

No. 23-996

In the
Supreme Court of the United States

JEANNA NORRIS, ET AL.,
Petitioners,

v.

SAMUEL STANLEY, JR., IN HIS OFFICIAL CAPACITY AS
PRESIDENT OF MICHIGAN STATE UNIVERSITY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

**AMICUS CURIAE BRIEF OF THE BUCKEYE
INSTITUTE IN SUPPORT OF PETITIONERS**

David C. Tryon
Counsel of Record for Amicus Curiae
Alex M. Certo
The Buckeye Institute
88 East Broad Street
Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

QUESTION PRESENTED

Whether *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), when read in light of this Court’s later acknowledgment that the right to refuse treatment is “deeply rooted in this Nation’s history and tradition,” requires that governmental actions which oblige individuals to submit to intrusive medical procedures on pain of penalties such as losing public employment must be subject to heightened scrutiny, and if so, whether Respondents’ Covid vaccine mandate failed this test?

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INTEREST OF *AMICUS CURIAE*¹

Amicus Curiae, The Buckeye Institute, was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization’s mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute assists executive and legislative branch policymakers by providing ideas, research, and data to enable lawmakers’ effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

Through its Legal Center, The Buckeye Institute works to restrain governmental overreach at all levels of government by filing lawsuits and submitting amicus briefs. Regarding this case, The Buckeye Institute has opposed government vaccine mandates in derogation of liberty interests protected by the Constitution.

¹ Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2.

SUMMARY OF ARGUMENT

This Court has long recognized that a right to bodily integrity exists under the Constitution. Yet, when the Court was confronted with a challenge to vaccine requirements in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Court seemingly approved of almost any restriction on the right. Or at least, that is how some lower courts have interpreted *Jacobson*.

The reason for such confusion by the lower courts is *Jacobson's* confusing analysis. On one hand, bodily integrity is a fundamental right under the Constitution. On the other hand, the police powers justify restricting that fundamental right—at least during an epidemic. *Jacobson's* uncertain analysis has resulted in lower courts giving extreme deferential treatment to legislative actions during epidemics—even if the actions infringe on fundamental rights and there is no other legal recourse.

It is time for the Court to set the record straight on *Jacobson*, and this case presents such an opportunity. The government is not the all-knowing purveyor of truth and should not be given deferential treatment when it wants to infringe on individual rights. The Court should grant the petition and present a clear—and stringent—review standard for infringements on bodily integrity.

ARGUMENT

And the rain descended, and the floods came, and the winds blew, and beat upon that house; and it fell not: for it was founded upon a rock. . . . And the rain descended, and the floods came, and the

winds blew, and beat upon [the] house
[built upon sand]; and it fell: and great
was the fall of it.

Matthew 7:25–27 (King James).

I. Introduction.

Jacobson v. Massachusetts, 197 U.S. 11, is a foundation for many court decisions. Unfortunately, it is a foundation of sand. *Jacobson's* soft foundation has undermined not only specific cases but also generally liberty jurisprudence and police power jurisprudence generally. When a case has caused as much confusion and misapplication as *Jacobson*, there comes a time for the Court to abandon the case and set forth foundational principles consistent with modern jurisprudence and the Constitution. This case presents that opportunity in a calm and dispassionate atmosphere.

Jacobson was decided when the country was in the throes of a smallpox epidemic. Decisions made under the pressures of anxiety and the unknown are not always the best decisions. And relying on such decisions is highly problematic. In its simplest form, *Jacobson* upheld a five-dollar fine for failure to get a smallpox vaccination. Unfortunately, *Jacobson* has been read much more broadly.

However, government actions in such circumstances are often suspect. As cynical as it may sound, some government officials—politicians—endorse the idea that “[y]ou never want a serious crisis to go to waste. And what I mean by that is an opportunity to do things that you think you could not do before.” Rahm Emanuel, Speech at the Wall Street

Journal CEO Council (Nov. 19, 2008).

II. The Smallpox Epidemic and the *Jacobson-Endorsed Edict*.

For hundreds of years, “smallpox devastated mankind.” Stefan Riedel, *Edward Jenner and the history of smallpox and vaccination*, 18 Baylor Univ. Med. Cnt’r Proceedings 21, 21 (2005). While the disease had temporarily subsided in the United States during the 1800s, by 1901, an epidemic spread to northern states—and was particularly widespread in Boston. Bernard Brabin, *An Analysis of the United States and United Kingdom Smallpox Epidemics (1901–5) – The Special Relationship that Tested Public Health Strategies for Disease Control*, 64 Med. Hist. 1, 8 (2020). The reemergence of smallpox unsurprisingly frightened the populace—and judges are part of the populace. States reacted by passing vaccination laws, some requiring vaccination to attend public school and others fining anyone who failed to get vaccinated. See generally Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 Buff. L. Rev. 131, 155 (2022) (*Irrepressible Myth*). But “despite all of these draconian measures, the states did not purport to have the power to vaccinate people forcibly.” *Id.* Henning Jacobson refused to get vaccinated for medical reasons (i.e., adverse reactions to previous vaccine shots) and contested Massachusetts’ five-dollar fine on constitutional grounds. The courts were unsympathetic and eventually the Supreme Court rejected his arguments.

