

No. 23-996

IN THE
Supreme Court of the United States

JEANNA NORRIS, et al.,

PETITIONERS,

v.

SAMUEL STANLEY, et al.,

RESPONDENTS.

*On Petition for Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit*

**AMICUS CURIAE BRIEF OF MEDICAL
PROFESSIONALS IN SUPPORT OF
PETITIONERS**

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QUESTIONS PRESENTED

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

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INTEREST OF THE AMICI CURIAE¹

Amici, Mark McDonald, M.D., Jeff Barke, M.D., and Ram Duriseti, M.D., Ph.D., are medical professionals and advocates for the right of patients to make their own informed decisions about medical care with their doctors, without the unjustified intrusion of government policymakers. They were each plaintiffs in one of two lawsuits that successfully challenged a recent California law that threatened the medical licenses of doctors who expressed disagreement with the State's preferred views regarding COVID-19. *See McDonald v. Lawson*, 94 F.4th 864 (9th Cir. 2024); *Høeg v. Newsom*, 652 F. Supp. 3d 1172 (E.D. Cal. 2023).

This case interests *amici* because the right of every American to make personal medical decisions for themselves is fundamental, and any attempt by government to intrude into such private medical decisions should be subject to heightened judicial scrutiny.

¹ Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amici* funded its preparation or submission. All counsel received timely notice of *amici*' filing.

SUMMARY OF ARGUMENT

Individuals have a fundamental right to refuse medical care—indeed, to impose even lifesaving medical care upon them would be a battery. *See Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990). It is not the role of the government to decide which individual risks each of us should take, or which protections each of us should adopt.

Yet the courts below held that the government has essentially free rein to impose mandatory medical care on more or less anyone they choose—as long as that mandatory medical care has a “rational basis,” which this court already knows is essentially a rubber stamp. Under rational basis review, if government officials require individuals to take any vaccine, or contraceptive pill, or statin, or SSRI, that strikes their mood, courts must go out of their way to accept or invent a “rational” reason for it—regardless of whether it was the government’s actual reason or is supported by any evidence.

Amici do not believe the mandated vaccinations at issue in this case were warranted. But even if they were, random middle-management government functionaries at a state university should not have had the power to make that decision for individuals, free from any scrutiny. Rather, any such intrusion into people’s bodily autonomy should have been subjected to heightened judicial scrutiny—asking whether mandatory vaccination was in fact a sensible policy that actually furthered important government interests.

The sort of rational basis review adopted by the lower courts is questionable in any context and especially inappropriate here: forcible injection of experimental medication is not a minor intrusion, and bodily autonomy and integrity is not a marginal right. *Amici* therefore submit that mandatory vaccination should be subject to more rigorous review than, say, economic regulatory distinctions between opticians and optometrists. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

ARGUMENT

I. Mandatory vaccination should be subject to heightened scrutiny.

As this Court has explained, mandatory vaccination represents “a significant encroachment into the lives—and health—of . . . employees.” *Nat’l Fed’n of Indep. Bus. v. DOL, OSHA*, 595 U.S. 109 (2022). It is also therefore an invasion of the individual liberty interests protected by the Constitution. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) (“[T]he Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s).”) At no point has there been a consensus around COVID-19 that would justify the sort of government certainty, and the invasion of individual rights based on it, that Petitioners challenge.

From the start, the medical “consensus” response to COVID-19 has been variable, disputed, and evolving. Examples abound. Consider the question whether masks are necessary or appropriate to prevent the

