madeline Holcombe & Christina Maxouris, *Fully Vaccinated People Who Get a Covid-19 Breakthrough Infection Can Transmit the Virus, CDC Chief Says*, CNN Health, https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday (Aug. 6, 2021); Catherine M. Brown, et al., *Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings—Barnstable County, Massachusetts, July 2021*, 70 MORBIDITY & MORTALITY WEEKLY REP. 1059 (2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC8367314/pdf/mm7031e2.pdf.

possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

Since *Jacobson*, this Court has often explained that a person possesses "a constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan*, 497 U.S. at 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."). This right is "not simply deduced from abstract concepts of personal autonomy." *Glucksberg*, 521 U.S. at 725. It is "entirely consistent with this Nation's history and constitutional traditions," "[g]iven the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment." *Id.* Indeed, the right to refuse unwanted medical treatment is also well-grounded in the common law doctrines of trespass and battery. *See Mills v. Rogers*, 457 U.S. 291, 294 n.4 (1982); *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914) (Cardozo, J.) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages."). For this reason, there exists a deeply rooted tradition of recognizing the right of individuals to "refuse unwanted medical treatment." *Glucksberg*, 521 U.S. at 725.

The right to refuse unwanted medical treatment "ordinarily outweighs any countervailing state interests." *Cruzan*, 497 U.S. at 273 (quoting *In*

re Conroy, 98 N.J. 321, 353-54 (1985)). But this Court's decisions elucidate several reasonable limits to the right (none of which is applicable here). First, when declining treatment would harm others, the government may override the individual right. *See id.* (observing that the protection of "innocent third parties" is a situation where the right to refuse medical treatment is not absolute). Second, individuals lacking mental competency enjoy diminished protection. *Id.* Finally, while not an explicit limit, this Court has cautioned against expanding the right in ways inconsistent with this nation's history and tradition. *Glucksberg*, 521 U.S. at 723. Suicide is the quintessential example where the government may override the right, as a "consistent and almost universal tradition has long rejected" applying the right in that context. *Id.* ("To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every state.").

Subsequent cases from the Court demonstrate that vaccine mandates implicate the right to refuse medical treatment. In *Washington v. Harper*, for example, the Court explained that "forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." 494 U.S. 210, 229 (1990); *see id.* at 221-22 ("We have no doubt that, in addition to the liberty interest created by the State's Policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."). This Court ultimately applied rational basis scrutiny and upheld the

constitutionality of forced medication "given the requirements of the prison environment." *Id.* at 227. But it did so in the context of an "inmate" who was "dangerous to himself or others." *Id.* *Harper* thus implicated the exception involving the safety of third parties. Here, unlike in *Harper*, the government has no countervailing interest in requiring vaccination because Covid vaccines do not protect third parties.[9]

Since *Jacobson*, this Court has made clear that the government's interest in forcing an individual to undergo unwanted medical care must be weighed against that individual's liberty interests. *See Schmerber v. California*, 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society … that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."). *Jacobson* itself weighed the plaintiff's significant liberty interests against the government's interest in mandating the smallpox vaccine. The decision is easily reconcilable with later decisions like *Cruzan* and *Glucksberg*, as *Jacobson* merely involved the protection of third parties—an exception to the right recognized by *Cruzan*. *Cruzan*, 497 U.S. at 273.

While neither *Glucksberg* nor *Cruzan* overruled *Jacobson*, the proper question is whether the government's interest in forcing individuals to take the Covid vaccine—for an individual's own benefit—outweighs the individual's liberty interest in refusing unwanted medical care.

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[9] *See supra* note 5.

Jacobson is easily reconciled with subsequent case law, but the Court should be cautious about expanding it outside its historical bounds. The decision produced part of the Supreme Court's anti-canon.[10] The Court has relied on *Jacobson*'s reasoning exactly once—to justify its abhorrent decision in *Buck v. Bell*, endorsing forcibly sterilizing a mentally "feeble" woman. 274 U.S. 200, 205, 207 (1927). Such poor company does not invalidate *Jacobson* itself. But it ought to make one wary of reading the decision too broadly or of imagining that it definitively resolved all future mandatory-vaccination legal disputes.

II. THIS CASE PROVIDES THE IDEAL VEHICLE FOR THIS COURT TO SETTLE THE IMPORTANT QUESTION OF *JACOBSON*'S SCOPE

Petitioners have requested consolidated review of their case and of *Curtis*. Petitioners also note two other cases on the same issue pending before the Court. *Sweeney v. University of Colorado Hospital Authority*, No. 25-1055, and *Horsley v. Kaiser Foundation Hospitals*, No. 25-1203. *Roberts v. Inslee*, No. 24-1949, 2025 WL 3539135 (9th Cir. Dec. 10, 2025), is also before the Court. Petition for Certiorari, *Roberts v. Ferguson*, No. 25-1327 (May 11, 2026). All of these cases present materially similar factual and legal backdrop and involved similar errors. The Court has chosen to deny *certiorari* in *Curtis* and *Sweeney*. *Sweeney v. Univ. of Colo. Hosp. Auth.*, No. 25-1055, 2026 WL 1513328 (Jun. 1, 2026), but not *Horsley* or

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[10] "Anti-Canon" are cases like the recently abandoned *Korematsu v. United States*, 323 U.S. 214 (1944), that are notoriously wrong but not formally overruled. *See* Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 389, 399 (2011).

