No. 22-1200

In the

United States Court of Appeals for the Sixth Circuit

JEANNA NORRIS, on behalf of herself and all other similarly situated; KRAIG EHM; D'ANN ROHRER,
Plaintiffs - Appellants

v.

SAMUEL L. STANLEY, JR., in his official capacity as President of Michigan State University; DIANNE BYRUM, in her official capacity as Chair of the Board of Trustees; DAN KELLY, in his official capacity as Vice Chair of the Board of Trustees; RENEE JEFFERSON, in their official capacities as Members of the Board of the Trustees of Michigan State University; PAT O'KEEFE, in their official capacities as Members of the Board of the Trustees of Michigan State University; BRIANNA T. SCOTT, in their official capacities as Members of the Board of the Trustees of Michigan State University; KELLY TEBAY, in their official capacities as Members of the Board of the Trustees of Michigan State University; REMA VASSAR, in their official capacities as Members of the Board of the Trustees of Michigan State University; John and Jane Does 1-10,
Defendants – Appellees

On Appeal from the United States District Court for the
Western District of Michigan
Case No. 1:21-cv-00756
Honorable Paul L. Maloney, United States District Court Judge

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Brief of *Amicus Curiae* Liberty, Life, and Law Foundation in Support of Plaintiffs-Appellants and Reversal

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1200 Case Name: Norris, et al. v. Stanley, Jr., et al.

Name of counsel: Deborah J. Dewart

Pursuant to 6th Cir. R. 26.1, Liberty, Life, and Law Foundation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on July 11, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah J. Dewart
Deborah J. Dewart
Attorney at Law

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Liberty, Life and Law Foundation ("LLLF"), as *amicus curiae*, respectfully urges this Court to reverse the Sixth Circuit decision.

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

INTRODUCTION AND SUMMARY OF THE ARGUMENT

COVID-19 has "prompted public health mandates without precedent for at least a century." Daniel Farber, *The Long Shadow of* Jacobson v. Massachusetts*: Public Health, Fundamental Rights, and the Courts*, 57 San Diego L. Rev. 833, 833 (November-December 2020). Officials at all levels and in all branches of government rely on "emergency" powers to issue mandates.

Michigan State University ("MSU") has arrogated to itself the alleged right to condition employment on a vaccination mandate (the "Mandate") that intrudes on the rights of its employees and students to make personal, private decisions about

[1] The parties have consent to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

their health in consultation with their own doctors. Many courts over the years have cited *Jacobson v. Massachusetts*, decided over a century ago, to justify this unprecedented expansion of government power. 197 U.S. 11 (1905). But *Jacobson* "is not an absolute blank check for the exercise of governmental power." *Robinson v. Attorney General*, 957 F.3d 1171, 1179 (11th Cir. 2020). *Jacobson* does not grant any level or branch of government carte blanche to issue medical mandates. *Jacobson* respected the Constitution, relying on a century of medical knowledge to craft a narrowly tailored mandate to address a compelling interest. And the penalty for violation—a small fine—pales in comparison to the life-altering loss of livelihood or education facing Appellants and others subject to the Mandate.

The judiciary is perhaps "the only institution . . . in any structural position to push back against potential overreaching by the local, state, or federal political branches." Lindsay F. Wiley and Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. 179, 183 (July 2020). But courts reviewing COVID-related claims often "disregard[] both the complexity and nuance of Justice Harlan's opinion." Wendy E. Parmet, *Rediscovering* Jacobson *in the Era of Covid-19*, 100 B.U. L. Rev. Online 117, 129 (2020).

Prior to the pandemic, *Jacobson* was typically met with "unwavering adherence." Kellen Russoniello, *Article: The End of* Jacobson*'s Spread: Five*

Arguments Why an Anti-intoxicant Vaccine Would Be Unconstitutional, 43 Am. J. L. and Med. 57, 83 (2017). But now, the sweeping mandates—lockdowns, masks, distancing, vaccines—should alarm Americans and prompt courts to take a closer look. *Jacobson* did not give easy answers. On the contrary, the Supreme Court warned that "public health powers can be abused," so courts "must be vigilant" and "alert to pretext or abuse of power." Parmet, *Rediscovering* Jacobson, 100 B.U. L. Rev. Online at 132.

