No. 23-1222

IN THE

Supreme Court of the United States

CHILDREN'S HEALTH DEFENSE, ET AL.,

Petitioners,

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Association of American Physicians and Surgeons ("AAPS") is a national association of physicians, founded in 1943. AAPS is dedicated to protecting the patient-physician relationship, and to defending the right of patients to make their own personal decisions about whether to receive an

[1] *Amicus* AAPS provided the requisite ten days' prior written notice to all the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *Amicus* AAPS, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

experimental or novel vaccine injection. AAPS has been a litigant in this Court and in other appellate courts. *See, e.g.*, *Ass'n of Am. Physicians & Surgs. v. Mathews*, 423 U.S. 975 (1975); *Ass'n of Am. Physicians & Surgs. v. Tex. Med. Bd.*, 627 F.3d 547 (5th Cir. 2010); *Ass'n of Am. Physicians & Surgs. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

As a longstanding medical association devoted to defending the rights of patients to withhold informed consent about novel and experimental treatments, amicus AAPS has strong interests in this matter.

SUMMARY OF ARGUMENT

Informed consent for experimental medical treatments is a matter of national significance, and students should not be forced to choose between their college diplomas and their bodily integrity. "Vaccine mandate" is not a pejorative term, as declared by the Third Circuit decision below while affirming the premature dismissal of this lawsuit, but is an accurate description used in more than a thousand court decisions, including rulings by this Court. Rutgers prohibited students, who are burdened by enormous debt in seeking a college degree, from attending in-person classes unless they received injections with the Covid vaccine. Students forced to choose between a college diploma and an experimental vaccine have a cause of action to challenge that mandate by a state university. Now, free of the hysteria surrounding the Covid pandemic, is the best time to address this coercive violation of informed consent, and allow students' claims to proceed to discovery below.

The Petition offers an excellent opportunity for the Court to overturn *Jacobson v. Massachusetts*, which is

an outdated precedent causing havoc of national significance. 197 U.S. 11, 39 (1905). *Jacobson* itself never held in favor of vaccine mandates having the draconian penalties that are common today. Moreover, individual rights are far more robust now than in 1905, when *Jacobson* was decided, and recognition of a right to decline novel medical treatment is inherent in the right of self-defense long recognized by this Court. Revisiting *Jacobson* now, beyond any pandemic, is an ideal time.

Finally, this Court should grant the Petition for review because there is a widening split in the Circuits on the issue of vaccine mandates. While the Third Circuit below adopted a highly deferential standard of review to hold sweepingly in favor of a harsh college vaccine mandate, the Fifth and Ninth Circuits have gone in the opposite direction by properly performing meaningful judicial review. This Court should grant the Petition to resolve the widening split in Circuit reasoning.

ARGUMENT

I. The Petition Should Be Granted Because No One Should Be Forced to Choose Between a College Diploma and Informed Consent.

The Third Circuit below slammed the door shut on students wrongly forced to choose between receiving the traditional in-person college education they were admitted into college to pursue, and submitting to medical treatment without informed consent. "In this country, neither the Amish nor anyone else should have to choose between their farms and their faith." *Mast v. Fillmore Cty.*, 141 S. Ct. 2430, 2434 (2021) (Gorsuch, J., concurring). Likewise, no one should be

compelled to forgo either a college diploma or informed consent in connection with an experimental biological injection.

Informed consent was impossible for the Covid vaccine required by Rutgers. The vaccine's long-term toxicity is unknown. Its short-term toxicity was never properly assessed. Upon release to the public there were astronomical numbers of injuries reported to the Vaccine Adverse Event Reporting System (VAERS) – under threat of punishment for any false reports – incurred within days of receiving the vaccine. The Covid vaccine was never shown to prevent infection, spread of Covid, hospitalization, or deaths. *See Health Freedom Def. Fund, Inc. v. Carvalho*, No. 22-55908, 2024 U.S. App. LEXIS 13910, at *22 (9th Cir. June 7, 2024) ("[Defendant] only provides a CDC publication that says 'COVID-19 vaccines are safe and effective.' But 'safe and effective' for what?"). Informed consent for this novel biological agent was impossible, and coercing this product through mandates was profoundly unethical.

The vaccine mandate at Rutgers, which was initially imposed against only students – the demographic at least risk from Covid – and not the more at-risk faculty or staff, was driven by financial conflicts of interest and political alliances. Abuse of power by government agencies and government-appointed, so-called experts, like Dr. Anthony Fauci, is incompatible with the principle of informed consent, the ethical practice of medicine, and the standard of individual rights.

