No. 23-_____

In the Supreme Court of the United States

KATIE SCZESNY, MARIETTE VITTI,
DEBRA HAGEN, AND JAIME RUMFIELD,

Petitioners,

v.

NEW JERSEY GOVERNOR PHILIP MURPHY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an appeal from the denial of a preliminary injunction becomes moot when the challenged executive order required private employers to enact vaccine mandates for their employees and the executive order rescinding that requirement expressly states that it shall not be construed to require that the mandates enacted pursuant to the original order be dismantled, when the original order to impose the mandates was rescinded with no representation from the government that the mandate will not be reinstated if circumstances revert or change again, and when the plaintiffs were involuntarily terminated from their employment pursuant to the mandates, thus creating an ongoing blemish on their employment records?

2. Whether the proper level of judicial scrutiny for a government order that requires workers to undergo a medical procedure as a condition of continued employment is rational basis or strict scrutiny, and whether it is different for medical procedures categorized as vaccination?

3. Whether Governor Murphy's Executive Order 283 (the booster mandate) violated the Nurses' individual substantive due process rights by placing an unconstitutional condition on their continued employment?

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants

- Katie Sczesny
- Mariette Vitti
- Debra Hagen
- Jaime Rumfield

Respondent and Defendant-Appellee

- New Jersey Governor Philip Murphy

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Third Circuit

No.. 22-2230

Katie Sczesny; Jaime Rumfield; Debra Hagen; Mariette Vitti, *Appellants,* v. Philip Murphy, in His Official and Personal Capacity; State of New Jersey

Date of Final Order: June 14, 2023

U.S. District Court for the District of New Jersey

Civ. No. 22-2314 (GC)

Katie Sczesny et al., *Plaintiffs,* v. The State of New Jersey, Governor Philip Murphy (in His Official and Personal Capacity), *Defendants.*

Date of Final Opinion: June 7, 2022

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Katie Sczesny, Mariette Vitti, Debra Hagen, and Jaime Rumfield respectfully petition for a writ of certiorari to review the order of the Third Circuit Court of Appeals dismissing Petitioner's appeal as moot in No. 22-2230.

OPINIONS BELOW

The District Court's denial of the Petitioners' motion for a preliminary injunction is unpublished. Pet.App.3a.

The Third Circuit Court of Appeal's dismissal of the appeal as moot is unpublished. Pet.App.1a.

JURISDICTION

The Third Circuit entered an order dismissing the appeal as moot on June 14, 2023. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND EXECUTIVE ORDERS

U.S. Const., amend. XIV § 1

> Section 1 of the Fourteenth Amendment to the 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.

The following lengthy executive orders are set out in the appendix:

Executive Order 283. (Pet.App.45a).

Executive Order 294. (Pet.App.58a).

Executive Order 332. (Pet.App.68a).

STATEMENT OF THE CASE

This petition presents an exceptionally important question for this Court's consideration and guidance: what is the proper level of judicial scrutiny for government imposed mandates concerning the Covid-19 vaccines? The only issue raised in the appeal is the substantive due process clause under the 14th Amendment.

1. On January 19, 2022, Governor Murphy signed Executive Order 283 ("EO 283"), which required employers in the field of healthcare and certain other "high risk congregate settings" to require their workers to be "up to date with their COVID-19 vaccinations." Pet.App.45a. In EO 283, "Up to date" was originally defined as having received "either a 2-dose series of an mRNA Covid-19 vaccine or a single dose COVID-19 vaccine, and any booster doses for which they are eligible as recommended by the CDC." Pet.App.55a.

2. On March 2, 2022, Governor Murphy signed Executive Order 290, which changed the deadlines for compliance set forth in Executive Order 283 because the CDC changed the recommended time period between the first and second dose from six weeks to eight weeks.[1]

3. On March 29, 2022 the CDC recommended a second booster dose for people older than 50 years and some immunocompromised people.[2] Because EO 283 required people to undergo additional vaccination when the CDC said they are eligible, these groups became required to take two boosters to continue working under the plain language of EO 283.

4. On April 13, 2022, Governor Murphy signed Executive Order 294 ("EO 294") providing that people who the CDC had recently recommended receive a

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[1] Executive Order 290 at page 5 available at https://nj.gov/infobank/eo/056murphy/pdf/EO-290.pdf (last accessed September 6, 2023).

[2] CDC, *CDC Recommends Additional Boosters for Certain Individuals*, Media Statement, March 29, 2022, available at https://www.cdc.gov/media/releases/2022/s0328-COVID-19-boosters.html (last accessed September 7, 2023).

fourth shot did not have to get it yet because "the CDC currently considers a person boosted and up to date with their COVID19 vaccination after receiving their first booster dose at this time." Pet.App.63a (emphasis added). EO 294 amended Paragraph 8 of EO 283 to state that workers shall be considered "up to date" if "they have received a primary series . . . and the first booster dose for which they are eligible." Pet.App.65a.