ARGUMENT

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

Jacobson was decided long before courts began to apply the now familiar tiered scrutiny of fundamental rights—indeed, "*Jacobson* predated the entire modern canonization of constitutional scrutiny." Wiley, *Coronavirus, Civil Liberties,* 133 Harv. L. Rev. F. at 193. While endorsing government protection for public health, the Supreme Court also "offered hints of judicially protected limitations on public health powers" and even "endorsed a relatively modern vision of individual liberty" that gave courts "a basis for limiting laws that infringe upon bodily integrity." Parmet, *Rediscovering* Jacobson, 100 B.U. L. Rev. Online at 126. The Court "looked back to its nineteenth-century police power jurisprudence" and simultaneously "forward to the fundamental-rights jurisprudence that would develop in the mid-

twentieth century." *Id*. *Jacobson* did not offer easy answers or tests and it provides no support for mere "rational basis" review of sweeping, intrusive medical mandates. On the contrary, it foreshadowed the balancing that would characterize future cases where fundamental rights are at stake.

A. *Jacobson* foreshadowed subsequent Supreme Court precedent confirming that bodily autonomy is a fundamental right "deeply rooted" in America's history and traditions.

In the employment context, OSHA acknowledges that "[h]ealth in general is an intensely personal matter…." (54 Fed. Reg. 23,042 (May 30, 1989)), and because "vaccine is an invasive procedure . . . OSHA prefers to encourage rather than try to force by governmental coercion, employee cooperation in [a] vaccination program" (54 Fed. Reg. 23,045 (May 30, 1989)). Unlike the small financial penalty assessed in *Jacobson*, MSU's Mandate "threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 618 (5th Cir. 2021).

Jacobson was one of earliest confrontations between "the assertion of an individual right to resist a state-mandated medical intervention" and a state claim that public health warranted the mandate. B. Jessie Hill, *Article: The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 Tex. L. Rev. 277, 296 (December 2007). But even at this early point, "the extent to which

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

Bodily integrity predates *Jacobson* and is indeed "one of the oldest fundamental rights recognized by the law." Hill, *A Tale of Two Doctrines*, 86 Tex. L. Rev. at 304. The Supreme Court has long recognized that no right is "more sacred" or "more carefully guarded" than "the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union P. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). *Botsford*'s concept of bodily integrity "served as a framework for the informed consent doctrine" articulated a century later in *Cruzan*. William M. Brooks, *Reevaluating Substantive Due Process as a Source of Protection for Psychiatric Patients to Refuse Drugs*, 31 Ind. L. Rev. 937, 989 (1998).

American law has long recognized the right to informed consent that is "generally required for medical treatment." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1989). *Cruzan* "effectively enshrined personal autonomy in a medical setting as a constitutionally protected liberty interest," with the majority assuming it while dissenting Justices "explicitly found that the right existed." Kathy L. Cerminara, *Cruzan's Legacy in Autonomy*, 73 SMU L. Rev. 27, 27 (Winter 2020). As then-Judge Cardozo previously expressed it, every competent adult has "a right to determine what shall be done with his own body; and a surgeon who performs an

operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff* v. *Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914). This tracks common law, where "even the touching of one person by another without consent and without legal justification was a battery." *Id*., citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed. 1984).

The logical corollary of informed consent is "the right of a competent individual to refuse medical treatment." *Cruzan*, 497 U.S. at 277; *see also In re Storar*, 420 N.E.2d 64, 70 (N.Y. 1982), cert. denied, 454 U.S. 858 (1981) (basing the right to refuse treatment on doctrine of informed consent). "The right to refuse any medical treatment emerged from the doctrines of trespass and battery, . . . applied to unauthorized touchings by a physician." *Mills v. Rogers*, 457 U.S. 291, 294, n.4 (1982). During the same term as *Cruzan*, the Supreme Court concluded in *Washington v. Harper* that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." 494 U.S. 210, 229 (1990). *Washington v. Harper* is perhaps the case "most pertinent to vaccination mandates." Russoniello, *The End of* Jacobson*'s Spread*, 43 Am. J. L. and Med. at 87. Coerced vaccination, like the injection of psychotropic drugs, is "an intrusive treatment . . . a significant infringement on bodily autonomy,

one of this Nation's most cherished rights under the Constitution." Brooks, *Reevaluating Substantive Due Process*, 31 Ind. L. Rev. at 945.

