Nos. 21A243, 21A244, 21A245, 21A246, 21A247, 21A248, 21A249, 21A250, 21A251, 21A252, 21A258, 21A259, 21A260 and 21A267

IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *et al.*,

Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

(For Continuation of Caption See Inside Cover)

ON EMERGENCY APPLICATIONS FOR STAY OF AGENCY STANDARD PENDING THE DISPOSITION BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OF A PETITION FOR REVIEW AND ANY FURTHER PROCEEDINGS IN THIS COURT, OR ALTERNATIVELY, PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT AND STAY PENDING RESOLUTION

MOTION OF WE THE PATRIOTS USA, INC. FOR LEAVE TO FILE ATTACHED *AMICUS* BRIEF IN SUPPORT OF APPLICATIONS FOR STAY OR INJUNCTION PENDING REVIEW AND PETITIONS FOR A WRIT OF CERTIORARI BEFORE JUDGMENT AND FOR LEAVE TO FILE WITHOUT 10-DAYS NOTICE

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December 30, 2021

309917

OHIO, *et al.*,

Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

JOB CREATORS NETWORK, *et al.*,

Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

PHILLIPS MANUFACTURING & TOWER COMPANY, *et al.*,

Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

THE SOUTHERN BAPTIST THEOLOGICAL SEMINARY, *et al.*,

Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

BST HOLDINGS, LLC, *et al.*,

Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

THE HERITAGE FOUNDATION,

Applicant,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

WORD OF GOD FELLOWSHIP, INC. D/B,

Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*,

Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

SCOTT BEDKE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, *et al. et al.*,

Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

REPUBLICAN NATIONAL COMMITTEE,

Applicant,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

BETTEN CHEVROLET, INC.,

Applicant,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

BENTKEY SERVICES, LLC, DBA THE DAILY WIRE,

Applicant,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

FABARC STEEL SUPPLY, INC., *et al.*,

Applicant,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

We The Patriots USA, INC. moves for leave to file the attached brief as *amicus curiae* supporting the applications to reinstate the stay of the Occupational Safety and Health Administration's emergency temporary standard (ETS) mandating COVID-19 vaccinations or testing and other precautions. It also moves for permission to file its brief without ten days' notice to the parties of its intent to file as normally required by this Court's 37.2(a).

The amicus curiae, We The Patriots USA, Inc., is a national, nonpartisan, nonprofit membership charity dedicated to promoting constitutional rights and other freedoms through education, outreach, and public interest litigation, thereby advancing religious freedom, medical freedom, parental rights, and educational freedom for all. It has funded and joined lawsuits on behalf of its members against state COVID-19 vaccination mandates on religious liberty and medical freedom grounds, including before the Court. *See, e.g.*, *We The Patriots USA, Inc., et al. v. Hochul, et al.*, No. 21A125. Many of its members will be impacted by the Court's decision.

The attached *amicus* brief articulates, for the Court's consideration, the rights and interests of the 80 million Americans who have chosen not to get a COVID-19 vaccination and will lose their livelihoods if they remain firm in their choices and the Court does not stay the ETS – a perspective that the Applicants/Petitioners have only acknowledged cursorily. It focuses on the reasons why many Americans are hesitant to receive a COVID-19, and it details their reliance on the historical rights of bodily integrity and self-determination, which support their

right to decline unwanted medical treatment. In doing so, the *amicus* urges the Court to clarify its substantive due process jurisprudence and subject the ETS to strict scrutiny before it infringes on these rights that the Court has described as sacred.

Additionally, the *amicus* provides the Court with a more complete analysis of its Commerce Clause jurisprudence that traces the Court's requirement that the principles of federalism prohibit Congress from regulating noneconomic activity under its power to regulate commerce. Its brief contains an important detailed analysis of the Court's modern Commerce Clause jurisprudence with authorities that the Applicants/Petitioners have not included in their applications for stays and petitions for writs of certiorari before judgment.

Given the expedited briefing schedule that the Court set in this case and its subsequent selection of the case for expedited oral argument, it simply was not feasible to give the parties ten days' notice of the filing of this brief. The Sixth Circuit granted the government's motion to dissolve the stay imposed by the Fifth Circuit on the evening of December 17, 2021, and the applications for a stay were filed in this Court on December 17, 18, and 20. The Court set a briefing deadline of December 30, 2021 for the Respondents' briefs, and it scheduled oral argument for January 7, 2022.

The Court's treatment of this matter reflects its overwhelming national importance, and it can be fairly said that at least 25% of Americans have an interest in its decision. Thus, the Court should liberally permit interested *amici* to bring additional considerations to the Court's attention, especially when, like the *amicus* here,

they express the interests held by a portion of the largest affected portion of the population.

Additionally, the amicus and the undersigned have been diligent in notifying the parties of their attention to file as soon as they identified how they could be of assistance through briefing to the Court. On December 23, 2021, the undersigned emailed all parties to the applications/petitions notifying them of their intention to file this brief and asking for their consent.