Roberts. With *Boysen* and the latter two cases, the Court still has an embarrassment of riches from which to choose cases to address the current scope of *Jacobson* and to do so while there is no a pandemic roiling the polity. Review is proper here to clarify *Jacobson*'s own internal limits and the limits imposed by this Court's subsequent decisions. *See* S. Ct. R. 10(c). The district court made every error in the use of *Jacobson* to deny petitioners their livelihoods and their licenses as health care workers. Lower courts have misapplied *Jacobson* in a manner divorced from the decision's narrow rationale. They have also applied the decision in a manner incompatible with this Court's subsequent decisions in *Cruzan* and *Glucksberg*.

Some of these errors may be attributed to this Court's failure to clearly articulate *Jacobson*'s limits. Nor has this Court explained how *Jacobson*'s contours should match subsequent decisions like *Cruzan* and *Glucksberg*.

Boysen presents the ideal vehicle at the ideal time to resolve these issues. The questions presented here lack procedural pitfalls. And resolution of the questions presented, should this Court wish, turn solely on the *Jacobson* question. For these reasons—and because the case comes to this Court outside the pandemic's understandably fraught timeframe—review by this Court is proper and necessary to settle this important question of federal law. *See Doe v. Hochul*, No. 24-1015, 2026 WL 1855625 (U.S. June 29, 2026) (Gorsuch, J. dissenting from denial of certiorari) (observing that the Court should granted certiorari in a Covid-era case).

A. The Proper Scope of the *Jacobson* Decision Is an Important Federal Question that Will Recur Until This Court Resolves It

As members of this Court have observed, *Jacobson* has important and nationwide effects. *See Roman Cath. Diocese*, 592 U.S. at 25 (Gorsuch, J., concurring). Throughout the pandemic, courts considered *Jacobson* as approval by this Court to override *numerous* constitutional guarantees. *Id.* While this Court partially, albeit belatedly, eliminated some government and lower court misbehavior in *Roman Catholic Diocese*, where it reminded states and lower courts that the First Amendment applies during a pandemic, *id.* at 17-19, the decisions below requested for consolidated review demonstrate that lower courts are *still* applying *Jacobson* to undermine other constitutionally guaranteed freedoms.

This Court should not assume that the pandemic's end rendered the *Jacobson* question irrelevant—it did not. The decision "stands ready" for the next crisis. Blackman, *The Irrepressible Myth of* Jacobson, at 137. Prior to the Covid pandemic, *Jacobson* garnered little attention from the lower courts for nearly 100 years. But absent this Court's action now, as Covid demonstrated, when the next

crisis arises, courts will wield the decision to justify endless cases of unconstitutional government excess.

Broad readings of *Jacobson* seemingly authorize the government to enforce *any* medical mandate subject to mere rational basis review. *Supra*, at 13. That cannot be the law. But this Court's failure to review any of these cases to address the issue would ensure that additional constitutional rights suffer tomorrow until this Court clarifies *Jacobson*'s limits.

At bottom, courts nationwide have read *Jacobson* to disregard multiple constitutional guarantees. And decisions like those below threaten dramatic, additional erosion in countless other contexts. Given the nationwide scope of the issue, and the constitutional rights involved, getting *Jacobson* right plainly involves a federal question of substantial importance.

B. Lower Courts Nationwide Have Consistently Misapplied *Jacobson*, and This Case Presents an Ideal Vehicle to Clarify the Decision

As the four cases proposed for consolidated review and the case below demonstrate, the lower court's errors are not unique. Courts nationwide have misread *Jacobson*'s narrow holding, applied the improper level of review, and failed to reconcile *Jacobson* with decisions like *Cruzan* and *Glucksberg*. *See Health Freedom Def. Fund*, 148 F.4th at 1029 (collecting cases). Guidance by this Court is

necessary to confine *Jacobson* to its proper bounds, prevent further government mischief, and ensure redress of liberty injuries for litigants nationwide.[11]

Neither the petitioner nor the lower courts below have identified any other procedural issues. So, the question whether the lower court properly applied the *Jacobson* decision is squarely presented.

CONCLUSION

The petition should be granted.

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[11] Although this Court often grants review when circuit courts are split on an important question of federal law, S. Ct. R. 10(a), it has also granted review in situations where *only* this Court may adequately address the question presented. For example, recently and without circuit split, this Court took the case of *Trump v. Slaughter*, No. 25-332, 2026 WL 1855612 (U.S. June 29, 2026), as this Court's own decision in the now-overruled *Humphrey's Executor* caused the relevant problem. Here, as in *Slaughter*, courts often feel bound by this Court's prior decision, even though the decision had come under scholarly and judicial criticism. *See Health Freedom Def. Fund*, 148 F.4th at 1033 ("Whatever the reach of these cases, they did not overrule *Jacobson*"); *Norris v. Stanley*, 73 F.4th 431, 436 (6th Cir. 2023) ("absent any indication from the Court that *Jacobson* is to be overruled or limited, we are bound to apply that decision").

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Respectfully submitted,

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