But *Jacobson* was not a model of decisional clarity. The decision might be viewed as a series of “on the one hand this, but on the other hand that” meanderings.

While the Court recognized the “liberty which the Constitution of the United States secures to every person,” *Jacobson*, 197 U.S. at 25, it mostly justified the state’s deprivation of such liberty, subject only to some unclear judicial review standard. Even though the Constitution protects liberty interests, the states have police powers and authority to “enact quarantine laws and ‘health laws of every description’” *Id.* And “the police power . . . embrace[s] . . . such reasonable regulation established directly by legislative enactment as will protect the public health and the public safety.” *Id.*

But on the other hand, the Court explains, the state cannot “contravene the Constitution . . . [or] infringe any right granted or secured by that instrument.” *Id.* Then back to the police power—“the liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances wholly freed from restraint.” *Id.* at 26. And the Court “has more than once recognized it as a fundamental principle that ‘persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state’” *Id.*

To emphasize the point, the Court explained:

The possession and enjoyment of all rights are subject to such reasonable conditions as may be *deemed* by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, *the greatest of all*

rights, is not unrestricted license to act according to one's own will.

Id. at 26–27 (emphasis added) (quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)). Indeed, the town inhabitants could be “required” to be vaccinated “when, *in the opinion* of the board of health, that was necessary for the public health or the public safety.” *Id.* at 27 (emphasis added). On the other hand, courts would “usurp” another branch of government if its “mode” of protecting against smallpox “was arbitrary, and not justified by the necessities of the case.” *Id.* at 28.

The Court then explained that, indeed, there is a “sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government” *Id.* at 29.

But on the other hand,

it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. But back on the other hand, or perhaps both hands, the judiciary can review such actions

when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to

protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 31. But on another hand—a third hand—apparently a “common belief” is all that is necessary to require vaccination:

A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. . . . The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases [W]hat the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not.

Id. at 35 (first alteration in original) (quoting *Viemeister v. White*, 179 N.Y. 235, 240–41 (1904)). So

much for science and evidence.

While the Court’s affirmation of the police power has been viewed expansively, the holding was quite narrow: The Massachusetts law, which imposed a \$5.00 fine—but did not mandate vaccination—did not violate the Constitution. “The imposition on Mr. Jacobson’s claimed right to bodily integrity, thus, was avoidable and relatively modest.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 24 (2020) (Gorsuch, J., concurring).

Even so, *Jacobson’s* exposition regarding protecting liberty interests seemed to be an afterthought, and how to evaluate the constitutionality of laws encroaching on those rights was unclear. So, it is no surprise that later courts found *Jacobson* foundational for their questionable, if not dubious, rulings.

III. Subsequent reliance on *Jacobson* demonstrates the need for the Court to take the case and correct the lower courts’ overinterpretation thereof.

“Three generations of imbeciles is enough.”
Buck v. Bell, 274 U.S. 200, 207 (1927).

Any case that lays the foundation for an anti-precedent becomes suspect itself. One of the more infamous Supreme Court decisions relied almost exclusively on *Jacobson* to justify its decision.

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who

are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Buck, 274 U.S. at 207 (citing *Jacobson*, 197 U.S. 11).

The *Buck* decision was not issued in a vacuum. Much like the *Jacobson* vaccination case, it was issued in a societal environment that sanctioned and even encouraged eugenics via sterilization. “When the Court heard *Buck*, the eugenics wave had swept the country as a full-fledged social movement. The Supreme Court Justices who decided *Buck* were among those societal elites most influenced by these ‘progressive’ ideas” Samantha C. Smith, *Buck As (Anti)canon: The Misuse of Eugenics Rhetoric in Selective-Abortion Jurisprudence and the Dangers for Tort Law*, 73 Am. U. L. Rev. 449, 458 (2023).