As of December 30, 2021, no party has opposed the amicus' filing of the attached brief. The Respondents have not responded to the amicus' notification regarding any of the applications currently before the Court. Most of the Applicants have consented or stated that they have no objection, and others have not responded as listed below:

In No. 21A243, the Applicants have not responded.

In No. 21A244, all of the Applicants have stated that they do not oppose the filing of the attached brief.

In. No. 21A245, the Applicants have not responded.

In No. 21A246, the Applicants have consented.

In No. 21A247, the Applicants have consented.

In No. 21A248, the Applicants have not responded.

In No. 21A249, the Applicant has stated that it does not oppose the filing of the attached brief.

In No. 21A250, the Applicants have consented.

In No. 21A251, the Applicants have consented.

In No. 21A252, the Applicants have stated that it does not object to the filing of the attached brief.

In No. 21A258, the Applicant has consented.

In No. 21A259, the Applicant has stated that it does not object to the filing of the attached brief.

In No. 21A260, the Applicant consented.

In No. 21A267, the Applicants have not responded.

Thus, in the absence of any objections and in light of the tremendous importance of the questions before the Court in these applications/petitions which have necessitated its expedited consideration, the *amicus* curiae respectfully ask the Court to permit it to file its brief and to do so without the 10-day notice required by Rule 37.2(a).

Respectfully submitted,

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December 30, 2021

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INTEREST OF AMICUS CURIAE[1]

We The Patriots USA, Inc. is a national, nonpartisan, nonprofit membership charity dedicated to promoting constitutional rights and other freedoms through education, outreach, and public interest litigation, thereby advancing religious freedom, medical freedom, parental rights, and educational freedom for all. Many of its members will be impacted by the Court's decision.

SUMMARY OF THE ARGUMENT

The Respondents' Emergency Temporary Standard (ETS) constitutes the largest invasion of personal choice and personal privacy in American history, and it violates every American's Fourteenth Amendment right to bodily integrity and self-determination by functionally imposing a COVID-19 vaccination mandate on them. Like most COVID-19 public health regulations, the ETS relies heavily on the Court's precedent in *Jacobson v. Massachusetts* as plenary authority to impose a nationwide vaccination mandate in the interests of public health.

The Court has fundamentally reshaped its constitutional jurisprudence in the 116 years since it decided *Jacobson*. It has developed a substantive due process jurisprudence that established frameworks for recognizing individual fundamental unenumerated rights under the Fourteenth Amendment. It has also developed tiers of constitutional scrutiny for both enumerated and

1. Under Rule 37, the amicus curiae give notice that no party's counsel authored any part of this brief, and no person or entity other than *amicus* funded its preparation and submission.

unenumerated constitutional rights. Most importantly, it has recognized an unenumerated right to bodily integrity and self-determination under the Fourteenth Amendment, specifically in refusing specific types of medical treatment.

Despite these developments, the Court's jurisprudence has not afforded consistent recognition or protection to unenumerated constitutional rights. In particular, the Court has not explicitly recognized certain unenumerated rights as fundamental in a consistent fashion despite describing them in terms normally reserved for fundamental rights. It also has not given fundamental unenumerated rights the benefit of strict scrutiny on a consistent basis. The right to bodily integrity and self-determination falls into this category.

Amicus urges the Court to take the opportunity to unequivocally establish the right to bodily integrity and self-determination as a fundamental unenumerated right entitled to strict scrutiny and consider it in its analysis of the major-questions issue submitted by the parties. This consideration is both appropriate and sorely needed because reasonable doubts exist as to the safety and efficacy of the COVID-19 vaccinations and almost 25% of Americans stand to lose their ability to provide the basic necessities of life for themselves and their families simply because they choose to exercise their constitutional rights to refuse a specific medical treatment. Their plight and their rights are appropriately considered as the Court analyzes whether Congress should have addressed this question because of its significance.

Amicus also urges the Court to reaffirm its precedents that confine Congress's commerce power to regulating

economic activity and do not permit it to regulate noneconomic inactivity. Upholding the ETS would depart drastically from the Court's Commerce Clause precedents, and such a decision would strip the states of their exclusive power to regulate public health by creating an unparalleled and unrestrained federal power to regulate public health. The principles of federalism contained in the Constitution do not permit such a departure.

ARGUMENT

The Respondents' ETS purports to offer a choice between COVID-19 vaccinations or weekly COVID-19 testing. *See COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402 (Nov. 5, 2021). The choice, however, is not really a choice at all.

COVID-19 testing is expensive, and data shows that the average cost for a COVID-19 test runs between $100-$149. *See* Nisha Kurani, et al., *COVID-19 Test Prices And Payment Policy*, Peterson-KFF (Apr. 28, 2021).[2] Someone has to bear the weekly cost of COVID-19 testing. For insurers and employers, bearing this cost would ultimately drive them out of business due to losses. For the average American employee living paycheck to paycheck, bearing another $400-$600 expense per month simply does not fit reality. Thus, the only realistic choice under the ETS is for employers to mandate COVID-19 vaccinations as a condition of employment and for employees to receive a vaccination to maintain their ability to provide the basic necessities of life for themselves and their families.

