

No. 22-40043

**United States Court of Appeals
for the Fifth Circuit**

FEDS FOR MEDICAL FREEDOM; LOCAL 918, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES; HIGHLAND ENGINEERING, INCORPORATED;
RAYMOND A. BEEBE, JR.; JOHN AMBRUST; et. al.

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, in his official capacity as President of the United States;
THE UNITED STATES OF AMERICA; PETE BUTTIGIEG, in his official capacity as
Secretary of Transportation; DEPARTMENT OF TRANSPORTATION; JANET
YELLEN, in her official capacity as Secretary of Treasury; et al.

Defendants-Appellees.

On Appeal from the U.S. District Court
for the Southern District of Texas, Case No. 3:21-cv-356

**MOTION OF LIBERTY JUSTICE CENTER
FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF
PLAINTIFFS-APPELLANTS ON REHEARING EN BANC**

Jeffrey D. Jennings
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
(312) 637-2280
jjennings@libertyjusticecenter.org
Attorney for Amicus Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Liberty Justice Center is a nonprofit entity operating under § 501(c)(3) of the Internal Revenue Code. Amicus is not a subsidiary or affiliate of any publicly owned corporation and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to Amicus's participation.

RULE 29 DISCLOSURE STATEMENT

No counsel for either party authored this brief in whole or in part. No person or entity other than amicus made a monetary contribution to its preparation or submission.

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS*

Pursuant to Federal Rule of Appellate Procedure 29, Liberty Justice Center requests leave to file an amicus brief supporting Plaintiffs-Appellants, to assist the Court in its consideration of their claims on rehearing en banc. All parties were provided with notice of Amicus's intent to file as required under Rule 29(2). All parties consented to this filing.

INTEREST OF *AMICUS*

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest legal aid firm that seeks to protect economic liberty, private property rights,

free speech, and other fundamental rights. LJC pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g. Janus v. AFSCME*, 138 S. Ct. 2448 (2018). This case interests Amicus because it involves similar issues to the ones that it litigated before this Court in *BST Holdings, LLC v. OSHA*, namely separation of powers and medical freedom. 17 F.4th 604, 618 (5th Cir. 2021).

ISSUES TO BE ADDRESSED BY *AMICUS*

Amicus will focus on the history behind the “constitutional freedom[s]” of employees to make their own medical decisions, which this Court recognized in *BST Holdings*, 17 F.4th 604, 618 (5th Cir. 2021). This is relevant to the Plaintiffs-Appellants’ arguments that this Court has jurisdiction to hear the case and that the statute at issue should be construed narrowly to respect employee medical freedom. En Banc Br. for Appellees 16-18, 44-56. This discussion will aid the Court as it considers these issues.

CONCLUSION

For the foregoing reasons, Liberty Justice Center requests leave to file the amicus brief attached to this motion.

Dated: September 2, 2022 Respectfully Submitted,

/s/ Jeffrey D. Jennings

Jeffrey D. Jennings

Liberty Justice Center

440 N. Wells Street, Suite 200,

Chicago, Illinois 60654

Telephone: 312-637-2280

jjennings@libertyjusticecenter.org

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Federal Rules of Appellate Procedure 27 because it contains 361 words, excluding the parts exempt by Federal Rule of Appellate Procedure 32(f).

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface, Century Schoolbook, in 14-point font.

Date: September 2, 2022

/s/ Jeffrey D. Jennings

Attorney for Amicus Curiae Liberty Justice
Center

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing through the Court's CM/ECF system, which will send a notification of such filing to counsel of record.

Dated: September 2, 2022 /s/ Jeffrey D. Jennings
Jeffrey D. Jennings

No. 22-40043

**United States Court of Appeals
for the Fifth Circuit**

FEDS FOR MEDICAL FREEDOM; LOCAL 918, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES; HIGHLAND ENGINEERING, INCORPORATED; RAYMOND
A. BEEBE, JR.; JOHN AMBRUST; et. al.

