

No. 25-765

---

IN THE

**Supreme Court of the United States**

---

HEALTH FREEDOM DEFENSE FUND, INC.,

*Plaintiffs-Appellants,*

v.

ALBERTO CARVALHO,

in his official capacity as Superintendent  
of the Los Angeles Unified School District, *et al.*,

*Defendants-Appellees.*

---

**On Petition for a Writ of Certiorari to the  
U.S. Court of Appeals for the Ninth Circuit**

---

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

---

John J. Vecchione

*Counsel of Record*

Christian Clase

Markham Chenoweth

NEW CIVIL LIBERTIES ALLIANCE

4250 N. Fairfax Dr., Suite 300

Arlington, VA 22203

(202) 869-5210

[John.vecchione@ncla.legal](mailto:John.vecchione@ncla.legal)

*Counsel for Amicus Curiae*

---

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
BACKGROUND .....	3
SUMMARY OF THE ARGUMENT .....	6
ARGUMENT .....	8
I.    THE <i>EN BANC</i> NINTH CIRCUIT COURT OF APPEALS MISAPPLIED <i>JACOBSON V. MASSACHUSETTS</i> .....	8
A.    The <i>En Banc</i> Court Erroneously Held that <i>Jacobson</i> Applied Rational Basis Review to Massachusetts's Smallpox Vaccine Mandate .....	8
B.    The <i>En Banc</i> Court Ignored that <i>Jacobson</i> Is Inapplicable When the Relevant Medical Intervention Does Not Protect Third Parties .....	10
C.    The <i>En Banc</i> Court Failed to Reconcile <i>Jacobson</i> with this Court's Subsequent Decisions Protecting a Right to Decline Unwanted Medical Care .....	14
II.    THIS CASE IS THE IDEAL VEHICLE FOR THIS COURT TO SETTLE THE IMPORTANT QUESTION OF <i>JACOBSON'S</i> SCOPE .....	18
A.    The Proper Scope of the <i>Jacobson</i> Decision Is an Important Federal Question that Will Recur Until Resolved by this Court .....	19

B. Lower Courts Nationwide Have Consistently Misapplied <i>Jacobson</i> , and this Case Presents an Ideal Vehicle for this Court to Clarify the Decision	21
CONCLUSION .....	23

## TABLE OF AUTHORITIES

### Cases

<i>Buck v. Bell</i> ,	18
274 U.S. 200 (1927) .....	18
<i>Cruzan by Cruzan v. Director, MO Dep’t of Health</i> ,	
497 U.S. 261 (1990) .....	5, 9, 14, 15, 17
<i>Dobbs v. Whole Women’s Health Organization</i> ,	
597 U.S. 215 (2022) .....	9
<i>FCC v. Beach Commc’ns, Inc.</i> ,	
508 U.S. 307 (1993) .....	9
<i>Health Freedom Def. Fund, Inc. v. Carvalho</i> ,	
104 F.4th 715 (9th Cir. 2024) .....	3, 4, 5, 11, 21, 22, 23
<i>Health Freedom Def. Fund, Inc. v. Carvalho</i> ,	
No. 22-55908, 2025 WL 2167401	
(9th Cir., July 31, 2025) .....	5, 10, 11, 12, 13, 17
<i>In re Cincinnati Radiation Litigation</i> ,	
874 F. Supp. 796 (S.D. Ohio 1995) .....	9
<i>Jacobson v. Massachusetts</i> ,	
197 U.S. 11 (1905) .....	2, 6, 9, 10, 11, 12, 13, 14
<i>Kheriaty v. Regents of the Univ. of Cal.</i> ,	
No. 22-55001, 2022 WL 17175070	
(9th Cir. Nov. 23, 2022) .....	6
<i>Korematsu v. U.S.</i> ,	
323 U.S. 214 (1944) .....	18
<i>Mills v. Rogers</i> ,	
457 U.S. 291 (1982) .....	15

