No. 21A244, **21A247**

In the Supreme Court of the United States

National Federation of Independent Business, et al., *Applicants*,

v.

Department of Labor, Occupational Safety and Health Administration, et al., *Respondents*

Ohio, et al., *Applicants*,

v.

Department of Labor, Occupational Safety and Health Administration, et al., *Respondents*

On Emergency Application of Administrative Action and Petition for Writ of Certiorari to the United States Courts of Appeals for the Sixth Circuit

Motion for Leave to File and Brief of The IU Family for Choice, not Mandates, Inc. as Amicus Curiae in Support of Applicants; for Leave to File Without 10-Days' Notice; and for Leave to File Pursuant to Sup. Ct. Rule 33.2

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Motion for Leave to File[1]

The IU Family for Choice, not Mandates, Inc. ("**IUFCNM**") respectfully moves for leave to file a short brief as amicus curiae in support of Applicants' Emergency Applications for Immediate Stay of Agency Action Pending Disposition of Petition for Review. Applicants consented to, and federal Respondents took no position on, the filing of the enclosed amicus brief.

Amicus respectfully requests that the Court consider the arguments presented in the enclosed amicus brief in support of Applicants' applications in No. 21A244 and No. 21A247. The attached amicus brief will be helpful to the Court as it considers the merits of the emergency application for immediate stay.

The brief demonstrates that this case presents a unique opportunity for this Court to define the proper role of government in decisions impacting medical treatment choice. In doing so, Amicus suggest that this Court take the opportunity to provide guidance regarding the proper judicial review standards that should be applied in such cases.

Statement of Movant's Interest

IUFCNM is a grassroots coalition of Indiana University students, parents, Alumni, and concerned community members advocating for medical autonomy and equal treatment of all university students, faculty, and staff. IUFCNM stands firm in its belief that everyone has sovereignty and freedom of choice to make medical

[1] No counsel for any party authored the following amicus brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to its preparation or submission.

decisions regarding their individual health. IUFCNM opposes any form of medical segregation or discrimination regarding access to education, employment, housing, and community events.

As such, Amicus is dedicated to ensuring that mandates involving forced vaccinations and forced medical treatments are analyzed under the proper applicable constitutional standards.

Statement Regarding Brief Form and Timing

Given the expected expedited briefing and oral argument scheduled for January 7, 2022, of Applicants' emergency application for immediate stay, Amicus respectfully requests leave to file the enclosed brief without 10 days' advance notice to the parties of intent to file. *See* Sup. Ct. R. 37.2(a).

Additionally, in consideration of the expected expedited briefing and oral argument schedule, Amicus respectfully requests leave to file the enclosed brief pursuant to the guidelines of Rule 33.2, including the reduced number of copies to be submitted, instead of the guidelines of Rule 33.1 as required by Rule 21.2(b).

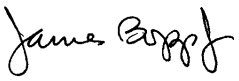
The expected expedited briefing schedule justifies Amicus's request to file its brief without the 10 days' advance notice and pursuant to the guidelines of Rule 33.2.

Conclusion

The Court should grant amicus curiae leave to file the enclosed brief in support of Applicants' Emergency Applications without 10 day advanced notice and pursuant to the guidelines of Rule 33.2.

December 30, 2021

Respectfully submitted,



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Brief of The IU Family for Choice, not Mandates, Inc.
as Amicus Curiae in Support of Applicants

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Interest of Amicus[2]

IUFCNM is a grassroots coalition of Indiana University students, parents, Alumni, and concerned community members advocating for medical treatment choice and equal treatment of all university students, faculty, and staff. IUFCNM stands firm in its belief that everyone has sovereignty over their own bodies and freedom of choice to make medical decisions regarding their individual health. IUFCNM opposes any form of medical segregation or discrimination regarding access to education, employment, housing, and community events.

As such, Amicus is dedicated to ensuring that mandates involving forced vaccination and forced medical treatments are analyzed under the proper applicable constitutional standards.

Introduction and Summary of the Argument

The science shows, and important government public health officials agree, that the COVID vaccines do not prevent infection by and the transmission of the COVID-19 virus ("**COVID**"). Because they do not prevent infection from and transmission of a communicable disease, *see* Part I, the COVID vaccines are properly considered medical treatments with potential benefit to the individual who takes them from more serious consequences of COVID, like hospitalization and death, but not as a public heath measure for government to mandate.

