No. 22-10077 consolidated with No. 22-10534

In the United States Court of Appeals
for the Fifth Circuit

U.S. Navy SEALs 1-26; U.S. Navy Special Warfare Combatant Craft Crewmen 1-5; U.S. Navy Explosive Ordnance Disposal Technician 1; U.S. Navy Divers 1-3,

Plaintiffs - Appellees,
v.

Joseph R. Biden, Jr., in his official capacity as President of the United States of America; Lloyd Austin, Secretary, U.S. Department of Defense, individually and in his official capacity as United States Secretary of Defense; United States Department of Defense; Carlos Del Toro, individually and in his official capacity as United States Secretary of the Navy.

Defendants - Appellants.

On Appeal from the United States District Court for the
Northern District of Texas, Fort Worth Division
Case No. 4:21-cv-01236-O
Honorable Reed O'Connor, United States District Court Judge

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

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS
No. 22-10077 consolidated with No. 22-10534

FIFTH CIRCUIT RULE 29.2

The undersigned counsel certifies that the following persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Deborah J. Dewart, Counsel for *Amicus Curiae*

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

The undersigned counsel also certifies that the sole *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 23, 2022

/s/Deborah J. Dewart
Deborah J. Dewart
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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 uphold the District Court's preliminary injunction because the plaintiffs have demonstrated a substantial likelihood of success on the merits and will suffer irreparable injury to their religious freedom rights, under both the First Amendment and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000bb *et seq*., if the injunction is vacated.

LLLF is a North Carolina nonprofit corporation established to defend and preserve constitutional liberties. LLLF is gravely concerned about the growing expansion of government power and the corresponding loss of basic rights, including religious freedom and the right to informed consent for medical treatment. LLLF's founder is the author of a book, *Death of a Christian Nation* (2010) and many *amicus curiae* briefs in the Supreme Court and the federal circuits.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

COVID-19 has "prompted public health mandates without precedent for at least a century." Daniel Farber, *The Long Shadow of* Jacobson v. Massachusetts*: Public Health, Fundamental Rights, and the Courts*, 57 San Diego L. Rev. 833, 833

[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.

(November-December 2020). Officials often rely on "emergency" powers to issue mandates. *Jacobson v. Massachusetts*, decided over a century ago, is often employed to justify this unprecedented expansion of government power. 197 U.S. 11 (1905). But *Jacobson* "is not an absolute blank check for the exercise of governmental power." *Robinson v. Attorney General*, 957 F.3d 1171, 1179 (11th Cir. 2020). *Jacobson* does not grant any level or branch of government carte blanche to issue medical mandates. *Jacobson* relied on a century of medical knowledge to craft a narrowly tailored mandate to address a smallpox outbreak while respecting fundamental liberties. And the penalty for violation—a small fine—pales in comparison to the life-altering loss of livelihood and career facing the Navy Seals. *Jacobson* also respected separation of powers and federalism.

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).

Prior to 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, the sweeping mandates—lockdowns, masks, distancing, vaccines—should alarm Americans and prompt courts to take a closer look at *Jacobson*. That case did not give easy answers. While affirming the government's general authority to protect public health, the 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. The Navy's position about the Seals is an example of such abuse.

ARGUMENT

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

In responding to the Navy Seals' claims, this Court must come to grips with all of the constitutional claims at stake—not only religious liberty but also fundamental rights respecting bodily autonomy and informed consent to medical treatment.

Jacobson was written before courts developed 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. The Supreme Court "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 decisions.

A. Supreme Court precedent following *Jacobson* confirms bodily autonomy as a fundamental right "deeply rooted" in America's history and traditions.

Health is an intensely personal matter and vaccination is an exceedingly invasive procedure. Unlike the small financial penalty ($5) assessed in *Jacobson*, the military mandate imposes a massive burden on the Navy Seals, who face a Hobson's choice between their careers and their fundamental liberties of religion and bodily autonomy. As a condition of continuing to defend the freedoms of *others*, these highly skilled individuals must sacrifice their own liberties. That cannot be right.

Jacobson was one of earliest confrontations between "the assertion of an individual right to resist a [government]-mandated medical intervention" and a

government claim that public health warranted the mandate. B. Jessie Hill, *Article: The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 Tex. L. Rev. 277, 296 (December 2007). But even at this early point, "the extent to which *Jacobson* considers and validates personal autonomy interests regarding medical treatment is surprising." *Id*. The Court should not overlook this aspect of *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).

1. Bodily autonomy encompasses the right to informed consent—and the corollary right to *refuse* medical treatment.

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.

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). Such 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* although concluding that assisted suicide is not a "fundamental right." 521 U.S. 702 (1997). *Glucksberg* 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 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 Supreme 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 Supreme Court "presumed that the legislature intended exceptions to its language which would avoid results of that character." *Id*. On this point, the Navy is consistent with *Jacobson* and bodily autonomy in providing for medical exemptions.

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

There is unquestionably tension between cases emphasizing public health and those considering 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 are seen as "threats" if they decline mandatory masks and 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). The Navy's rubber stamp denial of religious exemptions does not even attempt to meet this burden, even though *two* fundamental liberties are at stake.