<i>Norris v. Stanley</i> ,	
73 F.4th 431 (6th Cir. 2023) .....	21
<i>Norris v. Stanley</i> ,	
No. 1:21-cv-756, 2022 WL 557306 (Feb. 22, 2022).....	2
<i>Rodden v. Fauci</i> ,	
571 F.Supp.3d 686 (S.D.Tex., 2021) .....	2
<i>Roman Cath. Diocese of Brooklyn v. Cuomo</i> ,	
592 U.S. 14 (2020) .....	6, 8, 19, 20
<i>Schloendorff v. Soc'y of N.Y. Hosp.</i> ,	
211 N.Y. 125 (1914).....	15
<i>Schmerber v. California</i> ,	
384 U.S. 757 (1966) .....	16
<i>Stewart v. Walz</i> ,	
No. 25-cv-01330, 2025 WL 344570	
(D. Minn. Dec. 1, 2025) .....	3
<i>Union Pacific R. Co. v. Botsford</i> ,	
141 U.S. 250 (1891) .....	14
<i>Washington v. Glucksberg</i> ,	
521 U.S. 702 (1997) .....	8, 9, 15, 16
<i>Washington v. Harper</i> ,	
494 U.S. 210 (1990) .....	16
<i>West Virginia v. EPA</i> ,	
597 U.S. 697 (2022) .....	22
<i>Williamson v. Lee Optical</i> ,	
348 U.S. 483 (1955) .....	9
<i>Zywicki v. Washington, et al.</i> ,	
No. 1:21-cv-00894 (E.D. Va. Aug. 20, 2021) .....	2

## Other Authorities

Caltech, <i>Fighting Viruses: How Do Vaccines Work?</i> <a href="https://scienceexchange.caltech.edu/topics/covid-19-coronavirus-sars-cov-2/vaccines">https://scienceexchange.caltech.edu/topics/covid-19-coronavirus-sars-cov-2/vaccines</a> .....	4
CM Brown, <i>et al.</i> , <i>Outbreak of SARS-CoV-2 Infections, Including COVID 19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings—Barnstable County, Massachusetts, July 2021</i> , MMWR Morb. Mortl. Wkly. Rep. 2021; 70:1059-62 (Aug. 6, 2021) .....	14
Jamal Greene, <i>The Anticanon</i> , 125 Harv. L. Rev. 379 (2011) .....	18
John Locke, <i>The Two Treatises of Government</i> (Hollis ed. 1689) .....	14
Josh Blackman, <i>The Irrepressible Myth of Jacobson v. Massachusetts</i> , 70 Buff. L. Rev. 131 (2022) .....	8, 9, 20
Madeline Holcomb and Christina Maxouris, <i>Fully Vaccinated People Who Get a Covid-19 Breakthrough Infection Transmit the Virus</i> , CDC Chief Says, CNN Health (Aug. 6, 2021) <a href="https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday">https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday</a> .....	13
Richard A. Primus, <i>Canon, Anti-Canon, and Judicial Dissent</i> , 48 Duke L.J. 243 (1998) .....	18

## Rules

S. Ct. R. 10(a) .....	21
-----------------------	----

S. Ct. R. 37.6 .....	1
S. Ct. Rule 10(c) .....	18

## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

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 that the Constitution was

---

<sup>1</sup> 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 brief on January 14, 2026.

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 even a vaccine mandate for employees 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 *Rodden v. Fauci*, 571 F.Supp.3d 686 (S.D.Tex., 2021) (putative class action).

NCLA is particularly concerned by aspects of the *en banc* Ninth Circuit's decision 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 344570 (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 *en banc* court's plain misapplication of *Jacobson*.

