

In the Supreme Court of the United States

JANE ELIZABETH ROBERTS, ET AL.,

Petitioners,

v.

BOB FERGUSON, GOVERNOR OF WASHINGTON, ET AL.,

Respondents.

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

GOVERNOR BOB FERGUSON’S BRIEF IN OPPOSITION

NICHOLAS W. BROWN
Attorney General

NOAH G. PURCELL
Solicitor General

TERA M. HEINTZ
Deputy Solicitor General
Counsel of Record

PETER B. GONICK
Deputy Solicitor General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
Tera.Heintz@atg.wa.gov

QUESTIONS PRESENTED

Petitioners are former employees of a private hospital in Washington who allege that they were discharged because they refused to be vaccinated against COVID-19. They sued their former employer as well as then-Washington Governor Jay Inslee, who had issued a proclamation requiring most healthcare workers in Washington to be vaccinated (with religious and medical exemptions). They sought only monetary damages, raising state law claims as well as various federal claims under 42 U.S.C. § 1983. The district court dismissed them all. The court of appeals unanimously affirmed in an unpublished opinion, relying extensively on a previously issued published opinion in a case where this Court recently denied certiorari. While the exact issues Petitioners seek to present here are somewhat unclear, the questions presented appear to be:

1. Whether requiring health care workers to be vaccinated violated a clearly established substantive due process right.
2. Whether clearly established procedural due process precedent forbids States from requiring vaccination in light of a federal statute that grants immunity to certain health care professionals.

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INTRODUCTION

The petition in this case is meritless. This Court has recently denied several virtually identical petitions brought by the same counsel and raising the same claims, without even asking for a response. The Court should likewise deny certiorari here.

Like many other States and the federal government, Washington responded to the COVID-19 pandemic by requiring most healthcare workers to be vaccinated against the disease. Petitioners here are former employees of a private hospital who allege that they were discharged for refusing to be vaccinated. They sued their former employer and then-Washington Governor Jay Inslee, seeking only monetary damages under various federal and state law theories. Their attorney, who remains their counsel here, filed similar lawsuits across the country.

The district court dismissed all of Petitioners' claims. The court found that none of the various federal statutes and constitutional provisions Petitioners invoked created a clearly established right for healthcare workers to refuse vaccination without consequence, and therefore held that qualified immunity barred Petitioners' claims against Washington's Governor. Petitioners appealed, and while their appeal was pending, the Ninth Circuit decided another case brought by the same counsel and raising the same claims. The Ninth Circuit there held that substantive claims identical to Petitioners' were meritless. *See Curtis v. Inslee*, 154 F.4th 678 (9th Cir. 2025). Pet. App. 51a-86a. The panel in this case then issued a short, unpublished memorandum rejecting Petitioners' claims under the reasoning of

Curtis, without addressing the district court's qualified immunity ruling. This Court subsequently denied certiorari in *Curtis*, as it has in several other cases brought in other circuits by the same counsel. This Court should do the same here for at least three reasons.

First, the bulk of the petition does not even address the court of appeals opinion here, instead criticizing the Ninth Circuit's prior decision in *Curtis*. But this Court already denied certiorari in *Curtis*. Petitioners offer no reason why this case warrants a different result.

Second, Petitioners do not even allege, much less demonstrate, any circuit split as to the issues they raise here, and there is none. No court has held that healthcare workers have a clearly established substantive due process right to retain their jobs despite refusing vaccination, nor that there is any procedural due process problem based on the federal statute Petitioners invoke.

Finally, the petition suffers from insuperable vehicle problems. Several arguments in the petition were not raised below, while others critique the *Curtis* ruling on grounds irrelevant here. Most notably, even if this Court granted review and became the first court ever to accept Petitioners' substantive claims, it would make no difference to the outcome here because Petitioners' claims would still fail on qualified immunity grounds, as the district court held.

The Court should deny certiorari.

