No. - ____

IN THE

Supreme Court of the United States

JEANNA NORRIS, *ET AL.*,
Petitioners,

v.

SAMUEL STANLEY, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Gregory Dolin, M.D.
Counsel of Record
John J. Vecchione
Jenin Younes
Mark Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Ste. 450
Washington, DC 20036
(202) 869-5210
Greg.Dolin@ncla.legal
Counsel for Petitioners

QUESTIONS PRESENTED

"Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale." *Arizona v. Mayorkas*, 143 S.Ct. 1312, 1314 (2023) (Gorsuch, J., statement). Among these decisions were various "vaccine mandates" which required Americans to choose between receiving a vaccine and maintaining their jobs. Making matters worse, these mandates were not grounded in basic scientific facts about mechanisms of immunity. Instead, they cherry-picked advice of various public health officials (and then sought shelter in that cherry-picked advice), entirely ignoring fundamental liberty interests in avoiding unwanted, unproven, and often unnecessary medical treatment.

The courts routinely upheld these mandates on the sole authority of this Court's more than century-old decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), reasoning that supposed "public health" measures, even ones that directly impinge on individuals' bodily autonomy, are lawful so long as the government has a rational basis for such mandates. In so doing, lower courts failed to engage with the facts of *Jacobson* and ignored more than a century of case law since its issuance. This Court's intervention is needed to clarify that government orders which seek to override individuals' decisions about their own health and bodily autonomy must satisfy heightened scrutiny.

Petitioners thus present the following question:

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?

PARTIES TO THE PROCEEDINGS

Petitioners Jeanna Norris, Kraig Ehm, and D'Ann Rohrer were at relevant times, employees of Michigan State University ("MSU" or "the University"). Following their refusal to receive vaccination against Covid-19 Petitioners Ehm and Rohrer were terminated from their employment. Although Petitioner Norris also refused the vaccine, she was successful in obtaining a religious exemption from the mandate and therefore remains an employee of the University. All Petitioners were the Plaintiffs in the Western District of Michigan and Appellants in the United States Court of Appeals for the Sixth Circuit.

Respondents are Samuel L. Stanley, the President of MSU at the relevant time; Dianne Byrum, the Chair of the MSU Board of Trustees at the relevant time; Dan Kelly, the Vice-Chair of the MSU Board of Trustees at the relevant time; Renee Jefferson, Pat O'Keefe, Brianna T. Scott, Kelly Tebay and Rema Vassar, Members of the MSU Board of Trustees at the relevant time. All Respondents were Defendants in in the Western District of Michigan and Appellees in the United States Court of Appeals for the Sixth Circuit.[1]

RULE 29.6 STATEMENT

None of the parties is a nongovernmental corporation.

---

[1] All Respondents were sued in their official capacities.

RELATED PROCEEDINGS

Proceedings directly related to the case are as follows:

Norris v. Stanley, No. 21-cv-756 (W.D. Mich.). Judgment granted on February 22, 2022.

Norris v. Stanley, No. 21-1705 (6th Cir.). Case dismissed on November 24, 2021.

Norris v. Stanley, No. 22-1200 (6th Cir.). Judgment filed on July 13, 2023.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

Two of the decisions of the United States District Court for the Western District of Michigan are reported at 558 F. Supp. 3d 556 (W.D. Mich. 2021) (order denying motion for a temporary restraining order) and 567 F. Supp. 3d 818 (W.D. Mich. 2021) (order denying preliminary injunction). They are reproduced in the Appendix at 66a-74a and 54a-65a, respectively. The district court orders granting Respondents' motion to dismiss are not reported, but are available in electronic databases at 2022 WL 247507 (W.D. Mich., Jan. 21, 2022) and 2022 WL 557306 (W.D. Mich., Feb. 22, 2022). These opinions are reproduced in the Appendix at 37a-53a and 20a-35a, respectively. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 73 F.4th 431 (6th Cir. 2023) and is reproduced in the Appendix at 1a-19a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion and directed the entry of judgment in Petitioner's case on July 13, 2023. Petitioners timely sought rehearing *en banc*, which the Sixth Circuit denied on October 11, 2023. Justice Kavanaugh granted Petitioners' first request for extension of time on January 3, 2024, and the second request for extension of time February 7, 2024, giving Petitioners up to and including, March 9, 2024, to file the present petition for a *writ of certiorari.* This Court has jurisdiction under 28 U.S.C. § 1254(1)

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the U.S. Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21 U.S.C. § 360bbb-3, "Authorization for medical products for use in emergencies," states that "individuals to whom the product is administered" must be informed "of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks."