## BACKGROUND

During the Covid pandemic, the Los Angeles Unified School District (LAUSD) required its employees to receive a Covid-19 vaccine or lose their jobs.<sup>2</sup> After the Plaintiffs sued, the district court granted the Defendants' motion for judgment on the pleadings. A three-judge panel of the Ninth Circuit reversed. But the Ninth Circuit granted rehearing *en*

---

<sup>2</sup> The policy went through several iterations while it lasted, but the precise details of each are not relevant here. That said, LAUSD consistently manipulated the policy to evade review by the courts. *See Health Freedom Def. Fund, Inc. v. Carvalho*, 104 F.4th 715, 721-23 (9th Cir. 2024). In one particularly egregious example of this evasion, LAUSD withdrew the policy mere days after it faced “vigorous[] question[ing]” at oral argument before a Ninth Circuit panel and then argued that the rescission mooted the case. *Id.* Petitioners suggested LAUSD “withdrew the Policy because they feared an adverse ruling.” *Id.* The panel agreed, holding that case was not mooted because LAUSD had twice “withdrawn its policy only after facing some litigation risk” and that the recent withdrawal appeared “motivated, at least in part, by litigation tactics.” *Id.* at 723.

*banc*, and the *en banc* court then affirmed the district court. The present petition followed the *en banc* court’s decision.

The panel’s decision was limited and proper. The panel did not hold that *Jacobson* lacks relevance to the question of whether a vaccine mandate is constitutional or even that *Jacobson* did not govern the inquiry. It merely held that that the claims in the Plaintiffs’ complaint survived a motion to dismiss because, when taken as true (as they must be at this stage), the case is distinguishable from *Jacobson*. *See Health Freedom Def. Fund*, 104 F.4th at 725 (“Plaintiffs have plausibly alleged that the Covid-19 vaccine does not effectively ‘prevent the spread’ of Covid-19. Thus, *Jacobson* does not apply”); *see also id.* at 728 (Collins, J., concurring) (“Plaintiffs’ allegations here are sufficient to invoke that fundamental right [to refuse medical treatment.]”). The panel correctly cabined *Jacobson* to mandatory vaccinations that stop transmission and therefore provide a benefit to third parties.<sup>3</sup> In contrast, when vaccinations (or other medical interventions) benefit primarily the recipient, mandates like LAUSD’s implicate a fundamental liberty interest that tends to outweigh government’s interests. *See Cruzan by Cruzan v. Director, MO Dep’t of Health*, 497 U.S. 261, 278-79 (1990). Not only did the panel correctly interpret *Jacobson*, but it also reconciled that case with a “distinct and more recent line of Supreme Court authority” which has been protective of the right to refuse medical treatment, a

---

<sup>3</sup> The smallpox vaccine at issue in *Jacobson* was a “sterilizing” vaccine. That is, it removes the active virus from the vaccinated person so he can no longer spread it to others. Caltech, *Fighting Viruses: How Do Vaccines Work?* <https://scienceexchange.caltech.edu/topics/covid-19-coronavirus-sars-cov-2/vaccines>. As noted for such viruses, those who survive infections also have such non-spreadable immunity. *Id.*

deeply rooted right that has been ignored by numerous lower courts. *See Health Freedom Def. Fund*, 104 F.4th at 728 (Collins, J., concurring).

The *en banc* Ninth Circuit improperly reversed course. Unlike the panel, the *en banc* court ignored *Jacobson*'s explicit limits and subsequent caselaw from this Court recognizing a liberty interest in refusing medical treatment. "Whatever the reach of these cases" the *en banc* court said, "they did not overrule *Jacobson*" and "*Jacobson* remains binding and squarely governs this case[.]" *Health Freedom Def. Fund, Inc. v. Carvalho*, No. 22-55908, 2025 WL 2167401, at \*10 (9th Cir. July 31, 2025). And because the *en banc* court held that *Jacobson* "squarely" governed, it then applied rational basis review (unlike *Jacobson*, which weighed the plaintiff's substantial liberty interests) and upheld LAUSD's vaccine mandate. *Id.* at \*8, 10.

## SUMMARY OF THE ARGUMENT

Throughout the Covid-19 pandemic, courts wrongly—with little, no, or misguided analyses—held that under *Jacobson v. Massachusetts*, virtually all public-health measures adopted during a pandemic 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?”). 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 decision in *Buck v. Bell*, which relied exclusively on the *Jacobson* precedent.