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 explicitly 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 Supreme Court affirmed a state's right to pass "sanitary laws" preventing those suffering from contagious diseases from entering its borders 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 "exerted in such circumstances" may be "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*. In the wake of the Spanish flu epidemic, Arizona adopted a "public health elitism" model where the public defers to experts while the emergency lasts and law enforcement plays a key role. Jason Marisam, *Local Governance and Pandemics: Lessons from the 1918*

Flu, 85 U. Det. Mercy L. Rev. 347, 348 (Spring 2008). Arizona's "extreme and committed enforcement" of its public health measures—similar to the COVID-19 response—"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 example of overreach: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . . Three generations of imbeciles are enough." *Buck v. Bell*, 274 U.S. 200, 207 (1927) (coerced sterilization). The Supreme 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. Fifteen years later the Court struck down a sterilization mandate for criminals, highlighting a schism between its "autonomy" and "public health" cases. *Id*., citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

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

To prevail against the Navy Seals' religious liberty claims, the Navy must show a *compelling* interest in vaccinating these particular Seals contrary to their

sincerely held religious beliefs. This standard is compelled by both the Religious Freedom Restoration Act (RFRA), 42 U. S. C. §2000bb *et seq*., and precedent governing other fundamental rights, such as bodily autonomy.

Earlier in the pandemic, the Supreme Court recognized each state's "compelling interest in combating the spread of COVID-19 and protecting the health of its citizens." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting). "Stemming the spread of COVID-19" qualifies as "a compelling interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (*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).

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 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).

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. The Supreme Court began to apply 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 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—a standard explicitly applicable to the Seals'

religious liberty claims under the RFRA. *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* to evaluate the constitutionality of a vaccine mandate. 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 vaccine must not cause harm—implying the necessity for medical exemptions. Russoniello, *The End of* Jacobson*'s Spread*, 43 Am. J. L. and Med. at 103; *see In re Cincinnati*, 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.

D. *Jacobson* anticipated the "narrow tailoring" developed in later cases.

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" the Navy

imposes on the Seals. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 612 (5th Cir. 2021).

In *Jacobson*, "there was no dispute that smallpox was a dire threat to the community." Farber, *The Long Shadow*, 57 San Diego L. Rev. at 841. The Supreme 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 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 foreshadows the "least intrusive means" test stated in *Shelton v. Tucker*—"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). "[A] State may not choose means that unnecessarily restrict

constitutionally protected liberty," even to pursue a legitimate interest. *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—unlike the rapidly developed COVID-19 vaccine. COVID-19 has generated a multitude of conflicting opinions, even among medical professionals. Vaccines were developed at "warp speed." Many Americans are understandably hesitant to assume the potential risks of what seems to be a broad sweeping, coercive medical experiment. It is impossible to know the long-term impact of these vaccines at this early stage. 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.

II. *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). Courts are traditionally hesitant to intervene in military affairs. *Chappell v. Wallace,* 462 U.S. 296, 300 (1983). But the Supreme Court has never held that "military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Id*. at 304.

Jacobson's respect for separation of powers and federalism is worth noting. *Federal* vaccine mandates jeopardize that constitutional structure. 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*, 17 F.4th at 618-619. "[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). *Jacobson* did not upset the federal-state division of authority established "for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). "[S]tate sovereignty is not just an end in itself." *Id*.

A. *Jacobson*'s mandate was a *law* enacted by the state *legislature*.

Legislative power resides in the *legislativ*e branch. 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 *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021). *Jacobson* conformed to this principle.

This is not the first dispute about allocation of power 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." Marisam, *Lessons from the 1918 Flu*, 85 U. Det. Mercy L. Rev. at 364 (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).

The Supreme Court acknowledged its "duty to defend the Constitution, and even a public health emergency does not absolve [it] 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*, 141 S. Ct. at 70 (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." Farber, *The Long Shadow*, 57 San Diego L. Rev. at 863. "[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." Hill, *A Tale of Two Doctrines*, 86 Tex. L. Rev. at 333. Here, there is no legislation—only rushed action with insufficient time for even the best medical experts to evaluate the long-term consequences of a vaccine developed at warp speed. 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.

Jacobson is one of the only two cases where this Court has upheld a vaccine mandate imposed on individuals.[2] Both arose from state action—not federal—and acknowledged that this 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 oppose the emergency rule." *Id*.

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) (state legislation protects "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

[2] *See Zucht v. King*, 260 U.S. 174, 176 (1922) (upholding school requirement—"it is within the police power to provide for compulsory vaccination").

(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. Congress must use "*exceedingly clear* language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotation omitted) (emphasis added).

Jacobson echoed the prevailing understanding of the state's role—"to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power." 197 U.S. at 25-26. "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*, 140 S. Ct. 1613 (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, *Jacobson* did not 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 initiated at the *state* level—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 to the flu," although "the states could limit and override that power." Marisam, *Lessons from the 1918 Flu*, 85 U. Det. Mercy L. Rev. at 361.

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 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*, 17 F.4th at 618.

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

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 like the Navy Seals' religious liberty are balanced against compelling state interests and solutions are narrowly tailored to minimize the restraint on liberty.

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." *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").

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). Even in the face of a historic 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 should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2022, an electronic copy of the foregoing brief was filed with the Clerk of this Court using the CM/ECF system, which will serve all counsel of record.

/s/Deborah J. Dewart
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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,038 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I certify that the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13, the electronic submission is an exact copy of the paper submission, and the document has been scanned for viruses and is free of viruses.

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