No. 22-11287

In the United States Court of Appeals for the Eleventh Circuit

HEALTH FREEDOM DEFENSE FUND,
a Wyoming Not-for-Profit Corporation,
ANA CAROLINA DAZA, an individual,
SARAH POPE, an individual,
Plaintiffs - Appellees,

v.

PRESIDENT OF THE UNITED STATES,
SECRETARY OF HEALTH AND HUMAN SERVICES,
THE CENTERS FOR DISEASE CONTROL,
THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,
DIRECTOR OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, et al.,
Defendants - Appellants.

On Appeal from the United States District Court for the
Middle District of Florida, Tampa Division
Case No. 8:21-cv-1693-KKM-AEP
Honorable Kathryn Kimball Mizelle, United States District Judge

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Brief of *Amicus Curiae* Liberty, Life, and Law Foundation in Support of Plaintiffs-Appellees and Affirmance

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22-11287, *Health Freedom Defense Fund, et al. v. President of the United States, et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT FRAP 26.1; ELEVENTH CIRCUIT RULE 26.1

The undersigned counsel certifies that in addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement provided by Plaintiffs-Appellees in their opening brief, the following persons and entities have an interest in the outcome of this case:

Dewart, Deborah J., Counsel for *Amicus Curiae*

Liberty, Life, and Law Foundation, *Amicus Curiae*

The undersigned counsel also certifies that *Amicus Curiae*, Liberty, Life, and Law Foundation, is a nonprofit corporation that has no parent corporation, is not a publicly held corporation, and does not issue stock.

DATED: August 2, 2022

/s/Deborah J. Dewart
Deborah J. Dewart
Counsel for *Amicus Curiae*
Liberty, Life, and Law Foundation

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IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

Liberty, Life and Law Foundation ("LLLF"), as *amicus curiae*, respectfully urges this Court to affirm the District Court order vacating the Federal Transportation Mask Mandate ("FTMM"). Among other reasons, the FTMM exceeds the CDC's statutory authority, bypassed the notice-and-comment procedure that would be required if the CDC did have statutory authority, is arbitrary and capricious, and violates the rights of American citizens in other ways.

LLLF is a North Carolina nonprofit corporation established to defend constitutional liberties. LLLF is gravely concerned about the growing expansion of government power. LLLF's founder, Deborah Dewart, is the author of a book, *Death of a Christian Nation* (2010), and many *amicus curiae* briefs in the U.S. Supreme Court and the federal circuits.

STATEMENT OF THE ISSUES

Whether the District Court erred in vacating the transportation mask order nationwide on the grounds that the order exceeds the CDC's statutory authority, that the order was arbitrary and capricious, and that the CDC was required to go through notice-and-comment rulemaking.

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[1] The parties have consented to the filing of this brief. Neither the parties nor their counsel have authored this brief, and neither they nor any other person or entity other than amici curiae contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"I can't breathe!" On May 25, 2020, the entire nation heard George Floyd scream as his life was violently snuffed out. Breathe and *life* are inextricably intertwined. Finally, two years into COVID-19, a court has heard the muffled cries of Americans struggling to breathe because unlawful mask mandates have been imposed on them in airplanes, trains, ride shares, schools, stores, medical clinics, and other places.

FTMM is a draconian measure that finds no support in American jurisprudence. Congress did not hide this "elephant" in the "mousehole" CDC cites (42 U.S.C. §264(a)) as authority to issue this sweeping mandate. *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 468 (2001). The district court wisely cut off the unlawful mandate at the first exit. CDC lacked the statutory authority it asserted—and even if it had that authority, the rushed edict bypassed the requisite notice-and-comment. *See* 5 U.S.C. § 553(b). Not only that—the FTMM is a flagrant violation of federal law (Sect. IA).

Amicus curiae offers a "deep dive" into *Jacobson*, the 117-year-old case often cited to support vaccine and other medical mandates. *Jacobson* cannot carry the weight. On the contrary, a thoughtful analysis shows why current medical mandates are unsupportable. The judiciary is perhaps "the only institution . . . in any structural position to push back against potential overreaching by the local, state, or federal

political branches." Lindsay F. Wiley and Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. 179, 183 (July 2020). But courts reviewing COVID-related claims often "disregard[] both the complexity and nuance of Justice Harlan's opinion." Wendy E. Parmet, *Rediscovering* Jacobson *in the Era of Covid-19*, 100 B.U. L. Rev. Online 117, 129 (2020).