INTRODUCTION

The Covid-19 pandemic resulted in an untold number of government officials exercising unprecedented powers over people's lives—regulating or attempting to regulate everything—from Thanksgiving family celebrations, to religious practices, to schooling, and as most relevant here, to people's control over their own bodies. Many of the edicts treated Americans' constitutional rights, to the extent they were considered at all, as merely an afterthought. Respondents' vaccine mandates, for a non-sterilizing vaccine, are a case-in-point. In promulgating the mandates (and enforcing them by way of terminating Petitioners' employment), Respondents not only ignored basic scientific principles, but gave no weight to Petitioners' fundamental interests in liberty and bodily integrity. This Court should make it clear, before the next pandemic, that even an emergency, like the Covid pandemic undoubtedly was, does not suspend Americans' constitutional rights.

STATEMENT OF THE CASE

BACKGROUND

The novel coronavirus, which can cause the disease Covid-19, is a contagious respiratory virus spread mainly through person-to-person contact. It is not disputed that the virus, even before advent of the vaccines, only presented a significant risk to individuals who are immunocompromised, aged 70 or older, and those with comorbidities such as obesity or diabetes. Individuals under 50 faced, and continue to face, a negligible risk of a severe medical outcome from a coronavirus infection, akin to the types of risk that

most people take in everyday life. Smiriti Mallapaty, *The Coronavirus Is Most Deadly If You Are Older and Male*, 585 Nature 16 (Aug. 28, 2020) *available at* https://tinyurl.com/tn3k9df7 (last visited Feb. 29, 2024).

At the end of 2020 and beginning of 2021, the Food and Drug Administration (FDA) approved three vaccines pursuant to the federal Emergency Use Authorization (EUA)[2] statute, 21 U.S.C. § 360bbb-3: the Pfizer BioNTech, Moderna, and Johnson & Johnson (Janssen) vaccines.[3]

As with all vaccines, the basic mechanism of action of Covid vaccines is to induce through insult to the immunological system, in the absence of an actual infection, an immunological response in an inoculated individual. The vaccinated individual is then able to mount a robust response if and when he is infected with a live pathogen. In essence, vaccinations (and Covid vaccines are no exception) "trick" the body into thinking that it has been exposed to a live pathogen, and so vaccination imitates a response that a body would produce in response to an actual infection, but without having to risk an infection's negative sequela.

---

[2] Because EUAs allow the FDA to make a product available to the public following a truncated testing process, and based merely on the best available data, by definition products granted an EUA have not yet been proven safe and effective.

[3] On August 23, 2021 FDA fully approved Pfizer's Comirnaty Vaccine. Comirnaty vaccine differs from the original BioNTech version in that it has different inactive ingredients which can translate into a difference in safety and effectiveness. *See Doe #1–14 v. Austin*, 572 F. Supp. 3d 1224, 1230 n.5 (N.D. Fla. Nov. 12, 2021). Furthermore, at relevant times, there was insufficient availability of the Comirnaty vaccine.

At the same time, like all medical interventions, vaccines are not without their own risks. Petitioners do not dispute that Covid-19 vaccines are relatively safe at a population level, but they do have side-effects which range from minor and temporary to severe and long-lasting ones.[4] Therefore, as with any other treatment, the question faced by each individual is whether the risk of the procedure to that patient is outweighed by the potential benefits derived from it.

Crucial to an individual cost-benefit analysis is the question of "natural immunity," which is an individual's natural biological response to an infection. Naturally acquired and vaccine-induced immunity utilize the same basic immunological mechanism—stimulating the immune system to generate an antibody response to the pathogen. Indeed, the effectiveness of any vaccine is measured by comparing the body's immune response to the vaccine to the body's response to the live pathogen. *See, e.g.*, Alessandro Manenti, *et al.*, *Evaluation of Monkeypox- and Vaccinia Virus-Neutralizing Antibodies in Human Serum Samples After Vaccination and Natural Infection*, Frontiers in Pub. Health (June 21, 2023), http://tinyurl.com/yjpjjv3f (last visited Mar. 1, 2024). Once an individual has acquired immunity (by whatever means), further stimulation of the immune system is subject to the law of diminishing returns. In other words, immunity is essentially binary—either one is immune to the pathogen or not. One cannot

[4] Though rare, Covid vaccines are known to cause myocarditis and pericarditis which may require hospitalization, and in some cases lead to death.

become "doubly" or "super" immune.[5] To the contrary, overstimulation of the immune system may lead to "'exhaustion,' and in some cases even a deletion, of T-cells," causing a depleted immune response, which in turn can make such individuals *more* (rather than less) susceptible to reinfection. *See* Jennifer Block, *Vaccinating people who have had covid-19: why doesn't natural immunity count in the US?*, 374 British Med. J. 2101 (2021), *available at* http://tinyurl.com/bdz7erde (last visited Feb. 29, 2024).