OSHA does not have the authority to mandate employees receive unwanted

[2] No counsel for any party authored the brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to its preparation or submission. Respondents and Intervenor-Respondents consented to, and Applicants indicated that they do not oppose, the filing of the enclosed amicus brief.

medical treatment. In addition to the fact that the Emergency Provisions: (1) violate OSHA's stated fundamental values of biomedical ethics regarding mandated medical treatments; (2) contradict its previous positions on such mandates: and (3) conflict with other federal agencies' interpretations of such mandates, OSHA simply does not have the requisite police power to mandate medical treatments. Even if OSHA had the police power to force millions of private employees to take a medical treatment against their will, which it does not, it would still need to do so according to established constitutional jurisprudence and principles of judicial review. OSHA's Emergency Provisions cannot survive either the appropriate constitutional or agency review. *See* Part II.

This Court has developed doctrines to protect the infringement of constitutional rights of bodily integrity and autonomy, and of medical treatment choice, and the scrutiny level that should be applied to protect these constitutional rights, depending on the context involved. A heightened level of scrutiny should apply to OSHA's Emergency Provisions because the individual rights to bodily integrity and autonomy, and of medical treatment choice, are involved here and because there is no limiting context to those fundamental rights, such as within a prison. The harder-look substantial evidence standard required for pre-enforcement OSHA actions mirrors that of heightened constitutional scrutiny in that the government bears the burden of proof and OSHA's Emergency Provisions fail this scrutiny. *See* Part III.

Argument

I. COVID Vaccines Are a Medical Treatment, Not a Public Health Measure.

Currently, there are three available COVID injections on the market: the Moderna and Pfizer injections, which utilize mRNA technology, and the Johnson & Johnson injection, which utilizes a virus-based technology, and only Pfizer has received full FDA approval for use in adults over the age of sixteen. While these injections are colloquially referred to as "vaccines," the COVID injections differ from traditional vaccines in new "gene-transfer technology" and in that the injections do not prevent infection, re-infection, or transmission of the COVID virus, the key elements of a traditional vaccine. Instead, the COVID injections operate as medical treatments or therapeutics by lessening symptoms and severity of virus infection.

A. The FDA Classifies the COVID Injections as "CBER-Regulated Biologics," or Therapeutics, Not as Traditional Vaccines.

The COVID injections are not "vaccines" in the traditional sense in that they utilize a new "gene-transfer technology," and the FDA classifies them as "CBER-Regulated Biologics" or "therapeutics."[3]

B. COVID Vaccines Do Not Prevent the Spread of the COVID Virus.

While the vaccines appear to be 95% effective at preventing severe illness

[3] FDA, Coronavirus (COVID-19) | CBER-Regulated Biologics, https://www.fda.gov/vaccines-blood-biologics/industry-biologics/coronavirus-covid-19-cber-regulated-biologics; FDA, Coronavirus Treatment Acceleration Program (CTAP), https://www.fda.gov/drugs/coronavirus-covid-19-drugs/coronavirus-treatment -acceleration-program-ctap.

and death, they do not prevent infection or transmission of the COVID virus.[4] Dr. Corey, who oversaw the vaccine trials for the NIH COVID-19 Prevention Network, said "the studies aren't designed to assess transmission. They don't ask that question and there's no information on this at this point in time."[5]

The CDC agrees that vaccinated people can still become infected and that "[f]ully vaccinated people who do become infected can transmit it to others."[6] The CDC Director acknowledges that the vaccines do not stop the transmission of the Delta strain.[7] Thus, vaccinated and unvaccinated individuals may have similar viral loads, thereby having the same risk of transmitting the virus.[8]

The World Health Organization's chief scientist also agrees that the Omicron variant is spreading even faster that the Delta variant was and is much better at

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[4] Thompson, Mark G., *Interim Estimates of Vaccine Effectiveness of BNT162b2 and mRNA 1273 COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Health Care Personnel, First Responders, and Other Essential and Frontline Workers–Eight U.S. Locations, December 2020-March 2021*, https://www.cdc.gov/mmwr/volumes/70/wr/mm7013e3.htm.

[5] Alicia Ault, *Can a COVID-19 Vaccine Stop the Spread? Good Question*, Medscape Medical News, (Nov. 20, 2020), https://www.medscape.com/viewarticle/941388.

[6] Centers for Disease Control and Prevention, *Interim Public Health Recommendations for Fully Vaccinated People* (Updated Oct. 15, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html.