2. https://www.healthsystemtracker.org/brief/covid-19-test-prices-and-payment-policy/

As the documents supporting the ETS reveal, this Hobson's choice reaches "two-thirds of all private-sector workers," 86 Fed. Reg. at 61,403, or over 25% of the United States' population, *id.* at 61,475. In other words, ETS imposes a federal COVID-19 vaccination mandate by default on a segment of the United States' population, which has foregone vaccination for personal reasons. *Id.* at 61,553.

The Court's precedents clearly establish a fundamental principle. Individuals have a fundamental unenumerated right under the Fourteenth Amendment to make their own medical decisions. *See, e.g.*, *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990). They also establish the power to regulate noneconomic inactivity for public health purposes belongs exclusively to the states.

I. There Are Serious Questions On Whether The Risks Of COVID-19 Vaccinations Outweigh Their Rewards.

No one disputes that the COVID-19 pandemic posed an unknown and urgent public health danger in early 2020. To an extent, it also caught the United States unprepared, and public health officials scrambled to cope with a disease that they did not fully understand. Thus, federal officials decided that extraordinary times called for extraordinary measures.

One of the extraordinary measures that U.S. Food & Drug Administration (FDA) took was to issue emergency use authorizations (EUAs) pursuant to 21 U.S.C. § 360bbb-3 for three vaccines specifically developed at record speed to combat COVID-19: Pfizer, Moderna, and

Janssen.[3] Unlike the standard rigorous testing process that the FDA employs to test the safety of new drugs which averages 12 years from application to approval,[4] EUAs issue immediately based on knowledged-based risk assessments. In other words, the FDA weighs "the known and potential benefits of the product…" against its "known and potential risks…," and it determines whether a disease creates an emergency serious enough to justify the immediate use of an untested product. 21 U.S.C. § 360bbb-3 (c)(2)(B).

In another acceleration of normal time frames, the FDA then issued full approval to the Pfizer COVID-19 vaccination on August 23, 2021 – less than a year after it first issued its EUA for the Pfizer vaccination.[5]

While the haste to find vaccines to combat COVID-19 and make it available to the public is understandable, the haste also drives serious concerns about the vaccines' risks – both known and unknown – and how well the FDA considered them. Given the knowledge-based risk/reward assessment that the law required the FDA to perform for the EUAs, a prudent citizen would not depart from reason's realm if he conducted the same assessment in skepticism of the FDA's conclusions.

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3. https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-vaccines

4. *See* Gail A. Van Norman, *Drugs, Devices, and the FDA: Part 1: An Overview Of Approval Processes For Drugs*, JACC: Basical To Translational Science, Vol. 1, Issue 3, pp. 170-179 (2016).

5. https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine

Such skepticism is not baseless as two well-documented incidents pertaining to the Pfizer vaccine demonstrate. First, 21 C.F.R. § 601.51(e) requires the FDA to *immediately* release "all safety and effectiveness data and information" for newly approved drugs. The FDA did not release this information immediately after, or concurrent to, fully approving the Pfizer vaccine. Instead, when respected doctors and scientists from renowned institutions such as Yale University sought the information through Freedom of Information Act (FOIA) requests,[6] the FDA informed a federal district court that it could only produce the information at a rate that would ultimately require 55 years to fully produce the data.[7]

Second, at least one whistleblower made a corroborated complaint that one of Pfizer's testing contractors, Ventavia Research Group, falsified data and ignored adverse reactions to its COVID-19 vaccine while testing it. *See* Paul Thacker, *COVID-19: Researcher Blows The Whistle On Data Integrity Issues In Pfizer's Vaccine Trial*, BMJ (Nov. 2, 2021).[8] She reported that the FDA never inspected

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6. *See* Complaint, *Public Health And Medical Professionals For Transparency v. Food And Drug Administration*, Dkt. 4:21-cv-01058 (N.D.T.X. Sept. 16, 2021).

7. Second Joint Report, *Public Health And Medical Professionals For Transparency v. Food And Drug Administration*, Dkt. 4:21-cv-01058 (N.D.T.X. Nov. 15, 2021); *see also* Jenna Greene, *Wait What? FDA Wants 55 Years To Process FOIA Request Over Vaccine Data*, Reuters (Nov. 18, 2021)Reuters (Nov. 18, 2021. Retrieved from https://www.reuters.com/legal/government/wait-what-fda-wants-55-years-process-foia-request-over-vaccine-data-2021-11-18/

8. https://www.bmj.com/content/375/bmj.n2635

or audited the trial despite her reports and that Ventavia fired her for blowing the whistle. *Id*.