ARGUMENT

I. UNLIKE THE FTMM, *JACOBSON* DID NOT VIOLATE THE CONSTITUTION'S STRUCTURAL PROTECTIONS.

"Those who seek to protect individual liberty ignore threats to th[e] constitutional structure at their peril." Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417, 1419 (2008). Before the pandemic, *Jacobson* was typically met with "unwavering adherence." Kellen Russoniello, *Article: The End of* Jacobson*'s Spread: Five Arguments Why an Anti-intoxicant Vaccine Would Be Unconstitutional*, 43 Am. J. L. and Med. 57, 83 (2017). But now, sweeping medical mandates—lockdowns, masks, distancing, vaccines—should alarm Americans and prompt courts to take a closer look. *Jacobson* did not give easy answers. While affirming general state authority to protect public health, the Supreme Court also warned that "public health powers can be abused," so courts "must be vigilant" and "alert to pretext or abuse of power." Parmet, *Rediscovering* Jacobson, 100 B.U. L. Rev. Online at 132.

FTMM is an executive branch decree that jeopardizes the Constitution's structure, evading the normal procedures followed by legislatures and executive agencies. *Jacobson*, on the contrary, conformed to structural constitutional requirements, including separation of powers and federalism. The American public is best served by "maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps *particularly*, when those decisions frustrate government officials." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618-619 (5th Cir. 2021). "[T]he Framers crafted the federal system of Government so that the people's rights would be secured by the division of power." *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *see also New York v. United States*, 505 U.S. 144, 181 (1992) (federal-state division of authority is "for the protection of individuals . . . . [S]tate sovereignty is not just an end in itself.").

A. ***Jacobson*'s mandate was a *law* enacted by the state *legislature*. The FTMM was crafted through unauthorized *executive* action.**

Legislative power belongs to the *legislativ*e branch—not the executive. Art. I, § 1. Congress must "speak clearly" to grant an agency power to make decisions of "vast economic and political significance." *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 667 (2022), quoting *Ala. Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). Congress must use "*exceedingly clear*

language if it wishes to significantly alter the balance between federal and state power." *Id.* (quotation omitted) (emphasis added).

Contrary to the irritating admonition heard by weary travelers that "federal law" requires masks, there is no such "federal law." Indeed, FTMM is a brazen *violation* of federal law. As the Complaint noted (¶39), the FDA issued an "emergency use authorization" (EUA) for face masks on April 24, 2020. Under federal law—a *real* law enacted by Congress, not an executive branch imposter—an EUA medical device cannot be mandated. Informed consent is required and the user must have the option to refuse the product, i.e., to refuse to wear the mask:

> (ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are *informed*—
>
> (I) that the Secretary has authorized the emergency use of the product;
> (II) of the significant known and potential benefits *and risks* of such use, and of the extent to which such benefits and risks are unknown; and
> (III) of the *option to accept or refuse administration of the product*, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

21 U.S.C. § 369bbb-3(3)(1)(A)(ii) (emphasis added). Mask proponents are quick to presume benefits (without evidence) but risks are rarely even acknowledged, let alone disclosed.

This is not the first time the executive branch has encroached on legislative territory during a health crisis. The Arizona Supreme Court, considering a school closing case during the Spanish influenza epidemic, "was troubled that the board of

health had gone beyond clear *executive* enforcement powers and exhibited *legislative* tendencies." Jason Marisam, *Local Governance and Pandemics: Lessons from the 1918 Flu*, 85 U. Det. Mercy L. Rev. 347, 364 (Spring 2008) (emphasis added); *see Globe School District v. Board of Health of City of Globe*, 179 P. 55, 57 (Ariz. 1919) (explaining that the board of health could not be granted legislative powers).

