

No. 26-319

In the
Supreme Court of the United States

◆

KRYSTLE PERRY, INDIVIDUALLY AND ON BEHALF OF THEIR
MINOR CHILD, K. P., ET VIR,
Petitioners,

v.

STACY MARTENEY, AS THE VIRTUAL LEARNING COORDINATOR OF
THE UPSHUR COUNTY VIRTUAL SCHOOL, ET AL.,
Respondents.

◆

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

◆

**BRIEF FOR THE BUCKEYE INSTITUTE
AS AMICUS CURIAE SUPPORTING PETITIONERS**

◆

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QUESTIONS PRESENTED

1. Whether a law that exempts people based on secular criteria but not religious reasons is subject to strict scrutiny and violates the First Amendment even when the religious burden is implicated by an act—like attending school or working—that is not itself religiously motivated.

2. Whether a law is subject to strict scrutiny under *Mahmoud* when it imposes a non-curricular requirement that substantially burdens parents' rights to guide the religious development of their child.

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INTEREST OF AMICUS CURIAE¹

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 its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Buckeye Institute works to restrain governmental overreach at all levels. It has opposed government vaccine mandates that excessively derogate liberty interests the Constitution protects. It has also defended the First Amendment rights of parents and religious adherents when the State conditions a public benefit on abandoning a sincerely held belief.

SUMMARY OF THE ARGUMENT

The Fourth Circuit below upheld West Virginia’s vaccine regime based on an overly broad reading of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This

¹ As required by 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 timely provided the notice required by Rule 37.2.

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*, the Court seemingly approved of almost any restriction on the right. Or at least, that is how lower courts have interpreted *Jacobson*.

The reason for such confusion 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 it—at least during an epidemic. *Jacobson's* uncertain analysis has resulted in lower courts giving extreme deference to legislative actions regarding “public health”—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

I. Introduction

The Fourth Circuit acknowledged that West Virginia’s vaccine mandate exempts a secular category of students while refusing to accommodate religious students like K.P. It concluded that this disparity does not matter. Because “the Perrys do not allege that K.P.’s desire to attend the Virtual Academy is religiously motivated,” the court reasoned, “this is merely an instance of West Virginia treating some secular activity more favorably than other secular activity.” Pet. App. 16a. It then held that *Mahmoud v. Taylor*, 606 U.S. 522 (2025), is inapposite here because a vaccination rule is a “public health measure not an instrument of ideological indoctrination.” *Id.* at 327. The Fourth Circuit below relied on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), to assert that “[t]he police power of the states ‘embrace[s], at least, such reasonable regulations . . . as will protect the public health and the public safety.” Pet. App. 3a (quoting *Jacobson*, 197 U.S. at 25).

Those are the holdings this Court is asked to review. They are possible only if *Jacobson* and its progeny still license special deference for health edicts. It should not.

Jacobson has undermined not only specific cases but also liberty and police power jurisprudence generally. *Jacobson* was decided when the country was in the throes of a smallpox epidemic. Decisions made under the pressures of anxiety and the unknown often age poorly. And relying on such decisions is 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 to justify many mandated vaccinations, with little or no legal scrutiny. “Because I said so,” works for moms demanding kids eat their vegetables, but it should not be so for governments requiring injections against your will. The Constitution requires something more.

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.

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 U. Med. Ctr. Procs. 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 this Court rejected his arguments.

But *Jacobson* is 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. Although 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 Court reasoned that the States have police powers and authority to “enact quarantine laws and ‘health laws of every description.’” *Id.* And the Court further reasoned, “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. The Court noted that it “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.* The Court emphasized the point by declaring liberty subservient to “reasonable” government decisions:

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 Court argues, 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). Yet on the other hand, communities have a right to protect themselves against an epidemic, and courts would “usurp” another branch of government’s authority by declaring its chosen “mode” of defending itself as “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 (or fourth?) 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, *Jacobson*’s 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).