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, in his official capacity as President of the United States;
THE UNITED STATES OF AMERICA; PETE BUTTIGIEG, in his official capacity as
Secretary of Transportation; DEPARTMENT OF TRANSPORTATION; JANET
YELLEN, in her official capacity as Secretary of Treasury; et al.

Defendants-Appellees.

On Appeal from the U.S. District Court
for the Southern District of Texas, Case No. 3:21-cv-356

**BRIEF OF AMICUS CURIAE LIBERTY JUSTICE CENTER
IN SUPPORT OF PLAINTIFFS-APPELLANTS
ON REHEARING EN BANC**

Jeffrey D. Jennings
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
(312) 637-2280
jjennings@libertyjusticecenter.org
Attorney for Amicus Curiae

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Case No. 22-40043, *Feds for Medical Freedom v. Biden*

The undersigned counsel of record for amicus curiae certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case, as well as those listed in the Certificates of Interested Persons that the parties and other amici filed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

<u>Person or entity</u>	<u>Connection to case and interest</u>
Jeffrey D. Jennings	Counsel for Amicus Curiae Liberty Justice Center
Liberty Justice Center	Amicus Curiae

Amicus Curiae Liberty Justice Center is a not-for-profit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It does not have a parent corporation and no publicly held company has a 10% or greater ownership interest.

/s/ Jeffrey D. Jennings
Attorney of record for Liberty Justice Center.

TABLE OF CONTENTS

Certificate of Interested Persons and Corporate Disclosure Statement	i
Table of Authorities	iii
Interest of Amicus Curiae.....	1
Summary of the Argument	1
Argument	3
The federal government’s vaccine mandate violates its employees’ constitutional right to medical freedom	3
A. Since the founding era, Americans have guarded their freedom against government-mandated inoculation.....	3
B. The Progressive Era and <i>Jacobsen v. Massachusetts</i>	9
1. The embrace of vaccination was part of the Progressive Era’s love for scientific expertise	9
2. Modern society’s rejection of <i>Buck v. Bell</i> and eugenics also shows that <i>Jacobsen</i> did not end this country’s tradition of medical freedom.....	16
Conclusion.....	18
Certificate of Compliance.....	20
Certificate of Service.....	21

TABLE OF AUTHORITIES

Cases:

<i>Abigail Alliance for Better Access to Dev. Drugs v. von Eschenbach</i> , 495 F.3d 695 (D.C. Cir. 2007).....	6
<i>Agudath Isr. v. Cuomo</i> , 983 F.3d 620 (2d Cir. 2020)	15
<i>Austin v. U.S. Navy Seals</i> , 142 S. Ct. 1301 (2022)	8, 9
<i>BST Holdings, LLC v. OSHA.</i> , 17 F.4th 604 (5th Cir. 2021)	1, 2, 3, 4, 18
<i>Buck v. Bell</i> , 274 U.S. 200 (1927)	16, 17
<i>Cochran v. United States SEC</i> , 20 F.4th 194 (5th Cir. 2022)	12
<i>Commonwealth v. Pear</i> , 66 N.E. 719 (Mass. 1903).....	13
<i>Culinary Studios, Inc. v. Newsom</i> , 517 F. Supp. 3d. 1042 (E.D. Cal. 2021)	15
<i>Dep’t of Navy v. Egan</i> , 484 U.S. 518 (1988)	9
<i>Espinoza v. Mont. Dep’t of Revenue</i> , 140 S. Ct. 2246 (2020)	11
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	3

<i>In re Jacobs</i> , 98 N.Y. 108 (1885)	6
<i>In re Smith</i> , 40 N.E. 497 (N.Y. 1895)	6, 7
<i>Janus v. AFSCME</i> , 138 S. Ct. 2448 (2018)	1
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905)	2, 3, 13, 14, 15, 16, 17, 18
<i>O'Brien v. Cunard S.S. Co.</i> , 28 N.E. 266 (1891)	5
<i>Roman Cath. Diocese of Brooklyn v. Cuomo</i> , 141 S. Ct. 63 (2020)	2, 14, 15
<i>Smith v. Emery</i> , 42 N.Y.S. 258 (N.Y. App. Div. 1896)	7
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	18
<i>Wong Wai v. Williamson</i> , 103 F. 1 (C.C.N.D. Cal. 1900)	6