Courts have "a duty to defend the Constitution, and even a public health emergency does not absolve [them] of that responsibility." *Calvary Chapel Dayton Valley v. Sisolak,* 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting). "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so . . . *Jacobson* hardly supports cutting the Constitution loose during a pandemic." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). It is not easy to "balance the need for deference in an emergency and the court's duty to protect constitutional rights . . . neither giving the government a blank check nor hamstringing its emergency response." Daniel Farber, *The Long Shadow of* Jacobson v. Massachusetts*: Public Health, Fundamental Rights, and the Courts*, 57 San Diego L. Rev. 833, 863 (Nov-Dec 2020). "[T]he Constitution . . . entrusts the protection of the people's rights to the Judiciary." *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (Roberts, C.J., concurring). Courts must be cautious "in areas fraught with

medical and scientific uncertainties" and not "rewrite legislation." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Courts ordinarily "defer to legislative fact-finding" in keeping with the separation of powers principle that "allocates to legislatures the fact-dependent task of determining social policy." B. Jessie Hill, *Article: The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 Tex. L. Rev. 277, 333 (December 2007). Here, there is only rushed *executive* action—not legislation. This Court, as an "independent judiciary," should exercise its "unique role . . . to smoke out pretext for government actions during an emergency." Wiley, *Coronavirus, Civil Liberties,* 133 Harv. L. Rev. F. at 194-195. "Emergency does not create power" but merely provides an occasion to exercise pre-existing power. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

B. *Jacobson* involved action by a *state* government, based on a *local* determination of necessity—not the *federal* government.

Two centuries ago, then Chief Justice Marshall observed the power reserved to the states to enact "health laws of every description." *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824). That understanding has stood the test of time. *See, e.g., Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 149 (1855) (states legislate to protect "the lives, limbs, health, comfort, and quiet of all persons"); *Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985) (health is "primarily, and historically, a matter of local concern"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475

(1996) ("states have exercised their police powers to protect the health and safety of their citizens"). It is "beyond question" that Congress has recognized, "from an early day," the power of states to enforce regulations for the health and safety of their own residents. *Compagnie Francaise De Navigation A Vapeur v. Louisiana State Board of Health*, 186 U.S. 380, 387 (1902). In keeping with "both federalism concerns and the historic primacy of state regulation of matters of health and safety," even Congress does not normally pre-empt state police power regulations. *Medtronic*, 518 U.S. at 485.

Jacobson echoed the prevailing understanding of the states' role. 197 U.S. at 25-26 ("to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power"). "Our Constitution principally entrusts 'the safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring), quoting *Jacobson*, 197 U. S. at 38. These matters "do not ordinarily concern the National Government." *Id*. The "police power of a State" embraces "reasonable regulations established directly by legislative enactment" to "protect the public health and the public safety." *Id*. at 25. Despite the severity of the smallpox outbreak, there was no attempt to undercut federalism.

"Under the Constitution, state *and local* governments, not the federal courts, have the primary responsibility for addressing COVID-19 matters." *Calvary Chapel,*

140 S. Ct. at 2614 (Gorsuch, J., dissenting) (emphasis added). Not only was *Jacobson*'s mandate a *state* level action—it was explicitly based on a *local* determination of necessity. The Massachusetts legislature required vaccinations "only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety. . . . a Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions." *Jacobson*, 197 U.S. at 27. When Spanish influenza hit the world in 1918, "localities were empowered (and expected) to respond" although "the states could limit and override that power." Marisam, *Lessons from the 1918 Flu*, 85 U. Det. Mercy L. Rev. at 361. Courts have recognized the powers delegated to localities but strictly limited them. *Id*.

Medical mandates, including masks and vaccines, have become a matter of increasing controversy since the onset of COVID-19. *Jacobson* is one of the only two cases where the Supreme Court upheld a vaccine mandate imposed on individuals. *See Zucht v. King*, 260 U.S. 174, 176 (1922) (upholding school vaccination requirement). Both arose from *state* action—not federal—and acknowledged that health is a *state* matter. *MCP No. 165 v. United States DOL*, 20 F.4th 264, 273 (6th Cir. 2021) (Sutton, J., dissenting from denial of initial hearing en banc). "It's worth remembering that the power of a federal agency to regulate is the power to preempt—to nullify the sovereign power of the States in the area"

which explains why 27 States opposed the emergency OSHA vaccine rule several months ago. *Id*.

It is unlikely, under our constitutional structure, that even Congress would have "authority under the Commerce Clause to impose, much less to delegate the imposition of, a *de facto* national vaccine [or mask] mandate upon the American public." *MCP*, 20 F.4th at 285 (Bush, J., dissenting). "The States . . . have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach." *BST Holdings,* 17 F.4th at 618.