5. On or before June 6, 2022, the CDC changed the definition of "up to date" to be nearly identical to the original definition in EO 283. On or around June 6, 2022, the CDC webpage stated: "You are up to date with your COVID-19 vaccines when you have received all doses in the primary series and all boosters recommended for you, when eligible."[3]

6. In or around September 2022, the CDC changed the definition again, this time to: "having completed a COVID-19 vaccine primary series and received the most recent booster dose recommended for you by CDC."[4]

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[3] CDC definition of "up to date" as of June 6, 2022 was preserved by the Internet Archive at https://web.archive.org/web/20220606100150/ https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html. The Internet Archive is "a 501(c)(3) non-profit . . . building a digital library of Internet sites and other cultural artifacts in digital form." The Internet Archive allows people to preserve a screen capture of a website as it appeared on a particular day. Information about the Internet Archive can be found here: https://archive.org/about/. The CDC webpage defining up-to-date has been archived multiple times a day almost every day since January 5, 2022.

[4] CDC definition of "up to date" as of September 13, 2022 preserved at https://web.archive.org/web/20220913142536/https:/

7. On or around May 3, 2023, the CDC changed the definition again to "1 updated Pfizer-BioNTech or Moderna COVID-19 vaccine," which remains the current definition at the time this petition was filed.[5]

8. Governor Murphy and the CDC defined "up to date" differently for all time periods after June 6, 2022, even though Executive Orders 283 and 294 were purportedly premised on the CDC's definition of "up to date" and CDC guidance. Workers subject to EO 283 worked with the threat of Governor Murphy updating the definition of "up to date" at any time, thereby requiring them to submit for a fourth shot.

9. Petitioners are four Nurses who were subject to EOs 283 and 294. They are all fully vaccinated and were employed by Hunterdon Medical Center when Executive Orders 283 and 294 went into effect. Pet.App.45a. Three of the Nurses were terminated involuntarily pursuant to EO 283 and one, Debra Hagen, resigned so as to avoid an involuntary termination on her employment record. Pet.App.10a. Two of the Nurses, Debra Hagen and Mariette Vitti, were injured by the primary series of covid shots and did not want to be injected again with a vaccine that had already injured them. Pet.App.86a-90a; 92a-93a. One Nurse, Katie Sczesny, was terminated because she did not want to take a booster dose while pregnant with her daughter (who has since been

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/www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html (last accessed September 6, 2023).

[5] CDC definition of "up to date" as of May 3, 2023 preserved at https://web.archive.org/web/20230503052740/ https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html (last accessed September 6, 2023).

born). Pet.App.91a. Jaime Rumfield did not want to take any more shots after feeling ill after the first two and contracting covid anyway. Pet.App.90a-91a. All of the nurses experienced side effects from the first series of shots that made them feel ill. Pet.App.89a at ¶ 26, 90a at ¶ 33, 91a at ¶ 41, 90a at ¶ 92a 90a at ¶¶ 50-51**.** Each Nurse asserts her liberty to make her own medical decisions about her body and to decline unwanted medical procedures. The specific rights that the Nurses assert are infringed are privacy, bodily integrity, and the right to decline medical procedures. Pet.App.11a.

10. The Nurses initiated this action on April 21, 2022 by filing a Verified Complaint seeking declaratory judgment that EOs 283 and 294 are an unconstitutional condition on their employment as well as damages and attorney's fees pursuant to § 1983 and § 1988 of the Civil Rights Act. Pet.App.84a. Contemporaneously, the Nurses filed a motion for a temporary restraining order and/or preliminary injunction enjoining Executive Order 283. On June 7, 2022, the District Court denied the motion. Pet.App.3a. The Notice of Appeal was filed with the Third Circuit Court of Appeals on July 6, 2022. The case was fully briefed and oral argument was held on March 21, 2023.

11. On June 12, 2023, Governor Murphy wrote a letter informing the circuit court panel that he had rescinded EO 283 by way of a new executive order, Executive Order 332. Pet.App.68a. EO 332 cites a mishmash of federal agency guidance and external changing conditions (including the fact that the primary series of shots required by EO 283 are no longer available) as the basis for rescinding the mandate. *See* Pet.App.72a-73a (Purporting to summarize infor-

mation from CDC) and Pet.App.75a. (Noting that the FDA rescinded the emergency authorizations for the original covid vaccines). NJ also credits its purportedly successful pandemic response. *See* Pet.App.71a. (stating that "[a]s a result of significant emergency measures taken, the State made considerable progress in combatting COVID-19 variants"). While both EO 283 and EO 332 make general references to metrics that are measured with objective numbers (*e.g.*, hospitalization rate, infection rates), no actual numbers are cited in either order. The state's letter to the Third Circuit made no representation concerning whether the booster mandate will be reinstated. Pet.App.81a. Finally, it was public information that one of the judges on the panel before whom the appeal was argued was retiring on June 15, 2023[6], so the mandate was withdrawn just days before a decision could have reasonably been expected.