COUNTERSTATEMENT OF THE CASE

A. The FDA's Regulation of Vaccines in Public Health Emergencies

Drugs, medical devices, and biological products generally must be approved and licensed by the Food and Drug Administration (FDA) before they may be introduced into interstate commerce. *See* 21 U.S.C. §§ 355, 360(k), 360b, 360e. But Congress has recognized that public health emergencies often require more expeditious intervention. Thus, under the federal Food, Drug, and Cosmetic Act (FDCA), the FDA may grant an “emergency use authorization” (EUA) to a medical product, such as a vaccine. 21 U.S.C. § 360bbb-3. An EUA permits distribution of the product to the public to combat a public emergency before the product has received final FDA approval. *Id.*

When granting an EUA, the FDA is directed to set certain “conditions of authorization.” *Id.* § 360bbb-3(e)(1)(A). Those conditions ensure that “healthcare professionals administering the product” and “individuals to whom the product is administered” are “informed.” *Id.* Specifically, both healthcare professionals and individuals must be informed that the FDA “authorized the emergency use of the product” and of the “significant known and potential benefits and risks of such use,” and “the extent to which such benefits and risks are unknown.” *Id.* § 360bbb-3(e)(1)(A)(i), (ii). Individuals must also be informed “of the option to accept or refuse administration of the product, of the consequences, if

any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.” *Id.* § 360bbb-3(e)(1)(A)(ii).

The FDCA separately allows exemptions from FDA licensing requirements for “drugs intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety and effectiveness of drugs.” *Id.* § 355(i). The FDCA, however, expressly distinguishes between such “investigational” drugs and EUAs. “[I]f a product is the subject of an [EUA], the use of such product within the scope of the authorization *shall not be considered to constitute a clinical investigation[.]*” *Id.* § 360bbb-3(k) (emphasis added); *see also* 21 C.F.R. § 312.3 (defining “investigational new drug” as “a new drug or biological drug that is used in a clinical investigation”). Accordingly, EUA drugs are distinct from and subject to separate regulatory requirements than “investigational” drugs.

Separately, recognizing that public health emergencies frequently require officials to act amidst uncertainty, the Public Readiness and Emergency Preparedness Act (the PREP Act) permits the Secretary of Health and Human Services (HHS) to provide immunity to certain health care professionals tasked with responding to a designated public health emergency. 42 U.S.C. §§ 247d-6d, 247d-6e. The PREP Act authorizes the Secretary to “make a declaration . . . recommending” the use of certain “covered countermeasures” in response to what he determines to be a “public health emergency.” *Id.* § 247d-6d(b)(1). That declaration triggers immunity from suit or liability for “covered person[s],” such as manufacturers and health care professionals, for

“claims for loss” arising from administration or use of the declaration’s recommended countermeasures. *Id.* § 247d-6d(a)(1), (d)(1), (i)(2). The PREP Act establishes an exception to this immunity for “death or serious physical injury proximately caused by willful misconduct[.]” *Id.* § 247d-6d(d)(1). And it contains a narrow preemption clause providing that “no State . . . may establish . . . any provision of law or legal requirement that . . . is different from, or is in conflict with, any requirement applicable under *this section*.” *Id.* § 247d-6d(b)(8) (emphasis added). The relevant statutory section only permits the authorization, and creates immunity for the use of, “covered countermeasures[.]” 42 U.S.C. § 247d-6d.

B. The COVID-19 Pandemic and COVID-19 Vaccines

The COVID-19 pandemic was the “deadliest in American history.” *Florida v. Dep’t of Health & Hum. Servs.*, 19 F.4th 1271, 1275 (11th Cir. 2021) (quoting 86 Fed. Reg. 64996, 65519 (Nov. 19, 2021)). The highly contagious respiratory virus has caused over 1.24 million deaths in the United States.¹

In response to this health crisis, between December 2020 and February 2021 the FDA issued EUAs for three COVID-19 vaccines developed by Pfizer, Moderna, and Johnson & Johnson.² The

¹ CDC, National Center for Health Statistics, *Provisional COVID-19 Mortality Surveillance*, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> (last visited on Aug. 14, 2026).

² See also FDA, *Moderna COVID-19 Vaccine*, <https://www.fda.gov/vaccines-blood-biologics/coronavirus-covid-19-cber-regulated-biologics/moderna-covid-19-vaccine> (last visited Aug. 14, 2024); FDA, *Pfizer-BioNTech COVID-19 Vaccine*,

FDA eventually gave full approval to Pfizer’s vaccine—previously referred to as “BioNTech” and subsequently to be marketed as “Comirnaty”—for people 16 and older on August 23, 2021.³ The CDC considers the vaccines to be safe and effective in reducing the risk of severe illness or death due to COVID-19.⁴

When the FDA granted full approval to Pfizer’s Comirnaty vaccine, it also reissued the EUA for the predecessor and “identical” Pfizer vaccine that had previously been issued the EUA, BioNTech, because “there [wa]s not sufficient [Comirnaty] vaccine available for distribution” to the population “in its entirety at the time of reissuance of this EUA.” CA9.ER.0577; Pet. App. 14a. The FDA noted that Comirnaty and BioNTech share “the same formulation” and “c[a]n be used interchangeably . . . to provide the COVID-19 vaccination series” without