C. *Jacobson* did not rely on an abuse of emergency government powers.

It would be a "considerable stretch" to read *Jacobson*'s upholding of a "local ordinance" as establishing a standard applicable to "statewide measures of indefinite duration." *Calvary Chapel,* 140 S. Ct. at 2608 (2020) (Alito, J., dissenting). However serious COVID-19 may be, "a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists." *Id*. at 2605. Although an "emergency may afford a reason for the exertion of a living power already enjoyed," it cannot "call into life a power which has never lived." *MCP*, 20 F.4th at 292 (Bush, J., dissenting), quoting *Wilson v. New*, 243 U.S. 332, 348 (1917).

America's Founders understood that emergencies "afford a ready pretext for usurpation" of government powers that in turn "would tend to kindle emergencies."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring). In *Youngstown*, "the executive branch claimed it needed to seize control of the country's steel mills as a necessary measure to avert a national catastrophe." *MCP*, 20 F.4th at 269 (Sutton, J., dissenting from denial of initial hearing en banc), citing *Youngstown*, 343 U.S. at 582 (cleaned up). Judicial review guards against decisions like *Korematsu v. United States*, 323 U.S. 214 (1944), where courts "sustain gross violations of civil rights because they are either unwilling or unable to meaningfully look behind the government's purported claims of exigency." Wiley, *Coronavirus, Civil Liberties*, 133 Harv. Rev. F. at 183. If governments are only held to "modest burdens of justification for incursions into our civil liberties during emergencies," it will be easier for them to "find pretexts for triggering such emergencies" and then "use emergencies as pretexts for scaling back our rights." *Id*. at 198.

The duration of the emergency is a critical consideration. In early 2020, "two weeks to stop the spread" morphed into months of fluctuating restrictions, with executive officials repeatedly extending emergency declarations. Concerns escalate when a government official can declare open-ended emergencies. *See, e.g*., *Midwest Inst. of Health, PLLC v. Governor of Mich. (In re Certified Questions from the United States Dist. Court)*, 958 N.W.2d 1 (2020) (recognizing statutory and constitutional limits on the governor's authority to renew or indefinitely extend a

declaration of emergency); *Globe*, 179 P. at 61 (explaining that board of health order closing schools was valid "during the existence of said disease in epidemic form . . . and no longer").

Jacobson does not demand that "lower courts have no choice but to apply more deferential review to governmental restrictions during public health crises." Wiley, *Coronavirus, Civil Liberties*, 133 Harv. Rev. F. at 190. Instead, it foreshadows later cases where fundamental rights are balanced against compelling state interests and solutions are narrowly tailored to minimize the restraint on individual liberty.

II. *JACOBSON* ANTICIPATED LATER LEGAL DEVELOPMENTS PROTECTING FUNDAMENTAL RIGHTS AGAINST GOVERNMENT INTRUSION.

The FTMM, like "[a] national vaccinate-or-test mandate . . . is unprecedented, . . ., *presumably because the intrusion on individual liberty is serious*." *MCP*, 20 F.4th at 273 (Sutton, J., dissenting from denial of initial hearing en banc) (emphasis added). Those who advocate allowing the CDC to mask all travelers "must come to grips with each of the statutory imperatives, each of the clear statement requirements, and all of the constitutional claims." *Id*. 280. Those "constitutional claims" include the fundamental right to bodily autonomy, along with the related right to informed consent and the corollary right to refuse medical treatment

Jacobson was written long before courts began to apply the now familiar tiered scrutiny of fundamental rights—indeed, "*Jacobson* predated the entire modern canonization of constitutional scrutiny." Wiley, *Coronavirus, Civil Liberties,* 133 Harv. L. Rev. F. at 193. While endorsing government protection for public health, this Court also "offered hints of judicially protected limitations on public health powers" and even "endorsed a relatively modern vision of individual liberty" that gave courts "a basis for limiting laws that infringe upon bodily integrity." Parmet, *Rediscovering* Jacobson, 100 B.U. L. Rev. Online at 126. The Court "looked back to its nineteenth-century police power jurisprudence" and simultaneously "forward to the fundamental-rights jurisprudence that would develop in the mid-twentieth century." *Id*. *Jacobson* did not offer simple answers or easy tests but instead foreshadowed the balancing that would characterize future court decisions.

A. Legal precedent before and after *Jacobson* affirms that bodily autonomy is a fundamental right "deeply rooted" in American history and tradition.