12. On June 13, 2022, Petitioners submitted a letter arguing against a finding of mootness for the following reasons: the court could still grant meaningful and effectual relief to the Nurses, the doctrine of voluntary cessation applies, and the mandate is capable of repetition and evading review. *See* Pet.App.2a. (Third Circuit order summarizing Nurses' arguments).

13. On June 14, 2022, the Third Circuit dismissed the appeal as moot finding that it "no longer presents a live issue" and expressed no opinion on whether the case was moot. The court remanded for further

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[6] David Wildstein, *Greenaway Retiring After Nearly 27 Years on the Federal Bench*, February 07 2023 https://newjerseyglobe.com/section-2/greenaway-retiring-after-nearly-27-years-on-the-federal-bench/

proceedings. Pet.App.2a. The order denying the preliminary injunction was not vacated and has already been cited by another district court in a judicial opinion. *Children's Health Def., Inc. v. Rutgers, State Univ. of New Jersey*, No. 2022 WL 4377515, at *6 (D.N.J. Sept. 22, 2022).

14. On June 30, 2023, the Nurses filed an Amended Complaint narrowing the claims to only those arising under the 14th Amendment and attaching as an exhibit a Department of Human Services memorandum sent to all development center human resource managers the day after the appeal was dismissed as moot. The memorandum announced that "[i]n accordance with EO 332," the Human Services policy mandating vaccination was lifted, but the department "reserves the right to implement a new COVID-19 vaccination requirement in the future." Pet.App.104a. The State filed a motion to dismiss the Amended Complaint, which, at the time of filing this petition, is returnable on October 2, 2023. It did not contest the authenticity of this memorandum. The motion to dismiss argues extensively that the case is now moot and, on the merits, presents the same arguments that were before the Third Circuit Court of Appeals on the denial from the preliminary injunction.

REASONS FOR GRANTING THE PETITION

The Third Circuit Court of Appeals dismissed the Nurse's appeal as moot without requiring any showing, indeed without the state even asserting, that EO 283 or an equivalent mandate will not be reinstated. This is in contradiction to Supreme Court guidance that it must be "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur" for a matter to become moot. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Moreover, the appeal was dismissed as moot even though the circuit court had the ability to grant the Nurses effectual relief. Judicial recognition that the booster mandate was, and is, unenforceable would give immediate and effectual relief to the Nurses because it would nullify the basis for their involuntary termination from their jobs clearing their employment records and improving their employment prospects, ensure that the Nurses will not be subject to the same or similar mandate this fall, winter, or spring, and ensure that potential employers do not regard these Nurses as risky hires because they might have to be terminated if the mandate is reinstated. The appeal was not, and is not, moot because EO 283 constitutes an "immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125-26 (1974). In addition, even if the court were not able to grant effectual relief, this matter falls within the voluntary cessation doctrine and is capable of repetition and evading review.

The questions before the Third Circuit Court of Appeals, and which this Court is now respectfully petitioned to decide, are of great constitutional and public importance. The controversy between the Nurses and Governor Murphy is, fundamentally, a dispute over who holds the power to decide whether the Nurses must submit their bodies to an unwanted injection. Governor Murphy asserts the power to impose COVID-19 boosters on the Nurses through the state police power. The Nurses assert the power to reject unwanted medical procedures and exercise autonomy over their bodies, which are well-established fundamental rights under the common law and recognized by this Court's precedents. *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 *U.S.* 261, 270, 278 (1990) (tracing the right to reject medical treatment back to the common law right of informed consent and concluding that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"); *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (listing bodily integrity as a fundamental right) (citing *Rochin v. California*, 342 U.S. 165, 167 (1952)); *see also Glucksberg*, 521 *U.S.* at 777 (J. Souter, concurring) (explaining that the "liberty interest in bodily integrity was phrased in a general way by then-Judge Cardozo when he said, 'every human being of adult years and sound mind has a right to determine what shall be done with his own body' in relation to his medical needs"). Because the Nurses assert that fundamental rights are infringed by EO 283, the correct standard of review is strict scrutiny. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978) (stating that "a government practice or statute which restricts 'fundamental

rights' . . . is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available").

The district court upheld EO 283 without engaging in any balancing of rights and interests. Instead, the district court applied *Jacobson v. Massachusetts*, a 118-year-old Supreme Court case upholding a statute that authorized a $5 fine on a man who did not take the smallpox vaccine, after the due process of a trial. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The district court held that "Jacobson established that there is no fundamental right to refuse vaccination in the context of COVID-19 and thus rational basis review applies to vaccine requirements." Pet.App.23a. In so holding, the district court ruled the same way as the four circuit courts of appeals and numerous federal district and state courts that have upheld COVID-19 vaccination mandates based on *Jacobson*, even though *Jacobsen* is "factually . . . legally and historically" distinguishable. *Lukaszczyk v. Cook County*, 47 F.4th 587, 600-601 (noting that smallpox was deadlier than COVID-19, COVID-19 has a low "attack rate," the smallpox vaccine was "sterilizing" while the COVID-19 vaccines are not, and that *Jacobson* preceded tiered-constitutional analysis).