[T]he Court held that because the state was responsible for promoting “the welfare of society” and protecting society from “being swamped with incompetence,” it could forcibly sterilize Carrie Buck and avoid the burden on society. *Buck* succeeded as the eugenicists’ test case, and over thirty states ended up with sterilization laws on their books based on the model law Virginia had adopted. As a result, tens of thousands of Americans were forcibly sterilized.

Id.

Of course, as a more enlightened generation, we would never be influenced by untested “common beliefs,” fears, cultural demands, or other such influences. And our government would never again try to suppress information or mislead the public. We can trust the government and rely on cases such as *Jacobson* to govern the validity of governmental restrictions on our liberty rights. Or can we?

IV. *Jacobson* and Societal Fears as Justification for COVID Mandates

In 2020, COVID-19 invaded the country and was “scaring people because it [was] new and much [was] not known about it.” Katherine A. Mason, *Op-Ed: International Overreaction to the Coronavirus is More Dangerous than the Virus Itself*, L.A. Times (Jan. 31, 2020).² Some saw these fears as an overreaction. *Id.* (“This is not the end of the world. Treating the coronavirus outbreak as if it were will do a lot more harm than good.”). But fears, whether justified or not, took root. Soon the government declared a national emergency and effectively shut down the economy. The race was on to develop vaccines. Once they were developed and approved in late 2020, federal, state, and local governments generated mandatory vaccination laws, rules and regulations. Those that opposed these mandates were, in some cases, denigrated and vilified. See, e.g., Kari Campeau, *Who’s a Vaccine Skeptic? Framing Vaccine Hesitancy in Post-Covid News Coverage*, 40 *Written Commc’n*

² <https://www.latimes.com/opinion/story/2020-01-31/coronavirus-china-quarantine-world-health-organization>.

976 (2023); Brian Karem, *Op-Ed: Sit down. Get the vaccine. Act like an adult*, Wash. Diplomat (Sept. 13, 2021).³ When mandatory COVID-19 vaccination laws and edicts were challenged, the courts looked to *Jacobson* to justify these intrusions on personal liberty. Once again, the Court faced a crucial constitutional question amid a crisis, supported by a common belief and a cultural view that the newly invented vaccines were the only solution to the crisis.

Some have observed that the concurrence in *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) improperly increased the breadth of *Jacobson*.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905).

Id. at 1614 (Roberts, J., concurring in denial of application for injunctive relief). Whether fairly or not, some believe that this passage “sent an unmistakable signal to the lower courts” that resulted in those courts’ view that “*Jacobson*-level deference was warranted for all pandemic-related constitutional challenges.” *Irrepressible Myth, supra*, at 237–38. The

³ <https://washdiplomat.com/oped-so-please-sit-down-get-the-vaccine-act-like-an-adult/>.

“single citation to *Jacobson* led to a jurisprudential revolution almost overnight. Between June and December of 2020, . . . [a]pproximately 140 cases cited the solo opinion, more than 90 of which also cited *Jacobson*.” *Id.* at 238.

However, as COVID-19 illness rates fell, so did the *Jacobson* fever. Cooler heads began to prevail—or at least gain some traction. In *Agudath Israel of Am. v. Cuomo*, 979 F.3d 177, 184 (2d Cir. 2020) (Park, J., dissenting), Judge Park issued a dissenting opinion, “assail[ing]” *Jacobson*. He wrote, “*Jacobson* does not call for indefinite deference to the political branches exercising extraordinary emergency powers, nor does it counsel courts to abdicate their responsibility to review claims of constitutional violation.” *Id.* (Park, J., dissenting).

V. The Court should correct the widespread, overly broad interpretation of *Jacobson*.

“[W]hen governing decisions are unworkable or are badly reasoned, ‘this Court has never felt constrained to follow precedent.’” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). While there may not be a need to overrule *Jacobson*, there is a need to update or clarify the test to evaluate the constitutionality of laws invading liberty interests such as that of bodily integrity. Indeed, when courts misapprehend a precedent, the Court should step in and correct that misapprehension.

Professor Blackman recites Justice Alito’s November 12, 2020, cautions regarding *Jacobson*:

[I]t's important to keep *Jacobson* in perspective. Its primary holding rejected a substantive due process challenge to a local measure that targeted a problem of limited scope. It did not involve sweeping restrictions imposed across the country for an extended period. And it does not mean that whenever there is an emergency, executive officials have unlimited unreviewable discretion.