Rules

Federal Rule of Appellate Procedure 29(a)	1
---	---

Other Authorities:

Adam Cohen, <i>Imbeciles</i> , 9-10 (2016)	17
Alexandra Marvar, <i>How New York Separated Immigrant</i>	

<i>Families in the Smallpox Outbreak of 1901, Smithsonian Magazine</i> (Jan. 10, 2019), https://www.smithsonianmag.com/history/how-new-york-separated-immigrant-families-smallpox-outbreak-1901-180971211/	9, 10
Alexandra Stern, <i>Forced sterilization policies in the US targeted minorities and those with disabilities – and lasted into the 21st century</i> , University of Michigan Institute for Healthcare Policy & Innovation (September 23, 2020), https://ihpi.umich.edu/news/forced-sterilization-policies-us-targeted-minorities-and-those-disabilities-and-lasting-21st-century	17, 18
Alicia Ault, <i>History Shows Americans Have Always Been Wary of Vaccines</i> , Smithsonian Magazine (2021), https://www.smithsonianmag.com/smithsonian-institution/history-shows-americans-have-always-been-wary-vaccines-180976828/	4
Ann M. Becker, <i>Small Pox in Washington’s Army: Strategic Implications of the Disease during the American Revolutionary War</i> , 68 The Journal of Military History 381 (2004)	8
B. Jessie Hill, <i>The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines</i> , 86 Tex. L. Rev. 277 (2007)	3
Ben Horowitz, <i>A Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccinations During a Public Health Emergency</i> , 60 Am. U.L. Rev. 1715, 1732 (2011)	6
Bradley C.S. Watson, <i>One Supreme Court: Oliver Wendell Holmes, Louis Brandeis, and the Progressive Revolution in Constitutional Jurisprudence</i> , in <i>Progressive Challenges to the American Constitution: A New Republic</i> 257 (Bradley C.S. Watson ed., 2017)	16
“Buck v. Bell, Supreme Court of Appeals of Virginia,	

Brief for Appellee, September 1925,” <i>Document Bank of Virginia</i> , accessed Aug. 18, 2022, https://edu.lva.virginia.gov/dbva/items/show/227	18
Corinna B. Lain, <i>Three Supreme Court “Failures” and a Story of Supreme Court Success</i> , 69 Vanderbilt L. Rev. 1019 (2019)	17
Courtney Segota, Keeping Up with New Legal Titles, 113 Law Libr. J. 51, 68 (2021)	11
Frank P. Grad, <i>Communicable Disease and Mental Health: Restrictions of the Person</i> , 12 Am. J. L. and Med. 381, 385 (1986)	5
James Colgrove, <i>Between Persuasion and Compulsion: Smallpox Control in Brooklyn and New York, 1894-1902</i> , Bulletin of the History of Medicine, Vol. 78, No. 2 (Summer 2004). https://www.jstor.org/stable/44448007	7, 9
James Colgrove, <i>Science in a Democracy: The Contested Status of Vaccination in the Progressive Era and the 1920s</i> , 96 Isis 167, 182-83 (June 2005)	12, 13
John F. Witt, American Contagions: Epidemics and the Law from Smallpox to COVID-19 (2020)	11
Josh Blackman, <i>The Irrepressible Myth of Jacobson v. Massachusetts</i> , 70 Buff. L. Rev. 131, 155 (2022)	7, 8, 16
Matthew Niederhuber, <i>The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic</i> , Harvard University (2014), https://sitn.hms.harvard.edu/flash/special-edition-on-infectious- disease/2014/the-fight-over-inoculation-during-the-1721- boston-smallpox-epidemic/	4, 5