<https://www.fda.gov/vaccines-blood-biologics/coronavirus-covid-19-cber-regulated-biologics/pfizer-biontech-covid-19-vaccine> (last visited Aug. 14, 2024); FDA, *Janssen COVID-19 Vaccine*, <https://www.fda.gov/vaccines-blood-biologics/coronavirus-covid-19-cber-regulated-biologics/janssen-covid-19-vaccine> (last visited Aug. 14, 2024).

³ FDA, *FDA Approves First COVID-19 Vaccine* (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>; FDA, *FDA Approves Second COVID-19 Vaccine* <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-takes-key-action-approving-second-covid-19-vaccine>.

⁴ CDC, CDC Archive, *Overview of COVID-19 Vaccines* (updated May 23, 2023), <https://archive.cdc.gov/#/details?url=https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/overview-COVID-19-vaccines.html>.

presenting any safety or effectiveness concerns. Pet. App. 8a (citation omitted). Accordingly, while there are “legal distinctions” between the labels applied to these products, the FDA “exercise[ed] its enforcement discretion” not to enforce them. CA9.SER.009; CA9.ER.0399.

C. Washington State and the Federal Government Issue Vaccine Mandates in Response to the Pandemic

In response to the COVID-19 public health emergency, “[g]overnments at all levels instituted restrictions to curb the transmission of the virus.” *Slidewaters LLC v. Wash. Dep’t of Lab. & Indus.*, 4 F.4th 747, 752 (9th Cir. 2021).

In Washington State, then-Governor Jay Inslee proclaimed a state of emergency on February 29, 2020. *Id.* at 753. The Governor’s “emergency proclamation unlock[ed]” his “broad” emergency powers in “response to a disaster that threatens ‘life, health, property, or the public peace.’” *Colvin v. Inslee*, 467 P.3d 953, 962 (Wash. 2020) (quoting Wash. Rev. Code § 43.06.010(12)).

In the summer of 2021—the summer following FDA’s issuance of EUAs for three COVID-19 vaccines—a new, highly infectious COVID-19 strain called the Delta variant emerged. Delta spread like wildfire, causing Washington’s weekly COVID-19 hospitalizations to more than quadruple from July 3 to September 4, 2021.⁵ The COVID-19 vaccines,

⁵ CDC, *Corona Virus Disease 2019 (COVID-19) Hospitalization Surveillance Network (COVID-NET), COVID-NET Interactive Dashboard* (updated May 28, 2024),

however, proved highly effective against the Delta variant: According to a September 2021 CDC report (when Delta was dominant), unvaccinated people were five times more likely to contract, ten times more likely to be hospitalized with, and ten times more likely to die from COVID-19 than those who were fully vaccinated.⁶ And as the CDC explained, “[v]accines continue to reduce a person’s risk of contracting the virus that causes COVID-19, including this variant.”⁷ As of August 4, 2021, however, approximately 30% of Washington State residents eligible for vaccination (approximately 2.1 million people) remained unvaccinated.⁸

On August 9, 2021, Governor Inslee issued Proclamation 21-14, prohibiting healthcare providers, most state employees, and (later) educators from working after October 18, 2021, without being

<https://www.cdc.gov/coronavirus/2019-ncov/covidnetdashboard/de/powerbi/dashboard.html>.

⁶ CDC, Morbidity and Mortality Weekly Report (MMWR), *Monitoring Incidence of COVID-19 Cases, Hospitalizations, and Deaths, by Vaccination Status – 13 U.S. Jurisdictions, April 4–July 17, 2021* (Sept. 17, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7037e1.htm?s_cid=mm7037e1_w.

⁷ CDC, COVID-19, *Benefits of Getting a COVID-19 Vaccine* (updated Aug. 16, 2021), <https://web.archive.org/web/20211018080349/https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html>.