spread of COVID-19. In March 2020, “[t]he Centers for Disease Control and Prevention’s advice [wa]s unequivocal: Healthy people who do not work in the healthcare sector and are not taking care of an infected person at home do not need to wear masks” to protect themselves against COVID. Deborah Netburn, *To wear a mask or not? Experts Answer Coronavirus Protection Questions*, L.A. Times (Mar. 24, 2020)². A doctor telling adults outside the medical field to wear a mask—say, an N95 at a large indoor gathering—would have gone against this advice. But in July 2020, the CDC published a study *supporting* the use of masks and recommended workplace mask usage and daily symptom monitoring, and indeed masks would become a core strategy for reducing the spread of COVID. See Dr. M. Joshua Hendrix et al., *Absence of Apparent Transmission of SARS-CoV-2 from Two Stylists After Exposure at a Hair Salon with a Universal Face Covering Policy — Springfield, Missouri, May 2020*, CDC (July 17, 2020);³ see also Fauci On How His Thinking Has Evolved On Masks, Asymptomatic Transmission, Wash. Post (July 24, 2020)⁴; Yuxin Wang et al., *How Effective Is A Mask In Preventing COVID-19 Infection?*, Nat’l. Libr. of Pub. Med. (Jan. 5, 2021) (“[W]e absolutely should be wearing masks consistently. So that was one of the things I guess you could have said that, back then, was a mistake.”)⁵. In May 2021, the CDC determined “that people who were fully vaccinated against COVID-19 could go into most public places without a mask”; two months later, the

² <https://tinyurl.com/ywbdewxn>.

³ <https://tinyurl.com/mwwhjhe5>.

⁴ <https://tinyurl.com/ypkbrhf4>.

⁵ <https://tinyurl.com/yvhtd4vh>.

CDC “walked back its recommendations” because it concluded that “data suggest that fully vaccinated people infected with the delta variant may be able to transmit the virus to others.” Bridget Balch, *Vaccines Work Well Against The Delta Variant. Here’s Why You Should Wear A Mask Anyway*, Ass’n of Am. Med. Colls (Aug. 3, 2021).⁶ In announcing the change, Anthony Fauci said that “[t]he data are clear” before qualifying: “the most recent data.” *Id.*

Then there is the question of public gatherings. “As the pandemic took hold, most epidemiologists”—echoed by public policymakers—said: “No students in classrooms, no in-person religious services, no visits to sick relatives in hospitals, no large public gatherings.” Michael Powell, *Are Protests Dangerous? What Experts Say Might Depend on Who’s Protesting What*, N.Y. Times (July 6, 2020).⁷ California Governor Gavin Newsom even closed beaches. Jeremy B. White, *Newsom Closes All Orange County Beaches. Local Officials Call It An ‘Act Of Retribution’*, Politico (Apr. 30, 2020), (“The governor repeatedly chided outdoor recreators this week, warning that mass gatherings could undermine California’s progress toward containing the coronavirus.”).⁸ “[W]hen conservative anti-lockdown protesters gathered on state capitol steps,” “epidemiologists scolded them and forecast surging infections.” Powell, *supra*. Newsom warned that “[t]housands of people congregating together, not practicing social distancing or physical distancing’ could undermine the current progress in preventing the spread of the

⁶ <https://tinyurl.com/5n7mnkps>.

⁷ <https://tinyurl.com/38vhjw68>.

⁸ <https://tinyurl.com/drhxzpny>.

virus.” Lois Beckett, *California Governor Promises Changes To Lockdown As Protests Sweep State*, *The Guardian* (May 1, 2020) (cleaned up).⁹

Yet many changed their tune during the protests following the death of George Floyd: “[R]ather than decrying mass gatherings, more than 1,300 public health officials signed a May 30 letter of support, and many joined the protests.” Powell, *supra*. Catherine Troisi, an infectious-disease epidemiologist at the University of Texas Health Science Center at Houston, said: “I certainly condemned the anti-lockdown protests at the time, and I’m not condemning the protests now, and I struggle with that I have a hard time articulating why that is OK.” *Id.* (cleaned up).