"Yes, we should absolutely follow the science. But that doesn't mean we should always follow scientists. Because scientists don't always follow the science." *Ass'n of Am. Physicians & Surgeons Educ. Found. v.*

Am. Bd. of Internal Med., No. 23-40423, 2024 U.S. App. LEXIS 13321, at *26 (5th Cir. June 3, 2024) (Ho, J., dissenting in part). *See also* Samir Okasha, *Philosophy Of Science: A Very Short Introduction* 77 (2nd ed. 2016) (observing that scientists are subject to "peer pressure"); Katalin Karikó, *Breaking Through: My Life in Science* 184 (2023) ("I had become a very good scientist. But I was learning that succeeding at a research institution like Penn required skills that had little to do with science.").

The Third Circuit below adopted an overly deferential, rational-basis standard of review to dismiss serious allegations of wrongdoing by the state university. The court merely required that Rutgers provide "a conceivable rational basis for its action" or that the court hypothesize one for it. *Children Health Def., Inc. v. Rutgers*, 93 F.4th 66, 84 n.37 (3d Cir. 2024). The dissent below correctly criticized the flaw in the standard used by the panel majority. "Rational basis review requires us to look to the rationale Rutgers gave for imposing the mandate, not to some hypothetical rationale the University might wish it had given, or, as in this case, one the Majority devises." *Id.* at 89 (Jordan, J., concurring and dissenting in part).

The Third Circuit cites other decisions that likewise prematurely dismissed complaints against vaccine mandates without allowing discovery, while ignoring the precedents of this Court and other Courts of Appeals against the Covid-related mandates. This Court rather emphatically blocked the requirement by the Biden Administration that employees of large employers be mandated to receive the vaccine. *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 595 U.S. 109

(2022). So why is there any doubt that students have a valid cause of action to challenge an analogous vaccine mandate against them? Of course students have a legitimate claim against Rutgers for its requirement of Covid vaccination in order to pursue an education there, and it was improper for the Third Circuit to apply the highly deferential rational-basis standard of review in order to dismiss the lawsuit below.

This lawsuit was dismissed contrary to ordinary standards of notice pleading, thereby cutting off discovery that should have been readily available. Robust judicial review should exist for college students who are subjected to a vaccine mandate accompanied with harsh penalties, particularly when the mandate did not even initially apply to faculty and staff present on the same campus. Vaccine mandates are driven by financial conflicts of interest and political alliances, and the very deferential standard of review used below amounts to a denial of judicial review about an improper infringement on individual rights.

The allegations made below, which should have been taken as true on the motion to dismiss, describe financial conflicts of interest at Rutgers which gave it an incentive to impose its suffocating vaccine mandate on students. When a life-changing injection is required of thousands of students, and motivation for that requirement is tainted with conflicts-of-interest, meaningful judicial review should exist.

Safeguards exist against financial incentives for legislators to impose mandates on the general public, and the process of legislative hearings ensures some transparency to the process and the decision-making. But no such protections are in place against undue

influence of university officials to require vaccination of thousands of students, and to withhold diplomas from those who decline an injection. When the vaccine is experimental, as the Covid vaccine has been, a highly deferential standard of judicial review is inappropriate amid numerous indications of political and financial bias motivating a mandate.

The Third Circuit below concluded that:

> In short, there is no fundamental right to refuse vaccination, nor any unconstitutional condition implicated here. Accordingly, we apply rational basis review to Rutgers' Policy as did the Court in *Jacobson* and as we have done traditionally with the policies of other universities.

Children's Health Def. v. Rutgers, 93 F.4th at 81.

This extremely deferential standard of review adopted by the Third Circuit is woefully inadequate. The well-established right of self-defense, although found nowhere in the U.S. Constitution, is implicated by a vaccine mandate using an experimental substance. Moreover, an undue financial incentive to treat students as though they are guinea pigs, as fully alleged in this lawsuit, warrants development of a factual record in discovery rather than dismissal based on a highly deferential standard of review. Defendant's stated rationale should not be accepted at face value, without even allowing discovery as to whether the purported reason was the real one, when thousands of students' lives are disrupted so severely.

The rational-basis standard of review exists for commercial legislation, not for imposing the equivalent of a medical experiment on students who could be harmed the rest of their lives from it. There

might be an inherent presumption of good faith and validity in a law that is enacted in a transparent manner based on public hearings, passed by two legislative chambers, and signed by a governor. No such checks-and-balances exist in backroom decision-making made at an university with its own conflicts of interest.

The Third Circuit reasoned that students could seek an education elsewhere, but that fails to recognize that students had worked hard to earn their admission to Rutgers and had invested enormously in its costly programs. The term "refund" appears nowhere in the decision below, and the disruption to students' education and their ability to obtain letters of recommendation are profound when they are forced out for this reason unrelated to academic achievement. A student plainly has a cause of action when denied his chosen course of study as Rutgers has done.

The decision to receive an experimental or novel injection – the Covid vaccine – is a highly personal one not to be coerced by holding students' education hostage. This is as much an issue of national significance as the student loan controversy is, and the Petition should be granted.