The *en banc* Ninth Circuit below exemplified the widespread misapplication of *Jacobson*, misinterpreting it in three different ways. The court’s holdings were especially egregious, as the panel decision had correctly interpreted and applied *Jacobson*. Unfortunately, the *en banc* court’s errors were not novel. 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 wide-spread misunderstanding of *Jacobson* which allows the infringement of American’s rights when the government labels some medicine a “vaccine” whether it protects third-parties or not.

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

## ARGUMENT

### I. THE *EN BANC* NINTH CIRCUIT COURT OF APPEALS MISAPPLIED *JACOBSON V. MASSACHUSETTS*

#### A. The *En Banc* Court 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.<sup>4</sup>

---

<sup>4</sup> 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 deduced from abstract concepts of personal autonomy.” *Id.* at 725; *see Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 277 (1990) (“the common-law doctrine of informed consent is viewed as

*Jacobson* required the government to 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. 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) (explaining that, although *Jacobson* upheld compulsory vaccination, it had done so while “acknowledg[ing] that an aspect of fundamental liberty was

---

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 or abortion. *Glucksberg*, 521 U.S. at 723 (suicide); *Dobbs v. Whole Women’s Health Organization*, 597 U.S. 215, 231 (2022) (abortion).

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 *en banc* court erred then when it held that *Jacobson* required rational basis review of LAUSD’s vaccine mandate. *See Health Freedom Def. Fund*, 2025 WL 2167401, at \*10 (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 *en banc* court held otherwise. *Health Freedom Def. Fund*, 2025 WL 2167401, at \*8. That holding ignored *Jacobson*’s precise language. *See Jacobson*, 197 U.S. at 32 (holding that the vaccine mandate must bear a “real or substantial relation” to the end sought by the legislature) (emphasis added).

**B. The *En Banc* Court Ignored that *Jacobson* Is Inapplicable When the Relevant Medical Intervention 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*, 104 F.4th at 725 (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*, 2025 WL 2167401, at \*14 (explaining that the Supreme Court “upheld Massachusetts’ vaccine requirement against

smallpox precisely because the vaccine prevented the transmission and contraction of smallpox” (Lee, J., dissenting).

*Jacobson* did not vindicate every subsequent vaccine mandate. 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 *en banc* Ninth Circuit ignored *Jacobson*’s proper limits, endorsing the broad reading the decision rejected. In the *en banc* court’s view, *Jacobson* permits government actors to mandate vaccination *carte blanche*. The court held that *Jacobson* authorizes vaccine mandates—even where mandates benefit *only* the recipient—whenever “policymakers could reasonably conclude” the mandate would improve the “public’s health[.]” *Health Freedom Def.*

*Fund*, 2025 WL 2167401, at \*9. This expansive reading of *Jacobson* lacks a limiting principle, and it would allow the government to mandate *any* health intervention. *See id.* at 12 (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'"') (Lee, J., dissenting). 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 the law. As discussed, *Jacobson* limited its applicability to vaccines that prevent the *transmission* of a particularly deadly contagious disease. The smallpox vaccine is a sterilizing vaccine, meaning that it stops transmission to third parties. The Covid-19 vaccines are not sterilizing vaccines, so they do not stop transmission to third parties. *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.* at 35 (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 *en banc* court should have adhered to *Jacobson*'s limiting principle: government may mandate vaccination only where that intervention provides a significant benefit to third parties. *See Health Freedom Defense Fund, Inc.*, 2025

WL 2167401, at \*12 (*Jacobson* applies “only if a vaccine prevents transmission and contraction of a disease.”). Additionally, as was true in *Jacobson*, the disease in question must be particularly dangerous, and the relevant vaccine must be effective in preventing transmission to other members of the community. Whatever may be said of the danger Covid presents, it is beyond dispute that Covid vaccines do not prevent transmission.