Mary Holland, <i>Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children</i> , 12 Yale J. Health Pol’y L. & Ethics 39 (2012)	8
Michael Willrich, “ <i>The Least Vaccinated of Any Civilized Country</i> ”: <i>Personal Liberty and Public Health in the Progressive Era</i> , 20 Journal of Policy History 76 (2008).....	5, 6, 7, 9, 13
Robert M. Wolfe & Lisa K. Sharp, <i>Anti-vaccinationists past and present</i> , NIH (2002), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1123944/	7
Transcript of Record, <i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905) (No. 70-175) [https://perma.cc/ EUK9-TX4V]	13
Symposium, <i>Supreme Mistakes</i> , 39 Pepp. L. Rev. 1, 1-11 (2011).....	17

INTEREST OF AMICUS CURIAE

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest legal aid firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. LJC pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g. Janus v. AFSCME*, 138 S. Ct. 2448 (2018). Amicus has a particular interest in this case because it served as counsel to the plaintiffs in *BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021), which first recognized the constitutional dimensions of forcing an individual to take a COVID-19 vaccine.

LJC files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and all parties to the appeal have consented to the filing of this brief. No counsel for any party authored any part of this brief, and no person or entity other than amicus funded its preparation or submission.

SUMMARY OF THE ARGUMENT

Medical freedom from coercive vaccination is part of the history and tradition of United States. There has been a longstanding reluctance

from state and federal courts to permit schemes that force people to receive vaccinations. This Court joined that consensus in *BST Holdings* when it said that government-imposed vaccine mandates impose an intolerable choice by “threaten[ing] to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s),” which amounts to “the loss of constitutional freedoms.” 17 F.4th at 618.

This brief has two points. First, evidence from the founding era of our nation indicates a strong national aversion to coercive mandates on citizens’ medical freedom. This brief gives a foundation in the historical record for this Court’s holding in *BST Holdings* recognizing a constitutional interest in medical freedom. Second, that consensus started fracturing with *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which was a product of the Progressive Era, has been massively misread, and in all events is not a strong precedent. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring) (“Why have some mistaken this Court’s modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic?”). This brief seeks to cut through the doctrinal knot

that scholars recognize when they try to square the public-health rationale of *Jacobson* with the bodily-autonomy rights that *Griswold v. Connecticut* recognized. 381 U.S. 479 (1965); *see also, e.g.*, B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 Tex. L. Rev. 277, 281-82 (2007). The better approach is to take both *Jacobson* and *Griswold* with a great grain of salt and start with a more comprehensive understanding of our history.

ARGUMENT

The federal government’s vaccine mandate violates its employees’ constitutional right to medical freedom.

In *BST Holdings*, this Court granted the petitioners’ motion to stay OSHA’s vaccine mandate for private employers. 17 F.4th at 619. It reasoned that “the [OSHA] Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s). For the individual petitioners, the loss of constitutional freedoms ‘for even minimal periods of time . . . unquestionably constitutes irreparable injury.’” *Id.* at 618 (quotation omitted). The Court emphasized that, “The public interest is also 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.” *Id.* at 618-19. This holding aligns with the historical tradition of medical freedom in the United States.

A. Since the founding era, Americans have guarded their freedom against government-mandated inoculation.

In the founding era, vaccines did not exist, but inoculation (administration of a small dose of a disease that confers immunity) did exist.¹ Yet inoculation mandates were exceptionally rare in cases other than the military. Americans have vehemently rejected mandatory inoculations at every turn, beginning with tossing a bomb through the window of a pro-innoculation minister in Boston in 1721. Alicia Ault, *History Shows Americans Have Always Been Wary of Vaccines*, Smithsonian Magazine (2021).² Indeed, “[o]pposition to inoculation and then vaccination has been present for as long as the practices themselves” in the United States. Matthew Niederhuber, *The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic*, Harvard

¹ Those who have seen the HBO series *John Adams* cannot help but recall the vivid scene when Mrs. Adams decides to inoculate her family against smallpox. *John Adams*: Part 2: Independence.