[7] Madeline Holcombe, *Fully vaccinated people who get a Covid-19 breakthrough infection can transmit the virus, CDC chief says*, CNN (Updated Aug. 6, 2021), https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday/index.html

[8] Kasen K. Riemersma, et al., *Vaccinated and unvaccinated individuals have similar viral loads in communities with a high prevalence of the SARS-CoV-2 delta variant*, medRxiv (pre-print), https://www.medrxiv.org/content/10.1101/2021.07.31.21261387v1.

evading the antibodies generated by the COVID vaccines.[9]

C. Since the COVID Vaccines Do Not Stop the Spread of COVID, They Are Not a Public Health Measure, But a Medical Treatment.

As the American Public Health Association explains, "Public Health promotes and protects the health of people and communities where they live, learn, work and play. While a doctor treats people who are sick, those of us working in public health try to prevent people from getting sick or injured in the first place."[10] Thus, public health professionals promote vaccines for "vaccine-preventable diseases that can be a threat to our health."[11] The understanding that public health involves control of communicable diseases is long-standing, dating to at least 1920.[12]

Prior to August of this year, the CDC defined "vaccine" in conformance with the traditional understanding that vaccines are a public health measure: "a product that stimulates a person's immune system to produce immunity to a specific disease, protecting the person from that disease."[13] However, the CDC recently

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[9] *Omicron spreading and infecting the vaccinated - WHO*, Reuters (Dec. 20, 2021), https://www.aol.com/news/1-omicron- spread-ing-infecting-vaccinated-172033826-184810325.html.

[10] *What is Public Health?*, AMERICAN PUBLIC HEALTH ASSOCIATION, https://www.apha.org/what-is-public-health (last visited November 17, 2021).

[11] *Vaccines*, AMERICAN PUBLIC HEALTH ASSOCIATION, https://www.apha.org/Topics-and-Issues/Vaccines (last visited November 17, 2021).

[12] Office of Teaching & Digital Learning, Boston University School of Public Health, *What is Public Health?*, BOSTON UNIVERSITY MEDICAL CAMPUS (October 21, 2015) , https://sphweb.bumc.bu.edu/otlt/MPH-Modules/PH/PublicHealthHistory.

[13] *Immunization: The Basics*, CENTERS FOR DISEASE CONTROL, July 18, 2021, archived at https://web.archive.org/web/20210718162209/https://www.cdc.gov/vaccines/vac-gen/i

changed the definition of "vaccine" to "[a] preparation that is used to stimulate the body's immune response against diseases."[14] Thus, the CDC eliminated the public health component of producing "immunity to a specific disease, protecting the person from that disease." Regardless of this redefinition of vaccine, the scientific evidence establishes that COVID vaccines should not be viewed as a public health measure to prevent the spread of disease, since they do not stop the spread of the virus, but instead viewed as a medical treatment designed to provide therapeutic benefits to the individual who contracts COVID.

II. OSHA's Emergency Provision Exceeds Its Authority.

Congress did not give OSHA clear authority to mandate medical treatment to employees via regulatory fiat. OSHA is authorized "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). OSHA's Congressional authorization does not give it plenary police power over matters of individual medical treatment, or even public health, disguised under the broad veil of worker safety.

A. OSHA Does Not Have the Authority to Mandate Medical Treatment.

OSHA emphasizes personal autonomy in regulating safe and health working conditions and has issued prior interpretations of its positions on flu shots, medical examinations, and medication as a condition of employment that make clear that

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mz-basics.htm (last visited December 30, 2021).

[14] *Immunization: The Basics*, CENTERS FOR DISEASE CONTROL, September 1, 2021, https://www.cdc.gov/vaccines/vac-gen/imz-basics.htm (last visited November 16, 2021).

OSHA believes that they have no authority to mandate medical treatment. Lastly, other federal agencies have indicated that employers violate federal law by forcing employees to take a medical treatment.

1. OSHA's Emergency Provisions Violate Its Stated Fundamental Principles of Bioethics.

OSHA's mission is to assure safe and healthy working conditions for working men and women by developing, setting and enforcing standards and by providing outreach, education, training and compliance assistance, which adhere to fundamental principles of bioethics, including voluntary and informed consent to medical treatment. OSHA cites the American College of Occupational and Environmental Medicine (ACOEM) to establish "the fundamental principles of bioethics as they relate to the practice of occupational health," which limits OSHA's power.[15]

ACOEM's Code of Ethics establishes that one of its fundamental bioethical values is that of "autonomy."[16] This value characterizes the physician as "advisor" to an autonomous patient. *Id.* Pursuant to this belief, the "center of patient care is not in the physician's office or in the hospital; it is where people live their lives – in the home and in the workplace. *Id.* "It is in the home and the workplace that *patients*

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[15] United States Department of Labor Occupational Safety and Health Administration, *Ethics and Confidentiality in Occupational Health*, https://www.osha.gov/clinicians#ethics (last visited Dec. 28, 2021).