The *en banc* court erred then when it “reject[ed] Plaintiffs’ attempt to limit *Jacobson* to only those vaccines that prevent the spread of disease and provide immunity.” *Health Freedom Def. Fund*, 2025 WL 2167401, at \*8. In its view, “*Jacobson* required no such findings.” *Id.* But 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.<sup>5</sup> Because the Covid vaccines do not prevent transmission to third parties, *Jacobson* plainly does not control here.

---

<sup>5</sup> See Madeline Holcomb and Christina Maxouris, *Fully Vaccinated People Who Get a Covid-19 Breakthrough Infection Transmit the Virus, CDC Chief Says*, CNN Health (Aug. 6, 2021) <https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday> (last visited Jan. 28, 2026); CM 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*, MMWR 2021; 70:1059-62 (Aug. 6, 2021), <https://pubmed.ncbi.nlm.nih.gov/34351882/> (last visited Jan. 28, 2026).

### **C. The *En Banc* Court Failed to Reconcile *Jacobson* with this Court’s Subsequent Decisions 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 Pacific 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 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 703. It is “instead grounded in the Nation’s history and traditions, given 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 703.

The right to refuse unwanted medical treatment “ordinarily outweighs any countervailing state interests.” *Cruzan*, 497 U.S. at 273. 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 Cruzan*, 497 U.S. at 273 (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. *Glucksberg*, 521 U.S. at 723 (“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.<sup>6</sup>

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.”). As stated, *Jacobson*

---

<sup>6</sup> *See* Footnote 5.

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*. 497 U.S. at 273.

The *en banc* court's improper view of *Jacobson*'s preeminence caused it to improperly disregard *Cruzan* and *Glucksberg*, where this Court explicitly identified a liberty interest in declining unwanted medical treatment. In the *en banc* court's view, *Cruzan* and *Glucksberg* "did not overrule *Jacobson*," and "*Jacobson* ... squarely governs this case." *Health Freedom Def. Fund, Inc.*, 2025 WL 2167401, at \*10. However, *Jacobson* "governs" only where the vaccine at issue obviously protects third parties—the vaccine here does no such thing. *Jacobson* is therefore not dispositive. Nor is it relevant whether *Glucksberg* or *Cruzan* overruled *Jacobson* (they did not).

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. The *en banc* court conspicuously failed to address that question due to its broad, unconstrained view of the medical interventions *Jacobson* authorizes. But that view is improper, as it cannot be reconciled with *Cruzan* and *Glucksberg*. These decisions require that a court weighs the individual's liberty interests when it considers the propriety of a mandated medical intervention. The *en banc* court erred when it failed to weigh that interest.

Finally, insofar as *Jacobson* cannot be reconciled with subsequent case law (which it easily can be), the Court should be cautious about expanding it outside its historical bounds. The decision's direct progeny is part of the Supreme Court's notorious anti-canonical.<sup>7</sup> See Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 Duke L.J. 243, 303 (1998). The Court has relied on *Jacobson*'s reasoning exactly once—to justify its decision in *Buck v. Bell*, which infamously endorsed sterilizing a mentally ill woman. 274 U.S. 200, 207 (1927). Such poor company does not invalidate *Jacobson* itself. But one should be wary of reading the decision broadly or, worse yet, imagining that it definitively resolved all future mandatory-vaccination legal disputes.

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

Review is proper here to clarify *Jacobson*'s own internal limits and the limits imposed by this Court's subsequent decisions. See S. Ct. Rule 10(c). Lower courts have continually applied *Jacobson* in a manner divorced from the decision's narrow rationale. They have also applied the decision in a manner incompatible with subsequent decisions by this Court in *Cruzan* and *Glucksberg*.

Some of these errors may be attributable to this Court, as it has never clearly articulated *Jacobson*'s own limits. Nor has this Court explained how *Jacobson*'s contours fit alongside subsequent decisions like *Cruzan* and *Glucksberg*.