The last self-audit that the FDA Inspector General conducted does little to allay the concerns raised by the whistleblower. In 2005, the FDA Inspector General estimated that the FDA inspected approximately 1% of clinical trial sites. *See* Daniel R. Levinson, *The Food And Drug Administration's Oversight Of Clinical Trials*, U.S. Dept. Of Health And Human Services, Office of Inspector General (Sept. 2007).[9] There is no indication that the FDA's hands-off approach to monitoring clinical trials has changed, particularly as the world raced to find a solution to the COVID-19 pandemic.

The FDA's lack of transparency as to the Pfizer trial data despite its legal obligations and firsthand accounts of falsified data and misconduct during clinical trials raise serious questions on whether the COVID-19 vaccinations pose greater health risks than the federal government is willing to acknowledge. There is fire beneath this smoke. Private studies indicate that adverse reactions to COVID-19 vaccines likely occur at a rate almost 100 times higher than the Center for Disease Control and Prevention (CDC) has reported. *See* Kimberly G. Blumenthal, et al., *Acute Allergic Reactions To mRNA COVID-19 Vaccines*, JAMA [Research Letter] (Mar. 8, 2021) (reporting that adverse reactions to COVID-19 vaccines occur at a rate of 2.47 per 10,000 vaccinations compared to the CDC's estimate of 0.025-0.11 per 10,000 vaccinations).[10]

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9. https://www.oig.hhs.gov/oei/reports/oei-01-06-00160.pdf

10. https://jamanetwork.com/journals/jama/fullarticle/2777417

Skepticism does not render someone anti-vaccine or irresponsible. The haste in which the COVID-19 vaccines have been developed should make any reasonbly prudent person pause and carefully consider whether it is in the best interests of their health to take a COVID-19 vaccination. The FDA's lack of transparency and apparent inability to properly supervise clinical trials even when in receipt of complaints of falsified data and hidden adverse events further supports a healthy dose of skepticism. Finally, the United States government's own underreporting of adverse reactions to COVID-19 vaccinations compels a reasonably prudent person to make the same risks versus rewards calculation that the FDA made in issuing EUAs for the COVID-19 vaccines.

In other words, the facts do not support blind faith in the FDA's conclusions. They support searching inquiries conducted by individuals and their doctors, and, when an individual's health and life is at stake, the facts support the historical proposition that it is his sole right to make such a deeply personal and important choice on what risks to endure. As detailed below, the United States Constitution protects this individualized choice against government interference.

II. The ETS Violates The Major-Questions Doctrine Because Mandating Medical Treatment For Vast Portions Of The Population Is A Major Political And Economic Question That Congress Has Never Delegated To The Executive Branch Because It Cannot Constitutionally Act Itself.

Employment-related vaccine mandates have already come before the Court at least twice this year in the context

of eliminated religious exemptions. *See We The Patriots USA, Inc., et al. v. Hochul, et al.*, No. 21A125; *Dr. A., et al. v. Hochul, et al.*, No. 21A145; *Does 1-3, et al. v. Mills*, No. 21A90. While the Court has denied these emergency applications for relief with two justices implying that the Court would benefit from more percolation in the lower courts, *see Mills*, No. 21A90 (Oct. 29, 2021) (Barrett, J. and Kavanaugh, J. concurring), the same underlying question presents itself once again, albeit in a different format.

To what extent does the Constitution permit governments to police personal health decisions for public health reasons?

In view of the ancient common law and constitutional rights to medical freedom, achieving a constitutional balance is a delicate task of tremendous political significance. When the decision impacts over 80 million Americans' ability to provide the basis necessities of life for themselves and their families, it also becomes a task of tremendous economic significance.

The Court has clearly stated that it expects "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (Aug. 26, 2021). Congress, however, has never specifically authorized any agency – including OSHA – to police personal health decisions in the name of public health by imposing a vaccination mandate on millions of Americans. *See* Wen W. Shen, *State And Federal Authority To Mandate COVID-19 Vaccination*, Congressional Research Service, pp. 5-8 (Apr. 2, 2021). Instead, the single statutory provision

that the Respondents have pointed to in defense of their new-found power to mandate vaccination is an exemption provision, not an authorizing provision: "Nothing in this or any other provision of this chapter shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others." 29 U.S.C. § 669(a)(5).

Congress' silence has ostensibly reserved the question for itself, and its inaction reflects the state of modern constitutional jurisprudence. The Court's development of its substantive due process jurisprudence has rejected a freewheeling public health exception to the Constitution and recognized a fundamental unenumerated right to medical freedom.

A. The Court has implicitly narrowed *Jacobson v. Massachusetts* and rejected a public health exception to the Fourteenth Amendment.

Throughout the COVID-19 pandemic and particularly when it comes to vaccinations, the Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) invariably serves as the starting point and, for governments, the ending point in any dispute on the constitutionality of public health regulations. The Court, however, has implicitly narrowed its scope over the past 100 years of its jurisprudence.

Jacobson's facts have become axiomatic to an extent during the COVID-19 pandemic. Camrbidge, Massachusetts faced a smallpox outbreak, and it decided to cope with it by mandating smallpox vaccinations.