Nor does administering Covid vaccines to naturally immune individuals provide any additional benefit to third parties. Thus, the Centers for Disease Control and Prevention ("CDC") acknowledged that it was unable to document even a single case of a Covid-recovered, unvaccinated individual spreading the virus to another person.

In short, the cost-benefit calculus for the naturally immune is different than for those who have not been exposed to the live pathogen. The risks stemming from immunization (at best) remain the same,[6] while the benefits decrease.

---

[5] Immunity can, of course, wane over time. However, such waning does not change depending on the source of immunity, be it from a live pathogen or from a vaccine.

[6] There is significant evidence that naturally immune individuals who receive Covid vaccines are actually subject to additional risks stemming from the vaccination. *See, e.g.*, Cristina Menni, *et al.*, *Vaccine Side-Effects and SARS-CoV-2 Infection After Vaccination in Users of the COVID Symptom Study App in the UK: A Prospective Observational Study*, 21 Lancet Infect. Dis. 939 (2021) (cited in Decl. of Hooman Noorchashm, MD, Dist. Ct. Dkt. 55-1, PageID 1277 n.6); Mark B. Saltzman, *et al.*, *Multisystem Inflammatory Syndrome after SARS-CoV-2 Infection and COVID-*

Michigan State University's Vaccine Mandate

In July of 2021, MSU issued a vaccine mandate requiring all employees and students to receive a Covid-19 vaccine unless they obtained a medical or religious exemption. The mandate explicitly and categorically refused to consider immunity acquired through prior infection as a substitute for vaccination. Those who declined to get vaccinated were subject to discipline, including termination from employment. The mandate applied even to employees who worked remotely, like Ms. Norris, and thus had no face-to-face interactions with other MSU students or staff.

Under the mandate, vaccination with any of the vaccines certified by the World Health Organization ("WHO"), which included vaccines subject to FDA's EUA approval as well as Chinese-developed vaccines such as Sinovac and Sinopharm which were not approved for use within the United States. It is undisputed that Sinovac's efficacy at preventing Covid infection is about 50%, while Sinopharm's is under 80%—meaning that immunity acquired from either of these vaccines is significantly less efficacious than natural immunity.

According to MSU, the policy was promulgated because the then-extant "vaccines [were] highly effective in preventing hospitalizations, severe disease and death from the Delta variant of COVID-19." Exh. I, Dist. Ct. Dkt. 55-1, *archived at* https://tinyurl.com/4x6zxb5y (last visited March 5, 2024). At the same time, the University conceded that

---

19 Vaccination, 27 Emerg. Infect. Dis. 1944 (2021) (cited in Noorchashm Decl., *ante*, at PageID 1278, n.7).

"studies demonstrate[] both unvaccinated and vaccinated individuals can transmit the disease," and that "the Delta variant can create breakthrough infections in vaccinated individuals." *Id.*

Petitioners all were employees of MSU when the mandate was announced and had demonstrable naturally acquired immunity to the virus. For this reason, they declined to receive Covid-19 vaccinations. Disciplinary proceedings against them commenced, and two of the three eventually were terminated.

Lower Court Proceedings

On August 27, 2021, Petitioner Norris brought suit in United States District Court for the Western District of Michigan challenging the mandate on federal constitutional and statutory grounds. Petitioners sought injunctive and declaratory relief, a preliminary injunction (PI), and a temporary restraining order against the mandate, which was, at the time, set to take effect in mere days. After the district court denied preliminary relief, Petitioners (now including Ehm and Rohrer) filed an amended complaint alleging that (1) MSU's vaccine mandate deprived them of the right to refuse unwanted and medically unnecessary care under the Ninth and Fourteenth Amendments to the United States Constitution; (2) the mandate created an unconstitutional condition; and (3) because the mandate conflicted with the federal EUA statute, which requires informed consent, it was preempted.

In two separate orders the district court granted MSU's motion to dismiss the action. The Court held that under *Jacobson*, governmental vaccine mandates are subject only to rational basis review and concluded

that it was not "irrational for MSU not to provide an exception to its vaccine mandate for individuals who have naturally acquired immunity" in large part because it credited MSU's claim that in promulgating the mandate, it relied on CDC's guidance. App.33a.[7]

Petitioners appealed the dismissal to the Sixth Circuit which affirmed in a published opinion. *See Norris v. Stanley*, 73 F.4th 431 (6th Cir. 2023). On October 11, 2023, the Court of Appeals declined to rehear the case *en banc*.

Petitioners now seek *certiorari*.