The burden here is neither. West Virginia canceled K.P.’s enrollment in the State’s virtual school and told her parents that the only way back is to vaccinate her in violation of their beliefs—or to leave the public system for homeschooling or a pod, options the law already exempts from vaccination entirely. Unlike *Jacobson*, which concerned a single smallpox inoculation imposed on adults during an epidemic that was confined to city limits, West Virginia conditions

K–12 enrollment on immunization against 10 diseases—through multi-dose childhood series and later boosters. W. Va. Code § 16-3-4(b)–(c); *DHHR Reminds Parents of West Virginia Immunization Requirements for Back-to-School*, W. Va. Dep’t of Health (July 31, 2023), <https://health.wv.gov/article/dhhr-reminds-parents-west-virginia-immunization-requirements-back-school>. A decision about one shot in a citywide outbreak does not speak to a standing school-exclusion regime built on a full pediatric schedule plus adolescent boosters.

III. Subsequent reliance on *Jacobson* demonstrates the need for the Court to correct the lower courts’ overinterpretation of *Jacobson*.

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

Any case that lays the foundation for an anti-precedent becomes suspect itself. “*Jacobson* survives as the lodestar case for the government’s use of public health measures, and even draconian ones, in times of crisis.” Daniel B. Rodriguez, *Good Governing: The Police Power in the American States* 161 (2024).

One of the more infamous Supreme Court decisions, *Buck v. Bell*, a case upholding Virginia’s authority to forcibly sterilize people, relied almost exclusively on *Jacobson*.

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.

Id. (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).

In *Buck*, the Court allowed Virginia to forcibly sterilize Carrie Buck and avoid the burden she could possibly place on society because the State “was responsible for promoting ‘the welfare of society’ and protecting society from ‘being swamped with incompetence.’” *Id.* “*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.*

Buck is a warning that the Fourth Circuit did not heed. When courts treat “the welfare of society” and

“health” as domains in which ordinary free-exercise and parental-rights doctrines do not apply, they can easily find any crisis large enough to overcome those individual rights. *Buck* used *Jacobson* to take that step for eugenic sterilization. Wartime authorities used a similar necessity claim to intern Japanese Americans. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *abrogated by Trump v. Hawaii*, 585 U.S. 667 (2018). The government later conceded that the claim of military necessity was false. See *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). The Fourth Circuit’s implementation in this case of the rationale underlying *Buck* and *Korematsu* may not affect as many individuals as the Court did in those cases, but the Fourth Circuit’s ruling invades the affected individuals’ bodily integrity completely. The precedent that licensed *Buck* and *Korematsu* should not justify forcing vaccinations upon a public-school student with a faith-based objection, especially when the student is studying remotely—isolated from other students.

The lower court relies on two other cases to justify its extension of *Jacobson*: *Zucht v. King*, 260 U.S. 174 (1922), and *Prince v. Massachusetts*, 321 U.S. 158 (1944). *Zucht* upheld a vaccination condition of school attendance only as a due-process and equal-protection application of *Jacobson*’s police-power holding, and it is distinguishable because no free exercise claim was presented or decided. *Zucht*, 260 U.S. at 175–76. *Prince* did not uphold a school vaccination requirement at all: its statement that a parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds” was dicta in a child-labor prosecution, offered to illustrate

parens patriae authority the Court assumed would apply generally. *Prince*, 321 U.S. at 166–67.

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

The Court has “never felt constrained to follow precedent” “when governing decisions are unworkable or are badly reasoned.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). Although 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. At the very least, because the Court decided *Jacobson* in the context of an epidemic and on the grounds that the epidemic was a crisis, *Jacobson* should be cabined to similar crises. Otherwise, the government is free to wield emergency powers during times of stability simply by pointing to *Jacobson* as the basis of its authority.

Professor Josh Blackman recites Justice Alito’s 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 255–56 (quoting Josh Blackman, *Video and Transcript of Justice Alito’s Keynote Address to the Federalist Society*, Reason: Volokh Conspiracy (Nov. 12, 2020), <https://perma.cc/ZP8P-8X8P>). And as bad facts make bad law, a frantic social environment can also result in questionable reasoning and conclusions. Although 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. at 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 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 the “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.

V. Judicial vigilance is warranted more now because West Virginia’s school-entry mandate leaves the injured child without a real remedy.