⁸ Proclamation of Governor Jay Inslee, No. 21-14 at 2 (Wash. Aug. 9, 2021) (COVID-19 Vaccination Requirement), <https://governor.wa.gov/sites/default/files/proclamations/21-14%20-%20COVID-19%20Vax%20Washington%20%28tmp%29.pdf>.

vaccinated against COVID-19.⁹ The Proclamation required covered employers to evaluate requests for medical and religious exemptions and provide reasonable accommodations consistent with state and federal antidiscrimination statutes.¹⁰

The federal government issued its own COVID-19 vaccination requirement for most U.S. healthcare workers. In November 2021, HHS announced that, as a condition of federal Medicare and Medicaid funding, healthcare “facilities must ensure that their staff—unless exempt for medical or religious reasons—are vaccinated against COVID-19.” *Biden v. Missouri*, 595 U.S. 87, 89 (2022) (citing *Medicare and Medicaid Programs: Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61555 (Nov. 5, 2021)). The federal mandate required covered employees to receive an initial dose of the COVID-19 vaccine by December 6, 2021. 86 Fed. Reg. 61555 (2021).

HHS found that “vaccination of healthcare workers against COVID-19 was ‘necessary for the health and safety of individuals to whom care and services are furnished.’” *Biden*, 595 U.S. at 91 (quoting 86 Fed. Reg. at 61561). This finding was based on “data showing that the COVID-19 virus can spread rapidly among healthcare workers and from them to patients, and that such spread is more likely

⁹ *Id.*; Proclamation of Governor Jay Inslee, No. 21-14.1 at 4-5 (Wash. Aug. 20, 2021) (COVID-19 Vaccination Requirement), <https://governor.wa.gov/sites/default/files/proclamations/21-14.1%20-%20COVID-19%20Vax%20Washingt%20Amendment.pdf>.

¹⁰ Proclamation of Governor Jay Inslee, No. 21-14.1 at 5-6.

when healthcare workers are unvaccinated.” *Id.* HHS concluded that “unvaccinated [healthcare staff] . . . pose a serious threat to the health and safety of patients.” *Id.*

In *Biden v. Missouri*, this Court held that the HHS Secretary did not exceed his authority in adopting the vaccination rule and that the rule was not arbitrary and capricious, and rejected various other challenges to the rule. *Id.* at 95-97. In so holding, the Court acknowledged that “COVID-19 is a highly contagious, dangerous, and . . . deadly disease[.]” that the HHS Secretary “determined that a COVID-19 vaccine mandate will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients[.]” and that “ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm.” *Id.* at 93. The Court further recognized that “it would be the ‘very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID-19.’” *Id.* (quoting *Florida*, 19 F.4th at 1288).

D. Procedural Background

1. The Employees decline the COVID-19 Vaccine

Jane Elizabeth Roberts and the eleven other Petitioners (together, the Employees) allege that they were previously employees of Respondent Shriners Hospitals for Children (Shriners) in Washington State, and their employment was terminated for refusing to be vaccinated against COVID-19 by

the Proclamation's deadline. Pet. App. 2a, 8a. The complaint provides no details regarding the reason(s) for their refusal, or whether they sought religious or medical exemptions, as the Proclamation allowed.

2. The Employees' complaint

On October 13, 2023, the Employees filed this lawsuit against Shriners, several Shriners executives, and then-Governor Inslee (in his official and individual capacities). Pet. App. 8a-9a. Their complaint raised six claims under 42 U.S.C. § 1983, alleging that Respondents: (1) unlawfully "subjected [the Employees] to investigational drug use"; (2) violated the Equal Protection Clause; (3) violated the Fourteenth Amendment's Due Process Clause; (4) violated the Spending Clause; (5) violated the unconstitutional conditions doctrine; and (6) violated the PREP Act. Pet. App. 8a-9a. The Employees also raised claims for (7) breach of contract; (8) employment torts; (9) the tort of outrage; and (10) violation of the FDCA's EUA provisions under an implied right of action theory. Pet. App. 9a. The Employees sought damages only, disclaiming any request for declaratory or injunctive relief. Pet. App. 12a. The Employees also expressly disclaimed any challenge to the authority of the State or their Employer to require them to receive an FDA-approved vaccine. CA9.ER.0463. Instead, they grounded their claims in their allegation they had been penalized for refusing to accept the administration of an emergency-use-authorization drug. CA9.ER.0463.