² <https://www.smithsonianmag.com/smithsonian-institution/history-shows-americans-have-always-been-wary-vaccines-180976828/>

Univ. (2014).³ Americans continued to object as vaccinations gradually replaced the more hazardous practice of inoculation throughout the nineteenth century. Frank P. Grad, *Communicable Disease and Mental Health: Restrictions of the Person*, 12 Am. J. L. and Med. 381, 385 & n.31 (1986) (“There has been a considerable shift in popular attitudes toward immunization. Not so many years ago, compulsory immunization for the protection of individuals and the community met much resistance.”) (citing *O’Brien v. Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (1891)). Many Americans objected to compulsory vaccinations on the grounds that the procedure involved health risks such as “pain, sickness, disabled arms, and . . . death” in certain cases. Michael Willrich, “*The Least Vaccinated of Any Civilized Country:*” *Personal Liberty and Public Health in the Progressive Era*, 20 J. of Pol’y Hist. 76, 78 (2008).

These popular sentiments carried over into legal precedent: “Not only was the unauthorized touching of a human being a potential assault or battery at common law, courts in the nineteenth century dealt

³ <https://sitn.hms.harvard.edu/flash/special-edition-on-infectious-disease/2014/the-fight-over-inoculation-during-the-1721-boston-smallpox-epidemic/>.

specifically with forced vaccinations and implied that compelling one to be vaccinated without consent would be deemed an assault.” Ben Horowitz, *A Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccinations During a Public Health Emergency*, 60 Am. U.L. Rev. 1715, 1732 (2011). New York attorney Harry Weinberger contended that compulsory vaccination policies were unconstitutional acts of “medical oppression,” and another critic lamented that “the law under which [the vaccinators] operate should carry a clause providing that all sections of the Constitution guaranteeing the security of person or property are hereby repealed.” Willrich, *supra*, at 78.

These principles flowed from a broader principle well established at the time recognizing a person’s autonomy over his own body and health. *Abigail Alliance for Better Access to Dev. Drugs v. von Eschenbach*, 495 F.3d 695, 716-17 (D.C. Cir. 2007) (Rogers, J., dissenting) (discussing Blackstone’s *Commentaries* and other sources); *see also, e.g., Wong Wai v. Williamson*, 103 F. 1, 7 (C.C.N.D. Cal. 1900) (quoting *In re Jacobs*, 98 N.Y. 108, 108 (1885) (“[T]he (police) power, however broad and extensive, is not above the Constitution.”)); *In re Smith*, 40 N.E. 497,

499 (N.Y. 1895) (“[A]ll enactments which may affect the liberty of the person . . . must be construed strictly.”).

While the United Kingdom made vaccination against smallpox compulsory in 1853 for all infants, and Germany followed in 1874, most compulsory vaccination laws did not emerge in the United States until the late nineteenth century, and even then the American people fiercely resisted them. See Robert M. Wolfe & Lisa K. Sharp, *Anti-vaccinationists past and present*, NIH (2002);⁴ James Colgrove, *Between Persuasion and Compulsion: Smallpox Control in Brooklyn and New York, 1894-1902*, 78 Bull. of the Hist. of Med. 273, 352-53 (2004); Willrich, *supra*, at 78. The courts resisted the coercive tactics that overzealous state actors employed in New York to vaccinate individuals. See Colgrove, *supra*, at 367; *In re Smith*, 40 N.E. 497, 499 (N.Y. 1895); *Smith v. Emery*, 42 N.Y.S. 258, 261 (N.Y. App. Div. 1896); Willrich, *supra*, at 86.

Generally, states did not physically force citizens to take vaccinations. Rather, the states that had mandates, such as Massachusetts, required unvaccinated citizens to pay a small fine. Josh

⁴ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1123944/>.

Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 Buff. L. Rev. 131, 155 (2022); Mary Holland, *Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children*, 12 Yale J. Health Pol’y L. & Ethics 39, 43 (2012) (“No states had, or have, laws that force vaccination on unwilling subjects. In other words, no states physically restrain and vaccinate individuals . . .”).