REASONS FOR GRANTING THE WRIT

This petition raises the question of whether rational basis review automatically applies to all legal challenges to vaccine mandates. The Sixth Circuit below, and sister circuits in other cases, have interpreted *Jacobson* to stand for the proposition that it does. *See Norris*, 73 F.4th 431; *Lukaszczyk v. Cook Cnty.*, 47 F.4th 587, 602 (7th Cir. 2022) ("[T]he district judge in each of these cases followed Supreme Court and circuit court precedent by applying the rational basis standard. Following that same authority, we decline to apply strict scrutiny and instead review for rational basis"); *Kheriaty v. Regents of the Univ. of Cal.*, No. 22-55001, 2022 WL 17175070 at *1 (9th Cir. Nov. 23, 2022) (applying rational basis review).

Jacobson, however, was decided in an era that

[7] The court suggested, in a final footnote, that were it to decide the case based on the scientific evidence available at the time of the hearing on the motion to dismiss—February, 2022—it may have reached a different conclusion as to the rationality of the mandate. *See* App.34a, n. 4.

preceded the development of tiers of scrutiny and at the time when this Court endorsed a variety of medical interventions without giving due weight to individuals' liberty interest in their own bodies. *See, e.g.*, *Buck v. Bell*, 274 U.S. 200 (1927) (authorizing forcible sterilization of the intellectually disabled). Indeed, *Jacobson* was the *only* case cited in support of the *Buck* decision, with Justice Holmes noting, "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." *Id.* at 207.

The Court has, thankfully, long since recognized that the state cannot simply invade an individual's interest in their own bodily integrity merely because it can proffer some, not irrational justification for doing so. *See, e.g.*, *Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *Washington v. Harper*, 494 U.S. 210 (1990); *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535 (1942). The Court has since held that "[t]he [Due Process] Clause … provides *heightened* protection against government interference with certain fundamental rights and liberty interests" including the right "to bodily integrity." *Glucksberg*, 521 U.S. at 720 (internal quotations omitted, emphasis added). And *heightened* protection cannot, by definition, be surmounted through the application of mere rational basis review—the lowest tier of scrutiny.

To the extent that *Jacobson* subjects a state's decision to force individuals to undergo unwanted medical treatment to mere rational basis review, it "stands out like a sore thumb from the rest of [this Court's] jurisprudence." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 857 (2015)

(Scalia, J., dissenting). To the extent that *Jacobson*, properly read and consistent with modern case law, requires a heighted level of scrutiny, the lower courts are consistently misapplying it. In either case, this Court's intervention is needed to set the appropriate standard of review for governmental medical intervention mandates. The Court ought not wait for a new emergency pandemic to conduct such review.

Lower courts have permitted governmental agencies to use *Jacobson* as little more than a "magic word," mere incantation of which essentially insulated governments' decisions from any actual scrutiny. As a result, the courts have not inquired whether, as a factual matter, Covid vaccines are in any way similar to the vaccinations that were at issue in that case. The lower courts have declined to consider the fact that the smallpox vaccine in *Jacobson* protected against a disease that had the potential to decimate the human population *and that stopped the transmission of the disease, thus enabling eradication of the virus*. Covid, itself, by contrast, does not pose nearly the same amount of risk as did smallpox, the Covid vaccines do not prevent transmission of the disease, and they do not provide additional protection to individuals who have had the disease and naturally acquired immunity.

In short, the lower courts' understanding of *Jacobson* has been woefully flawed. If allowed to stand, it would contradict this Court's admonition that "deference does not imply abandonment or abdication of judicial review," *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003), and effectively insulate from scrutiny almost any policy, no matter how intrusive, disproven, unscientific, or at odds with constitutional protections.

Allowing public universities and other governmental entities to use *Jacobson* as a shibboleth does just that.

For these reasons, it is critical that this Court correct the error.

I. THE COURT SHOULD CLARIFY THAT ANY GOVERNMENTAL POLICY MANDATING INTRUSIVE MEDICAL TREATMENT IS SUBJECT TO AT LEAST INTERMEDIATE SCRUTINY

A. The Right to Refuse Treatment Is Deeply Rooted in the Nation's History and Traditions

The Court has long recognized that the right to bodily autonomy is deeply rooted in this Nation's history and traditions. *See Rochin v. California*, 342 U.S. 165, 169 (1952). In fact, the idea that a person must be secure in his own body long pre-dates the Constitution. *See, e.g.*, John Locke, Second Treatise of Government § 27 (1690) ("[E]very man has a property in his own person: this no body has any right to but himself."). The right to refuse treatment derives from the "well-established, traditional rights to bodily integrity and freedom from unwanted touching." *Vacco*, 521 U.S. at 807 (citing *Cruzan*, 497 U.S. at 278-79).