Cruzan's affirmation of bodily integrity was not confined to the majority. Justice O'Connor's concurrence noted that "incursions into the body" are "repugnant to the interests protected by the Due Process Clause" because "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination." 497 U.S. at 287 (O'Connor, J., concurring). Such coercion "burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment." *Id.* at 289. The conclusion is inescapable—"the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment." *Id*.

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

Building on *Cruzan*, *Washington v. Harper*, and other precedent, the Supreme Court confirmed the right to bodily integrity again in *Washington v. Glucksberg* 521 U.S. 702 (1997). Although concluding that assisted suicide is not a "fundamental right," *Glucksberg* echoed the common-law doctrine of informed consent utilized by the *Cruzan* majority and Justice O'Connor's concurrence. Cerminara, *Cruzan's Legacy*, 73 SMU L. Rev. at 28. *Glucksberg* highlighted the now-familiar terminology that defines "fundamental rights," combining key phrases from *Snyder v. Massachusetts*, 291 U.S. at 105 ("so rooted in the traditions and conscience of our people as to be ranked as fundamental") and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937) ("implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed"). 521 U.S. at 721.

There is unquestionably tension in case law between public health and bodily autonomy. In public health cases, sick persons are viewed "not so much as autonomous decision makers" but "threats to others that can and indeed must be controlled." Hill, *A Tale of Two Doctrines*, 86 Tex. L. Rev. at 295. During the COVID-19 era, even asymptomatic persons are seen as "threats" if they decline mandatory masks and vaccines. Autonomy cases, beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965), "treat[] the right to choose appropriate medical treatment as an aspect of the rights to bodily integrity and decisional autonomy." Hill, *A Tale of Two Doctrines*, 86 Tex. L. Rev. at 295. Resolving the tension demands

a balancing of the respective interests, and when a fundamental liberty is at stake, "the government's burden [is] to provide more than minimal justification for its action." *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 813 (S.D. Ohio 1995).

MSU cannot establish even "minimal justification" for a mandate which makes no exception for employees working remotely or those whose natural immunity offers protection that equals or surpasses vaccination. The Mandate borders on recklessness, considering the rushed development of covid-19 vaccines. It is impossible to know the long-term impact in terms of safety, adverse effects, or lasting protection from the virus. There has been no time to acquire that information. MSU has no way to know how the vaccine could potentially harm an employee who was previously infected, let alone whether the vaccine enhances the protection already offered by natural immunity. Under these circumstances, the Mandate is irrational.

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

Jacobson narrowly defined its scope according to the "necessities of the case"—"smallpox being prevalent and increasing" in the geographic area subject to the mandate. *Jacobson*, 197 U.S. at 28. The Supreme Court explicitly recognized that such a mandate "might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public" so as to "authorize

or compel the courts to interfere for the protection of such persons." *Id*., citing *Wisconsin, M. & P. R.R. Co. v. Jacobson*, 179 U.S. 287, 301 (1900). In *Railroad Company v. Husen*, 95 U.S. 465, 471-473 (1878) the Supreme Court affirmed a state's right to pass laws preventing those suffering from contagious diseases from entering its borders, but the laws at issue were invalid because they "went beyond the necessities of the case" and "violated rights secured by the Constitution." *Jacobson*, 197 U.S. at 28. In sum, *Jacobson* acknowledged that state police powers "may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression." *Id*. at 38.

Examples of overreach are seen in the years following *Jacobson*. In the wake of the Spanish flu epidemic, Arizona adopted a "public health elitism" model in response to the crisis. Jason Marisam, *Local Governance and Pandemics: Lessons from the 1918 Flu*, 85 U. Det. Mercy L. Rev. 347, 348 (Spring 2008). Under that model, the public defers to experts while the emergency lasts, and law enforcement plays a key role. *Id*. Arizona's "extreme and committed enforcement" of its public health measures, much like the COVID-19 response in some areas, "paints a vivid picture of the potential for abuse and the problems of relying on coercion instead of public cooperation." *Id*. at 362. Deputized citizens demonstrated "patriotic zeal" as

they arrested persons who coughed without covering their mouths and stopped traffic to intimidate those who were not traveling for business. *Id*.