Despite these vast differences, the circuit courts of appeals, like the district court below, each determined that *Jacobson* is applicable and controlling precedent and that *Jacobson* stands for the proposition that there is no fundamental right to refuse vaccination. Though none of the courts holding this state explicitly why they found that *Jacobson* is controlling, it appears to be based principally, or entirely, on the fact that

Jacobson involved the smallpox vaccine and the COVID-19 shots are also called vaccines. However, when *Jacobson* was decided the word "vaccine" had a fixed definition: "Of or pertaining to cows; pertaining to, derived from, or caused by, vaccinia; as, vaccine virus; the vaccine disease. –n. The virus of vaccinia used in vaccination."[7] Today the word is a category of many things with new items being regularly added to it as technology advances. In 1905 "vaccine" was a specific medical treatment. Today it is a category of medical treatments. The FDA lists 94 vaccines currently licensed for use in the United States.[8] Under the holdings of the circuit courts and district court in this case, that there is no fundamental right to decline vaccines and that vaccine mandates are subject to rational basis review, the executive and legislative branches of government can mandate that individuals take any of the FDA licensed vaccines and the judiciary will uphold the mandate unless the workers can "negative every conceivable basis which might support it." *F.C.C. v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315 (1993). This is an absurd result, inconsistent with basic liberty.

Applying *Jacobson* to the COVID-19 vaccines simply because they share the name "vaccine" has had the effect of expanding *Jacobson* from application to one specific fixed medical procedure, the smallpox

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[7] Webster's 1913, https://www.websters1913.com/words/Vaccine (emphasis removed) This website is the 1913 Meriam Webster's dictionary, which has entered the public domain.

[8] U.S. FDA, *Vaccines Licensed for Use in the United States*, available at https://www.fda.gov/vaccines-blood-biologics/vaccines/vaccines-licensed-use-united-states (last accessed September 9, 2023).

vaccine (which had already existed for a century at the time *Jacobson* was decided)[9] to an ever-growing category of pharmaceuticals to which new substances are regularly added. This essentially created new precedent that allows the government to coerce workers to undergo medical procedures, so long as the procedure has been categorized as a "vaccine" and conceivably furthers the public health. This is an error in reasoning that the Supreme Court should correct now. It has resulted in a catastrophic loss of individual liberty that will grow if this precedent is not reversed.

I. THE THIRD CIRCUIT'S DISMISSAL OF THE NURSES' APPEAL AS MOOT WAS WRONG.

A. The Third Circuit Could Have Provided Meaningful and Effectual Relief and There Is an Active, Genuine, and Adversarial Controversy Between the Parties.

The controversy before the Third Circuit Court of Appeals and its ability to provide effectual relief to the Nurses did not extinguish when the Governor rescinded Executive Order 283. By the time the denial of the preliminary injunction was appealed, the Nurses had all already been terminated from their jobs, but neither New Jersey nor the Third Circuit suggested that this made the appeal moot even though the court did not have jurisdiction or

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[9] The smallpox vaccine was invented in 1796 by Dr. Edward Jenner. History of smallpox: Outbreaks and vaccine timeline (mayoclinic.org), available at https://www.mayoclinic.org/diseases-conditions/history-disease-outbreaks-vaccine-timeline/smallpox (last accessed September 11, 2023).

power to order that the Nurses be reinstated. The controversy remained live after the mandate was rescinded for the same reason it remained live after the Nurses were terminated: if the policy pursuant to which they were terminated was, and is, unenforceable because it is unconstitutional, then judicial recognition of that fact provides meaningful and effectual relief to the Nurses immediately. For these Nurses, it is the difference between having been terminated for violating a government mandate or having been terminated for standing on a constitutional right. In addition, the threat that the mandate may be reenacted with the new definition of "up-to-date" and that these Nurses are likely to again refuse the booster makes them currently less attractive candidates to potential employers because their employers may have to terminate them if the mandate is reinstated. These are all continuing and present effects of the mandate for which the Third Circuit should have, and this court can, provide immediate effectual relief.

In addition, the state's explicit approval of continuing the mandates that covered entities enacted pursuant to EO 283 constitutes a continuing live controversy that the Third Circuit Court of Appeals should have resolved. EO 332 states:

> Nothing in this Order shall prevent covered settings from choosing to maintain a COVID-19 vaccination or testing policy, including but not limited to, one implemented pursuant to . . . Executive Order Nos. 283, 290, and 294 (2022) . . . or from establishing a COVID-19 vaccination or testing policy that includes additional or stricter requirements.

Pet.App.78a. Because every covered entity was required to adopt a COVID vaccine mandate pursuant to EO 283, the persistence of the private mandates erected pursuant to EO 283 perpetuates a live controversy. The state has not represented whether or how it communicated to the covered entities that they no longer had to maintain the mandates instituted pursuant to EO 283. Judicial recognition of the Nurses' liberty will remove the imprimatur of state approval from mandates instituted pursuant to EO 283 and maintained pursuant to the encouragement of EO 332. A ruling would provide immediate effectual relief to the Nurses.