At common law, even the touching of one person by another without consent and without legal justification was a battery. Before the turn of the century, this Court observed that "[n]o right is held more sacred, or is more carefully guarded, by the common law, 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." *Cruzan*, 497 U.S. at

342 n.14 (Stevens, J., dissenting) (quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); *see also Mills v. Rogers*, 457 U.S. 291, 294 n.4 (1982) ("Under the common law of torts, the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician."); *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914) (Cardozo, J.), *abrogated on other grounds by Bing v. Thunig*, 2 N.Y. 2d 656 (1957) ("Every human being of adult years and sound mind 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.").

The reason that this right has such a long-standing pedigree is because it is "implicit in the concept of ordered liberty," *Glucksberg*, 521 U.S. at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)), and has been recognized as universal. *See* Judgment, *United States v. Brandt*, Case 1 (Nuremberg Military Tribunal Aug. 19, 1947). When evaluating the propriety of a medical procedure, "[t]he voluntary consent of the human subject is absolutely essential." *Id.* at 181, *available at* http://tinyurl.com/9jze493a (last visited Mar. 1, 2024). It is therefore no surprise that this Court concluded that a "forcible injection … into a nonconsenting person's body represents a *substantial* interference with that person's liberty." *Harper*, 494 U.S. at 229 (emphasis added).

B. Given the Interests at Stake, at Least Intermediate Scrutiny Is Required

"Ordinarily, where a fundamental liberty interest

protected by the substantive due process component of the Fourteenth Amendment is involved, the government cannot infringe on that right 'unless the infringement is narrowly tailored to serve a compelling state interest.'" *Johnson v. City of Cincinnati*, 310 F.3d 484, 502 (6th Cir. 2002) (quoting *Glucksberg*, 521 U.S. at 721). But even assuming that bodily integrity is not a *fundamental* liberty interest and merely an "important" one, something more than mere rational basis review is required.

Precisely because mandated medical procedures substantially interfere with an individual's liberty interest, *Jacobson* itself spoke in terms of society facing "great dangers," 197 U.S. at 29, and the smallpox vaccine mandate having a "substantial relation," *id.* at 31, to the alleviation of those dangers. Although *Jacobson* preceded this Court's development of tiers of scrutiny, the language in that opinion is unmistakable—it is a nearly *verbatim* recitation of the modern intermediate scrutiny test. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."). The actual language of *Jacobson* (rather than the lax interpretation given it by lower courts) provides a far more exacting standard than rational basis, which requires only that the government articulate an interest and a rational connection between the challenged law and the government's interest. *See generally FCC v. Beach Comm'ns, Inc.*, 508 U.S. 307 (1993); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).

This Court need not, at present, decide whether MSU's mandate actually withstands intermediate

scrutiny (though Petitioners respectfully submit that it does not). Instead, it should clarify that lower courts must apply *Jacobson* as it was written, *i.e.*, require that any governmental directives that require citizens to submit to mandatory medical intervention be *substantially* related to an important governmental interest.[8] The Court should do so after full briefing when not under the confusion, pressure and urgency of an ongoing pandemic and novel emergency orders.

In the alternative, and to the extent that *Jacobson* cannot be fairly read to require intermediate scrutiny, *see, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 23 (2020) (Gorsuch, J., concurring) (opining that the "Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that" required vaccination against smallpox),[9] then the Court should recognize that *Jacobson* is inconsistent with the modern doctrine and overrule or modify it.

The rational basis review approach to forced medical treatment is radically inconsistent with this Court's more recent decisions. For example, in *Sell v. United States*, 539 U.S. 166 (2003), the Court applied intermediate scrutiny to the government's attempt to forcibly medicate an individual so that he would be

---

[8] Petitioners do not dispute that alleviation of dangers posed by Covid-19 is an important governmental interest. However, MSU's vaccine mandate, at least as it applied to naturally immune individuals, was not substantially related to accomplishing that purpose.

[9] According to Justice Gorsuch, the mandate in *Jacobson* itself was so narrowly tailored that it may have even survived strict scrutiny. 592 U.S. at 24.

competent to stand trial. The Court recognized that "[t]he Government's interest in bringing to trial an individual accused of a serious crime is important," because doing so "protect[s] through application of the criminal law the basic human need for security." *Id.* at 180. But *Sell* also demanded that in deciding whether forced medication is an appropriate means of achieving a concededly important governmental interest, courts must consider whether "involuntary medication will *significantly further* those those … interests, and if "involuntary medication is *necessary* to" do so. *Id.* at 181 (emphasis in original).