Jacobson, 197 U.S. at 12-13. Henning Jacobson declined to receive a vaccination because it posed an undue risk to his health, he had suffered greatly from a vaccine-caused disease in his childhood, and his son had experienced similar suffering. *Id.* at 23-24, 36. In response, the city criminally prosecuted him, secured his conviction, and imprisoned him until he paid a $5 fine. *Id.* at 13-14. Jacobson appealed his conviction on the grounds that the Fourteenth Amendment protected an "inherent right of every freeman to care for his own body and health in such way as to him seems best," and he claimed that executing the law on him was "nothing short of an assault upon his person." *Id.* at 26. The Court applied a deferential standard of review akin to rational basis review and held that Cambridge's vaccination was reasonable and did not offend any right secured by the Constitution. *Id.* at 38.

Jacobson, however, was a man ahead of his time. He claimed a fundamental unenumerated right under the Fourteenth Amendment just before the Court's first foray into unenumerated rights in *Lochner v. New York*, 198 U.S. 45 (1905) and well before the Court's first substantive due process recognition of unenumerated rights to "personal liberties" in *Meyer v. Nebraska*, 262 U.S. 390 (1923). Thus, the Court treated Jacobson's claim of an inherent right to care for his own body as a claim of generalized liberty and applied its normal standard of deferential review.

The Court's treatment of Jacobson's claims tracks its treatment of the Fourteenth Amendment up until 1905. Although the Fourteenth Amendment's Framers clearly expressed an intention to grant unenumerated

rights through its Privileges or Immunities Clause,[11] the Court declined to do so in *The Slaughter-House Cases*, 83 U.S. 36 (1873). When the Court ultimately recognized unenumerated rights under its substantive due process jurisprudence in *Lochner*, it did so in a freewheeling generalized fashion. The Court finally brought order to its treatment of unenumerated rights in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938) by establishing what we now recognize as modern constitutional scrutiny doctrines. Even then, the Court did not apply a form of scrutiny other than rational basis review for six years after it outlined tiers of scrutiny in *Carolene Products Co. See Korematsu v. United States*, 323 U.S. 214 (1944).

Despite these developments, the Court's substantive due process jurisprudence underwent another major shift inspired by Justice Harlan's concurrence in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Justice Harlan's concurrence suggested that the Court ground its substantive due process jurisprudence in "basic values implicity in the concept of ordered liberty." *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (internal quotation marks and citations omitted). Under Harlan's framework, the Court began to recognize specific fundamental unenumerated rights under its substantive due process doctrine rather than applying foundational principles case-by-case. *See* Cameron L. Atkinson, *A General Sovereign/Public Employer Distinction: Should Garcetti v. Ceballos Govern Public Employment Cases Concerning*

11. *See* Randy E. Barnett & Evan Bernick, *The Privileges or Immunities Clause Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 Notre Dame L.R. 499, 500 (2019)

Off-Duty Sexual Conduct Instead of Lawrence v. Texas? 38 Quinnipiac L. Rev. 325, 333 (2020) (tracing early recognitions of fundamental unenumerated rights as they pertain to marriage). Harlan's framework then required the Court to develop a test for recognizing unenumerated rights and determining which level of scrutiny to apply to them, which it did in *Washington v. Glucksberg*, 521 U.S. 702 (1997) and possibly revised in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). *Id*. at 333-35.

Within the Harlan framework, the Court issued three decisions that significantly narrowed *Jacobson*. First, in 1973, it held that a woman possesses a fundamental unenumerated constitutional right to privacy in deciding whether to have an abortion. *Roe v. Wade*, 410 U.S. 113, 154 (1973). While the Court cited *Jacobson* for the proposition that a woman's right to privacy in her decision to obtain an abortion was not unlimited, it abandoned *Jacobson*'s deference to public health policy decisions and held that Texas's public health poplicy choice – life begins at conception – could not avoid strict scrutiny analysis when it regulated a woman's right to get an abortion.[12] *Id*. at 162. Thus, the Court discarded *Jacobson*'s deference to public health policy decisions in favor of a far more stringent analysis when a fundamental unenumerated constitutional right was at stake.

Second, in 1992, the Court held that its "cases since *Roe* accord with *Roe*'s view that a State's interest

12. *See* Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, forthcoming in Buffalo L.R., Vol. 70, pp. 59-66 (Sept. 24, 2021) (discussing *Roe*'s inconsistency with *Jacobson*). Professor Blackman's article is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906452

in the protection of life falls short of justifying any plenary override of individual liberty claims." *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992). *Casey*'s reiteration of *Roe*'s treatment of *Jacobson* even more clearly narrows *Jacobson*'s impact within the Court's modern constitutional jurisprudence by eliminating its role as an escape hatch for public health regulations to avoid ordinary constitutional scrutiny.