Finally, the opinion denying the Nurses' request for a preliminary injunction is a decision that continues to have real world effects. The opinion has already been cited approvingly by another district court. *Children's Health Def., Inc. v. Rutgers, State Univ. of New Jersey*, No. 2022 WL 4377515, at *6 (D.N.J. Sept. 22, 2022)). In addition, according to Westlaw citations, the underlying opinion has also been cited by the City of Boston, the State of Rhode Island, the State of New Jersey, and the District of Columbia Water and Sewerage authorities in dispositive motions concerning COVID-19 vaccine mandates. The appeal should be heard because resolution of the issues in this appeal will have immediate real world effects for the Nurses and will ensure that a wrongly decided opinion is not used to spawn more wrongly decided opinions. It is not moot and should be resolved now.

B. The Appeal Is Not Moot Because the Voluntary Cessation Doctrine Applies and the Mandate Is Capable of Repetition and Evading Review.

Even if the court were not able to provide effectual relief, the doctrine of voluntary cessation and the fact that the mandate is capable of repetition and evading review preclude a finding of mootness.

It is established that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth*, 528 U.S. at 189. On the contrary, in such a situation, the matter is presumptively not moot and "[t]he Government bears the burden to establish that a once-live case has become moot." *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2594 (2022). This is a "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 190; *see also Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007). It is an especially "heavy" burden in a case like this one where, "[t]he only conceivable basis for a finding of mootness . . . is [the defendant's] voluntary conduct." *W. Virginia v. Env't Prot. Agency*, 142 at 2607 (cleaned up and internal citations omitted). The Supreme Court has stated that when a Defendant voluntarily withdraws a challenged policy that is the basis of litigation but continues to "vigorously defend" the legality of its action, the claim remains justiciable. *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. at 2607 (citing *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 288–289 (1982)).

Here, the Third Circuit dismissed the appeal as moot without Governor Murphy making any assertion that he would not reinstate the mandate in the future. It is hard to see how it could be absolutely clear that the mandate will not be reinstated when the state has made no such representation. On the contrary, the day after the appeal was dismissed as moot, the state Department of Human Services sent out a memorandum to all developmental homes announcing that the mandate had been lifted and expressly "reserve[d] the right to implement a new COVID-19 vaccination requirement in the future." Pet.App.104a. In addition, the state has vigorously defended the mandate throughout the litigation. Finally, the fact that the mandate was dropped mere days before the planned retirement of one of the judges on the panel suggests that it may have been withdrawn at that time to avoid a decision from the circuit court of appeals.

The ease with which the mandate could be reinstated with the new CDC definition of up-to-date also counsels against mootness. The mandate was enacted with the stroke of a pen. There was no legislative process, public notice, or public hearings. It can be reinstated anytime at Governor Murphy's discretion.[10]

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[10] Governor Murphy is still acting pursuant to emergency powers delegated to him by the NJ legislature under the NJ Disaster Control Act. In June 2021, the NJ legislature passed a law specifically stating that the state of emergency Governor Murphy declared in March 2020 "shall remain in effect until terminated by the Governor. NJ. St. 26:13-35. It does not appear that the Governor has terminated that state of emergency. That delegation of power from the legislative to the executive branch has been deemed a valid delegation of power by a state court and is not challenged here, but it is relevant

Moreover, the existing district court opinion denying the preliminary injunction creates a presumption and perception that he likely has the power to do so. Executive Order 283 was both enacted and rescinded based on vague and nebulous assertions concerning changing pandemic conditions. No objective metrics were actually cited in EO 283 or EO 332, just conclusory assertions about their improvement or decline. *See* Pet.App.71a (EO 322 setting forth conclusory references to "decreasing key statistics, such as the number of hospitalized patients in the State, the number of daily positive COVID-19 cases, spot positivity, and the rate of transmission," but not providing any objective metrics or information on when these decreases happened). Moreover, even though the Executive Orders cite the CDC extensively and purport to rely on CDC recommendations, it is established fact that: 1) the CDC never recommended that the government mandate booster shots, or any shots, for workers and 2) Governor Murphy has been out of step with the CDC's definition of up-to-date since June 6, 2022, making clear that the purported reliance on CDC guidance is illusory. The decision to order that the Nurses undergo a medical procedure to continuing working ultimately came down to the discretion of the single person who signed the executive order, Governor Murphy. The decision to reinstate it would be the same.

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insofar as it shows Governor Murphy would not have to declare a new state of emergency to issue a new mandate. *Policemen's Benevolent Ass'n v. Murphy*, 271 A.3d 333 (App. Div. 2022) cert. denied by New Jersey State *Policemen's Benevolent Ass'n v. Murphy*, No. 086732, 2022 WL 551253 (N.J. Feb. 14, 2022).