It cannot be that dangerously psychotic criminal defendants who may opportunistically seek to escape responsibility for their crimes, *see id.* at 191 (Scalia, J., dissenting), enjoy a higher level of constitutional protection than law-abiding citizens who merely seek to have the government recognize the basic scientific tenets of immunology. And while no one disputes that protection against infectious disease is an important governmental interest, the courts below (much like the courts in *Sell*) failed to analyze whether MSU's mandate significantly furthered those interests.[10] Thus, in order to harmonize *Jacobson* with the subsequent century of constitutional law, and to the extent the Court concludes that *Jacobson* does not already require intermediate scrutiny, this Court should accordingly overrule or modify it. This case presents a particularly good vehicle for the resolution of this question because, as the lower court noted, the

[10] As explained further below, *see* pp. 18-24, *post*, had the lower courts considered MSU's proffered rationale, it would have necessarily concluded that the mandate fails any level of review, and certainly intermediate scrutiny.

rational basis test itself was different at different times. In other words, as the District Court recognized, *see* App.34a, n. 4, the later-released CDC studies significantly undermined, if not outright vitiated MSU's claim that its vaccine mandate was rational.

II. VACCINE MANDATES FOR NATURALLY IMMUNE INDIVIDUALS DO NOT SURVIVE EVEN RATIONAL BASIS SCRUTINY

The Court should clarify that vaccine mandates, like all other forced medical interventions, are subject to at least intermediate scrutiny. If it is disinclined to do that, the Court should at the very least demand that even under rational basis review, lower courts must actually *review* governmental edicts rather than simply accept them. *See Nordlinger v. Hahn*, 505 U.S. 1, 31 (1992) (Stevens, J., dissenting) ("[D]eference is not abdication and 'rational-basis scrutiny' is still scrutiny."); *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 857 (4th Cir. 1999) (*en banc*), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000) (noting that "judicial restraint" is not meant to be "a deference so absolute as to preclude any independent judicial evaluation of constitutionality whatsoever" which would be "indistinguishable from judicial abdication."). "Rational basis review, while deferential, is not 'toothless,'" *Peoples Rts. Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)), and courts must "insist on knowing the relation between the classification adopted and the object to be attained," *Romer v. Evans*, 517 U.S. 620, 632 (1996). Unfortunately, when it came to Covid, lower courts

rarely scrutinized governmental actions to any degree whatever.

To survive rational basis scrutiny a regulation must both have a legitimate purpose and be a rationally related means to accomplishing that purpose. *See, e.g.*, *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 668 (1981). Without a doubt, preventing spread of transmissible disease is a legitimate governmental purpose. However, it does not follow that any action that the government may *claim* helps accomplish the stated goal is actually rationally related to accomplishing it.

First, the state's legitimate interest is in protecting *public* health, not in protecting the very individual who must submit to vaccination or treatment. Thus, in *Jacobson*, the Court held that Massachusetts had the power to adopt such measures "as will protect the public health and the public safety." 197 U.S. at 25 (citations omitted). Here, however, MSU never suggested that vaccinating naturally immune individuals (*i.e.*, individuals who have previously been infected with Covid) provided any additional *public* benefits. To the contrary, MSU justified its mandate on the basis that vaccinating naturally immune individuals provides "additional" protections *to those individuals*. But protecting competent individuals against their own (even unwise) choices is not a legitimate governmental interest. *See, e.g.*, *Cruzan*, 497 U.S. at 278-79. Were the states free to mandate medical treatment for an individual's own benefit, they would be able to mandate anything from consumption of particular foods to a daily exercise regimen. *Cf. NFIB v. Sebelius*, 567 U.S. 519, 660 (2012) (Scalia, Thomas, Kennedy, & Alito, JJ., dissenting) ("[T]he

failure of some to eat broccoli may be found to deprive them of a newly discovered cancer-fighting chemical which only that food contains, producing health-care costs that are a burden on the rest of us … ."). Obesity is one of the most significant risk factors for a severe Covid-19 infection, but no serious person has suggested mandating BMI below a certain level; to even consider such a concept is ludicrous. *Id.* at 553-54 (opinion of Roberts, C.J.). Thus, in constitutional parlance, only desire to protect *third parties* is a legitimate governmental purpose. Yet, MSU based its mandate (as applied to naturally immune individuals) on a claim that vaccination would help those individuals themselves. That objective does not pass constitutional muster.