Third, the Court remained silent about *Jacobson* in *Lawrence v. Texas*, 539 U.S. 558 (2003). The CDC described HIV/AIDS as a global pandemic in 2006,[13] and it was treated as a global pandemic since the 1980s.[14] According the CDC's 2008 statistics, gay and bisexual men accounted for 69% of new HIV diagnoses.[15] Despite HIV/AIDS being declared a global pandemic and the increased risk of the spread of HIV/AIDS among gays and bisexuals, the Court clearly established that states' police power does not permit them to criminalize homosexual intimacy. *Lawrence*, 539 U.S. at 578. In doing so, the Court used language that intimated its recognition of a fundamental unenumerated right to engage in homosexual relationships, but it applied rational basis review. *See* Atkinson, 38 Quinnipiac L. Rev. at 338-339 (discussing the confusion created by *Lawrence*'s apparent recognition of a fundamental unenumerated right, but its application of

13. https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5531a1.htm

14. Michael H. Merson, *The HIV-AIDS Pandemic at 25 – The Global Response*, N. Engl. J. Med. (2006). https://www.nejm.org/doi/full/10.1056/nejmp068074

15. https://www.cdc.gov/hiv/statistics/overview/ataglance.html

rational basis scrutiny). Neither *Jacobson* or its progeny made an appearance in *Lawrence*, but the Court narrowed *Jacobson* significantly by requiring states to demonstrate harm "specific to an individual," thus implying that "generalized state interest[s] in public health concerns" are not enough to overcome the protection afforded to unenumerated rights protected by the Fourteenth Amendment. *Id*. at 355.

Thus, this history and *Roe, Casey*, and *Lawrence* stand for an unmstakable proposition. *Jacobson* did not create a "plenary override" or an escape valve for a public health regulation to escape strict constitutional scrutiny when it burdens a fundamental unenumerated constitutional right.

B. The Court's precedents establish an individual's fundamental unenumerated right under the Fourteenth Amendment to make their own medical decisions.

In 1891, the Court recognized the common law's historical reverence for bodily integrity and self-determination as legal rights: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *see also Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 269-270 (1990). It then inferred its constitutional status in 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." *Cruzan*, 497 U.S. at 278 (citing *Jacobson*, 197 U.S. at 24-30); *see also Washington v. Harper*, 494 U.S. 210, 221-222 (1990).

Like *Lawrence*, however, the Court has not afforded the constitutional rights to bodily integrity and self-determination the protection of strict scrutiny despite describing them in terms characteristic of fundamental unenumerated rights. *Cruzan*, 497 U.S. at 278; *Harper*, 494 U.S. at 221-222. Instead, the Court has employed an ambiguous balancing test akin to *Jacobson*'s deferential rational basis standard. *Cruzan*, 497 U.S. at 279 ("whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests").

This deferential test has rendered the Court's bodily integrity and self-determination jurisprudence just as standardless and freewheeling as its repudiated *Lochner* jurisprudence was.

For example, compare the Court's language recognizing a constitutional right to abortion as a fundamental constitutional right and its language recognizing bodily integrity and self-determination as rights. The Court described a woman's decision on whether to terminate a pregnancy as one of the "most intimate and personal choices that a person may make in a lifetime, choices central to personal dignity and autonomy." *Casey*, 505 U.S. at 851. It described a person's right to decline medical treatment: "[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 or interference of others, unless by clear and unquestionable authority of law." *Botsford*, 141 U.S. at 251; *Cruzan*, 497 U.S. at 269-270 (same).

The Court's description of the rights to bodily integrity and self-determination is at least equally strong as its description of abortion, and a reasonable jurist could even argue that its description of bodily integrity and self-determination is stronger than its description of the right to an abortion. The Court, however, has applied strict scrutiny to examine state regulations of the right to an abortion – *Roe*, 410 U.S. at 154-56 – while employing a deferential and ambiguous balancing test to the rights to bodily integrity and self-determination. *Cruzan*, 497 U.S. at 279.

It requires too much from scholars, jurists, and lawyers to build a legal distinction between the Court's treatment of the two rights.[16] For abortion, the Court requires a state actor to satisfy strict scrutiny even when it has decided that the act of abortion is the actual intentional killing of another human being. For declining medical treatment, the Court defers to a state actor's decision that someone may infect another person with a disease that he possibly might die from and employs a unique balancing test that almost always favors the state's interests.

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16. Nor is the confusion confined to these two rights in particular. The Court caused similar confusion in *Lawrence v. Texas*. *See generally* Atkinson, 38 Quinnipiac L. Rev. 325; Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (2004).

Lochner-esqe, freewheeling substantive due process jurisprudence of this nature gives protection to fundamental constitutional rights based on the idiosyncratic values of the Court's justices. The rights secured by the Constitution do not ebb and flow with the preferences of the Court's members. The Court should take the opportunity to bring consistency to its substantive due process jurisprudence in this case, and it should begin by reaffirming its prior statements on the importance of the rights to bodily integrity and self-determination, declaring the rights to bodily integrity and self-determination fundamental unenumerated rights under the Fourteenth Amendment, and requiring the Respondents to satisfy strict scrutiny with respect to the ETS.

