No. 25-765

IN THE

Supreme Court of the United States

HEALTH FREEDOM DEFENSE FUND INC., *et al.*,

Petitioners,

v.

ALBERTO CARVALHO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This petition asks the Court to correct the widespread misinterpretation of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), a case that, like other cases decided during the early twentieth century—including the pro-eugenics decision in *Buck v. Bell*, 274 U.S. 200 (1927)—had been confined to the dustbin of history before the COVID-19 pandemic. The Ninth Circuit's en banc panel treated *Jacobson* as a bedrock piece of constitutional law. Unlike the panel majority, it refused to reconcile *Jacobson* with this Court's substantial bodily integrity canon, including *Cruzan v. Director of Missouri Department of Health*, 497 U.S. 261 (1990), and *Washington v. Glucksberg*, 521 U.S. 702 (1997), both of which recognized the nation's long history of protecting a right to reject unwanted medical treatment. It held that, when the government orders a person to take a shot, even a shot that does not prevent infection (and thus does not qualify as a "vaccine" under the federal definition), *Jacobson* controls and triggers rational basis review. In modern constitutional parlance, that means the government always wins, even without the presentation of evidence.

I THE NINTH CIRCUIT ERRED IN APPLYING *JACOBSON* WITHOUT CONSIDERING *CRUZAN* AND OTHER PARTS OF THIS COURT'S "BODILY INTEGRITY" CANON

As we explained in the petition, the Ninth Circuit erred in construing *Jacobson* that way. Not every error justifies review, of course. But this one comes from an en banc panel of the nation's largest circuit court, a panel that disregarded its own prior interpretation of *Jacobson* from *Glucksberg*. This is the only court that can reconcile *Jacobson* with the unwanted medical

treatment decisions in *Cruzan, Glucksberg* and *Sell v. United States*, 539 U.S. 166 (2003), among others in the Court's bodily integrity canon.

Respondents did not show otherwise. They accuse Petitioners of seeking to overrule *Jacobson*. They are wrong. Petitioners seek to *reconcile Jacobson* with the Court's other bodily integrity cases. Indeed, far from demanding that *Jacobson* be overruled, the petition explained how courts viewed *Jacobson* until the COVID-19 pandemic, uniformly describing it as involving a "balancing" test, and how the lower courts have erroneously veered from that interpretation since 2020. Pet. at 9-14.

Respondents also contend that "this Court has never adopted the broad, overarching fundamental right to bodily integrity that Petitioners claim." Opp. Cert. at 25. They are wrong. The Court has long recognized that "[n]o 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 and interference of others." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). These principles of privacy and personal autonomy are "embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives." *Dobbs v. Jacobson Women's Health Org.*, 597 U.S. 215, 365 (2022) (Breyer, Sotomayor and Kagan, JJ., dissenting). Thus, in America, "we do not believe that a government controlling all private choices is compatible with a free people." *Id.*[1]

[1] To the extent Respondents argue that bodily autonomy only includes the right to reject forced medication in an institutional setting, they are wrong. Such cases "usually arise in the context

That is especially important in situations like this, which involved the highly politicized issue of vaccination. Constitutional law exists "to shield individual actions and decisions 'from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" *Id.* at 389 (quoting *West Va. Bd. Of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)); *see also Olmstead v. United States*, 277 U.S. 438, 474-75 (1928) (Brandeis, J., dissenting) (explaining that "the very essence of constitutional liberty" extends to those "privacies of life" that have "never been forfeited by [a person's] conviction of some public offense" (quotations omitted)).

Jacobson recognized that. That is why the Court required that the City of Cambridge present *evidence* to support its public health rationale. That is why it *balanced* the evidence of that public health benefit against the severity of the intrusion on Mr. Jacobson's interest in bodily autonomy. And that is why, given the limited intrusiveness—notably, the $5 fine that Jacobson could have paid to maintain his autonomy—it found the balance to favor the government. *Jacobson*, 197 U.S. at 37-38. The Court also followed those principles in *Cruzan* and *Glucksberg*, which involved the highly politicized topic of assisted suicide. That is why it did not decide those important

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of government-imposed punishment or physical restraint, but that is far from a categorical rule. Instead, the central tenet of the Supreme Court's vast bodily integrity jurisprudence is balancing an individual's common law right to informed consent with tenable state interests, regardless of the manner in which the government intrudes upon an individual's body." *Guertin v. State*, 912 F.3d 907, 919 (6th Cir. 2019) (quotations and citation omitted).

constitutional issues at the pleading stage, based on a "rational basis" test that is no test at all, but after a bench trial (*Cruzan*) or on summary judgment (*Glucksberg*).