In the context of vaccine mandates, even OSHA acknowledged that "[h]ealth in general is an intensely personal matter…." (54 Fed. Reg. 23,042 (May 30, 1989)), and because "vaccine is an invasive procedure . . . OSHA prefers to encourage rather than try to force by governmental coercion, employee cooperation in [a] vaccination program" (54 Fed. Reg. 23,045 (May 30, 1989)). Masks pose a different but no less burdensome physiological burden, restricting the ability to breathe. In addition, the

FTMM impedes the freedom to travel, long considered "a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement is basic in our scheme of values." *Kent v. Dulles*, 357 U.S. 116, 125 (1958). These burdens far exceed the small financial penalty assessed in *Jacobson*.

Bodily integrity is "one of the oldest fundamental rights recognized by the law." Hill, *A Tale of Two Doctrines*, 86 Tex. L. Rev. at 304. Even before *Jacobson*, the Supreme Court recognized that no right is "more sacred" or "more carefully guarded" 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 P. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). *Botsford*'s concept of bodily integrity "served as a framework for the informed consent doctrine" articulated a century later in *Cruzan*. William M. Brooks, *Reevaluating Substantive Due Process as a Source of Protection for Psychiatric Patients to Refuse Drugs*, 31 Ind. L. Rev. 937, 989 (1998).

Jacobson was one of earliest confrontations between "the assertion of an individual right to resist a state-mandated medical intervention" and a state claim that public health warranted the mandate. Hill, *A Tale of Two Doctrines*, 86 Tex. L. Rev. at 296. But even at this early point, "the extent to which *Jacobson* considers

and validates personal autonomy interests regarding medical treatment is surprising." *Id*. This Court should not overlook this aspect of *Jacobson*.

1. Bodily autonomy undergirds the right to informed consent and the corollary right to refuse medical treatment.

As discussed earlier, federal law requires informed consent for face masks because they are subject to the statutory requirements for EUA medical devices. Sect. I-A, citing 21 U.S.C. § 369bbb-3(3)(1)(A)(ii).

American law has long recognized the right to informed consent that is "generally required for medical treatment." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1989). *Cruzan* "effectively enshrined personal autonomy in a medical setting as a constitutionally protected liberty interest," with the majority assuming it while dissenting Justices "explicitly found that the right existed." Kathy L. Cerminara, *Cruzan's Legacy in Autonomy*, 73 SMU L. Rev. 27, 27 (Winter 2020). As then-Judge Cardozo expressed it, every competent adult 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." *Schloendorff* v. *Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914). This tracks common law, where "even the touching of one person by another without consent and without legal justification was a battery." *Id*., citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed. 1984).

The logical corollary of informed consent is "the right of a competent individual to refuse medical treatment." *Cruzan*, 497 U.S. at 277; *see also In re Storar*, 420 N.E.2d 64, 70 (N.Y. 1982), cert. denied, 454 U.S. 858 (1981) (basing the right to refuse treatment on doctrine of informed consent). "The right to refuse any medical treatment emerged from the doctrines of trespass and battery, . . . applied to unauthorized touchings by a physician." *Mills v. Rogers*, 457 U.S. 291, 294, n.4 (1982). During the same term as *Cruzan*, the Supreme Court concluded in *Washington v. Harper* that "[t]he 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). *Washington v. Harper* is perhaps the case "most pertinent to vaccination mandates." Russoniello, *The End of* Jacobson*'s Spread*, 43 Am. J. L. and Med. at 87. Coerced vaccination, like the injection of psychotropic drugs, is "an intrusive treatment . . . a significant infringement on bodily autonomy, one of this Nation's most cherished rights under the Constitution." Brooks, *Reevaluating Substantive Due Process*, 31 Ind. L. Rev. at 945. Although masks do not physically invade the body in the same manner as a drug or vaccine, they substantially impede the ability to breathe freely—a basic bodily function essential to sustain life and health.

Cruzan's affirmation of bodily integrity was not confined to the majority. Justice O'Connor's concurrence noted that "incursions into the body" are "repugnant

to the interests protected by the Due Process Clause" because "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination." 497 U.S. at 287 (O'Connor, J., concurring). Coercion "burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment." *Id.* at 289. The conclusion is inescapable—"the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment." *Id*. at 289.

The *Cruzan* dissents agreed that "freedom from unwanted medical attention is unquestionably among those principles 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)." *Cruzan,* 497 U.S. at 305 (Brennan, J., dissenting). Justice Stevens was equally adamant: "The right to be free from medical attention without consent, to determine what shall be done with one's own body, *is* deeply rooted in this Nation's traditions, as the majority acknowledges." *Cruzan*, 497 U.S. at 342 (Stevens, J., dissenting). The right is "firmly entrenched in American tort law" and "securely grounded in the earliest common law." *Id*.