Irrepressible Myth, supra, at 55–56 (quoting Josh Blackman, *Video and Transcript of Justice Alito's Keynote Address to the Federalist Society, Reason: Volokh Conspiracy* (Nov. 12, 2020, 11:18 PM)⁴). And as bad facts make bad law, a frantic social environment can also result in questionable reasoning and conclusions. While courts have accepted *Jacobson* as a shield for broad vaccine mandates, “*Jacobson* hardly supports cutting the constitution loose during a pandemic.” *Roman Cath. Diocese of Brooklyn*, 592 U.S. 14, 23, (Gorsuch, J., concurring). Indeed, *Jacobson's* “deferential precedent is not a rubber stamp for all government actions during a pandemic.” *Irrepressible Myth, supra*, at 260–61. “Still, some courts continue to follow *Jacobson*. Indeed, district court judges, bound by circuit precedent, may have their hands tied.” *Id.* at 267. Leaving *Jacobson* in place, with all the accompanying confusion and lowered standard of review, is dangerous. There will be other health emergencies, other societal pressures

⁴ <https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society/> [<https://perma.cc/ZP8P-8X8P>].

to bend to governmental dictates in times of trouble, and other crises that demand swift action. “Judges of all stripes have a natural tendency to exercise restraint in times of crisis.” *Id.* at 268. But courts should not “shelter in place when the Constitution is under attack. Things never go well when [they] do.” *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 25 (Gorsuch, J., concurring).

Courts have considered *Jacobson* as directing a simple rational basis review of laws in these situations. But “[t]he standard of review from *Jacobson* does not resemble modern constitutional law. *Jacobson*’s test did not serve as a progenitor of the modern rational basis test. It is a mistake to conflate the two doctrines.” *Irrepressible Myth, supra*, at 259–260. Amicus agrees with Petitioners that the appropriate standard of review for any governmental policy mandating intrusive medical treatments, such as vaccines, is subject to at least intermediate scrutiny. See, e.g., Pet. at 12. Amici will not belabor those arguments here.

VI. Judicial vigilance is warranted more now because there is no judicial remedy for vaccine injuries.

After *Jacobson*, products liability claims eventually provided recourse against vaccine manufacturers and distributors for vaccine-caused injuries. Indeed, the liabilities became so intense that in 1986, Congress enacted The National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1 et seq. (the Vaccine Act), “to address vaccine shortages that occurred following a spate of successful vaccine injury lawsuits against manufacturers and other entities in

vaccine supply chains that caused some to withdraw from the market.” Cheri Faley & Chalana Damron, *PREP Act Protections for COVID-19 Vaccine Liability*, PharmExec.com (Jan. 11, 2021).⁵ This immunized vaccine manufacturers and distributors from many vaccine-related claims, but not manufacturers of other pharmaceuticals. See *id.* But even then, “it [did] not afford complete protection [to vaccine makers].” *Id.* Both vaccines and other drugs have to be approved by the FDA prior to distribution to the public, see *How Vaccines Are Developed and Approved for Use*, Ctr. Disease Control & Prevention⁶, but that FDA approval does not shield them from all liability, see *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 96 (2d Cir. 2006), *aff’d sub nom. Warner-Lambert Co., LLC v. Kent*, 552 U.S. 440 (2008) (finding that “[t]he existence of properly-obtained FDA approval becomes germane [in state products liability litigation] *only* if a defendant company chooses to assert an affirmative defense made available by [state law]” (emphasis sic)).

Then, the government enacted the Public Readiness and Emergency Preparedness (PREP) Act of 2005. “The PREP Act’s broad immunities extend well beyond the bounds of Vaccine Act protections because they include many types of claims ancillary to receipt of the vaccine itself.” Faley & Damron, *supra*. It “serves as a liability shield for manufacturers, distributors, and administrators of countermeasures

⁵ <https://www.pharmexec.com/view/prep-act-protections-for-covid-19-vaccine-liability>.

⁶ <https://www.cdc.gov/vaccines/basics/test-approve.html> (last visited Apr. 4, 2024).

deemed critical to the response and prevention of a declared public health emergency,” such as vaccines. Junying Zhao et. al., *Reforming the Countermeasures Injury Compensation Program for Covid-19 and Beyond: An Economic Perspective*, 9 J.L. & Biosciences 1, 3 (2022). Thus, when the government insists that people must get vaccinated, it creates a burden even beyond intruding on one’s bodily integrity—any person harmed thereby has no recourse in state or federal court.

Granted, the PREP Act provides “a public liability insurance mechanism—the Countermeasures Injury Compensation Program (CICP)—to compensate for injuries caused by such countermeasures.” *Id.* Any COVID-19 vaccine-related claims must be filed with the CICP. See *National Vaccine Injury Compensation Program*, Health Res. & Servs. Admin.⁷ But that “insurance” program is woefully inadequate. It lacks transparency, accountability, independence, appellate process, due process, and is laden with conflicts of interest. It certainly does not provide standard due process protections normally provided to those harmed by the vaccine. See, e.g., Zhao, et al., *supra*, at 27.