West Virginia mandates certain vaccines for all children—subject to limited exemptions—in any public, private, or parochial school. W. Va. Code § 16-3-4(b)–(c). Officials applied that bar to K.P., who studies from home through the State’s Virtual Academy. The State disenrolled K.P. and told her parents that the only way back is to vaccinate her in violation of their beliefs. Meanwhile, children outside of the school system who receive in-home instruction, are educated in learning pods, or attend microschools, are exempt altogether. *Id.* §§ 16-3-4, 18-8-1(c) and (n). For public school students—even those who study virtually—a physician’s certificate is the only individualized way out. *Id.* § 16-3-4(h)(1). Faith is not.

Accordingly, the parents’ constitutional claim is the only means they have to resist having their rights violated before the injection occurs.

If a student is physically injured by a vaccine, the post-injury regime Congress built does not fill the gap. After product-liability suits drove manufacturers from the market, Congress enacted the National Childhood Vaccine Injury Act of 1986, S. 1744, 99th Cong. § 301 (1986), “to stabilize the vaccine market.” *Bruesewitz v.*

Wyeth LLC, 562 U.S. 223, 228 (2011). The Act covers the vaccines West Virginia requires for school. Health Rsch. & Servs. Admin., *Vaccine Injury Table*, www.hrsa.gov/sites/default/files/hrsa/vicp/vaccine-injury-table-01-03-2022.pdf (last visited Oct. 9, 2026).

It also sharply limits any later claim against the manufacturer of the shots the State demands. 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 limited recourse in state or federal court.

Federal law immunizes a manufacturer for a vaccine-related injury or death associated with the administration of a vaccine if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and accompanied by proper directions and warnings. 42 U.S.C. § 300aa-22(b)(1); see *Bruesewitz*, 562 U.S. at 231–32. A claim based solely on the manufacturer's failure to warn the injured person directly is also barred. 42 U.S.C. § 300aa-22(c). No action for more than \$1,000 may be filed against a manufacturer or administrator unless a petition has first been brought under the Act and the judgment rejected, or the petition withdrawn. *Id.* §§ 300aa-11(a)(2)(A) and 300aa-21. Punitive damages are unavailable absent fraud, intentional withholding of information, or other criminal or illegal activity. *Id.* § 300aa-23(d)(2).

What remains is the National Vaccine Injury Compensation Program, a no-fault substitute funded by an excise tax. It is not a remedy against West Virginia's school rule. A petition is filed in the Court of Federal Claims, not against the virtual-learning

coordinator or the superintendent. *Id.* § 300aa-12. Meanwhile, state courts are closed to the Perrys because state officials are immune from suit under state law. W. Va. Code §§ 29-12A-3(a) and 29-12A-5(b). West Virginia withholds attendance at its virtual public school unless the Perrys accept a series of injections. If they refuse, their daughter is out. If they submit and a required shot injures her, the State that imposed the condition is not the defendant, the manufacturer is largely beyond reach, and the federal program offers a capped, time-limited payment rather than the ordinary tort remedy. Homeschoolers and pod students never have to make that trade. The Perrys do because they chose the public virtual school.

When the government implements a vaccine mandate scheme for students, 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, objectors have no effective outlet to protect themselves.

CONCLUSION

In 1984, Judge Patel admonished that *Korematsu* “stands as a constant caution that in times of . . . declared [] necessity our institutions must be vigilant in protecting constitutional guarantees.” *Korematsu*, 584 F. Supp. at 1420; see also *Mahmoud*, 606 U.S. 522 (2025) (upholding parents’ rights under the Free Exercise Clause to opt their children out of certain lessons after the State argued it was necessary to include such lessons in the curriculum); *Tandon v. Newsom*, 593 U.S. 61 (2021) (enjoining California from

imposing occupancy limits on religious gatherings to limit the spread of illness).

These words should guide the Court now. The Court need not overrule *Jacobson* to say what *Jacobson* does not mean: It does not mean that vaccine conditions are exempt from the rule against favoring secular exemptions over religious exercise, and it does not mean that *Mahmoud* stops at the classroom door whenever the State invokes health. *Jacobson*'s intrusions on bodily integrity and individual liberty cannot be justified by "common beliefs" or a vague premise that "government knows best." *Jacobson* cannot justify ejecting a child from virtual public school for her parents' religion while unvaccinated homeschoolers, pod students, and microschool students remain untouched.

For those reasons, the Court should grant the petition.

Respectfully submitted,

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