Nicholas A. Christakis, professor of social and natural science at Yale, said: “We allowed thousands of people to die alone. We buried people by Zoom. Now all of a sudden we are saying, never mind?” *Id.* “[T]he former dean of Harvard Medical School” “pointed out that the protesters were also engaging in behaviors, like loud singing in close proximity, which [the] CDC ha[d] repeatedly suggested could be linked to spreading the virus.” Dan Diamond, *Suddenly, Public Health Officials Say Social Justice Matters More Than Social Distancing*, *Politico* (June 4, 2020).¹⁰

Authorities have not even been consistent in their views about the risks and efficacy of COVID vaccines. In 2021, official experts told the public that the Johnson & Johnson vaccine was safe and just as effective

⁹ <https://tinyurl.com/5ddczv89>.

¹⁰ <https://tinyurl.com/34cue3mn>.

as the other vaccines. Karina Zaiets et al., *Comparing the Covid-19 vaccines*, USA Today (Apr. 13, 2021);¹¹ see *FDA Issues Emergency Use Authorization for Third Covid-19 Vaccine*, FDA (Feb. 27, 2021).¹² Doctors who endorsed getting a different vaccine instead would have been out of line with the apparent medical consensus. Six weeks later, however, updated FDA and CDC guidance called for a pause of the Johnson & Johnson vaccine. See *Joint CDC and FDA Statement on Johnson & Johnson Covid-19 Vaccine*, FDA (Apr. 13, 2021).¹³ “In December, the CDC changed its recommendations to say shots made by Moderna and Pfizer/BioNTech are preferred.” Jen Christensen & Deidre McPhillips, *‘Reassuring’ Data Suggests Johnson & Johnson Vaccine May Still Have Role To Play Against Covid-19*, CNN (Mar. 20, 2022);¹⁴ see *Overview of COVID-19 Vaccines*, CDC (Sept. 2, 2022).¹⁵

It turned out the final CDC guidance limited the use of the Johnson & Johnson vaccine because of “life-threatening blood clots that have been associated with the vaccine.” Kathy Katella, *You Got the J&J Vaccine: Should You Get the booster?*, Yale Med. (July 20, 2022).¹⁶

Consider also quarantines. In April 2020, medical authorities advised that quarantining for less than fourteen days puts others at risk. See Laurel Wamsley

¹¹ <https://tinyurl.com/4x95ux4c>.

¹² <https://tinyurl.com/289h2rn3>.

¹³ <https://tinyurl.com/zx9t7xmt>.

¹⁴ <https://tinyurl.com/25ysj96v>.

¹⁵ <https://tinyurl.com/58thyn94>.

¹⁶ <https://tinyurl.com/9fuptc79>.

& Selena Simmons-Duffin, *The Science Behind a 14-Day Quarantine After Possible Covid Exposure*, NPR (Apr. 1, 2020).¹⁷ Some countries even enforced this understanding through fines. See, e.g., Paul Karp & Lisa Cox, *Coronavirus: People Not Complying With New Australian Self-Isolation Rules Could Face Fines*, The Guardian (Mar. 15, 2020).¹⁸ A doctor recommending a five-day quarantine would have fallen far outside the then-conventional guidance. Fast forward two years, however, and that same doctor would be giving standard advice. See *Guidance for Local Health Jurisdictions on Isolation and Quarantine of the General Public*, Cal. Dep't Of Pub. Health (June 9, 2022).¹⁹

And, of course, the opinions of public-health officials on whom government officials choose to rely are not the only opinions on these matters. On all these issues, there have been dissenters among researchers and practicing physicians such as Petitioners, whose advice to their patients on various COVID-related matters would differ in important respects from the government line of the moment. For years many medical experts, including petitioners, explained that the cloth masks required by force of law in many jurisdictions did little to no good—and after years of claiming otherwise the public health authorities eventually admitted that was true. Apoorva Mandavilli, *The C.D.C. concedes that cloth masks do not protect against the virus as effectively as other masks*, New York Times, Jan.

¹⁷ <https://tinyurl.com/24j9k843>.

¹⁸ <https://tinyurl.com/3yemprus>.