3. The district court dismisses all claims with prejudice

The district court dismissed all of the Employers' claims. Pet. App. 25a-26a; Pet. App. 49a. As relevant here, the district court dismissed the six § 1983 claims against Governor Inslee in his official capacity because "an official acting within his official capacity is . . . not a 'person' within the meaning of Section 1983" and the Employees sought monetary damages rather than prospective injunctive relief. Pet. App. 11a-12a. The district court also dismissed the § 1983 claims against Governor Inslee in his individual capacity on qualified immunity grounds, holding that the Employees "ha[d] not established that the Proclamation violated any clearly established constitutional or statutory rights," and thus Governor Inslee was entitled to qualified immunity on all claims raised under § 1983. Pet. App. 11a, 22a. The district court dismissed the Employees' remaining claims on the merits. Pet. App. 23a-26a. Concluding that any further amendment of the Complaint would be futile, the district court dismissed all claims against Governor Inslee with prejudice. Pet. App. 26a.

The Employees appealed the dismissal to the Ninth Circuit.

4. The Ninth Circuit's decision in *Curtis v. Inslee*

After this case was briefed and argued in the Ninth Circuit—but before any opinion issued—the Ninth Circuit decided a related case, *Curtis v. Inslee*, 154 F.4th 678 (9th Cir. 2025). Pet. App. 51a-86a. *Curtis* was filed by the same counsel as this case and

involved a nearly identical set of legal issues. The *Curtis* court affirmed the district court's dismissal of all of the plaintiffs' federal claims with prejudice. Pet. App. 77a.

Like the Employees here, the *Curtis* plaintiffs alleged a variety of claims under 42 U.S.C. § 1983 based on an "eclectic collection of statutes, an international treaty, a regulation, two agreements, a report, and constitutional doctrines and provisions." Pet. App. 58a. Specifically, like the Employees here, the plaintiffs in *Curtis* raised arguments about alleged violations of 21 U.S.C. § 360bbb-3 (EUA Statute); 10 U.S.C. § 980 (Funds Appropriated for Human Subjects); 42 U.S.C. § 247d-6 (Public Readiness and Emergency Preparedness Act); and 45 C.F.R. pt. 46 (Human Subjects in Research). Pet. App. 58a. The *Curtis* plaintiffs styled these claims as "'subjected to investigational drug use,' 'unconstitutional conditions doctrine,' equal protection, due process, and 'spending clause doctrine'" claims. Pet. App. 58a. The *Curtis* court dispensed with each of these claims because "[n]one of these claims alleges a specific and definite right enforceable by Employees under Section 1983." Pet. App. 58a.

The *Curtis* court also dismissed the plaintiffs' substantive due process claims. The *Curtis* panel recognized that substantive due process rights are "highly circumscribed," only rarely expanded, and extend to "[o]nly those aspects of liberty that we as a society traditionally have protected as fundamental." Pet. App. 67a (citing *Mullins v. Oregon*, 57 F.3d 789, 793 (9th Cir. 1995)). Citing cases dating back to 1905, the court found that "penalties for refusing

vaccination are plainly permissible” and that the Employees cannot allege a substantive due process right to refuse an investigational drug that was medically identical to an approved COVID-19 vaccine “without penalty or pressure.” Pet. App. 68a-69a (citing *Jacobson v. Massachusetts*, 97 U.S. 11, 27, 31 (1905)).

Similarly, the *Curtis* court dispensed with the plaintiffs’ various procedural due process theories, which mirror those raised by the Employees here. The Ninth Circuit applied blackletter law in holding that the plaintiffs had failed to identify any protected property interest in at-will employment. Pet. App. 70a. And the *Curtis* court reasoned that, even assuming plaintiffs had “a protected liberty interest in the refusal of unwanted administration of a drug and a protected property interest in the use of their medical licenses[,]” they failed to allege they were deprived of the requisite process. Pet. App. 70a-71a. As the court explained, “the Proclamation provided notice of the vaccination requirements and of the consequence of termination for failure to comply.” Pet. App. 71a.

The *Curtis* court rejected the plaintiffs’ Equal Protection claim under rational-basis review. Pet. App. 74a. Citing “the legitimate state interest of stemming the spread of COVID-19” and this Court’s reasoning in *Biden v. Missouri*, 595 U.S. 87, the Ninth Circuit concluded: “If there were any state action constituting differential treatment of [the plaintiffs] as a class, that action had a rational basis.” Pet. App. 75a.

The *Curtis* plaintiffs, still represented by the same counsel as the Employees here, petitioned for a writ of certiorari. While the petition was pending, the *Curtis* plaintiffs notified this Court that a cert petition had also been filed in this case, which “present[ed] identical or closely related questions of exceptional national importance.”¹¹

This Court denied certiorari in *Curtis* on June 1, 2026. *Curtis v. Inslee*, No. 25-1119, 2026 WL 1513282, at *1 (U.S. June 1, 2026).