Thus, the use of an evidence-based balancing test to review medical mandates is consistent with this Court's long history of protecting from the political process that "limited class of rights sometimes described by the Court as those that can fairly claim to be 'objectively, deeply rooted in this Nation's history and tradition.'" *Browder v. City of Albuquerque*, 787 F.3d 1076, 1078 (10th Cir. 2015) (Gorsuch, J.) (quoting *Glucksberg*, 521 U.S. at 720-21). And it is especially important now, with the reemergence of scientific "expertise" as the guiding light for many government agencies. "Past deference to expertise provided the theory of eugenics added legitimacy and considerable momentum," especially after *Buck*. *United States v. Skrmetti*, 605 U.S. 495, 531-32 (2025) (Thomas, J., concurring) (quotations omitted). In fact, economic and political elites joined the scientific establishment to boost eugenics, with California sterilizing 2,558 people between 1907 and 1921. *See* Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* (1st ed. 2024), at 55-56.

During the COVID-19 pandemic, the establishment treated unvaccinated people with similar disdain. The president claimed they would prolong the pandemic. They became pawns in a political struggle. Judicial review is critical in such situations.

While granting review does not require overruling *Jacobson*, that is an option. After all, the Court relied on the same "public good" principle to sustain the separate but equal doctrine in *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896). At minimum, review is needed to

correct the misinterpretation of *Jacobson* that has spread through the judiciary during the past six years. Review is needed to ensure that forced medication does not become the norm, as it was during the first Progressive Era, when "experts" ruled public policy and scholars foresaw a brave new world, above political discourse and divorced from the principles of freedom on which America was founded. *See* Clarence Thomas, *Justice Thomas: Progressives vs. the Declaration*, The Wall Street Journal, Apr. 16, 2026, at A17.

In short, the Court needs to update its bodily integrity jurisprudence. It needs to distinguish *Jacobson* from the unwanted medication cases that Petitioners invoked. And it needs to confirm that a constitutional right to privacy still exists, at least when it is grounded in those privacies of life long protected by the common law. Some have questioned this Court's commitment to those privacies since *Dobbs*. Granting certiorari will remove those doubts.

II THE CASE IS NOT MOOT AND IT IS AN IDEAL VEHICLE TO REVIEW THESE IMPORTANT CONSTITUTIONAL QUESTIONS, ESPECIALLY AFTER *DOBBS*

Recognizing the important constitutional issues this case presents, Respondents argue that the case is moot and would eventually be dismissed if the Court were to grant review. They are wrong.

The en banc panel held that this case was not moot because Petitioners' complaint sought a broad range of equitable relief, including reinstatement for those Petitioners who lost their jobs (a request they intended to make explicitly once the case returned to the district court). App. A at 13a-17a. It was correct. Respondents know that. Thus, they accuse Petitioners of seeking

"to avoid mootness by attempting to add additional relief that they have neither pleaded nor pursued." Opp. Cert. at 15. But, as the en banc panel held, when construing the allegations in the complaint in favor of Petitioners, they *did* make that request. There is no law that says a complaint must identify every request for injunctive relief that will be sought. After all, the whole purpose of Rule 8 "is to decide cases fairly on their merits, not to debate finer points of pleading where opponents have fair notice of the claim or defense." *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010).

Moreover, Petitioners did not try to game the system here. Respondents did. They did not even argue that the case was moot until they realized they would lose the appeal. That did not sit well with the three-judge panel that initially heard the case. App. B at 54a-58a.

The panel was correct. Under established law, the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979). Indeed, this Court has held that the voluntary cessation doctrine prohibits a finding of mootness unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quotations omitted). The moving party bears a "formidable burden" to show this. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). And it fails when, despite ceasing the challenged conduct, it "continues to defend the legality" of its actions. *Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S. 298, 307

(2012); *see also West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 720 (2022) (same).

That reasoning applies squarely here. *See* App. B at 52a-54a, 56a-57a (explaining why). If anything, these circumstances weigh in favor of granting certiorari. They represent an egregious example of litigation gamesmanship, accompanied by statements that show Respondents did not regret their actions and are ready to take them again. App. B at 53a-54a. Of course, "often a case will become moot even when a defendant vehemently insists on the propriety of the conduct that precipitated the lawsuit." *Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234, 244 (2024) (quotations omitted). But it is "the potential for a defendant's future conduct" that guides the analysis. *Id.* at 244. Thus, this Court has found a case to not be moot because the defendant had a "practice of changing its announced policies …." *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 724 (2010). Similarly, the Court held that the government's promise to not place people on the federal No Fly List did not moot the individuals' lawsuits for injunctive relief because "the government's sparse declaration falls short of demonstrating that it cannot reasonably be expected to do again in the future what it is alleged to have done in the past." *Fikre*, 601 U.S. at 242. The same is true here.

Respondents also say that COVID-19 was a "once in a century" pandemic. They say these issues will not arise again. That is not what they told the Ninth Circuit, though. They cited the "the exigencies of the COVID-19 pandemic" when they petitioned for en banc review. Ninth Circuit ECF 56-1 at 22. They said this area of law is "of critical significance to the general public." *Id.* at 6. Indeed, the States of Oregon and

California urged the Ninth Circuit to hear the case en banc by mentioning their "planning for the next significant outbreak of infectious disease." Ninth Circuit ECF 57 at 7; *see also id.* at 2 (urging Ninth Circuit to act "before the next significant outbreak of infectious disease"). If the case were moot, Respondents would not have sought en banc review. If the case were moot, Oregon and California would not have rushed to support them.