[16] American College of Occupational and Environmental Medicine, *About ACOEM, Code of Ethics*, https://acoem.org/about-ACOEM/Governance/Code-of-Ethics (last visited Dec. 28, 2021).

make the daily choices that determine their health." *Id.* (emphasis added). This value respects the idea that the individual best understands his or her own best interests. *Id.*

OSHA's Emergency Provisions, however, violate its own fundamental bioethical values, that limits its power, by nullifying the principle of personal autonomy in medical decision-making. Instead, OSHA seeks to override millions of employees' personal medical decision by mandating a medical treatment in the form of a COVID vaccine. OSHA's Emergency Provisions conflict not only with its fundamental values, but also conflict with its own understanding of the limits of its own power.

2. OSHA Has Previously Acknowledged That It Lacks the Power to Force Medical Treatment.

OSHA's previous positions on medical treatments such as mandatory flu shots and medical examinations demonstrate that they understood that OSHA does not have the power to mandate medical treatment. For instance, OSHA issued an interpretation on OSHA's policy regarding medical surveillance stating that "OSHA does not require an employer to force the employees to take medical examinations." U.S. Dep't of Lab. OSHA Interpretation Letter to Hon. Sam Gejdenson (Aug. 6, 1987).[17] Likewise, in response to H1N1, OSHA's position on mandatory flu shots for employees stated, "although OSHA does not specifically require employees to take

[17] Interpretation letter referenced found at: https://www.osha.gov/laws-regs/standardinterpretations/1987-08-06 (last checked Dec. 29, 2021).

vaccines, an employer may do so." U.S. Dep't of Lab. OSHA Interpretation Letter to Hon. Marcy Kaptur (Nov. 9, 2009).[18]

These prior interpretations by OSHA of its power seriously undermines its claim that it has the power to mandate employees to receive medical treatment, via a COVID vaccine.

3. Other federal agencies have indicated opposition to employers forcing medical treatment on employees.

The EEOC has consistently rejects the idea that employers can force unwilling employees to take medication. For instance, when asked whether an employer can require an employee to take medication as a condition of employment, the EEOC said that "the decision to take medication should be made by the employee with a disability, and not by the employer." U.S. Equal Emp. Opportunity Comm'n., *ADA: Disability-Related Inquiries and Medical Examinations; Terms and Conditions of Employment* (Nov. 7, 2000).[19] Instead of forcing medication on employees, the EEOC stated that employer should focus on whether an employees is having performance or conduct problems and handle those accordingly. *Id.*

In 2015, the EEOC also sued a Michigan paper mill for requiring an employee to take anti-epileptic medication under observation during his shifts. *EEOC v. Neenah Paper, Inc.*, JVR No. 1606170018, No. 2:15-cv-00113 (W.D. Mich.

[18] Interpretation letter referenced found at: https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09 (last checked Dec. 29, 2021).

[19] Discussion letter referenced found at: https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-16 (last checked Dec. 29, 2021).

Mar. 31, 2016). Thus, the EEOC objects to employers forcing employees to take medications as a condition of employment.

Thus, OSHA's Emergency Provisions: (1) violate OSHA's stated fundamental values of biomedical ethics regarding mandated medical treatments that limits its authority; (2) contradict its previous positions rejecting such mandates: and (3) conflict with other federal agencies' rejections of such employer mandates,

B. OSHA Does Not Have Police Power to Mandate Vaccinations.

Furthermore, OSHA simply does not have the requisite police power to mandate medical treatments. This Court "always ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *United States v. Morrison*, 529 U.S. 598, 618-19 (2000). Congress passed the Occupational Safety and Health Act under its Commerce Clause authority "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). Under the U.S. Constitution, States have police power, not federal agencies—and even the States' police powers are limited by the Constitution and these police powers must be exercised within the boundaries set by constitutional jurisprudence.

III. OSHA's Emergency Provisions Should be Subject to Heightened Scrutiny Under Both the Constitution and Under the Pre-enforcement "Harder-Look" Doctrine.

Even if OSHA had the statutory or police power to force millions of private employees to take a medical treatment against their will, which it does not, it would still need to do so according to established constitutional principles and principles of

agency review, which require heightened scrutiny.