5. The court of appeals affirms

Approximately two months after the Ninth Circuit decided *Curtis*, the same Ninth Circuit panel affirmed the dismissal of the Employees’ claims in a brief, unpublished memorandum disposition. The Ninth Circuit explained that its recent published decision in *Curtis* “forecloses each of [the Employees’] federal claims” and affirmed the district court’s dismissal. Pet. App. 3a. Those two sentences comprise the court’s entire substantive analysis of the Employees’ federal claims. The court also concluded that the Employees’ state law claims were meritless and affirmed the district court’s dismissal in full. Pet. App. 4a.

The Employees then filed this petition.

¹¹ Letter from David J. Schexnaydre, Counsel for Petitioners, to Scott Harris, Clerk of the Court (May 12, 2026), *Curtis v. Inslee*, No. 25-1119 (U.S. May 12, 2026), https://www.supremecourt.gov/DocketPDF/25/25-1119/408638/20260512125320618_2026.05.12%20SCOTUS%20Letter%20Requesting%20Review%20of%20Related%20Cases-A.pdf.

REASONS FOR DENYING THE PETITION

The Employees present no ground for this Court's intervention. Indeed, the Employees do not even seek review of the decision in this case but instead focus their entire petition on rehashing arguments against an earlier Ninth Circuit vaccine mandate decision, *Curtis v. Inslee*, which this Court already deemed unworthy of review just months ago. As with the failed petition in *Curtis*, the Employees do not and cannot demonstrate any circuit split or other important issue warranting this Court's attention because every circuit court to address this issue has upheld state COVID-19 vaccine mandates and this Court has uniformly denied review in all such cases. The Employees' novel claim that an immunity statute deprives them of due process (which they waived by failing to raise it in the district court) similarly fails to invoke any circuit split or provide any reason for this Court's review. On top of failing to provide any reason to grant review, this case presents insuperable barriers that make this a particularly ill-suited vehicle to address the questions presented.

The petition presents no reason for this Court to change course now. As it has done in case after case that challenged state vaccine mandates, this Court should deny review here.

A. The Employees Seek Review of *Curtis v. Inslee*, Which This Court Already Declined to Review

This Court should deny review here because the Employees seek review of the Ninth Circuit's decision in *Curtis*, not this case, and this Court has already denied certiorari in *Curtis* without even

requesting a response from the State. *Curtis*, 2026 WL 1513282, at *1. While the Employees argue that this case raises important and unsettled issues of federal law, their petition focuses entirely on the decision in *Curtis*. Pet. 18, 19, 22, 23, 25, 26 (“The *Curtis* panel relied exclusively on . . .”); (“The *Curtis* panel extended . . .”); (“The *Curtis* panel held . . .”); (“The *Curtis* panel invented . . .”); (“The *Curtis* panel did not . . .”); (“The *Curtis* panel held . . .”); (“This Court foreclosed the *Curtis* panel’s reasoning . . .”); (“The *Curtis* panel did . . .”). The Employees’ only reference to the court of appeals decision in *this* case is a single sentence and footnote stating that the same court of appeals panel that decided *Curtis* also decided this case based on its decision in *Curtis*. Pet. 7 & n.1. But the Petition here otherwise rehashes the same arguments this Court already determined were not worthy of review. This Court should not allow this second attempt at seeking review of *Curtis* through a petition filed in this case.

But even in the unlikely scenario that this Court would reconsider reviewing *Curtis*, the Employees grossly mischaracterize that decision to manufacture a basis for review here. While the Employees’ Petition creates an impression that the *Curtis* court analyzed the federal statutes and agreements cited by the Employees to conclude that those laws did not preempt state law, in truth, the *Curtis* court dismissed most of the federal claims in that case because none of the cited statutes created “a specific and definite right enforceable by Employees under Section 1983.” Pet. App. 58a. The Employees do not even seek review of that obviously correct decision. See Pet. i (Questions Presented); Rule 14(1)(a) (“Only

the questions set out in the petition, or fairly included therein, will be considered by the Court.”).