II. The Petition Offers an Excellent Opportunity for the Court to Overturn *Jacobson v. Massachusetts*.

Jacobson v. Massachusetts was the cornerstone of the horrific (and racist) eugenics movement that yielded the much-criticized holding in *Buck v. Bell*:

> The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson* v. *Massachusetts*, 197 U.S.

11. Three generations of imbeciles are enough.

Buck v. Bell, 274 U.S. 200, 207 (1927). To uproot this error by Justice Oliver Wendell Holmes, Jr., in *Buck v. Bell*, it is necessary to overturn *Jacobson*, and the Petition presents an ideal opportunity to correct this terrible blight in Supreme Court jurisprudence.

To be sure, the precedent of *Jacobson* was not initially as tyrannical as it has become with its expansive application to uphold every vaccine mandate imaginable. *Jacobson* merely affirmed a $5 fine (equivalent to $178.15 in today's dollars)[2] of an adult who declined a vaccine intended to halt the spread of smallpox in a community "confessedly endangered by the presence of a dangerous disease." *Jacobson*, 197 U.S. at 39. That is a far cry from denying students a college education because they decline an experimental vaccine, and particularly a vaccine that never halted the spread of the disease (Covid). Moreover, the defendant in *Jacobson* apparently never asserted any reason, such as a medical or religious basis, for declining the smallpox vaccine.

The Supreme Court itself in *Jacobson* emphasized that its decision should not be applied broadly, as many courts are wrongly doing today:

> It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body, would be cruel and inhuman in the last degree. We are not

[2] CPI Inflation Calculator, https://www.in2013dollars.com/us/inflation/1905?amount=5 (viewed June 6, 2024).

> to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. "All laws," this court has said, "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter." *United States v. Kirby*, 7 Wall. 482; *Lau Ow Bew v. United States*, 144 U.S. 47, 58.

Jacobson v. Massachusetts, 197 U.S. at 38-39.

The *Jacobson* decision then created a medical exemption from vaccination that is largely ignored by applications of that decision today:

> Until otherwise informed by the highest court of Massachusetts we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death.

Id. at 39.

The Third Circuit decision blows through the above limits imposed by *Jacobson*, and instead declares that "the federal appellate courts, for their part, have uniformly relied on *Jacobson* in dismissing challenges

to vaccination requirements." *Children's Health Def. v. Rutgers*, 93 F.4th at 80 & n.29 (citing repetitively to only the Seventh, Sixth, and Second Circuits). The appellate decision below also asserts that "in the last three years alone, the Supreme Court has cited *Jacobson* five times," but none of its examples is to anything more than dissents and concurrences. *Id.* at 80 & n.28.

In its expansive misapplication of *Jacobson*, the Third Circuit below further held that "the penalties for non-compliance in *Jacobson* were more, not less, severe than those at issue here: The city ordinance authorized criminal prosecution and imprisonment for up to fifteen days." *Id.* at 79. That penalty is paltry compared with the cost of higher education today, even at publicly funded universities like Rutgers. As of June 2023, the annual cost of attendance at Rutgers was $34,780 (in-state) and $52,480 (out-of-state).[3] This enormous investment required of students imposes life-changing debt burdens on them for decades to come, far more than the mere $5 fine and possibility of 15 days in prison (which was not imposed) in *Jacobson*. Students who had already invested heavily in their education at Rutgers were generally forced to abandon their investment or abandon their right to informed consent.

In 1905, unlike today, natural law provided a basis for meaningful judicial review of an inhumane governmental action, as a one-size-fits-all mandate of an experimental vaccine is. The existence or absence of a constitutional right was not dispositive as to the

[3] Rutgers University Tuition and Fees (Last Updated – 06/2023), https://tinyurl.com/2wk2drye (viewed June 6, 2024).

level of scrutiny applied by a federal court, in 1905.

Yet *Jacobson* has since become a rubber stamp for judicial affirmance of any and all vaccine mandates. *Jacobson* was never intended to be that, but it appears impossible to turn back the clock at this point to salvage it. Instead, *Jacobson* should be overruled, and the extensive misapplication of it by the Third Circuit below makes the Petition an ideal vehicle for correcting this.

III. The Petition Should Be Granted to Resolve the Widening Split Between the Third Circuit Below, and the Fifth and Ninth Circuits, in Reviewing Vaccine Mandates.

While the panel majority below presented its decision as being in uniformity with other courts, the opposite is true as neither the Fifth nor the Ninth Circuit rubber-stamps vaccine mandates as the Third Circuit did. The overly deferential standard of review adopted by the Third Circuit in reviewing a vaccine mandate stands in sharp contrast with multiple decisions by the Fifth and Ninth Circuits, and by this Court. Rather than allow this Circuit split to worsen, the Petition presents an optimal case for resolving it.