The one notable exception to this 200-year history of medical freedom is one instance involving the military. During the Revolutionary War, a widespread wave of smallpox infected large numbers of the American population, including the Continental Army, leading George Washington to order that the entire army be inoculated. Ann M. Becker, *Small Pox in Washington’s Army: Strategic Implications of the Disease during the American Revolutionary War*, 68 J. of Military History 381, 422 (2004).

Washington’s mandatory inoculation of the Continental Army is often cited as justification for modern vaccine mandates, but the military is a unique category in which the government enjoys an unusual level of control and deference. See *Austin v. U.S. Navy Seals*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring) (“[C]ourts

traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”) (quoting *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988)). This one instance should not be extrapolated to undermine a broad social consensus against mandatory vaccination, given the unique nature of the military. If anything, this Court could note that only the military was subject to an inoculation mandate, while the general public retained its right to choose.

B. The Progressive Era and *Jacobson v. Massachusetts*.

1. The embrace of vaccination was part of the Progressive Era’s love for scientific expertise.

This longstanding resistance to mandatory vaccination came to an end around 1900 due to two trends. First was widespread immigration to the United States. Those who “knew better” targeted these newly arrived, low-income immigrant neighborhoods for mandatory vaccinations. Alexandra Marvar, *How New York Separated Immigrant Families in the Smallpox Outbreak of 1901*, Smithsonian Magazine (Jan. 10, 2019);⁵ see also Colgrove at 367; Willrich, *supra*, at 86. One

⁵ <https://www.smithsonianmag.com/history/how-new-york-separated-immigrant-families-smallpox-outbreak-1901-180971211/>.

instance occurred “late on a Friday night in February 1901, when the residents of an Italian neighborhood in New York City’s East Harlem were home and sleeping, a battalion of more than 200 men—police officers and doctors—quietly occupied the roofs, backyards and front doors of every building for blocks.” Marvar, *supra*. Then, “[u]nder the command of the Bureau of Contagious Diseases, they entered the homes one by one, woke every tenant, scraped a patch of their skin raw with a lancet, and rubbed the wound with a small dose of the virus variola.” *Id.*

This event “was a smallpox raid, and the residents in good health were being vaccinated.” *Id.* And “for anyone who showed any symptom of smallpox, the events of that night were even more alarming: They were taken immediately to docks on the East River, and sent by boat under the cover of night to an island just south of the Bronx: North Brother.” *Id.* As one local health official explained it, “No one knows the harm that has been done by these Italians. They have gone from infected homes to work everywhere; they have ridden in street cars, mingled with people, and may have spread the contagion broadcast.” Marvar, *supra*.

Unfortunately, as is often the case, authorities at the time “appl[ied] more liberal sanitationist methods to those with political and economic clout, while applying authoritarian, quarantinist measures to everyone else.” Courtney Segota, *Keeping Up with New Legal Titles*, 113 Law Libr. J. 51, 68 (2021) (reviewing John F. Witt, *American Contagions: Epidemics and the Law from Smallpox to COVID-19* (2020)). In other words, “the general historical trend toward sanitationism and civil rights in the United States has been set back by more authoritarian quarantinist measures against historically disadvantaged populations.” *Id.*

Courts are already well-aware of the harsh backlash against Catholic immigrants from Europe that pervaded American society in this era: mandatory vaccination was a part of this trend as much as mandatory public education. *See Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2259 (2020) (the post-Civil War era was “a time of pervasive hostility to the Catholic Church and to Catholics in general”); *id.* at 2268-72 (Alito, J., concurring) (noting Blaine Amendment prompted by “virulent prejudice against immigrants, particularly Catholic immigrants”). This virulent prejudice against immigrants included a

newfound willingness on the part of state authorities to practice mandatory vaccination against individuals.