The CICP’s systemic conflicts of interest start at the approval stage. Vaccines are approved by the Federal Drug Administration—affirming that the vaccine is safe and effective. The FDA is part of the Department of Health and Human Services (DHHS).

⁷ <https://www.hrsa.gov/vaccine-compensation#:~:text=COVID%2D19%20claims,vaccines%20have%20no%20serious%20problems> (last visited Apr. 4, 2024).

And the CICIP is administered by DHHS. So, the very agency that declares the vaccine to be safe then adjudicates if it harmed the claimant—or, in other words, it is asked to admit that its initial safety determination was wrong. More insidious is that DHHS is both the Defendant and the adjudicator of vaccine claims. *Id.* at 8. And it gets worse. “Acting as the adjudicator, if DHHS declines a CICIP claim, it reduces [its] expenses.” *Id.* And there are no judicial appeals. *Id.* Perhaps that is why “the CICIP’s rate” is a meager 6%. *Id.*

When the government implements a vaccine mandate scheme, the system is rigged from beginning to end. The courts need to provide an outlet against government overreach. With the rational basis test advocated by the government, vaccine objectors have no effective outlet to protect themselves.

VII. Judicial subservience to government declarations is as dangerous now as it was in the *Jacobson/Bell* era.

The government is a collection of imperfect human beings who make mistakes, may be misinformed themselves, or may be tempted to put personal political or policy goals ahead of disinterested scientific inquiry. Throughout the COVID-19 pandemic, the government portrayed itself as the guardian of scientific truth. Nate Hochman, *Trust the Science?*, Nat’l Rev. (Nov. 29, 2021)⁸ (“[T]hey’re really criticizing science because I[, Anthony Fauci,] represent science.”).

⁸ <https://www.nationalreview.com/corner/trust-the-science/>.

But no government, scientist, doctor, expert, or organization has a monopoly on knowledge. In fact, the government has a long history, and more importantly, a recent history of disseminating inaccurate or misleading information—and then relying thereon to formulate various vaccine mandates.

At one time, the CDC was considered an unbiased and legitimate source of medical information. The federal government used the public's trust in the CDC to impose strong, and even draconian, restrictions on the American public—and even worldwide. Those who disagreed with the CDC were often vilified as purveyors of “misinformation” and generally denounced. Dr. Anthony Fauci, the former director of the U.S. National Institute of Allergy and Infectious Diseases, was similarly held up as the ultimate expert. He even tried to refute criticisms by proclaiming that “attacks on me . . . are attacks on science.” Carlie Porterfield, *Dr. Fauci on GOP Criticism: ‘Attacks on Me, Quite Frankly, Are Attacks on Science,’* Forbes (Dec. 10, 2021).⁹ However, as it relates to COVID-19, Anthony Fauci and the CDC have a poor record. The government has changed its “facts” and even been deceptive—at the same time it deprecated any who disagreed. Here are a few examples.

1. Covid 19 Origins: From bats to labs. The CDC and Dr. Fauci initially—in 2020—insisted that “[the scientific evidence] is very, very strongly leaning

⁹ <https://www.forbes.com/sites/carlieporterfield/2021/06/09/fauci-on-gop-criticism-attacks-on-me-quite-frankly-are-attacks-on-science/?sh=717612345429>.

toward [the fact that COVID-19] could not have been artificially or deliberately manipulated Everything about the stepwise evolution over time strongly indicates that [this virus] evolved in nature and then jumped species” Nsikan Akpan & Victoria Jaggard, *Fauci: No scientific evidence the coronavirus was made in a Chinese lab*, Nat’l Geographic (May 4, 2020).¹⁰ Others claimed it originated in a lab in China. Jack Brewster, *A Timeline of the COVID-19 Wuhan Lab Origin Theory*, Forbes (May 24, 2020).¹¹ Around the same time as Dr. Fauci’s claims, President Trump stated that “he has a ‘high degree of confidence’ the virus came from a lab in Wuhan.” *Id.*

The Select Subcommittee on the Coronavirus Pandemic found that Dr. Fauci and “[f]ormer NIH Director Dr. Francis Collins were directly involved in the drafting, publication, and public promotion of Proximal Origin — a paper written to suppress the COVID-19 lab-leak hypothesis.” *Hearing Wrap Up: Suppression of the Lab Leak Hypothesis Was Not Based in Science*, Comm. on Oversight & Accountability (Jul. 12, 2023).¹² Eventually, government agencies conceded that COVID-19

¹⁰ <https://www.nationalgeographic.com/science/article/anthony-fauci-no-scientific-evidence-the-coronavirus-was-made-in-a-chinese-lab-cvd>.