Moreover, Governor Murphy, in every executive order at issue in this litigation, has pointed to the federal government as his source for guidance. Thus, the fact that the federal government has stated that "there is a reasonable likelihood that another serious pandemic that may be worse than COVID-19 will occur soon" and that the rapid development and deployment of vaccines (within 130 days of identifying the virus) is the planned response, suggests that repetition is likely.[11] In addition, the procedures and infrastructure put in place by these mandates by both the government and by private entities pursuant to government order, along with the simple fact that it happened once, increase the likelihood of it happening again and even faster. A path already trodden is easier to take again. The fact that the specific mandate was withdrawn is irrelevant because the procedures remain in place to institute a substantially similar mandate with the strike of a pen on the judgment of a single person.

If Governor Murphy were to reinstate a mandate this fall, winter, or next spring, it would require a new challenge, possibly entirely new litigation, which could be expected to take a similar amount of time to wind its way up to the Third Circuit Court of Appeals and would similarly risk being dismissed if the government withdrew the mandate before the

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[11] The White House, *American Pandemic Preparedness: Transforming Our Capabilities*, at pages 5 and 11 (stating that top goals of pandemic preparedness will be to have a vaccine ready to go 130 days after a potential threat has been identified). https://www.whitehouse.gov/wp-content/uploads/2021/09/American-Pandemic-Preparedness-TransformingOur-Capabilities-Final-For-Web.pdf

Court of Appeals had ruled. With these medical procedure mandates, the harm occurs immediately upon their announcement because that is when the unconstitutional coercion begins. Consequently, the Nurses and other affected workers would be subject to unconstitutional coercion until such time as an appellate court could decide the case, if it were able to decide the case before the government withdraws the mandate again. The mandate is capable of repetition and evading review and thus should not have been dismissed as moot.

II. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT AND HAVE BEEN DECIDED WRONGLY BY MULTIPLE CIRCUIT COURTS DUE TO A MISAPPLICATION OF SUPREME COURT PRECEDENT.

The underlying questions that the Third Circuit was to decide, namely: what is the proper level of judicial scrutiny when the government requires workers to undergo an unwanted medical procedure as a condition of continued employment and whether EO 283 violates individual liberty, are exceptionally important.

The Nurses assert the fundamental rights of privacy, bodily integrity, and the liberty to refuse unwanted medical treatments, which are all well-established rights under Supreme Court precedent. The clearest example of how deeply embedded the fundamental right to refuse medical treatment is in our nation's history can be found in the multiple judicial opinions filed in *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). Eight justices joined four opinions stating in compelling and clear language that the right to decline

medical treatment is fundamental. *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 270, 278 (1990) (stating that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment," and "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"); *id.* at 288 (stating that "the liberty guaranteed by the due process clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment") (O'Connor, J., concurring); *id.* at 305 (stating that "freedom from unwanted medical attention is unquestionably among those principles so deeply rooted in the traditions and conscience of our people as to be ranked fundamental") (Brennan, J., dissenting on other grounds); *id.* at 342 (stating that "the sanctity and individual privacy of the human body is obviously fundamental to liberty. Every violation of a person's bodily integrity is an invasion of his liberty") (Stevens, J., dissenting on other grounds).

These were the rights asserted by the Nurses here and the assertion of those rights should have triggered strict scrutiny and an analysis of the mandates from the perspective of the rights threatened. *See Harris v. McRae*, 448 U.S. 297, 312 (1980) (stating that "[i]t is well settled that . . . if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional"); *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (stating that it is usually the case that the "standard of review is determined by the nature of the right asserted threatened

or violated rather than by the power being exercised or the specific limitation imposed."); *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) (stating that "it is the character of the right, not of the limitation, which determines what standard governs").

The Second, Sixth, Seventh, and Ninth Circuit Courts of Appeals have examined COVID-19 vaccine mandates in the context of the substantive due process clause. In each case, the plaintiff asserted that the mandates violated their rights to privacy, bodily integrity, and the right to refuse medical treatment. In each case, the Circuit Court of Appeals held that *Jacobson* is the controlling precedent and that rational-basis is the proper level judicial scrutiny. *Norris v. Stanley*, 73 F.4th 431, 435 (6th Cir. 2023) (holding that "[p]laintiffs' substantive due process claim fails because MSU's vaccine policy satisfies rational basis scrutiny, which the district court correctly held governs this claim. We base our standard of review on *Jacobson v. Massachusetts*") (internal citations omitted); *Lukaszczyk v. Cook County*, 47 F.4th 587, 602 (7th Cir. August 29, 2022) (stating "the district judge in each of these cases followed Supreme Court precedent 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 California*, No. 22-55001, 2022 WL 17175070 at *1 (9th Cir. Nov. 23, 2022) (applying rational basis review).[12]

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[12] *Kheriaty* is an unpublished opinion and technically not precedential, but it has already been cited by two California and one Michigan district courts in dismissing cases challenging covid vaccine mandates. *See Schmidt v. Pasadena*, 2023 WL

In *We The Patriots USA, Inc. v. Hochul*, the Second Circuit Court of Appeals applied rational basis review on the substantive due process claims stating:

> This Court cannot find an overriding privacy right when doing so would conflict with *Jacobson*. Although in 1905, when it was decided, *Jacobson* might have been read more narrowly, for over 100 years it has stood firmly for the proposition that the urgent public health needs of the community can outweigh the rights of an individual to refuse vaccination. *Jacobson* remains binding precedent".