The involvement of those "progressive" states should remind everybody of how arbitrary and politicized COVID-19 became. *See S. Bay United Pentecostal Church v. Newsom*, 590 U.S. 965, 967 (2020) (Kavanaugh, Thomas and Gorsuch, JJ., dissenting). That weighs in favor of granting certiorari. The scope of freedom should not depend on the state people live in. There must be a clear standard, a uniform standard, to govern judicial review.

Moreover, it is naive to think that the COVID-19 pandemic was a once-in-a-lifetime event, something so rare that this Court should not entertain the compelling constitutional issues the petition raises. According to one journal, there have been at least five pandemics since the 1918 influenza pandemic, "three caused by influenza virus in 1957, 1968, and 2009, one caused by the retrovirus HIV that began in 1981, and another caused by the coronavirus SARS-CoV-2 in 2019." Arturo Casadevall, *Pandemics past, present, and future: progress and persistent risks*, J Clin Invest. 2024 (Apr 1) *available at* https://pmc.ncbi.nlm.nih.gov/articles/PMC10977977/. But even that number is hard to pin down because, as the writer noted, "it is not clear when pandemics end, or whether they really end." *Id.* Meanwhile, some people want to expand the definition of pandemic to include pollution and other

environmental consequences of human behavior. Jake Miller, *Pandemics in the 21st Century,* Harvard Medical School (June 9, 2022), https://hms.harvard.edu/news/pandemics-21st-century. Thus, there is no reason to think these issues will not arise again. They will. And without a clear rule from this Court that reconciles *Jacobson* with *Cruzan*, Americans will again see their private medical choices subject to the panicked decision-making of government officials.

The political branches need such a rule. It will ensure that they do not act arbitrarily, that they ground their decisions in evidence instead of speculation and fear and while considering the potential harm from their policies. That potential for harm is especially important since the Court has interpreted federal law to immunize vaccine makers from most product liability claims, "leav[ing] a regulatory vacuum in which no one ensures that vaccine manufacturers adequately take account of scientific and technological advancements when designing or distributing their products." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 250 (2011) (Sotomayor and Ginsburg, JJ., dissenting).

Granting review will also give the Court the chance to show that *Dobbs* did not eliminate the concept of bodily autonomy or the doctrine of substantive due process. There seems to be some doubt about that. *See Mirabelli v. Bonta*, 607 U.S. --, 146 S. Ct. 797, 804 (2026) (Barrett and Kavanaugh, JJ., and Roberts, C.J., concurring) (discussing this disagreement). This case presents the ideal follow-up to *Dobbs*. It represents the perfect chance for the *Dobbs* majority to explain why a person's right to reject unwanted medical treatment differs from the right to abort a child, as one is deeply rooted in our nation's history and tradition and one is

not. And it gives the *Dobbs* dissenters the chance to show that their belief in bodily autonomy does not extend only to abortion. In short, this is one of the few substantive due process cases that every member of this Court should agree on.

The fact that Respondents used their employment power to enact the vaccine policy does not change that. This "Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights." *Lane v. Franks*, 573 U.S. 228, 236 (2014). In any event, it makes no difference that Respondents used something other than the police power to enact and enforce the vaccine requirement, as "a plaintiff need not establish any constitutional significance to the means by which the harm occurs" to show a violation of bodily integrity. *Guertin*, 912 F.3d at 919 (quotations omitted).

That makes sense. The federal government used its contracting power to "forc[e] medical workers to get a covid-19 vaccination on pain of losing their jobs." Gorsuch, *Over Ruled* at 45. Meanwhile, a federal workplace safety agency "asserted the authority to issue a mandate requiring some 84 million Americans to mask and test at their own expense or take newly developed vaccines rushed to market" by the political branches of government. *Id.* at 48. And many of the mandates stemmed from executive orders and the exercise of emergency powers by unelected bureaucrats, not legislation debated and voted on by lawmakers. *See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 125-26 (2022) (Gorsuch, Thomas and Alito, JJ., concurring).

That is why the States of Oregon and California pushed for en banc review. That is why several other States support granting certiorari. It is time to consider these important questions.

CONCLUSION

The Court decided *Jacobson* during its 1904-05 term. It also decided *Lochner v. New York*, 198 U.S. 45 (1905), that term, launching the era in which courts protected economic freedom at the expense of human rights. Society ultimately rejected that doctrine, but it took until 1963 for the Court to say so. *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963). *Jacobson* deserves similar treatment. It is not too late to correct the flawed interpretation given to *Jacobson* during the pandemic nor too early to guard against the threats to freedom that will surely come during the next emergency.

Therefore, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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