¹¹ <https://www.forbes.com/sites/jackbrewster/2020/05/10/a-timeline-of-the-covid-19-wuhan-lab-origin-theory/?sh=58800c455aba>.

¹² <https://oversight.house.gov/release/hearing-wrap-up-suppression-of-the-lab-leak-hypothesis-was-not-based-in-science/>.

might have originated in a China virus lab. Julian Barnes, *Lab Leak Most Likely Caused Pandemic, Energy Dept. Says*, N.Y. Times (Feb. 26, 2023).¹³ “Though the hypothesis of a lab leak as the origin of a pandemic that has killed more than 1.1 million Americans is no longer dismissed today as a ‘conspiracy theory,’ *the damage to democratic discourse has been done.*” Robert E. Moffit, *How Fauci and NIH Leaders Worked to Discredit COVID-19 Lab Leak Theory*, Heritage Found. (Jul 18, 2023)¹⁴ (emphasis added). On February 28, 2023, FBI director Wray stated that “[t]he FBI has for quite some time now assessed that the origins of the pandemic are most likely a potential lab incident in Wuhan.” Adam Sabes, *FBI director says COVID pandemic ‘most likely’ originated from Chinese lab*, Fox News (Feb. 28, 2023).¹⁵

Fauci and Collins even denied that the government funded gain of function research at the Wuhan, China lab. Ed Browne, *Fauci Was ‘Untruthful’ to Congress About Wuhan Lab Research, New Documents Appear to Show*, News Week (Sept. 9, 2021).¹⁶ However, documents obtained via FOIA requests showed “that NIH grants supported the

¹³ <https://www.nytimes.com/2023/02/26/us/politics/china-lab-leak-coronavirus-pandemic.html>.

¹⁴ <https://www.heritage.org/public-health/commentary/how-fauci-and-nih-leaders-worked-discredit-covid-19-lab-leak-theory>.

¹⁵ <https://www.foxnews.com/politics/fbi-director-says-covid-pandemic-most-likely-originated-chinese-lab>.

¹⁶<https://www.congress.gov/117/meeting/house/114270/documents/HHRG-117-GO24-20211201-SD004.pdf>.

construction of mutant SARS-related coronaviruses that involved blending different types together. The result was a lab-generated virus that could infect human cells” *Id.* And Dr. Fauci “knew by January 2020 that his agency was funding gain-of-function research of novel coronaviruses in Wuhan, China.” David Zimmerman, *Fauci Knew NIH Funded Wuhan’s Gain-of-Function Research as Pandemic Began, Email Reveals*, Nat’l Rev. (September 5, 2023).¹⁷

2. Masks don’t work; yes, they do; no, they don’t. On March 8, 2020, it was reported: “When it comes to preventing coronavirus, public health officials have been clear: Healthy people do not need to wear a face mask to protect themselves from COVID-19.” Brit Mccandless Farmer, *March 2020: Dr. Anthony Fauci talks with Dr Jon LaPook about COVID-19*, CBS News (Mar. 8, 2020).¹⁸ Anthony Fauci asserted: “There’s no reason to be walking around with a mask’” *Id.* “While masks may block some droplets, Fauci said, they do not provide the level of protection people think they do.” *Id.* U.S. Surgeon General Jerome Adams similarly asserted “[y]ou can increase your risk of getting it by wearing a mask if you are not a health care provider” Ben Schreckinger, *Mask mystery: Why are U.S. officials dismissive of protective*

¹⁷ <https://www.nationalreview.com/news/fauci-knew-nih-funded-wuhans-gain-of-function-research-as-pandemic-began-email-reveals/>.

¹⁸ <https://www.cbsnews.com/news/preventing-coronavirus-facemask-60-minutes-2020-03-08/>.

covering?, Politico (Mar. 30, 2020).¹⁹ Adams even tweeted: “Seriously people — STOP BUYING MASKS!” . . . “They are NOT effective in preventing general public from catching #Coronavirus . . .” *Id.*