Buck v. Bell, twenty years after *Jacobson*, is a glaring example of overreach: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . . Three generations of imbeciles are enough." *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding coerced sterilization). The Supreme Court "applied *Jacobson*'s hallmark deference to legislatures" but "ignore[ed] *Jacobson*'s suggestion of an individual right to protect one's own health." Hill, *A Tale of Two Doctrines*, 86 Tex. L. Rev. at 300. Only fifteen years later, the Court struck down a sterilization mandate for criminals, highlighting a schism between the Court's "autonomy" cases and its "public health" cases. *Id*., citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). More recent decisions have developed tests to balance public health (compelling state interests) with fundamental rights (autonomy).

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

In *Jacobson*, the petitioner failed to provide proof of his adverse childhood reaction to a vaccine—his reason for objecting to the mandate. *Jacobson*, 197 U.S. at 36-37. But the Supreme Court recognized that a person "embraced by the mere words" of the law might have a medical condition that would render the vaccination "cruel and inhuman." *Id*. at 38-39. In that case, courts would "be competent to

interfere and protect the health and life of the individual concerned." *Id*. at 39. The Supreme Court "presumed that the legislature intended exceptions to its language which would avoid results of that character." *Id*.

The MSU Mandate does provide for medical exemptions. But the exclusion of natural immunity—a quintessential *medical* reason for refusing the vaccine—lacks a rational explanation. As Appellants note, the University has acknowledged that "both unvaccinated and vaccinated individuals can transmit the disease to those who cannot currently be vaccinated." Op. Br. 11. This statement highlights the lack of a rational basis for the coerced vaccination policy. So does MSU's failure to exempt employees who work remotely and thus could not pass the disease among MSU's staff or students. Op. Br. 10.

B. *Jacobson* foreshadowed the "compelling interest" standard later developed in cases involving fundamental rights.

"Stemming the spread of COVID-19" may qualify as "a compelling interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (*per curiam*). Even if it does, "this interest cannot qualify as [compelling] forever. . . . [C]ivil liberties face grave risks when governments proclaim indefinite states of emergency." *Doe v. Mills*, 211 L. Ed. 2d 243, 246 (2021) (Gorsuch, J., dissenting).

Jacobson did not suspend consideration of the claimant's fundamental rights, but instead "adopted a quintessential balancing test." Wiley, *Coronavirus, Civil Liberties,* 133 Harv. L. Rev. F. at 190. Despite what "some contemporary courts

have concluded," *Jacobson* cannot fairly be read to establish a weak standard of review. *Id*. at 191. The Supreme Court rejected the argument that compulsory vaccination is inevitably "unreasonable, arbitrary and oppressive" (*Jacobson,* 197 U.S. at 26), "however widespread the epidemic" (*id*. at 37), but also acknowledged its duty to invalidate a statute that had "no real or substantial relation" to public health and safety, or that was "beyond all question, a plain, palpable invasion of rights secured by fundamental law." *Id*. at 31, citing *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

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

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

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

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

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

C. Jacobson anticipated the "narrow tailoring" developed in later cases.

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

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

In *Jacobson*, smallpox was undisputedly a "dire threat to the community" necessitating drastic measures. Farber, *The Long Shadow*, 57 San Diego L. Rev. at 841. The Supreme Court "permitted the state to require vaccinations because smallpox threatened life," not because the treatment might be beneficial. Brooks, *Reevaluating Substantive Due Process*, 31 Ind. L. Rev. at 1004. *Jacobson* reasoned there was a "paramount necessity" for the community to act in "self-defense" to protect against the epidemic. 197 U.S. at 27. When the Board of Health adopted the mandate, smallpox was "prevalent to some extent in the city of Cambridge and the disease was increasing." *Id*. The mandate was limited to the well-defined geographic area where the disease was present and spreading. The Supreme Court compared the situation to one where a citizen returning from a voyage must be quarantined because of exposure to yellow fever or cholera, but only until "the danger of the spread of the disease among the community at large has disappeared." *Id*. at 29.

