UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ZULAY RODRIGUEZ VELEZ ET AL.,

Plaintiffs,

v.

HON. PEDRO R. PIERLUISI URRUTIA, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO,

Defendant.

Civil No. 21-1366 (PAD)

AMICUS CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTEREST OF THE AMICUS CURIAE

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center located in Chicago, Illinois that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

The Liberty Justice Center has filed several cases challenging government overreach in response to COVID-19. *See, e.g.,*, *Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020); *Rahman v. CDC*, 21-CV-4299 (N.D. Ill.). This case presents yet another example of government violating individual rights in its response to COVID-19, specifically the right to bodily integrity, which is fundamental.

LOCAL RULE 7.1 CORPORATE DISCLOSURE STATEMENT OF THE LIBERTY JUSTICE CENTER

Amicus Curiae Liberty Justice Center is a nonprofit corporation and does not have any parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

INTRODUCTION

At the beginning of the COVID-19 pandemic, the U.S. Supreme Court's 1905 decision in *Jacobson v. Commonwealth of Massachusetts* towered over courts ruling on various state and local governments' public health measures against the virus. 197 U.S. 11 (1905). Relying on this archaic case's highly deferential standard of review, courts upheld restriction after restriction in the early days of the government's response to COVID-19. The Supreme Court even initially seemed to bless this application of *Jacobson*, as Chief Justice John Roberts suggested by citing the case in his concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). *See generally* Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637 (2021). But as government restrictions dragged on—and even expanded—judges and legal scholars began to rethink *Jacobson*, culminating in a Supreme Court ruling that called its continued viability into question—*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

This brief explains why this Court should not apply *Jacobson* to the Puerto Rico government's general requirement that its employees take a COVID-19 vaccine. Amicus Liberty Justice Center urges this Court to grant the Plaintiffs' motion for a preliminary injunction (Dkt. 11) and deny the Defendant's motion to dismiss (Dkt. 20).

ARGUMENT

The Court should apply strict scrutiny to the government's vaccine mandate.

A. *Jacobson* predates modern constitutional rights jurisprudence, which establishes a fundamental right to bodily integrity.

After the Fourteenth Amendment was adopted in 1868, the Supreme Court embarked on a gradual process of defining the rights that inhered in its guarantee of "due process." This process had only just begun when the Court decided *Jacobson* in 1905. In *Jacobson*, the defendant asserted an "inherent right of every freeman to care for his own body and health in such way as to him seems best" and claimed that being subjected to vaccination constituted "an assault upon his person." *Jacobson*, 197 U.S. at 26. The Court held that the state's interest in public health overrode this individual interest. But in the 116 years since the Court decided *Jacobson*, it has dramatically expanded the protections of substantive Due Process, including to the very interest in bodily integrity asserted by the *Jacobson* plaintiff. In doing so, it has fundamentally shifted the constitutional balance between individual and state that existed in 1905.

Summing up roughly half a century of the substantive Due Process doctrine's expansion, the Court named bodily integrity as one of the fundamental rights protected by that doctrine. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). It ruled in *Glucksberg* that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests . . . includ[ing] the right[] . . . to bodily integrity . . . and to . . . refuse unwanted lifesaving medical treatment." *Id.* at 720 (citing *Rochin v. California,* 342

U.S. 165 (1952) and *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261, 278–279 (1990)). The Court has broadly described this right in numerous cases. *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("Among the historic liberties so protected was a right to be free from . . . unjustified intrusions on personal security."); *Cruzan*, 497 U.S. at 269 ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body.").

Since deciding *Jacobson*, the Court has found that the Due Process right to bodily integrity protects the individual right to make decisions about contraceptives, abortion, end-of-life care, and the injection of foreign substances into the body.[1] All of these decisions are important to this Court's analysis because they represent a significant shift in constitutional doctrine toward the individual's interests in personal autonomy and away from competing societal interests. But several decisions are especially compelling due to their factual proximity to the present case. In *Washington v. Harper,* 494 U.S. 210, 229 (1990), the Court stated that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." This interest in "avoiding involuntary administration [of medication]," the Court explained in a similar case two years later, was "protected under the Fourteenth Amendment's Due Process Clause." *Riggins v. Nevada*, 504 U.S. 127, 134 (1992). In a more recent case, the Court stated with regard

[1] *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (abortion); *Cruzan*, 497 U.S.261 (right to refuse life-extending medical treatment); *Rochin,* 342 U.S. 165; *Washington v. Harper*, 494 U.S. 210, 229 (1990) (forced administration of foreign substances).

to forced blood tests that "any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *Missouri v. McNeely*, 569 U.S. 141, 159 (2013). *See also Rochin v. California,* 342 U.S. 165 (1952) (holding that the fundamental right to bodily integrity was implicated by the nonconsensual injection of an emetic into an individual's stomach).