Then, in June 2020, Fauci reversed himself. He said “he has ‘no doubt’ that Americans who aren’t wearing face masks, especially in large crowds, are increasing the risk of spreading the coronavirus.” Berkeley Lovelace Jr. & Noah Higgins-Dunn, *Dr. Anthony Fauci says Americans who don’t wear masks may ‘propagate the further spread of infection’*, CNBC (June 5, 2020).²⁰ He later admitted that he was spreading misinformation when he said masks don’t work, but he justified his deception, not because he was wrong on the science, but because “[h]e [] acknowledged that masks were initially not recommended to the general public so that first responders wouldn’t feel the strain of a shortage of PPE.” Alexandra Kelley, *Fauci: why the public wasn’t told to wear masks when the coronavirus pandemic began*, The Hill (June 16, 2020)²¹ (emphasis added). The federal government then demanded that everyone wear masks, and some state governments required it. Kaia Hubbard, *These States Have COVID-19 Mask*

¹⁹ <https://www.politico.com/news/2020/03/30/coronavirus-masks-trump-administration-156327>.

²⁰ <https://www.cnn.com/2020/06/05/dr-anthony-fauci-says-americans-who-dont-wear-masks-may-propagate-the-spread-of-infection.html>.

²¹ <https://thehill.com/changing-america/well-being/prevention-cures/502890-fauci-why-the-public-wasnt-told-to-wear-masks/>.

Mandates, U.S. News (Mar. 28, 2022).²² It turns out that scientists have long disputed masks' effectiveness. *See, e.g., Youlin Long, et al., Effectiveness of N95 respirators versus surgical masks against influenza: A systematic review and meta-analysis*, 13 J. Evid. Based Med. 93, 96 (2020)²³ (finding “no statistically significant differences in preventing laboratory-confirmed influenza, laboratory-confirmed respiratory viral infections, laboratory-confirmed respiratory infection, and influenza-like illness using N95 respirators and surgical masks”).

3. COVID-19 vaccines will prevent infection and transmission; no, they don't. The official narrative from November 2020, until at least May of 2021, was that the new COVID-19 vaccines would prevent infection and transmission. Skeptics were blocked, banned, silenced and attacked in media outlets. *See, e.g., Campeau, supra* (finding New York Times articles “established nonvaccination as a product of individual wrong belief, portrayed vaccine skeptics as gullible, ignorant, and/or selfish, and framed nonvaccination as a problem of individuals' wrong beliefs”). Dr. Fauci assured the public that the release of the vaccines would mark the end of the pandemic. Fauci proclaimed that “the Pfizer-BioNTech and Moderna vaccines are so effective they could ‘crush’ the COVID-19 pandemic” and explained that he is “very

²² <https://www.usnews.com/news/best-states/articles/these-are-the-states-with-mask-mandates>.

²³ <https://onlinelibrary.wiley.com/doi/epdf/10.1111/jebm.12381>.

encouraged . . . by the extraordinary level of efficacy’ of the two vaccines [and] . . . they’ve been found to be up to 95 per cent effective in preventing the COVID-19 . . . and almost 100 per cent effective in preventing the serious form of the disease . . .” Brandie Weikle, *Fauci confident vaccines can ‘crush’ COVID — if vaccine hesitancy doesn’t get in the way*, CBC (Dec. 12, 2020).²⁴ Those who questioned this assessment were labeled “anti-vaxers” or “vaccine skeptics.”

Fauci’s statements later proved false. For example, “[a]bout three-fourths of people infected in a Massachusetts Covid-19 outbreak [in July 2021] were fully vaccinated . . .” per the CDC. Berkeley Lovelace Jr., *CDC study shows 74% of people infected in Massachusetts Covid outbreak were fully vaccinated*, CNBC (July 30, 2021).²⁵ Indeed, in testimony before the House Select Subcommittee on the Coronavirus Crisis, Dr. Deborah Birx, who had served as the White House COVID-19 coordinator, revealed how flimsy those early statements of “fact” were. They were not facts. They were, at best, hopes. Dylan Housman, *Birx: Biden Admin Was ‘Hoping,’ Not Lying, When It Said Vaccines Would Stop COVID Spread*, Daily

²⁴ <https://www.cbc.ca/radio/whitecoat/fauci-confident-vaccines-can-crush-covid-if-vaccine-hesitancy-doesn-t-get-in-the-way-1.5832956>.

²⁵ <https://www.cnbc.com/2021/07/30/cdc-study-shows-74percent-of-people-infected-in-massachusetts-covid-outbreak-were-fully-vaccinated.html>.