Building on *Cruzan*, *Washington v. Harper*, and other precedent, the Supreme Court confirmed the right to bodily integrity in *Washington v. Glucksberg,* 521 U.S. 702 (1997). *Glucksberg* concluded that assisted suicide is not a "fundamental right" but echoed the common-law doctrine of informed consent utilized by the *Cruzan*

majority and Justice O'Connor's concurrence. Cerminara, *Cruzan's Legacy*, 73 SMU L. Rev. at 28. *Glucksberg* highlighted the now-familiar terminology that defines "fundamental rights," combining key phrases from *Snyder v. Massachusetts*, 291 U.S. at 105 ("so rooted in the traditions and conscience of our people as to be ranked as fundamental") and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937) ("implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed"). 521 U.S. at 721.

2. *Jacobson* acknowledged the potential for government overreach.

Jacobson narrowly defined its scope according to the "necessities of the case"—"smallpox being prevalent and increasing" in the area subject to the mandate. *Jacobson*, 197 U.S. at 28. The Supreme Court recognized that such a mandate "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" so as to "authorize or compel the courts to interfere for the protection of such persons." *Id*., citing *Wisconsin, M. & P. R.R. Co. v. Jacobson*, 179 U.S. 287, 301 (1900). In *Railroad Company v. Husen*, 95 U.S. 465, 471-473 (1878) the Court affirmed a state's right to pass laws preventing the entrance of persons suffering from contagious diseases, but the laws at issue "went beyond the necessities of the case" and "violated rights secured by the Constitution," so they were invalid. *Jacobson*, 197 U.S. at 28. In sum, *Jacobson*

acknowledged that state police powers "may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression." *Id*. at 38.

Examples of overreach are seen in the years following *Jacobson*. Arizona adopted a "public health elitism" model in response to the Spanish flu epidemic. Marisam, *Lessons from the 1918 Flu*, 85 U. Det. Mercy L. Rev. at 348 (Spring 2008). Under that model, the public defers to experts while the emergency lasts, and law enforcement plays a key role. *Id*. Arizona's "extreme and committed enforcement" of its public health measures—similar to the COVID-19 response in some areas—"paints a vivid picture of the potential for abuse and the problems of relying on coercion instead of public cooperation." *Id*. at 362. Deputized citizens demonstrated "patriotic zeal" as they arrested persons who coughed without covering their mouths and stopped traffic to intimidate those who were not traveling for business. *Id*.

Buck v. Bell, twenty years after *Jacobson*, is a glaring demonstration of overreach: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . . Three generations of imbeciles are enough." 274 U.S. 200, 207 (1927) (upholding coerced sterilization). The Court "applied *Jacobson*'s hallmark deference to legislatures" but "ignore[ed] *Jacobson*'s suggestion of an individual right to protect one's own health." Hill, *A Tale of Two Doctrines*, 86 Tex. L. Rev. at 300. Only fifteen years later, the Court struck down a

sterilization mandate for criminals, highlighting a schism between the Court's "autonomy" cases and its "public health" cases. *Id*., citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). More recent decisions developed tests to balance public health (compelling state interests) with fundamental rights (autonomy).

3. *Jacobson* acknowledged the need for mandatory medical exemptions in appropriate cases.

In *Jacobson*, the petitioner failed to provide proof of his adverse childhood reaction to a vaccine—his reason for objecting to the mandate. *Jacobson*, 197 U.S. at 36-37. But the Court recognized that a person "embraced by the mere words" of the law might have a medical condition that would render the vaccination "cruel and inhuman." *Id*. at 38-39. In that case, courts would "be competent to interfere and protect the health and life of the individual concerned." *Id*. at 39. The Court "presumed that the legislature intended exceptions to its language which would avoid results of that character." *Id*. Masks also present the potential for adverse medical reactions, e.g., persons with heart or respiratory conditions and women whose memories of sexual assault are triggered by a face covering.

B. *Jacobson* foreshadowed the "compelling interest" standard.

Each state "undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens." *South Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting). "Stemming the spread of COVID-19" may temporarily

qualify as "a compelling interest." *Roman Catholic Diocese*, 141 S. Ct. at 67 (*per curiam*). But "this interest cannot qualify as [compelling] forever. . . . [C]ivil liberties face grave risks when governments proclaim indefinite states of emergency." *Doe v. Mills*, 211 L. Ed. 2d 243, 246 (2021) (Gorsuch, J., dissenting).