Second, administering vaccines to individuals with naturally acquired immunity is not rationally related to the governmental goals of reducing Covid-19 transmission, because such a requirement runs contrary to the basic principles of immunology. As discussed above, there is no difference between naturally acquired and vaccine-induced immunity because both utilize the same basic immunological mechanism. *See, e.g.*, Sandy Cohen, *Natural Immunity vs. Vaccine-induced Immunity to COVID-19*, UCLA Health (Jan. 20, 2022), *available at* https://tinyurl.com/4r4kmatu (last visited March 7, 2024) ("Q: What's the difference between infection-induced immunity and vaccine-induced immunity? A: The short answer: Not much other than illness. Infection with COVID-19 or vaccination against the virus both prompt the body to produce an immune response in the form of disease-fighting antibodies and virus-targeting T-cells."); CDC, *Immunity Types*,

available at https://tinyurl.com/ymm8hjns (last visited March 7, 2024) ("Active immunity can be acquired through natural immunity or vaccine-induced immunity. … *Either way*, if an immune person comes into contact with that disease in the future, their immune system will recognize it and immediately produce the antibodies needed to fight it. Active immunity is long-lasting, and sometimes life-long.") (emphasis added). The above is true for *any and every* infectious agent, and Covid-19 is no exception. Indeed, the level of antibodies in the blood of those who have naturally acquired immunity served as the benchmark for determining the efficacy of vaccines during clinical trials. Laurence Chu, *et al.*, *A Preliminary Report of a Randomized Controlled Phase 2 Trial of the Safety and Immunogenicity of mRNA-1273 SARS-CoV-2 Vaccine*, 39 Vaccine 2791, 2793 (Feb. 9, 2024), http://tinyurl.com/5dtx5dz9 (last visited Mar. 1, 2024) (explaining that in evaluating test subjects' immune response to a Covid vaccine, "[h]uman sera from COVID-19 convalescent patients … served as a reference."). It is not rational for a governmental agency to ignore basic scientific principles any more than it would be rational to legislate on the theory that the Earth is flat. *See* Richard Delgado, *Active Rationality in Judicial Review*, 64 Minn. L. Rev. 467, 520 n. 219 (1980) ("[C]ommon sense is shaped by science. In earlier times, common sense told us our earth was flat and the center of the universe. … Today, largely because of the discoveries of scientists, these are no longer part of our common sense."). Such a law would be irrational even though a vast majority of the legislators (and other people) don't actually experience the roundness of the planet. *Id.* Rational basis does not mean that judicial review of anything that a

legislative body denominates as a "public health" measure is, in effect, foreclosed. Rather, even the most deferential review must ensure that governmental commands do not contradict fundamental scientific principles in the service of violating constitutional rights. And the insistence that vaccine-mediated immunity is somehow superior to naturally acquired immunity is just such an illogical contradiction. It is tantamount to claiming that the Earth is flat.[11]

Additionally, MSU's claim to be acting rationally is further undermined by the fact that it deemed vaccination with non-FDA approved vaccines from China as full compliance with its mandate. These vaccines did not receive FDA authorization (even on emergency basis). Yet, MSU deemed them to be sufficient. There can be only one explanation for this

---

[11] To be clear, the challenge here is *not* to the *choice* between various public health measures—a choice that, at least under rational basis review, belongs to the political branches. For example, were the spread of infection controllable by either vaccination or quarantine, under rational basis review, the government would be free to choose either approach even where one is more intrusive than the other. *Jacobson*'s holding was no broader than that. Henning Jacobson argued that instead of vaccinations, Massachusetts could have chosen other means to control the spread of smallpox, but the Court rejected that position, writing that the legislature was free to "proceed[] upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population." 197 U.S. at 30-31. The case at hand is different because there is no legitimate scientific theory positing that vaccinating naturally-immune individuals provides additional protection to the public, and indeed, basic scientific knowledge squarely contradicts such a claim. After all, it is not disputed that MSU-mandated Covid-19 vaccines do not prevent transmission.

choice—the University did not want to lose tuition from foreign students and so accepted demonstrably inferior foreign vaccines that do not stop the spread of the virus. The University is of course free to adopt policies that will maximize its revenues. What it cannot do is to claim that policies directed toward that goal are rationally related to an entirely different goal of protecting public health.[12]

Finally, even assuming, *arguendo* (and *dubitante*) that the MSU mandate was rational when first promulgated, the information that came to the fore in the following weeks rendered continued adherence to the mandate irrational. This Court has previously held that when assessing constitutional challenges, courts can (and should) take facts and circumstances into account that have changed since the law or ordinance was enacted. Thus, in *Chastleton Corp. v. Sinclair*, when considering the constitutionality of a law designed to address an emergency after that emergency had ended, the Court held that "[a] law depending upon the existence [of a] … certain state of facts to uphold it may cease to operate if … the facts change even though valid when passed." 264 U.S. 543, 547-48 (1924). Similarly, in *Nashville, C. & St. L. Ry. v. Walters*, the Court noted that "[a] statute valid when enacted may become invalid by change in the conditions to which it is applied," and that when the state refuses to take these changes into account, it

[12] For the same reason, MSU cannot rationally defend its policies on the basis that it was merely following the federal government's expert advice. MSU cannot plausibly claim that it was following FDA's or CDC's vaccination advice (which only advised vaccination by FDA-approved vaccines), while simultaneously eschewing that advice when MSU's tuition dollars were at stake.

begins to exercise its police powers arbitrarily and unreasonably. 294 U.S 405, 415 (1935) (citations omitted). The Court repeated this admonition in *United States v. Carolene Prods., Co.*, writing that "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." 304 U.S. 144, 153 (1938) (citing *Chastleton Corp.*, 264 U.S. at 543). *See also Roman Cath. Diocese of Brooklyn*, 592 U.S. at 23 (Gorsuch, J., concurring) (noting that with passage of time, the rationale for sustaining prior Covid-related orders "has expired according to its own terms" and can no longer be relied on).