This Court has developed constitutional doctrines to protect the infringement of constitutional rights of bodily integrity and autonomy, and of medical treatment choice, through a heightened level of scrutiny, with one limited exception. This certainly applies here when medical treatment is mandated by government. OSHA forces employees to make a choice: retain your rights to bodily integrity and autonomy, and of medical treatment choice, or either: (1) take the COVID vaccine; or (2) submit to frequent testing and masking. OSHA is not permitted under the U.S. Constitution to force such a choice on employees.

Pre-enforcement review of agency actions also requires this Court to take a "harder look" of such actions. This harder-look is comparable to a heightened level of constitutional scrutiny in the key aspect of which party has the burden of proof. Applicants urge constitutional avoidance, because the constitutional questions at stake here are critical, and *Amicus* urges this Court to consider the proper level of scrutiny when analyzing OSHA's Emergency Provisions.

A. Mandating Medical Treatment is Governed by *Cruzan* and Subsequent Forced Medical Treatment Cases.

Our constitutional history and heritage have repeatedly indicated that rigorous scrutiny must be applied when bodily integrity and autonomy is involved. "'[N]o right is held more sacred, or is more carefully guarded,…than the right of every individual to the possession and control of his own person.'" *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 269 (1990) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Such was the case at common law "unless by

clear and unquestionable authority of law." *Id.* "The logical corollary of [this doctrine was] that a patient generally possesse[d] the right… to refuse treatment." *Id.* This principle was so deeply recognized in Anglo-American law that "no order to inspect [a party's] body…[had] been made, or even moved for, in any of the English courts of common law, at any period of their history." *Union Pac.*, 141 U.S. at 253; *see also* Judge Thomas Cooley, *Cooley on Torts* 29 (1st ed. 1888) (stating that "the right to one's person may be said to be a right of complete immunity"). It took nearly a century for any court in the United States to issue an order "for the inspection of the body of [a] plaintiff in [a legal action.]" *Union Pac.*, 141 U.S. at 255 (citing an 1868 case from New York: *Walsh v. Sayre*, 52 How. Pract. 334). Even this case was subsequently overruled. *Id.* (citing *Roberts v. Ogdensburgh & Lake Champlain Railroad*, 29 Hun, 154).

Thus, because OSHAs Emergency Provisions mandate medical treatment, the rights to bodily autonomy and medical treatment choice are infringed.

B. *Jacobson* Does Not Apply But If It Did, Constitutional Rights Could Be Asserted.

Two precedents are most often cited to support vaccine mandates, like OSHA's Emergency Provision, *Jacobson v. Commonwealth of Massachusetts*, which involved a question of whether a state's police powers extended to forcing citizens to take a small pox vaccine or pay a small one-time fine, 197 U.S. 11, 30 (1905), and *Zucht v. King*, which affirmed a public school's ability to require vaccinations for deadly diseases common among school-age children. 260 U.S. 174, 176-177 (1922). At first glance, *Jacobson* and *Zucht* seem directly on point to questions implicating

vaccine mandates. If these cases were applied literally and as proponents advocate, Applicants would bear the burden to negate every conceivable basis which might support OSHA's Emergency Provisons. *See F.C.C. v. Beach Commc'ns, Inc,* 508 U.S. 307, 313-14 (1993). Because of this standard, laws and regulations analyzed using this extremely deferential standard are almost never found to be unconstitutional. This extremely deferential legal standard would provide nearly carte blanche plenary power to the government, no matter the gloss of "reasonableness" that must be applied.

However, *Jacobson* does not apply since if involved public health measure, not mandating medical treatment as here, so that the controlling precedent is not *Jacobson*, but rather *Cruzan*, which controls on questions involving forced medical treatment. Second, *Jacobson* itself permits assertion of constitutional rights, such as those in *Cruzan*. And third, *Jacobson* is just overrated.

1. *Jacobson* Does Not Apply Since It Involved a Public Health Measure, Not Medical Treatment.

While competent individuals have a "constitutionally protected liberty interest in refusing unwanted medical treatment," *Cruzan*, 497 U.S. at 278, *Jacobson* and *Zucht* both involved the state's use of its police power to implement public health measures to control the spread of deadly diseases among the population subject to the vaccination mandates.[20]

For constitutional review, the difference between a public health measure

[20] *Jacobson* also does not apply because it involved the scope of a local government's police power, which OSHA does not have.

and a medical treatment can be critical. Constitutional jurisprudence over the last century shows that courts historically grant greater deference (and rational basis review) to decisions to public health measures, but not to forced medical treatments. The reasons for this different treatment is rooted in the differences in purpose behind such mandates. A personal decision to refuse a vaccine, that is a medical treatment, does not create a risk to other people to whom the disease might spread. *See Jacobson*, 197 U.S. at 35 (holding deference applies to those requirements "adapted to prevent the spread of contagious diseases"). Instead, declining medical treatment impacts only the health of the individual making the medical treatment decision.