Second, and closely related, was the rise of Progressivism. *See generally Cochran v. United States SEC*, 20 F.4th 194, 214 (5th Cir. 2022) (en banc) (Oldham, J., concurring). “At the heart of the ideological battles over the legitimacy of vaccination were differing views of the role of the role elite knowledge and scientific expertise should play in a rapidly changing liberal democratic society. . . In his essay ‘Science in a Democracy’ the [American Association for Medical Progress] managing director, Benjamin Gruenberg, sought to reconcile liberal democratic values with the growing complexity of the modern world that technological advances were creating. ‘Most people would not venture an opinion on the feasibility of producing transparent lead, or steel-hard aluminum, or synthetic proteins,’ Gruenberg wrote. ‘Yet these same people insist upon the right to hold opinions (and to act according to these opinions) upon such highly technical questions as the efficacy of vaccination, the value of serums, or the causation of cancer.’” James Colgrove, *Science in a Democracy: The Contested Status of Vaccination*

in the Progressive Era and the 1920s, 96 *Isis* 167, 182-83 (June 2005). In other words, the experts knew best, and society had to trust them.

Jacobson embodies this turn toward expertise, and even still only tentatively so. In *Jacobson*, the Court upheld the state's power to impose a five-dollar fine on an unvaccinated person. *Jacobson*, the plaintiff, argued that the Massachusetts vaccine mandate was unparalleled in "the history of our Republic, and, indeed, of England." Transcript of Record, at 28, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (No. 70-175).⁶ "If a person should deem it important that vaccination should not be performed in his case, and the authorities should think otherwise, *it is not in their power to vaccinate him by force*, and the worst that could happen to him under the statute would be the payment of the penalty of \$5." *Commonwealth v. Pear*, 66 N.E. 719, 722 (Mass. 1903) (emphasis added), *aff'd sub nom. Jacobson*, 197 U.S. at 39. This represents the emergence of the "no-force principle," a protective standard in "balancing personal liberty and administrative power in American public health law." Willrich, *supra*, at 88.

⁶ <https://perma.cc/EUK9-TX4V> (page 45 of the pdf).

Even while upholding this relatively tame mandate, the Court cautioned that such regulations should be justified on nothing less than “paramount necessity” and not exceed what is “reasonably required” for public safety. *Jacobson*, 197 U.S. at 28. Justice Harlan also imposed four express limitations: constitutional structural constraints on state police powers, unenforceability against persons for whom the vaccine would be particularly dangerous, a prohibition on enactments based on pretextual motivations, and that the mandate cannot violate certain individual rights. Blackman, *supra*, at 177-180.

Justice Gorsuch pointed out the common misinterpretation of *Jacobson* in his concurring opinion in *Roman Catholic Diocese of Brooklyn*, saying, “in *Jacobson*, individuals could accept the vaccine, pay the fine, or identify a basis for exemption. The imposition on Mr. Jacobson’s claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors.” *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 71 (Gorsuch, J., concurring).

In contrast, the vaccine mandate in question today threatens unvaccinated employees with disciplinary action “up to and including termination or removal” for noncompliance. ROA.810. “Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, *Jacobson* explained that the challenged law survived only because it did not “contravene the Constitution of the United States” or “infringe any right granted or secured by that instrument.” *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 71 (Gorsuch, J., concurring).

While *Jacobson* has often been misunderstood, this is changing. *Id.* For example, a court recently opined: “Based on the recent U.S. Supreme Court precedent of *Roman Catholic Diocese of Brooklyn*, the concurrence of Justice Gorsuch, and even the concurring opinion (in *South Bay* [II]) and dissenting opinion (in *Roman Catholic Diocese*) of Chief Justice Roberts, this Court concludes that the normal constitutional standards of review should apply, not a separate ‘*Jacobson* standard.’” *Culinary Studios, Inc. v. Newsom*, 517 F. Supp. 3d. 1042, 1063 (E.D. Cal. 2021); *see also Agudath Isr. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020) (“*Jacobson* predated the modern

constitutional jurisprudence of tiers of scrutiny, was decided before the First Amendment was incorporated against the states, and did not address the free exercise of religion.”).

2. Modern society’s rejection of *Buck v. Bell* and eugenics also shows that *Jacobson* did not end this country’s tradition of medical freedom.