The Employees now seek to dress up their statutory arguments as a substantive due process claim, but neither the *Curtis* plaintiffs nor the Employees clearly argued below that they had a fundamental substantive due process right to reject an investigational drug that is medically identical to an approved vaccine, as the Employees now argue here. Appellants’ Reply Br. at 10-11, 18, *Roberts v. Inslee*, No. 24-1949 (9th Cir. Oct. 24, 2024), ECF No. 31.1; Pet. i (Questions Presented); 22-25. The court rejected the *Curtis* plaintiffs’ substantive due process claim because “the right to refuse a vaccine is not inviolate[.]” and thus does not implicate a fundamental right under longstanding precedent dating back to the early 1900s. Pet. App. 68a. While the Employees here take issue with the *Curtis* panel’s reliance on *Jacobson v. Massachusetts*, 197 U.S. 11, 21, 26 (1905); and *Zucht v. King*, 260 U.S. 174, 175 (1922) for this point, nowhere do the Employees even attempt to argue that a right to refuse a vaccine without repercussion is “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty,” as required to demonstrate a substantive due process right. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation omitted). The federal statutes the Employees cite have no bearing on this question or the *Curtis* decision.¹²

¹² The court below rejected the Employees’ statutory claims without reaching their merits, Pet. App. 58a, so Governor Ferguson does not address those claims here, other than to note

The Employees’ second question presented similarly has nothing to do with the actual *Curtis* decision. The Employees ask this Court to determine whether the PREP Act’s immunity clause, 42 U.S.C. § 247d-6d(a)(1), “extinguishes the right to access courts” in violation of the Fourteenth Amendment. *See* Pet. i (Question Presented). But the *Curtis* panel never cited PREP Act immunity to dismiss the plaintiffs’ claims or to prevent the plaintiffs’ access to courts. To the contrary, *Curtis* noted the very existence of plaintiffs’ lawsuit and appeal disproved its claim, holding that “[e]mployees cannot allege a deprivation of their ability to bring suit, as they have had an opportunity to be heard in this action.” Pet. App. 70a. The Employees’ arguments about whether PREP Act immunity unconstitutionally extinguishes property rights is a purely hypothetical question that has nothing do with the *Curtis* decision, and which on its face is highly improbable given the plethora of long-standing immunity statutes in federal and state law.

In short, this Court should not reconsider its decision denying certiorari in *Curtis*, especially given the Employees’ mischaracterizations of the legal questions implicated in that decision.

B. There is No Circuit Split

The Employees do not allege any conflict among circuit court opinions that this Court should resolve, and wisely so. On a broad level, courts across

strong disagreement with the Employees’ interpretations. *See, e.g.,* Pet. App. 14a (district court concluding available vaccines were not “investigational”).

the country have consistently followed *Jacobson v. Massachusetts*, 197 U.S. 11, and its progeny in upholding the legality of COVID-19 vaccine mandates.¹³ *E.g.*, *Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 1112 (2022); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 293 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021), *cert. denied sub nom Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022); *Child.’s Health Def., Inc. (CHDI) v. Rutgers, the State Univ. of N.J.*, 93 F.4th 66, 78 (3d Cir. 2024), *cert. denied*, 144 S. Ct. 2688 (2024); *Antunes v. Becerra*, No. 22-2190, 2024 WL 511038, at *1 (4th Cir. Feb. 9, 2024), *cert. denied*, 145 S. Ct. 159 (2024); *Klaasen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021); *Norris v. Stanley*, 73 F.4th 431 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 1353 (2024); *Curtis v. Inslee*, 154 F.4th 678 (9th Cir. 2025), *cert. denied*, 2026 WL 1513282 (U.S. June 1, 2026). This Court denied certiorari in every one of these cases where it was sought, including most recently in June 2026 when the Court denied cert of a nearly identical case to that presented here. The Employees do not provide any argument for why the Court should now chart a new course.

The Employees argue that *Jacobson* is not applicable because unlike in that case, federal law preempts the vaccine mandate. Pet. 18. But as

¹³ At least one circuit court opinion has invalidated a COVID-19 vaccine requirement, but that opinion addressed a specific policy that the court determined was motivated by religious animus, discriminated among religions, and improperly questioned the sincerity of religious views—all factors not relevant here. *Does 1-11 v. Bd. of Regents of Univ. of Colo.*, 100 F.4th 1251, 1256-57 (10th Cir. 2024).

explained above, these statutes have no bearing on whether this Court should recognize a new fundamental right for substantive due process purposes. *See supra* pp. 17-18. In any event, the Employees do not allege any conflict on this point because there is no conflict. *See, e.g., CHDI*, 93 F.4th at 75-76 (rejecting claim that EUA statute preempted vaccine mandate); *Norris*, 73 F.4th at 438 (same); *Curtis*, 154 F.4th at 690 (holding that alleged federal preemption by EUA statute and PREP Act cannot be the basis of a Section 1983 claim).