However, the COVID vaccines appear to be effective at mitigating symptoms, hospitalizations and deaths, as all medical treatments and prophylactics do, but do not prevent individuals from either getting or transmitting the COVID virus.

Using *Jacobson*, and its deferential standard, as controlling precedent, would require this Court to base its analysis on the supposition that these products would be effective in meeting OSHA's stated goal of slowing the spread of the COVID virus and thereby protecting the public at large. However, that presupposition is inaccurate, and the COVID vaccines are properly understood as a medical treatment, where substantive constitutional rights of individuals are involved.

2. *Jacobson* Allows Protection of Constitutional Rights When Implicated.

Even *Jacobson*, however, recognized the danger that forced vaccinations, that were within the government's police powers, could be *exercised* in violation of

federal constitutional law, or in a way to go "beyond what [i]s reasonably required for the safety of the public." 197 U.S. at 28. This left the judicial review of the *exercise* of those police powers to subsequent courts. And here, the substantive due process body of constitutional law, including recognizing substantial constitutional protection for the right of bodily integrity and autonomy, and medical treatment choice, was not developed until much later, *see Griswold v. Connecticut*, 381 U.S. 479 (1965), so while these rights could not be asserted then, they could be asserted now.

3. In Any Event, *Jacobson* Is Overrated.

The circumstance surrounding *Jacobson* could not be more different than today. First, the *Jacobson* Court understood the vaccine to be a public health measure, where an important government interest in protecting others from the spread of a deadly disease were obvious,[21] not now where the COVID vaccinations are a medical treatment. Second, the reality was that the *Jacobson* decision was a Progressive Era decision, which lead directly to, and was cited as authority for, *Buck v. Bell*, 274 U.S. 200, 207 (1927), one of this Court's most notorious decisions, which approved forced sterilization of person with metal retardation. Third, as a result of the Progressive Era influence, the Court was much more deferential to the government in areas potentially implicating individual rights.[22] And finally the

[21] As explained, at the time of *Jacobson*, vaccines were understood as public health measure to halt the spread of an infectious disease and small pox was a deadly killer against which the small pox vaccine was safe and effective.

[22] Consider that "[t]he Privileges or Immunities Clause was an empty vessel [] State were not bound by the Bill [of] Rights [a]nd separate was [still] equal." Josh

substantive due process body of constitutional law, including recognizing substantial constitutional protection for the right of bodily integrity and autonomy, and medical treatment choice, was not developed until much later. *See Griswold*, 381 U.S. at 479.

Thus, Justices of this Court have observed that, rather than Court approval for plenary government authority, *Jacobson* was a "modest decision" and not "a towering authority that overshadows the Constitution during a pandemic." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring) (observing *Jacobson* involved: (1) an old mode of analysis instead of modern constitutional review; (2) a "bodily-integrity" right involving not only a vaccine, but a civil penalty; and (3) "an imposition . . . [that] was avoidable and relatively modest"). He further remarked that "no Justice now disputes any of these [three] points," none argued that normal constitutional rules should not apply in a pandemic. *Id.* Chief Justice Roberts agreed, downplaying an earlier comment in concurrence citing *Jacobson* to the effect that such matters are usually left to the states. *Id.* at 71.

Roman Catholic Diocese was preceded by a similar case—*Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (denying injunctive relief to church occupancy limits). There, Justice Alito dissented, joined by Justices Thomas and Kavanaugh, noting that "at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules," "[b]ut a public health emergency does not give

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Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 Buff. L. Rev. at 9 (2021).

. . . public officials *carte blanche* to disregard the Constitution as long as the medical problem exists." *Id.* at 2605. Rather, "[a]s more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights." *Id.* Which, of course, is the precise situation here.

Justice Alito's dissenting view was essentially adopted by *Roman Catholic Diocese*, meaning that "blunt rules" may be permitted initially, but fine-tuning to actual scientific evidence is then required—requiring an *evidence-focused* inquiry in judicial review. Applying the normally-required, current jurisprudence in that case required the government to justify itself under strict scrutiny, which eschews blunt rules and requires narrow tailoring to the least restrictive means to further a compelling interest.