MSU never updated its policies even as the factual basis underlying them went from pretextual and flimsy to entirely non-existent. *See* App.34a, n.4 (noting that more recent scientific findings cannot continue "to provide the rational basis for" similar mandates "in the future" without some additional convincing explanation). And yet, the courts below declined to consider these changed circumstances in evaluating MSU's irrational policies. Because even deferential rational basis review calls for more than mere rubber-stamping of governmental policies, the lower courts' approach was in error.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED

In the last few years, this Court has had to face questions about the extent of governmental power to limit civil rights during the pandemic. *See, e.g.*, *NFIB v. OSHA*, 142 S.Ct. 661, 664 (2022); *Ala. Ass'n. of Realtors v. HHS*, 141 S.Ct. 2485 (2021); *Tandon v.*

Newsom, 593 U.S. 61 (2021); *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021); *Roman Cath. Diocese of Brooklyn*, 592 U.S. 14. However, in many of these cases, given their time-sensitive nature, the Court's review was hampered by (and occasionally criticized for) its inability to fully "consider[] and discuss[] in the ordinary course of proceedings" important scientific, public policy, and constitutional questions presented. *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 37 (Breyer, J., dissenting). There were also concerns that the Court's "intervention [in the middle of the pandemic may] worsen the Nation's COVID crisis." *South Bay*, 141 S.Ct. at 723 (Kagan, J., dissenting). None of these concerns are present here.

First, while Covid infection continues to present some risk and create some problems, the Nation has essentially returned to normal. *See, e.g.*, *Moving Beyond COVID-19 Vaccination Requirements for Federal Workers*, Exec. Order No. 14099, 88 FR 30891 (May 9, 2023). Indeed, MSU itself no longer imposes Covid vaccination requirement.[13] Thus, a decision from this Court holding MSU's former mandate unlawful will not run the risk of "worsen[ing] the Nation's COVID crisis."

Second, because the remedy being sought in this case is not of an emergent nature (unlike ones sought in *Tandon*, *South Bay*, *Roman Catholic Diocese of Brooklyn, NFIB v. OSHA, or Ala. Ass'n of Realtors*), the Court can reach its decision after full deliberation and as part of its regular process. Because all too

[13] Nevertheless, the University refuses to reinstate Petitioners to their previous positions.

often "hard cases[] make bad law," *N. Sec. Co. v. United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting), this Court is right to be circumspect when asked to act quickly in the face of an ongoing and rapidly evolving emergency. But the passage of time, which allows the issues to come into better focus and the boundaries of asserted rights and governmental powers to be better defined, allows this Court to properly analyze the issues at stake. Because it is inevitable that the country will face future healthcare emergencies, it is best to address the question of governmental powers during the period of calm, rather than in the midst of a crisis.

Third, the present case comes to the Court with a full record. Unlike earlier cases where the scientific knowledge was rapidly evolving, at this point, it is a settled consensus view that naturally-acquired and vaccine-induced immunities are, at the very least, equivalent. *See* CDC, *Science Brief: SARS-CoV-2 Infection-induced and Vaccine-induced Immunity* at 6, *available at* https://tinyurl.com/y2mnupyp (last visited March 7, 2024) ("A systematic review and meta-analysis including data from three vaccine efficacy trials and four observational studies from the US, Israel, and the United Kingdom, found no significant difference in the overall level of protection provided by infection as compared with protection provided by vaccination ...."). The Court thus need nor engaged in "armchair epidemiology" *South Bay*, 141 S.Ct. at 723 (Kagan, J., dissenting) in order to evaluate the legal or scientific soundness of MSU's mandate. Instead, it can proceed on the basic, century-old, and now-confirmed in the context of Covid, understanding of immunology.

For all the foregoing reasons, this case represents an ideal vehicle to address the question presented.

CONCLUSION

The Court should grant the petition to clarify that for *Jacobson v. Massachusetts* to be properly situated in modern jurisprudence it must be read to require intermediate scrutiny, and that MSU's mandate fails the test. Alternatively, the Court should grant the petition and hold that even under rational basis review, governmental policies that ignore basic scientific principles like natural immunity cannot be sustained.