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

Jacobson took judicial notice of "nearly a century" of medical authority determining that the smallpox vaccine was safe and effective—unlike the rapidly developed COVID-19 vaccine. COVID-19 has generated a multitude of conflicting opinions, even among medical professionals. Vaccines were developed at "warp speed" using new technology. Many Americans are understandably hesitant to assume the potential risks of what seems to be a broad sweeping, coercive medical

experiment. This is nothing like *Jacobson*. In the wake of Boston's smallpox outbreak, both the Supreme Judicial Court of Massachusetts and the U.S. Supreme Court noted that "for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox." *Jacobson*, 197 U.S. at 23-24; *see Commonwealth v. Pear*, 66 N.E. 719, 721 (Mass. 1903). Medical experts had considered the "risk of injury" and concluded it was "too small to be seriously weighed as against the benefits." *Jacobson*, 197 U.S. at 24. "The regulation was not simply reasonable because it aimed to prevent a deadly epidemic but because it was based on public health knowledge" available at the time. Parmet, *Rediscovering* Jacobson, 100 B.U. L. Rev. Online at 125. There is no comparable knowledge available for any of the COVID-19 vaccines.

II. *JACOBSON* DID NOT VIOLATE THE CONSTITUTION'S STRUCTURAL PROTECTIONS.

"Those who seek to protect individual liberty ignore threats to th[e] constitutional structure at their peril." Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417, 1419 (2008).

Contrary to the many executive branch decrees of the COVID-19 era, *Jacobson* conformed to the Constitution. The American public is best served by "maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or

perhaps *particularly*, when those decisions frustrate government officials." *BST*, 17 F.4th at 619. "[T]he Framers crafted the federal system of Government so that the people's rights would be secured by the division of power." *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *see also New York v. United States*, 505 U.S. 144, 181 (1992) (federal-state division of authority is "for the protection of individuals . . . . [S]tate sovereignty is not just an end in itself.").

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

MSU is neither a legislature nor an executive branch agency, but it is instructive to consider how those roles have been confused and abused during COVID-19 and earlier times of crisis. The University has far exceeded its legitimate authority over students and faculty.

Legislative power belongs solely to the *legislativ*e branch—not the executive. *See, e.g.*, Art. I, § 1. The Supreme Court requires Congress to "speak clearly" to grant an agency power to make decisions of "vast economic and political significance." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *see BST,* 17 F.4th at 617. Congress must use "*exceedingly clear* language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotation omitted) (emphasis added). *See MCP No. 165 v. United States DOL*, 20 F.4th 264, 268 (6th Cir. 2021) (Sutton, J., dissenting from denial of initial hearing en banc).

This is not the first time that executive branch agencies have encroached on legislative territory during a health crisis. The Arizona Supreme Court, considering a school closing case during the Spanish influenza epidemic, "was troubled that the board of health had gone beyond clear *executive* enforcement powers and exhibited *legislative* tendencies." Marisam, *Lessons from the 1918 Flu*, 85 U. Det. Mercy L. Rev. at 364 (emphasis added); *see Globe School District v. Board of Health of City of Globe*, 179 P. 55, 57 (Ariz. 1919) (the board of health could not be granted legislative powers).

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

uncertainties" and not "rewrite legislation." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Courts ordinarily "defer to legislative fact-finding" in keeping with the separation of powers principle that "allocates to legislatures the fact-dependent task of determining social policy Hill, *A Tale of Two Doctrines*, 86 Tex. L. Rev. at 333. This Court, the "independent judiciary" handling this case, should exercise its "unique role . . . to smoke out pretext for government actions during an emergency." Wiley, *Coronavirus, Civil Liberties,* 133 Harv. L. Rev. F. at 194-195. "Emergency does not create power" but merely provides an occasion to exercise pre-existing power. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

B. *Jacobson*'s mandate was based on a *local* determination of necessity.

Two centuries ago, then Chief Justice Marshall observed the power reserved to the states to enact "health laws of every description." *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824). That understanding has stood the test of time. More specifically, health is "primarily, and historically, a matter of local concern." *Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985). *Jacobson* echoed the prevailing understanding that state and local politically accountable authorities were primarily responsible for public health regulation. "Our Constitution principally entrusts 'the safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring),

quoting *Jacobson*, 197 U. S. at 38. The "police power of a State" embraces "reasonable regulations established directly by legislative enactment" to "protect the public health and the public safety." *Id*. at 25. Despite the severity of the smallpox outbreak, there was no attempt to undercut federalism.