Despite the government's interest in public health during a pandemic, *Roman Catholic Diocese* required *normal* heightened scrutiny levels instead of defaulting to an exaggerated view of *Jacobson*'s analysis. Thus, the Court must analyze the contexts in which heightened scrutiny applies to cases involving bodily integrity and autonomy, and of medical treatment choice.

C. Constitutional Jurisprudence Related to Forced Medical Treatment, Outside of the Penal Context, Requires Heightened Scrutiny.

When medical treatment has been **mandated** by the government, contrary to the decision of the person, such mandates uniformly require heightened scrutiny. *See, e.g., Cruzan,* 497 U.S. at 278 (right to consent to or refuse medical treatment for incompetent person); *Humphrey v. Cody*, 405 U.S. 504 (1972); *Vitek v. Jones*, 445

U.S. 480 (1980) (involuntary commitment of mentally ill patients for medical treatment); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Sell v. United States*, 593 U.S. 166, 186 (2003) (pre-trial forced administration of antipsychotic drugs).[23] Further, the Court's recent constitutional jurisprudence gives greater weight to the protection of bodily integrity and autonomy, and of medical treatment choice, than it did a century ago.[24] These medical treatment mandate cases are directly applicable to the review of the OSHA regulation here and would require heightened scrutiny. *Rochin v. California*, 342 U.S. 165, 207 (1952) (applying a "narrow scrutiny" in reversing a conviction based upon evidence obtained through stomach pumping); *Humphrey*, 405 U.S. at 504 (applying a standard more rigorous than rational basis in a case concerning involuntary commitment to a mental hospital for treatment); *Vitek*, 445 U.S. at 495 (holding that notwithstanding "strong" state interest in segregating and treating mentally ill patients, liberty interests protected by the due process clause are entitled to strong constitutional protection); *Riggins,* 504 U.S. at 135 (holding that only an "essential" or "overriding" state interest would overcome a claimant's "interest in avoiding involuntary administration" of drugs); *Sell*, 539 U.S. at 179 (holding that states must demonstrate an "*important*

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[23] During modern times, the Court has also applied heightened scrutiny when an important personal choice has been **prohibited** by the government. *See, e.g.*, *Griswold*, 381 U.S. 479 (contraception); *Roe v. Wade*, 410 U.S. 113 (1973), modified by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (abortion), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriage).

[24] *See* Weiler, *Bodily Integrity: A Substantive Due Process Right to Be Free from Rape by Public Officials*, 34 Calif. West. L. Rev. 591, 596-604 (1998) (compilation and analysis of modern bodily integrity and autonomy cases).

governmental interest" and means that are both "necessary significantly to further" that interest to require involuntary administration of antipsychotic drugs) (emphasis in the original).

The only exception to the application of heightened scrutiny for a medical treatment mandate is in the context of convicted inmates in prison—in this context alone, the Court's precedent supports the application of rational basis review. Even within the prison context, the Court recognized that inmates still "possess a significant liberty interest in avoiding the unwanted administration of…drugs," *Washington v. Harper*, 494 U.S. 210, 222 (1990), but recognized these rights must be balanced with the "legitimate penological interest." *Id.* at 223. Consequently, the Court applies only rational basis review to medical treatment mandates for inmates in prison, but nowhere else.

The inescapable understanding derived from these cases is that this Court must require a heightened level of scrutiny here, as employees are not prisoners. It cannot be the case that prisoner rights are equal with or greater than rights possessed by health, competent and free citizens. *Wolfe v. McDonnell*, 418 U.S. 539, 555 (1974) (holding prisoner's rights "may be diminished by the needs and exigencies of the institutional environment"). As the Supreme Court's decisions in the medical treatment mandate cases, and in *Harper* and *Wolfe,* make clear: rational basis scrutiny is only applied to rights concerning bodily integrity and autonomy, and of medical treatment choice, within the prison context. Outside this context, the Constitution demands a higher level of scrutiny.

D. Under Heightened Scrutiny, the Burden Shifts to OSHA to Justify its Emergency Provision.

The Supreme Court signals that heightened scrutiny is applied by:

(1) either the description of the right involved (i.e., "fundamental," "significant liberty interest");

(2) the weight of the government interest that is needed to overcome the right (i.e. "essential" or "overriding"); or

(3) the procedural burdens placed on the government when acting to advance its interest (i.e., "clear and convincing evidence" or robust procedural requirements).