Caller (June 23, 2022).²⁶

4. Fully vaccinated people cannot transmit the virus; actually, they can. The government initially insisted that everyone should be vaccinated, and in May 2021, Dr. Fauci explained that “fully vaccinated people can go without masks even if they have an asymptomatic case of COVID-19 *because the level of virus is much lower in their nasopharynx, the top part of their throat that lies behind the nose, than it is in someone who is unvaccinated*” and promised that for vaccinated people, “it [is] extremely unlikely — not impossible but very, very low likelihood — that they’re going to transmit it” Joseph Choi, *Fauci: Vaccinated people become ‘dead ends’ for the coronavirus*, The Hill (May 16, 2021)²⁷ (emphasis added). But just two months later, the CDC contradicted Dr. Fauci on both accounts, explaining that “the people who were vaccinated *were growing just as much virus in their noses as those who weren’t vaccinated*. So what this study shows is that *people who are immunized can transmit the virus and possibly just as much as those who aren’t immunized*.” Michaelleen Doucleff, *Vaccinated People Can Spread The Delta Variant, CDC Research Indicates*, NPR (July 30, 2021)²⁸ (emphasis added).

²⁶ <https://dailycaller.com/2022/06/23/deborah-birx-joe-biden-covid-coronavirus-vaccine/>.

²⁷ <https://thehill.com/homenews/sunday-talk-shows/553773-fauci-vaccinated-people-become-dead-ends-for-the-coronavirus/>.

²⁸ <https://www.npr.org/2021/07/30/1022909546/vaccinated-people-can-spread-the-delta-variant-cdc-research-indicates>.

5. Your physician is wrong; the FDA is right. “You are not a horse,” the FDA professed when it learned that some individuals were treating their COVID symptoms using the animal version of a drug called ivermectin. *Apter v. Dep’t of Health & Hum. Servs.*, 80 F.4th 579, 583 (5th Cir. 2023). “The messaging traveled widely across legacy and online media. Left unmentioned in most of that messaging: ivermectin also comes in a human version. And while the human version of ivermectin is not FDA-approved to treat the coronavirus, some people were using it off-label for that purpose.” *Id.* While the FDA mocked the use of ivermectin, at least one study concluded that “[t]he regular use of ivermectin decreased hospitalization for COVID-19 by 100%, mortality by 92%, and the risk of dying from COVID-19 by 86% when compared to non-users.” Lucy Kerr et al., *Regular Use of Ivermectin as Prophylaxis for COVID-19* (2022).²⁹ When several doctors sued the FDA because its messaging injured their reputations and practices, the Fifth Circuit proclaimed, “FDA is not a physician. It has authority to inform, announce, and apprise—but not to endorse, denounce, or advise.” *Apter*, 80 F.4th at 595. “While refusing to admit any wrongdoing,” the FDA has now settled the lawsuit with the doctors and “agreed to remove from its website a page titled, ‘Why You Should Not

²⁹ <https://www.cureus.com/articles/111851-regular-use-of-ivermectin-as-prophylaxis-for-covid-19-led-up-to-a-92-reduction-in-covid-19-mortality-rate-in-a-dose-response-manner-results-of-a-prospective-observational-study-of-a-strictly-controlled-population-of-88012-subjects%23!#!/>.

Use Ivermectin to Treat or Prevent COVID-19.”
 Susan Shelley, *The FDA Overstepped Against Ivermectin*, L.A. Daily News (Mar. 30, 2024).³⁰

VIII. Bodily interests and individual liberty are entitled to the respect bestowed via an elevated scrutiny analysis.

Jacobson and *Buck* stand for the proposition that societal pressures affect judicial conduct as well as legislative and executive action. We saw the same influence of societal anxiety when Japanese Americans were unfairly targeted and unconstitutionally interred. The Court declined to second guess government authorities’ representations of necessity—which representations the government knew to be false. Jeffery Burton, et al., *A Brief History of Japanese American Relocation During World War II*, Nat’l Park Serv.³¹

In 1984, Judge Patel admonished that “[*Korematsu*] stands as a constant caution that in times of [declared emergency] or declared [] necessity our institutions must be vigilant in protecting constitutional guarantees.” *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). And that “in times of distress the shield of [] necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.” *Id.* These words should guide the

³⁰ <https://www.dailynews.com/2024/03/30/fda-overstepped-on-ivermectin/>.

³¹ <https://www.nps.gov/articles/historyinternment.htm>, (last visited Aug. 1, 2023).

Court now.

The Court should overtly reject *Jacobson's* deference standard. *Jacobson's* intrusions on the interests of bodily integrity and individual liberty cannot be justified by "common beliefs" or a vague justification of "government knows best."

CONCLUSION

Amicus respectfully requests that the Court grant certiorari.

Respectfully submitted,

David C. Tryon
Counsel of Record for Amicus Curiae
Alex M. Certo
The Buckeye Institute
88 East Broad Street
Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org