In a challenge to one of the famous Covid vaccine mandates by the Biden Administration, the Fifth Circuit issued a stay with the following reasoning:

> The Mandate is staggeringly overbroad. Applying to 2 out of 3 private-sector employees in America, in workplaces as diverse as the country itself, the Mandate fails to consider what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to *some* employees than to *other* employees. All else equal, a 28 year-old

> trucker spending the bulk of his workday in the solitude of his cab is simply less vulnerable to COVID-19 than a 62 year-old prison janitor. Likewise, a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus. The list goes on, but one constant remains—the Mandate fails almost completely to address, or even respond to, much of this reality and common sense.

BST Holdings, L.L.C. v. OSHA, 17 F.4th 604, 615 (5th Cir. 2021).

In contrast, the Third Circuit completely omits any recognition of how college students, due to their relatively young age, had very little risk of harm from Covid. The Third Circuit analysis further overlooks how "a naturally immune unvaccinated worker is presumably at less risk," as candidly observed by the Fifth Circuit. *Id.* The vaccine mandate by Rutgers was "staggeringly overbroad," and yet that factor was not a consideration to the Third Circuit, in contrast with the more objective analysis by Fifth Circuit.

"The petitioners' challenges to the Mandate show a great likelihood of success on the merits, and this fact weighs critically in favor of a stay," the Fifth Circuit held. *BST Holdings,* 17 F.4th at 618. With its opposite approach, the Third Circuit's analysis below upheld Rutger's vaccine mandate based on a highly deferential standard of review that relied on imagining any conceivable justification for it. Blatant corruption in the decision-making by the university would not have changed the outcome in the Third Circuit, under its flawed reasoning.

The U.S. Supreme Court ultimately ruled as the Fifth Circuit had in staying the same vaccine mandate by the Biden Administration:

> The Fifth Circuit initially entered a stay [in *BST Holdings]*. But when the cases were consolidated before the Sixth Circuit, that court lifted the stay and allowed OSHA's rule to take effect. Applicants now seek emergency relief from this Court, arguing that OSHA's mandate exceeds its statutory authority and is otherwise unlawful. Agreeing that applicants are likely to prevail, we grant their applications and stay the rule [that imposed a vaccine mandate].

Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 595 U.S. 109, 142 S. Ct. 661, 663 (2022).

The Fifth Circuit also ruled against United Airlines ("United"), in a challenge related to a vaccine mandate it imposed on its pilots and flight attendants. Like Rutgers, United ostensibly provided a religious exemption. Like Rutgers, the religious exemption carried with it substantial burdens and inconveniences, which were entirely unjustified by any science.

When employees challenged United's vaccine mandate, the reasoning and outcome were very different in the Fifth Circuit compared with the Third Circuit, and the Fifth Circuit took the better route of applying meaningful judicial review to what United had done:

> Plaintiffs are United Airlines employees. United has given them a choice: receive the COVID-19 vaccine or be placed on unpaid leave indefinitely. The question we address here is narrow. If United's

> policy is not preliminarily enjoined, are plaintiffs likely to suffer irreparable harm? For the two plaintiffs who received religious exemptions and remain on unpaid leave, we hold that they are. We therefore REVERSE the decision of the district court and REMAND for consideration of the other factors courts must evaluate when deciding whether to issue a preliminary injunction.

Sambrano v. United Airlines, Inc., No. 21-11159, 2022 U.S. App. LEXIS 4347, at *2 (5th Cir. Feb. 17, 2022).

The Ninth Circuit recently rejected application of *Jacobson* to vaccine mandates because "*Jacobson* … did not involve a claim in which the compelled vaccine was designed to reduce symptoms in the infected vaccine recipient rather than to prevent transmission and infection." *Health Freedom Def. Fund*, 2024 U.S. App. LEXIS 13910, at *21 (inner quotations omitted). The shots were never shown to prevent transmission of Covid, and indeed the manufacturers never even made that claim. Rather, the shots are gene-based medical treatments and, unlike the Third Circuit, the Ninth Circuit recognized this distinction:

> The district court thus erred in holding that *Jacobson* extends beyond its public health rationale – government's power to mandate prophylactic measures aimed at preventing the recipient from spreading disease to others – to also govern "forced medical treatment" for the recipient's benefit.

Id. There, as here, the issue is forced medical treatment, and:

> we must accept Plaintiffs' allegations that the vaccine does not prevent the spread of COVID-19

> as true. And, because of this, ***Jacobson* does not apply**. [Defendant] cannot get around this standard by stating that Plaintiffs' allegations are wrong.

Id. (emphasis added).

Now is the best time to close the growing gap between the Third, Fifth, and Ninth Circuits, and the Petition presents an ideal vehicle for resolving this Circuit conflict.

CONCLUSION

This Court should grant the Petition for the reasons stated in it, and for those explained above.

Respectfully submitted,

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