And although the Employees' petition and questions presented do not appear to seek review of the Ninth Circuit's rejection of their 1983 claims, their criticism of the lower court's reasoning mischaracterizes the ruling and fails to identify any conflict on this issue. The Ninth Circuit applied well-settled law in concluding that nearly all of the grab bag of statutes, treaties, regulations, and constitutional provisions on which the Employees base their claims do not provide a cause of action under Section 1983, even if the Employees' statute-based arguments were not meritless. For example, the Ninth Circuit correctly observed that "[t]he Supremacy Clause itself 'is not a source of any federal rights' enforceable under Section 1983." *Curtis*, 154 F.4th at 690 (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989)). Similarly, the Ninth Circuit applied settled law from this Court in determining that the EUA statute, the PREP Act, and other statutes cited by the Employees did not create a "private right that is enforceable under Section 1983." *Curtis*, 154 F.4th at 687-90 (citing *Health & Hosp. Corp. of Marion Cnty. v.*

Talevski, 599 U.S. 166, 183 (2023); *Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357 (2025); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)). The Employees identify no circuit court opinions to the contrary, and the State is aware of none.

There is no conflict justifying this Court’s review.

C. This Case is a Poor Vehicle for Addressing the Issues Presented

In addition to all the other problems with the Employees’ petition, this case is also an exceptionally poor vehicle for addressing the questions presented because the Employees waived many of the arguments raised in their petition and all their claims are independently barred by the doctrine of qualified immunity. Thus, even if this Court reached the merits of the questions presented, it would have no impact on the outcome of this case.

To start, the Employees waived a number of their arguments by failing to make those arguments to the district court. For example, the Employees never argued to the district court that 21 U.S.C. § 360bbb-3(1) means that “Congress prohibited the Secretary—the federal official who declares the emergency, issues the authorization, and administers the entire EUA framework—from requiring any person to participate” in vaccinations. Pet. 13, 18; CA9.ER.203-33, 240-50, 330-81. Nor did the Employees argue to the district court that, “[b]y conditioning Petitioners’ continued employment on acceptance of a PREP Act-covered countermeasure, Respondents triggered the Act’s sweeping immunity provisions and thereby extinguished Petitioners’

protected property interest in any federal or state cause of action for injuries caused by the drug or its administration.” Pet. 32; *see also* CA9.ER.203-33, 240-50, 330-81. Similarly, the Employees never argued to the district court that “[t]he PREP Act strips nearly all State-law remedies from individuals who receive a covered countermeasure.” Pet. 34-35; CA9.ER.203-33, 240-50, 330-81. The Employees have forfeited many of the arguments they now ask this Court to review.

The Employees’ claims against Governor Ferguson are also independently barred by qualified immunity. This bar was the basis of the district court opinion below and is plain on the face of the Employees’ petition. *See* Pet. App. 9a (granting motion to dismiss based on qualified immunity). To overcome a defense of qualified immunity, the Employees must demonstrate both a constitutional violation *and* that the constitutional right was clearly established at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). But the very fact that the Employees seek review of the *Curtis* decision—a final Ninth Circuit decision holding that similarly situated hospital employees had no due process right to decline the COVID-19 vaccine without repercussions—demonstrates that the due process rights the Employees assert here were not “clearly established” at the time of the alleged conduct. Indeed, both *Curtis* and the Employees’ petition cite cases dating back to 1905 and 1922, including *Jacobson*, 197 U.S. at 26, *Zucht*, 260 U.S. at 175, and *Health Freedom Defense Fund, Inc. v. Carvalho*, 148 F.4th 1020, 1029 (9th Cir. 2025) (en banc), which affirmed various penalties against individuals for refusing vaccines. Pet.

App. 68a; Pet. 18. These cases confirm that the rights the Employees assert here were not “clearly established” at the relevant time period. And because this Court can “quickly and easily decide that there was no violation of clearly established law[,]” *Pearson*, 555 U.S. at 239, there would be no reason to address whether the constitutional rights existed in the first instance. But even if the Court did so anyway, it would have no impact on the outcome here because the Employees cannot overcome qualified immunity.

Nothing about this case warrants this Court’s intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

NICHOLAS W. BROWN
Attorney General

NOAH G. PURCELL
Solicitor General

TERA HEINTZ
Deputy Solicitor General
Counsel of Record

PETER B. GONICK
Deputy Solicitor General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200

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