"Under the Constitution, state *and local* governments, not the federal courts, have the primary responsibility for addressing COVID-19 matters." *Calvary Chapel,* 140 S. Ct. at 2614 (Gorsuch, J., dissenting) (emphasis added). Not only was *Jacobson*'s mandate a *state* level action—it was explicitly based on a *local* determination of necessity. The Massachusetts legislature required vaccinations "only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety. . . . a Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions." *Jacobson*, 197 U.S. at 27. When Spanish influenza hit the world in 1918, "localities were empowered (and expected) to respond to the flu," although "the states could limit and override that power." Marisam, *Lessons from the 1918 Flu*, 85 U. Det. Mercy L. Rev. at 361. Courts have recognized a limited power for localities and strictly construed the powers delegated to them. *Id*.

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

It would be a "considerable stretch" to read *Jacobson*'s upholding of a "local ordinance" as establishing a standard applicable to "statewide measures of indefinite

duration." *Calvary Chapel,* 140 S. Ct. at 2608 (2020) (Alito, J., dissenting). However serious COVID-19 may be, "a public health emergency does not give Governors and other public officials"—such as those who set policies for a state university—"*carte blanche* to disregard the Constitution for as long as the medical problem persists." *Id*. at 2605. Although an "emergency may afford a reason for the exertion of a living power already enjoyed," it cannot "call into life a power which has never lived." *Wilson v. New*, 243 U.S. 332, 348 (1917).

America's Founders understood that emergencies "afford a ready pretext for usurpation" of government powers that in turn "would tend to kindle emergencies." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring). In *Youngstown*, the Supreme Court rejected the executive branch's claim that it was necessary to seize control of the country's steel mills in order to avert a national catastrophe. Judicial review guards against decisions like *Korematsu v. United States*, 323 U.S. 214 (1944), where courts "sustain gross violations of civil rights because they are either unwilling or unable to meaningfully look behind the government's purported claims of exigency." Wiley, *Coronavirus, Civil Liberties*, 133 Harv. Rev. F. at 183. If government officials are only held to "modest burdens of justification for incursions into our civil liberties during emergencies," it will be easier for them to "find pretexts for triggering such emergencies" and then "use emergencies as pretexts for scaling back our rights." *Id*. at 198.

The duration of the emergency is a critical consideration. In early 2020, "two weeks to stop the spread" morphed into months of fluctuating restrictions, with executive officials repeatedly extending emergency declarations. Concerns escalate when a government official can declare open-ended emergencies. *See, e.g.*, *Midwest Inst. of Health, PLLC v. Governor of Mich. (In re Certified Questions from the United States Dist. Court)*, 958 N.W.2d 1 (2020) (recognizing statutory and constitutional limits on the governor's authority to renew or indefinitely extend a declaration of emergency); *Globe*, 179 P. at 61 (explaining that board of health order closing schools was valid "during the existence of said disease in epidemic form . . . and no longer").

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

CONCLUSION

Obedience to the Constitution does not hinge on "the circumstances of a particular crisis . . . . The People have decreed that it shall be the supreme law of the land at all times." *Downes v. Bidwell*, 182 U. S. 244, 384 (1901) (Harlan, J.,

dissenting). A century later, even with the threat of America's worst pandemic, "we may not shelter in place when the Constitution is under attack." *Roman Catholic Diocese*, 141 S. Ct. at 71 (Gorsuch, J., concurring).

The district court ruling should be reversed and remanded to allow Plaintiffs-Appellants to proceed with the litigation of their claims.

Respectfully submitted,

DATED: July 11, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,790 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on July 11, 2022. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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