---

<sup>7</sup> "Anti-Canon" are cases like the recently abandoned *Korematsu v. U.S.*, 323 U.S. 214 (1944), that are notoriously wrong but not overruled. See Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 399 (2011).

Moreover, leaving the *en banc* court’s decision intact—which overturned the panel’s correct application of *Jacobson*—would dangerously signal to other courts that the *en banc* court correctly applied *Jacobson*.

This case 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 turns only on the *Jacobson* question. For these reasons—and because the case comes to this Court outside the understandably fraught timeframe of the recent pandemic—review by this Court is proper and necessary to settle this important question of federal law.

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

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, 502 U.S. at 17-19, the *en banc* court’s decision demonstrates 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 as Covid demonstrated, when the next crisis arises, courts will unearth the decision and use it to justify endless cases of unconstitutional government excess.

As discussed, the *en banc* court’s decision, and numerous other decisions like it, are easily applied to other contexts. For example, broad readings of *Jacobson* seemingly authorize the government to enforce *any* medical mandate subject to mere rational basis review. *Supra*, at 12. That cannot be the law. But this Court’s failure to review the *en banc* court’s decision today 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 of the *en banc* court 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 for This Court to Clarify the Decision**

The *en banc* court’s errors are not unique. Courts nationwide have misread *Jacobson*’s narrow holding, applied the improper level of review, and failed to read *Jacobson* in light of decisions like *Cruzan* and *Glucksberg*. *See Health Freedom Defense Fund, Inc.*, F.4th at 1029 (collecting cases). Given the near unanimity with which circuit courts have misread *Jacobson*, *id.*, guidance by this Court is necessary to return *Jacobson* to its proper bounds, prevent further government mischief, and ensure redress of injuries for litigants nationwide.<sup>8</sup>

Of course, some courts—like the Ninth Circuit panel below—have gotten it right. The panel properly recognized

---

<sup>8</sup> Although this Court often grants review when circuit courts are split on an important question of federal law, Sup. 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, as this Court’s own decision in *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 Defense 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 (“absent any indication from the Court that *Jacobson* is to be overruled or limited, we are bound to apply that decision[.]”).

*Jacobson*'s internal limits. *Health Freedom Defense Fund*, 104 F.4th at 725 ("The district court thus erred in holding that *Jacobson* extends beyond its public health rationale."). And by identifying that *Jacobson* cabins itself to a "public health rationale," *id.*, the panel's decision squares easily with this Court's subsequent decisions in *Cruzan* and *Glucksberg*. *See Supra*, at 17.

Were this Court to deny review, it would strongly signal that the *en banc* court's approach was correct. And due to the limitless rationale employed by the *en banc* court, one can be certain that this Court's tacit endorsement of that decision would reverberate throughout the lower courts. That result promises to undermine Americans' constitutionally protected freedoms in numerous other contexts. So, to preclude that troubling outcome, this Court must grant review and clarify that the vacated panel opinion below correctly specified *Jacobson*'s limits.

That said, the *en banc* court got one thing right—it recognized that this case squarely presents the *Jacobson* question. *See Health Freedom Defense Fund, Inc.*, F.4th at 1026-28. Even though the pandemic has ceased and the relevant policy has been rescinded, the panel and *en banc* court agreed that the case was not moot and judicial review of the underlying merits was proper. *Id.* The courts' views are consistent with this Court's decisions that have reviewed government action despite the relevant policy no longer being in effect. *West Virginia v. EPA*, 597 U.S. 697, 718-720

(2022). Neither the litigants nor the lower courts have identified any other procedural issues. So, the only relevant question is whether the *en banc* court properly applied the *Jacobson* decision. *See Pet.* at (i) (Questions Presented).

## CONCLUSION

The petition should be granted.

Respectfully submitted,

/s/ John J. Vecchione

John J. Vecchione

*Counsel of Record*

Christian Clase

Markham Chenoweth

NEW CIVIL LIBERTIES ALLIANCE

4250 N. Fairfax Drive, Suite 300

Arlington, VA 22203

*Counsel for Amicus Curiae*