We The Patriots, 17 F.4th 266, 293 (2d Cir.), opinion clarified on other grounds, 17 F.4th 368 (2d Cir. 2021), and cert. denied sub nom. *Dr. A. v. Hochul*, 142 S. Ct. 2569, 213 L. Ed. 2d 1126 (2022). The Second Circuit expounded on its understanding that *Jacobson* compels rational basis analysis of COVID-19 vaccine mandates in *Clementine Co., LLC v. Adams*, 74 F.4th 77, 84 (2d Cir. 2023) (stating "*Jacobson v. Massachusetts* . . . which remains good law . . . instructs us to uphold governmental measures to protect public health unless they bear no real or substantial relation to the object of public health or are beyond all question, a plain, palpable invasion of rights secured by the fundamental law") (cleaned up and internal quotations omitted).

4291440 (C.D. Cal. March 8, 2023), *Norris v. Stanley*, 2022 WL 557306 (W.D. Mich. February 2, 2022), *Miller v. Farris*, 2023 WL 4680370, at *9 (C.D. Cal. June 14, 2023), report and recommendation adopted sub nom. *Miller v. Ferris*, 2023 WL 4850749 (C.D. Cal. July 28, 2023).

Each circuit court extrapolated the holding in *Jacobson* to mean that there is no fundamental right to decline vaccines. *Clark v. Jackson*, No. 22-5553, 2023 WL 2787325, at *6 (6th Cir. Apr. 5, 2023) (holding that "[b]ecause plaintiff fails to meaningfully argue that refusing vaccination is a fundamental right, and because Jacobson evaluated a vaccine mandate under rational basis review, we apply that standard to Clark's substantive due process claims"); *Kheriaty*, 2022 WL 17175070 (9th Cir. Nov. 23, 2022) (holding that plaintiff "fails to offer any appropriate historical example to establish a 'fundamental right' to be free from a vaccine mandate at a workplace. To the contrary, the Supreme Court upheld a much more onerous vaccine requirement in *Jacobson v. Massachusetts*"); Pet.App.23a**,** *Sczesny v Murphy*, (holding that "[t]he Court joins numerous other courts, both in this district and across the country, to conclude that Jacobson established that there is no fundamental right to refuse vaccination in the context of COVID-19 and thus rational basis review applies to vaccine requirements").

In *Lukasczyk* the Seventh Circuit discussed the myriad of ways in which *Jacobson* is "factually . . . legally and historically distinguishable" from the COVID-19 vaccine mandate at issue. *Id.* at 600-601. Nevertheless, the court found that "recent circuit precedent supplements *Jacobson*" and under the combined precedent, the workers challenging the vaccine mandate were unable to set forth a fundamental right, so the mandate was subject to only rational basis review:

> Neither this court nor the district judges deny that requiring the administration of

> an unwanted vaccine involves important privacy interests. But the record developed and presented here does not demonstrate that these interests qualify as a fundamental right under substantive due process. The 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.

Lukaszczyk v. Cook Cnty., 47 F.4th 587, 602 (7th Cir. 2022), cert. denied sub nom. *Troogstad v. City of Chicago, Illinois*, 143 S. Ct. 734 (2023).

These decisions from the Second, Sixth, Seventh and Ninth Circuits, and a multitude of similarly reasoned district and state court decisions, have essentially created a new body of case law holding that people do not have a fundamental right to reject a medical procedure if the procedure is called a vaccine. This has become such a commonly prevailing view of the law that Westlaw has even created a headnote that states it directly:

> There is no fundamental right under the Constitution to refuse vaccination, and rational basis review applies to due process challenge of government action requiring vaccination. U.S. Const. Amend. 14.

Westlaw Keycite No. 198Hk385 (vaccination and immunization).

There are 21 judicial opinions and orders under this headnote at the time of writing, including the opinion that is the subject of this petition. The

earliest case under the headnote is from 2021. This new body of case law is in direct contravention to the well-established rights to informed consent, bodily integrity, privacy, and the right to reject unwanted medical treatments. *See Cruzan.*

Under this new body of case law, created through the expanding application of *Jacobson*, the legislative and executive branches of government can presumptively mandate individuals to take substances called "vaccines" and the judiciary will defer to those branches so long as there is a conceivable basis upon which the mandate is rationally related to public health. In light of the fact that the covid shots did not prevent transmission or infection very well, the precedent will ultimately stand for the proposition that the government will not have to show that a particular vaccine prevents infection and transmission very well in order to mandate it. Moreover, in light of CDC recognized safety concerns, such as myocarditis, this precedent will also stand for the proposition that even if a medical procedure has known risks like heart damage, it can still be mandated if it is called a vaccine and there is any conceivable way the mandate advances public health. That is the precedent set in the last two years by these decisions.