There is unquestionably a tension in case law between public health and bodily autonomy. In public health cases, sick persons are viewed "not so much as autonomous decision makers" but "threats to others that can and indeed must be controlled." Hill, *A Tale of Two Doctrines*, 86 Tex. L. Rev. at 295. During the COVID-19 era, even asymptomatic persons were seen as "threats" if they declined masks or vaccines. Autonomy cases, beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965), "treat[] the right to choose appropriate medical treatment as an aspect of the rights to bodily integrity and decisional autonomy." Hill, *A Tale of Two Doctrines*, 86 Tex. L. Rev. at 295. Resolving the tension demands a balancing of the respective interests, and when a fundamental liberty is at stake, "the government's burden [is] to provide more than minimal justification for its action." *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 813 (S.D. Ohio 1995).

Jacobson did not suspend consideration of the claimant's fundamental rights, but instead "adopted a quintessential balancing test." Wiley, *Coronavirus, Civil Liberties,* 133 Harv. L. Rev. F. at 190. Despite what "some contemporary courts have concluded," *Jacobson* cannot fairly be read to establish a weak standard of

review. *Id*. at 191. The Supreme Court rejected the argument that compulsory vaccination is inevitably "unreasonable, arbitrary and oppressive" (197 U.S. at 26), "however widespread the epidemic" (*id*. at 37)—but also acknowledged its duty to invalidate a statute that had "no real or substantial relation" to public health and safety, or that was "beyond all question, a plain, palpable invasion of rights secured by fundamental law." *Id*. at 31, citing *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). There is a serious need for scientific studies and analysis to determine whether masks offer *any* real benefit to public health and to identify the potential harms.

Subsequent cases developed standards of "proportionality and balancing," generally "permit[ting] greater incursions into civil liberties in times of greater communal need." Wiley, *Coronavirus, Civil Liberties,* 133 Harv. L. Rev. F. at 182-183. Courts applied a "more searching judicial inquiry" for liberties within the Bill of Rights. Russoniello, *The End of* Jacobson*'s Spread*, 43 Am. J. L. and Med. at 86; *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting a "narrower scope for . . . the presumption of constitutionality" in such cases). Although the general standard for public health regulations "shifted from reasonableness to the very lenient rational basis," courts "began to apply a higher level of scrutiny to government actions violating fundamental rights." Farber, *The Long Shadow*, 57 San Diego L. Rev. at 844. The federal government's role "as a guarantor of basic federal rights against state power was clearly established" after

the Fourteenth Amendment was passed. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). This followed the U.S. Constitution's historical role "as a shield against intrusive governmental behavior and a sword to uphold individual liberty." Brooks, *Reevaluating Substantive Due Process*, 31 Ind. L. Rev. at 940. A law that infringes on a fundamental liberty must be narrowly tailored to further a compelling state interest. *See, e.g., Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (racial equality); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973) (under strict scrutiny, the state "is not entitled to the usual presumption of validity").

Cruzan affirmed that a competent person's "constitutionally protected liberty interest" in "refusing unwanted medical treatment" could be inferred from *Jacobso*n and other prior decisions (497 U.S. at 278), citing *Jacobson*'s balancing "an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease." 497 U.S. at 279. *See* Farber, *The Long Shadow*, 57 San Diego L. Rev. at 846 (noting *Cruza*n's reliance on *Jacobso*n to infer a "right to refuse medical treatment at the end of life").

Professors Hodge and Gostin derived a helpful four-factor test from *Jacobson* that can be used to evaluate vaccine, mask, and other medical mandates. James G. Hodge, Jr. & Lawrence I. Gostin, *School Vaccination Requirements: Historical, Social and Legal Perspectives*, 90 KY. L.J. 831, 856 (2001). First, the mandate cannot exceed what is reasonably required to respond to a public health necessity. Second, the state must use reasonable means that have a "real or substantial relation" to the danger targeted. Third, the mandate must be a proportionate response that is not arbitrary or unduly onerous. Finally, the medical intervention must not cause harm—implying that medical exemptions must be available. Russoniello, *The End of* Jacobson*'s Spread*, 43 Am. J. L. and Med. at 103; *see, e.g., In re Cincinnati Radiation Litig.*, 874 F. Supp. at 813 ("bodily invasions often cannot be readily remedied after the fact through damage awards").