In these instances of heightened scrutiny, the key difference is the shift in the burden of proof to the government, from the challenger, to justify its mandate.

If rational basis review applies, "the burden is on the one attacking [the regulation] to [negate] every conceivable basis which might support it." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). However, *Griswold*, *Roe*, *Casey*, *Glucksberg*, *Obergefell*, *Cruzan*, *Rochin*, *Humphrey*, *Vitek*, *Riggins* and *Sell* all required the *government*, not the challenger, to prove it meets the heightened standard of review for interference with the individual's right to bodily integrity and autonomy, and medical treatment choice. Because the government held the burden of proof in these cases, the Court necessarily applied heightened scrutiny, regardless of the exact language used to describe the scrutiny level.

Two levels of heightened scrutiny exist—intermediate scrutiny and strict scrutiny. Under intermediate scrutiny, the Court applies a "rigorous standard of review" that requires "the State [to] demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgments of" the right.

McCutcheon v. Federal Election Commission, 572 U.S. 185, 197 (2014). Under strict scrutiny, the government has the burden of proof to establish the law is necessary to advance a compelling governmental interest by narrowly tailored and least restrictive means. *Sherbert v. Verner*, 374 U.S. 398 (1963). Both levels of heightened scrutiny impose on OSHA the burden of proof which must be required here.

Sell is the latest and most comprehensive case establishing a strict scrutiny framework for government medical treatment mandates and its analysis. Describing the *Sell* test as a strict scrutiny test is fair since it contains all of the essential elements of strict scrutiny, i.e. a protected constitutional right, a sufficiently important state interest to overcome the right, narrow tailoring and less restrictive means, and the requirement that the government must prove it all. Sell, 539 U.S. at 178-83. This surely describes strict scrutiny which should be applied here. And the *Sell* test is not used within "the penal framework"—Sell was in a mental hospital awaiting trial, not a convicted felon in prison, like *Harper*. That is why *Sell* applied heightened scrutiny, not *Harper*'s rational basis. Surely a medical treatment choice by health, law-abiding and conpetent adults, like Applicants, is entitled to at least the same respect as a medical treatment decision by a person with severe mental illness awaiting trial.

Sell's strict scrutiny test for medical treatment decisions has been applied beyond the narrow confines of involuntary administration of drugs to a mentally ill defendant facing criminal charges in order to render that defendant competent to stand trial. Multiple circuits have applied the *Sell* test in various contexts. *See, e.g.,*

United States v. Seaton, 773 F. App'x 1013 (10th Cir. 2019); (applying *Sell* to forced administration of antipsychotic drugs to render defendant competent to be sentenced); *Witt v. Department of the Air Force*, 527 F.3d 806, 817-821 (9th Cir. 2008) (applying *Sell* to discharge of Air Force nurse for homosexual relationship); *Russell v. Richards*, 384 F.3d 444, 450 (7th Cir. 2004) (applying *Sell* to involuntary administration of delousing shampoo to inmates). Thus *Sell* provides the framework for the heightened scrutiny analysis of the Emergency Provisions and requires OSHA prove that its Emergency Provisions are justified.

E. The "harder look" also required for pre-enforcement agency review supports heightened scrutiny.

Pre-enforcement judicial scrutiny also requires courts to take a harder look at agency's action than if reviewing action under more deferential arbitrary and capricious standard applicable to agencies governed by the Administrative Procedure Act, §§ 551 et seq. and 701 et seq. of Title 5. *Asbestos Information Ass'n/North America v. Occupational Safety and Health Admin*., 727 F.2d 415 (5th Cir. 1984). Under this harder look, the burden is on the Secretary of Labor to show that the [regulation] is supported by substantial evidence. *Associated Industries of N.Y. State, Inc. v. U.S. Dept. of Labor,* 487 F.2d 342 (2d Cir. 1973). That is, the Secretary must show that the "determination is supported by evidence presented to or produced by it and does not rest on faulty assumptions or factual foundations." *Color Pigments Mfrs. Ass'n, Inc. v. Occupational Safety & Health Admin*., 16 F.3d 1157 (11th Cir. 1994).

This harder-look, substantial evidence standard mirrors that of heightened

constitutional scrutiny which both imposes on government the burden of proof, which OSHA cannot meet.

Conclusion

For the foregoing reasons, amicus asks this Court to grant Applicants' Emergency Application for a stay.

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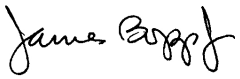
Respectfully submitted,



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