¹⁹ <https://tinyurl.com/jh7xpxyb>.

14, 2022.²⁰ Prominent public health researchers who disagreed with the official line existed the whole time, such as Stanford professor Jay Bhattacharya, who warned that lockdowns would do far more harm than good.²¹ The public health authorities even disagreed with themselves, as when CDC Director Rochelle Walensky endorsed, as a political appointee, the CDC's six-foot social distancing requirement for schools—in contradiction of the three-foot guideline she'd preferred as a Harvard professor.²²

Such changes in and differences among experts' opinions should not be surprising. Medical advice in always implicates a mix of fact and opinion, and many of the relevant issues—particularly involving a recent, ever-evolving virus with new vaccines—are not matters of established “fact.” And the nature of scientists' and physicians' work demands that they constantly challenge their own and others' opinions as they review evidence and search for the truth. As a result of that process, knowledge evolves and changes. Medical “[r]eversal is not a rare occurrence.” Vinay Prasad & Adam Cifu, *Medical Reversal: Why*

²⁰ <https://www.nytimes.com/2022/01/14/health/cloth-masks-covid-cdc.html>.

²¹ See, e.g., Bendavid, Eran; Oh, Christopher; Bhattacharya, Jay; Ioannidis, John P.A. (April 2021). *Assessing Mandatory Stay-at-Home and Business Closure Effects on the Spread of COVID-19*, *European Journal of Clinical Investigation*, 51 (4): e13484. doi:10.1111/eci.13484. ISSN 0014-2972. PMC 7883103. PMID 33400268.

²² Matt Welch, *Democrats Try To Whitewash Their Starring Role in School Closures*, Reason, Aug. 31, 2023. <https://reason.com/2023/08/31/democrats-try-to-whitewash-their-starring-role-in-school-closures/>.

We Must Raise the Bar Before Adopting New Technologies, 84 *Yale J. Biology & Med.* 471, 472 (2011) (collecting many examples); see also Diana Herrera-Perez et al., *A Comprehensive Review of Randomized Clinical Trials in Three Medical Journals Reveals 396 Medical Reversals*, in *Meta-Research, A Collection of Articles* (Peter A. Rodgers ed., 2019). Many once-“consensus” medical views, including the need for lobotomies and eugenic sterilizations, are no longer accepted. See Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* 66 (2016) (“The most important elite advocating eugenic sterilization was the medical establishment,” “with near unanimity”; “every article on the subject of eugenic sterilization published in a medical journal between 1899 and 1912 endorsed the practice”).

History not only shows that medical “consensus” can change drastically; it also shows that individuals have every reason to be wary of governments that would restrict liberty in the name of health or medicine. “Throughout history, governments have manipulated the content of doctor-patient discourse to increase state power and suppress minorities.” *Id.* (cleaned up). “[D]uring the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception”; “[i]n the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients”; and “[i]n Nazi Germany,” “German physicians were taught that they owed a higher

duty to the ‘health of the Volk’ than to the health of individual patients.” *Id.* (cleaned up).

As the CEO of the American Medical Association recently testified about a different law, “[g]overnment manipulation of doctor-patient discourse has a dark past and should not be taken lightly.” Declaration of Dr. James L. Madara, MD in Support of Plaintiffs’ Motion for Preliminary Injunction ¶ 10, *Am. Med. Ass’n v. Stenehjem*, No. 1:19-cv-00125-DLH-CRH, ECF No. 6-5 (D.N.D. June 25, 2019). “

As Petitioners argue, the importance of the right to bodily autonomy, by itself, calls for at least intermediate scrutiny of government mandates that infringe on it. *See* Pets.’ Br. 13-17. The inherently questionable reliability of the authorities and information on which government officials rely—and the threat of tyranny imposed in the guise of public health measures—further demonstrate that the extreme deference of rational-basis review is inappropriate.

CONCLUSION

The Court should grant the petition.

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