These factors track the general tests for fundamental constitutional rights—compelling state interest, narrow tailoring, least restrictive means. When "the fundamental right to refuse unwanted medical treatment" is at stake, "a court should apply strict scrutiny . . . ." Russoniello, *The End of* Jacobson*'s Spread*, 43 Am. J. L. and Med. 57 at 60.

C. *Jacobson* anticipated "narrow tailoring."

The characterization of bodily autonomy as a fundamental right is significant. The "substantive component" to "due process of law" "forbids the government to

infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302 (1993); *see also Zablocki*, 434 U.S. at 388 (restriction must be "closely tailored to effectuate . . . sufficiently important state interests"). *Jacobson* paved the way with a narrowly tailored, "delicately handled scalpel" in contrast to the "one-size-fits-all sledgehammer" like what OSHA attempted to impose on millions of Americans (*BST Holdings,* 17 F.4th at 612) or what the CDC imposed on American travelers for many months.

In *Jacobson*, "there was no dispute that smallpox was a dire threat to the community" necessitating drastic measures. Farber, *The Long Shadow*, 57 San Diego L. Rev. at 841. The Court "permitted the state to require vaccinations because smallpox threatened life," not because the treatment might be beneficial. Brooks, *Reevaluating Substantive Due Process*, 31 Ind. L. Rev. at 1004. *Jacobson* reasoned there was a "paramount necessity" for the community to act in "self-defense" to protect against the epidemic. 197 U.S. at 27. When the Board of Health adopted the mandate, smallpox was "prevalent to some extent in the city of Cambridge and the disease was increasing." *Id*. The mandate was confined to the well-defined geographic area where the disease was present and spreading. The Supreme Court compared the situation to one where a citizen returning from a voyage must be quarantined because of exposure to yellow fever or cholera, but only until "the

danger of the spread of the disease among the community at large has disappeared." *Id*. at 29.

Jacobson's narrow mandate, unlike FTMM's one-size-fits-all sledgehammer, foreshadows the "least intrusive means" test in *Shelton v. Tucker*, i.e., "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 364 U.S. 479, 488 (1960). Even to pursue a legitimate interest, "a State may not choose means that unnecessarily restrict constitutionally protected liberty." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979), quoting *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973). States must "adopt the least drastic means" to achieve their interests. *Illinois State Bd.*, 440 U.S. at 185. *Jacobson* can be understood to require state laws to conform to "public health necessity, reasonable means, proportionality, and harm avoidance." Parmet, *Rediscovering* Jacobson, 100 B.U. L. Rev. Online at 128, quoting Lawrence O. Gostin, Public Health Law: Power, Duty, Restraint 68 (1st ed. 2000).

Jacobson took judicial notice of "nearly a century" of medical authority determining that the smallpox vaccine was safe and effective. There is no comparable history to warrant the mass masking of asymptomatic Americans. COVID-19 has generated a multitude of conflicting opinions, even among medical

professionals. This is nothing like *Jacobson*. In the wake of Boston's smallpox outbreak, both the Supreme Judicial Court of Massachusetts and the Supreme Court noted that "for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox." *Jacobson*, 197 U.S. at 23-24; *see Commonwealth v. Pear*, 66 N.E. 719, 721 (Mass. 1903). Medical experts had generally considered the "risk of injury . . . too small to be seriously weighed as against the benefits." *Jacobson*, 197 U.S. at 24. "The regulation was not simply reasonable because it aimed to prevent a deadly epidemic but because it was based on public health knowledge" available at the time. Parmet, *Rediscovering* Jacobson, 100 B.U. L. Rev. Online at 125.

CONCLUSION

Obedience to the Constitution does not hinge on "the circumstances of a particular crisis . . . . The People have decreed that it shall be the supreme law of the land at all times." *Downes v. Bidwell*, 182 U. S. 244, 384 (1901) (Harlan, J., dissenting). A century later, even with the threat of America's worst pandemic, "we may not shelter in place when the Constitution is under attack." *Roman Catholic Diocese*, 141 S. Ct. at 71 (Gorsuch, J., concurring).

The District Court ruling is an excellent, well-reasoned decision that should be affirmed.

Dated: August 2, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,456 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on August 2, 2022. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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