C. The ETS targets individuals who exercise their right to make personal medical decisions that contradict the federal government's public health recommendations.

Transparency has been a major issue for many Americans when it comes to their personal decisions about whether to get a COVID-19 vaccination. Besides the direct concerns about the COVID-19 vaccinations discussed previously, the nation's leaders have struggled to offer definite answers and have confessed to amending their answers for political purposes. It should come as no surprise that they have not inspired trust and confidence in their advocacy for people to get vaccinated.

There is no shortage of such incidents.

First, almost every known infectious disease that the world combats by vaccination becomes nearly extinct once a population reaches herd immunity – "the indirect protection from an infectious disease that happens when a population is immune either through vaccination or immunity developed through previous infection." World Health Organization, *Coronavirus Disease (COVID-19): Herd Immunity, Lockdowns, And COVID-19* (Dec. 31, 2020)[17] In December 2020, The World Health Organization (WHO) stated that no studies have effectively established what percentage of a population must become vaccinated to reach herd immunity against COVID-19, but pointed to herd immunity against measles as requiring 95% of a population to be vaccinated and polio requiring 80%. *Id.*

Dr. Anthony Fauci – the expert leading the Respondents' response to COVID-19 – also attempted to establish a number for herd immunity. Dr. Fauci's numbers, however, kept changing. When the pandemic began, Dr. Fauci consistently told the United States that it needed to achieve a 60-70% herd immunity threshold. *See* Donald G. McNeil, Jr., *How Much Herd Immunity Is Enough?* New York Times (Dec. 24, 2020) (reporting Dr. Fauci's previous public statements and interviewing him).[18] At the end of 2020, he gradually increased his prognostication until he reached 85%. *Id.* At the same time that he moved his prognostications up, Dr. Fauci practically staked his fortune on the fact that COVID-19 would not require the same herd immunity threshold as

17. https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19

18. https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html

measles: "I'd bet my house that Covid isn't as contagious as measles." *Id.*

Had Dr. Fauci left his comments there, a reasonable reader could have concluded that he simply made a scientific error as he sought to cope with an unknown disease like the rest of the world. Dr. Fauci, however, made a stunning confession that he adjusted his numbers for political reasons: "When polls said only about half of all Americans would take a vaccine, I was saying herd immunity would take 70 to 75 percent…. Then, when newer surveys said 60 percent or more would take it, I thought, 'I can nudge this up a bit,' so I went to 80, 85." *Id.*

Second, Dr. Fauci then attempted to place himself and his government colleagues beyond legislative and popular criticism. In a MSNBC interview, Dr. Fauci declared that "[a]ttacks on me, quite frankly, are attacks on science…. All of the things I have spoken about, consistently, from the very beginning, have been fundamentally based on science. Sometimes those things were inconvenient truths for people." *See* Carlie Porterfield, *Dr. Fauci On GOP Criticism: "Attacks On Me, Quite Frankly, Are Attacks On Science*," Forbes.com (Jun. 9, 2021).[19]

Third, the United States – along with international and state governments – promised that COVID-19 vaccinations would chart a course to return life to normal one day. New variants of COVID-19 have emerged regularly, and officials, including Dr. Fauci, have left the

19. https://www.forbes.com/sites/carlieporterfield/2021/06/09/fauci-on-gop-criticism-attacks-on-me-quite-frankly-are-attacks-on-science/

door open on whether additional COVID-19 booster shots will be necessary. *See* Josh Nathan-Kazis, *Fauci Says 'Tough To Tell' If COVID Boosters Will Be Needed Every Year*, Barron's (Dec. 13, 2021).[20]

Combined with the concerns discussed above about the safety of the COVID-19 vaccinations, these three elements have created a complete lack of trust in the United States' leaders among a large portion of the American population, and they have raised reasonable skepticism on whether the COVID-19 vaccines are actually effective enough to justify their risks. Rather than work in a straightforward manner to regain Americans' trust, Dr. Fauci and his colleauges have claimed that they are above criticism and skepticism – claims that have only solidified reasonable people in their concerns about the Respondents' recommendations.

Thus, "frustrated with the nearly 80 million Americans who are still not vaccinated…" and have chosen to exercise their constitutional rights to decline the medical treatment of vaccination, the Respondents have abandoned persuasion and turned to coercion. *See* President Joseph Biden, *Remarks By President Biden On Fighting The COVID-19 Pandemic* (Sept. 9, 2021). The coercion that they have chosen is to draw a line of demarcation via the ETS between the vaccinated and the unvaccinated and to saddle qualified employers with such severe hardships as to compel them to require their employees to become vaccinated.