The Fifth Circuit has not directly addressed the issue of substantive due process in relation to a covid vaccine mandate, but in *Feds for Medical Freedom v. Biden*, the Fifth Circuit, sitting *en banc*, affirmed a preliminary injunction enjoining President Biden's federal employee vaccine mandate. *Feds for Medical Freedom v. Biden,* No. 22-40043 at 12 (5th Cir. March 23, 2023) (en banc). In affirming the injunction, the Fifth Circuit Court of Appeals necessarily found that

the mandate constituted irreparable harm, which both the majority opinion and Judge Ho's concurrence stated was based on the imposition of an unwanted medical procedure. *Id.* at 32 (holding that "[t]he mandated medical decision alone is an injury") and *id.* at 39 (stating that "by affirming the preliminary injunction, we also hold that coercing an employee to comply with a vaccine mandate as a condition of continued employment constitutes irreparable injury") (Ho, C.J., concurring). This presents an apparent conflict between the circuits, because the Fifth Circuit's characterization of the vaccine mandate as a "mandated medical decision" constituting irreparable injury suggests intrusion on a fundamental right.

The error made by the district court and circuit courts of appeals is a misapplication of law. Had the government authorities enacting and defending the COVID-19 vaccine mandates cited a 118-year-old statute concerning the smallpox vaccine as evidence for their legal authority, the rules of statutory construction would have guided the courts to interpret the word "vaccine" in accordance with its use when the statute was passed. *New Prime Inc. v. Oliveira*, 139 U.S. 532, 540 (2019) (stating "it's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute"). However, the authority the governments pointed to was not statutory law, but 118-year-old case law upholding the statute, and the courts did not examine the language in the context of time, which was error. As a consequence, the circuit courts have carved out an entire category of ever-expanding medical procedures that are essentially exempt from

informed consent. Under this precedent, if the medical procedure is categorized as a vaccine, coercive measures taken by the government to overcome a person's will are constitutional so long as they pass the very low bar of having a rational basis connected to public health. This is completely incompatible with centuries of law concerning informed consent, which cannot be obtained by coercion.

The expansion of the word "vaccine" would be nothing more than a cultural curiosity, like how the word "phone" has come to encompass smartphones, except that if courts apply *Jacobson* to any pharmaceutical that federal government agencies categorize as a "vaccine," then every advance in the medical technology of vaccines decreases liberty because it is a new medical procedure that workers have no right to refuse. This is far outside *Jacobson's* holding and constitutes an unprecedented loss of individual liberty that this Court should address as soon as possible.

III. THIS CASE IS A PARTICULARLY SUITABLE VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED.

For three reasons, this case presents an excellent vehicle for resolving the questions surrounding the proper level of judicial scrutiny and analytic framework for when the government mandates medical procedures for workers.

1. The only issue presented in this appeal is substantive due process under the Fourteenth Amendment. There are no outstanding issues concerning authority or whether the authority was properly delegated to Governor Murphy because it has already been decided by a

state court that the delegation of authority from the legislature to the executive was valid under state law. *New Jersey State Policemen's Benevolent Ass'n v. Murphy*, 271 A.3d 333 (App. Div. 2022) cert. denied by *New Jersey State Policemen's Benevolent Ass'n v. Murphy*, No. 086732, 2022 WL 551253 (N.J. Feb. 14, 2022).

2. The errors made in this case mirror the errors made in other cases decided over the past two years, specifically: analyzing the dispute from the perspective of the power asserted by the government rather than the right allegedly infringed, applying *Jacobson* without putting material words in the context of time, and expanding the holding of *Jacobson* to determine that there is no right to decline "a vaccine" without defining the term vaccine. The record developed below traces the history of the word "vaccine" over the course of more than a century, including its use in statutes and case law. This case crystalizes the definitional error that other courts have made with regard to interpreting and applying *Jacobson* because, in this case, the district court found that "the CDC opines that the primary dose and booster, when eligible, are 'vaccines' . . . and deferr[ed] to the 'expertise of the CDC and its guidance with respect to COVID-19,' <u>including its definition of vaccine</u>." Pet.App.20a (emphasis added). The district court did not say what CDC definition of vaccine it was adopting. It was error to

defer to the CDC's categorization of a substance to determine whether it falls within the ambit of century-old case law.

3. Because the federal and state governments have declared the emergency over and most mandates have been lifted, this case is one of the few remaining from the past two years that can be presented to the Supreme Court for this issue to be resolved. If the Supreme Court does not take up the question of substantive due process in the context of these medical mandates, then the headnote "there is not fundamental right to refuse a vaccine and vaccine mandate are subject to rational basis review" will become prevailing law. The federal government anticipates the use of emergency vaccines for future pandemics, which it predicts are likely. It is urgent that the Court settle these questions before that time arrives.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari to the Third Circuit Court of Appeals be granted.

Respectfully submitted,

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