Jacobson led directly to one of the worst moments in the Supreme Court's (indeed the nation’s) history, *Buck v. Bell*, wherein Justice Holmes fully embraced the Progressive Era’s ideal of the sanitized society. See Bradley C.S. Watson, *One Supreme Court: Oliver Wendell Holmes, Louis Brandeis, and the Progressive Revolution in Constitutional Jurisprudence*, in *Progressive Challenges to the American Constitution: A New Republic* 257, 273-74 (Bradley C.S. Watson ed., 2017). In *Buck*, Justice Holmes famously said, “three generations of imbeciles are enough,” upholding the forced sterilization of Carrie Buck, described as a “feeble-minded woman.” 247 U.S. 200, 207 (1927).

“Justice Holmes recast *Jacobson*’s limited holding to support forcible intrusions onto bodily autonomy. The law did not involve forcible vaccination, but Holmes still used the case to uphold a compulsory sterilization regime.” Blackman, *supra*, at 131. Citing *Jacobson*, Justice

Holmes claimed that “the principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.” 274 U.S. at 207. Indeed, reading the key passage from *Buck* discussing the legal justification for the decision, the primary precedent relied upon is *Jacobson*.

But *Buck* is seen as one of the worst Supreme Court decisions in history, an embarrassing example of eugenics and scientific racism. *See, e.g.,* Corinna B. Lain, *Three Supreme Court “Failures” and a Story of Supreme Court Success*, 69 *Vanderbilt L. Rev.* 1019, 1020 (2019); Adam Cohen, *Imbeciles* 9-10 (2016) (naming *Buck* as one of the five worst Supreme Court decisions); Symposium, *Supreme Mistakes*, 39 *Pepp. L. Rev.* 1, 2, 5 (2011) (discussing symposium on the “most maligned decisions in Supreme Court history,” naming *Buck* as one of the top five).

This is for good reason given that over 60,000 people across thirty-two states were forcibly sterilized under the banner of eugenics during the twentieth century. *See* Alexandra Stern, *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities – and Lasted into the 21st Century*, Univ. of Mich. Inst. for Healthcare Pol’y &

Innovation (Sept. 23, 2020). The sterilization laws of the United States provided a model for the Third Reich’s 1933 “Law for the Prevention of Offspring with Hereditary Diseases” under which the Nazis sterilized 400,000 people. *Id.* “During the Nuremberg trials after World War II, several Nazis on trial based their defense of Germany’s sterilization laws on the prevalence of such laws in the United States and the Supreme Court decision in *Buck v. Bell*.” *Buck v. Bell, Supreme Court of Appeals of Virginia, Brief for Appellee, September 1925*,” Document Bank of Va., <https://edu.lva.virginia.gov/dbva/items/show/227> (last visited Aug. 29, 2022).

CONCLUSION

This Court does not need to reach the question of whether a *Washington v. Glucksberg* analysis would lead to a fundamental right subject to strict scrutiny in this case. 521 U.S. 702 (1997). But this Court can ground its decision recognizing a constitutional liberty interest in medical decision-making in better doctrine than *Jacobson* or *Griswold*. By looking to the founding era, and recognizing the intellectual environment in which *Jacobson* arose, this Court can bring its decision in this case within the broad stream of American

jurisprudence which historically has aligned with the public's belief in individual medical freedom.

This Court should affirm the district court's injunction in favor of the Plaintiffs-Appellants given the important "constitutional freedoms" that the vaccine mandate implicates. *BST Holdings*, 17 F.4th at 618.

Dated: September 2, 2022

Respectfully Submitted,

Jeffrey D. Jennings

Jeffrey D. Jennings

Liberty Justice Center

440 N. Wells St., Ste. 200

Chicago, IL 60654

Telephone: 312-637-2280

jjennings@libertyjusticecenter.org

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because the brief contains 3,391 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook font.

Date: September 2, 2022

/s/ Jeffrey D. Jennings
Attorney for Amicus Curiae Liberty
Justice Center

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing through the Court's CM/ECF system, which will send a notification of such filing to counsel of record.

Dated: September 2, 2022 /s/ Jeffrey D. Jennings
Jeffrey D. Jennings