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20. https://www.barrons.com/articles/covid-booster-omicron-anthony-fauci-51639401295

For an American who chooses to exercise his constitutional right to refuse this medical treatment, the consequences are devastating. The ETS functionally bars him from working for almost any medium-to-large-sized business in the United States, essentially foreclosing countless job opportunities and leaving him with virtually no means to provide the basic necessities of life – food, shelter, and clothing – for himself and his family. In other words, the ETS outlaws from the American workforce the citizens who have chosen a reasonable course of action instead of blind faith, and it renders their continued existence in society nearly untenable.

In terms of scale, the ETS represents the largest invasion of personal freedom and privacy in American history, affecting almost two-thirds of the American economy and 25% of its population. Its imposition by executive fiat instead of careful legislative deliberation demonstrates a complete and utter regard for its political and economic significance. Thus, the Court should hold, in view of the individual constitutional rights at stake and the ETS' devastating consequences, that the Respondents have violated the major-questions doctrine, and it should offer clear guidance to Congress that any action that it takes on this question must satisfy strict scrutiny if it regulates the individual rights to bodily integrity and self-determination.

III. Federalism Prohibits Congress From Exercising Police Power To Enact General Measures To Protect Public Health.

Congress's power to regulate workplace conditions comes from the Commerce Clause. Despite the breadth

of Congress's power to regulate commerce, the Court has long held that that the states did not surrender the power to police public health to the federal government, and it enumerated certain powers that are off-limits to Congress: "Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries…. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation." *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824).

Federalism requires this approach even when core state functions have substantial effects on interstate commcerce. *See, e.g., United States v. Morrison*, 529 U.S. 598, 615 (2000) (striking down the civil enforcement of the Violence Against Women Act because it regulated gender-motivated violence regardless of whether it crossed state lines or occurred through an instrumentality of interstate commerce); *United States v. Lopez*, 514 U.S. 549, 565, 577 (1995) (striking down a federal law criminalizing the possession of guns near schools because it opened the door for Congress to regulate every aspect of schools, including their curriculums). Critical to the Court's reasoning in *Lopez* and *Morrison* was the fact that Congress attempted to regulate conduct that was not economic in nature. *Lopez*, 514 U.S. at 551 ("The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce"); *Morrison*, 529 U.S. at 610-612 (same). Thus, *Gibbons*, *Lopez*, and *Morrison* establish that Congress cannot regulate a noneconomic activity unconnected to interstate commerce without exceeding its Commerce Clause powers in violation of federalism

even when that activity substantially affects interstate commerce. *Morrison*, 529 U.S. at 614.

These cases do not contradict the Court's decisions in *Wickard v. Filburn*, 317 U.S. 111 (1942) or *Gonzalez v. Raich*, 545 U.S. 1 (2005). In *Wickard*, the Court upheld a federal regulation establishing a wheat quota as applied to a farmer's excess growth solely for his own personal use. 317 U.S. at 127-28. In *Raich*, the Court upheld Congress's authority to prohibit the home growth of marijuana for personal consumption. 545 U.S. at 33. As the Court explained in *Raich*, both cases concerned economic activity under its adoption of Webster's Third New International Dictionary's definition of "economics:" "Economics refers to the production, distribution, and consumption of commodities." *Id.* at 25-26 (internal quotation marks omitted). Because both cases involved the production and consumption of a specific commodity and substantially affected interstate commerce, the regulated activity was economic, placing them within Congress's power to regulate.

The ETS does not regulate activity that meets *Raich*'s definition of economic activity, and, unlike other OSHA regulations, it does not regulate a commodity such as a manmade chemical that can inadvertantly be consumed. Instead, the ETS attempts to regulate a disease, not a commodity, by regulating noneconomic inactivity through the imposition of a public health law – a power that this Court has long held that only the states hold. *Gibbons*, 22 U.S. at 203. An individual's refusal to receive a COVID-19 vaccine or submit to testing is noneconomic inactivity similar to the inactivity that the Court held to be beyond Congress's commerce power in *N.F.I.B. v. Sebelius*, 567

U.S. 519, 555–58 (2012) (opinion of Roberts, C.J.) ("Any police power to regulate individuals['s] [inactivity], as opposed to their activities, remains vested in the States").

Departing from the Court's precedents now would open the door to federal public health regulation on an unparalleled level. Just in the context of the COVID-19 pandemic, Congress would gain the power to control lockdowns, quarantines, and masking rules simply by claiming that they substantially affect interstate commerce. It would also potentially gain the power to mandate measures such as regular exercise and regular doctor's visits. Implementing what the public health doctor orders does not lie within Congress's power. The Court should reject this invitation to expand Congress's commerce power to include public health measures.

CONCLUSION

For these reasons, *amicus* urges the Court to grant the Applicants' request for injunctive relief and their petition for a writ of certiorari before judgment. It also urges the Court to unequivocally recognize the individual rights to bodily integrity and self-determination as fundamental unenumerated rights protected by the Fourteenth Amendment and deserving of strict scrutiny. It also urges the Court to reaffirm its Commerce Clause precedents that prohibit Congress from regulating noneconomic inactivty.

Respectfully submitted,

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