These bodily integrity precedents demonstrate that under modern jurisprudence individuals have a fundamental right not to have foreign substances injected into their body against their will. Modern courts apply strict scrutiny to governmental infringement on fundamental rights: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. 113, 155 (1973).

Jacobson predated the articulation of bodily integrity as a fundamental right under the Due Process clause. The *Jacobson* Court discounted an appeal to bodily integrity because that right had not yet been recognized. Now it has been. This Court should grant the modern substantive Due Process protection to plaintiffs' claims of bodily integrity rather than rely on an anachronistic decision which predates the recognition of that fundamental right.

B. *Jacobson* predates the modern tiers of scrutiny, and its deferential standard should not be used in place of them.

Jacobson urges judicial deference to a public health measure unless it is applied in an "arbitrary, unreasonable manner," lacks "real or substantial relation"

to protecting public health, or "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 28, 31. Although courts have differed as to whether this is a different standard of judicial review from modern tiers of scrutiny or is approximately equivalent to today's rational basis review, it is undisputed that the decision predates modern constitutional review doctrine by decades.[2] Whether rational basis or something *sui generis*, *Jacobson*'s standard of review is inapplicable in light of modern precedent for two reasons.

First, despite some courts' assumption that *Jacobson* instructs them to give officials *carte blanche* on public health matters, the Supreme Court said last year that "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). The framework courts use to protect the rights the Constitution guarantees has changed significantly since 1905. Thus, the Court's deference in *Jacobson* might not have "put away" the Constitution at the time, but it certainly deprives modern litigants of the more systematic and protective-of-individual-rights judicial review that exists today. *See Bayley's Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 31 (D. Me. 2020) ("[W]hen the Supreme Court elaborates a new standard for analyzing a constitutional claim, [courts] use that most recent formulation."); *see also Cty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 897 (W.D. Pa. 2020) (questioning whether the *Jacobson* standard

[2] *See Delaney v. Baker*, 511 F. Supp. 3d 55, 71 (D. Mass. 2021) ("*Jacobson* predates the tiers of scrutiny by thirty to sixty years depending on which academic you ask."); *see also* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. 179, 193 (2020).

"remains instructive in light of the intervening jurisprudential developments"); *New Orleans Catering, Inc. v. Cantrell*, No. CV 20-3020, 2021 WL 795979, at *5 (E.D. La. Mar. 2, 2021) (noting "the increasingly significant debate as to *Jacobson*'s value as a precedential matter").

Second, according to at least one Supreme Court justice, *Jacobson* applied the same standard of review during a pandemic that would be applied when not in a pandemic: "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue." *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). At the time, that legal test was what we would call today, "rational basis review." But the Court has since recognized that individuals have a fundamental right not to have foreign substances injected into their bodies without consent. *See, supra,* Part 1. Because the vaccine mandate at issue here implicates a fundamental right, the correct standard of review under modern jurisprudence is strict scrutiny, not rational basis review or a watered-down *Jacobson* review.

C. Recent Supreme Court precedent shows that *Jacobson* does not supply the standard of review for challenges to public health measures that implicate fundamental rights.

Earlier in the government's response to COVID-19, courts applied *Jacobson*'s public health exception liberally, even at the expense of basic constitutional rights such as the free exercise of religion. But late last year, the Court slammed the brakes on this watered-down version of judicial review in *Roman Catholic Diocese of*

Brooklyn. That decision stands for the proposition that courts will apply traditional strict scrutiny rather than the deferential *Jacobson* standard to public health measures that infringe on fundamental rights. In *Roman Catholic Diocese*, the Court invalidated certain of New York's public health restrictions that treated religious establishments worse than secular ones (including "restaurants, marijuana dispensaries, and casinos"). *Id*. at 69 (Gorsuch, J., concurring). Rather than applying the deferential *Jacobson* standard of review to the restrictions, the Court applied the strict scrutiny review it normally uses when fundamental constitutional rights are at stake. The majority opinion does not cite *Jacobson*, but Gorsuch's concurrence offers insight into the Court's decision not to apply it. In Justice Gorsuch's view, *Jacobson* does not need to be overturned for courts to stop reviewing public health measures with special deference because it never created a special type of deference for public health responses to begin with. Instead, it applied what was essentially rational basis review, which was appropriate given that the plaintiff did not assert that he was subject to "suspect classifications based on race or some other ground, or a claim of fundamental right."[3] *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). Thus, "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so." *Id*.

In determining in *Roman Catholic Diocese* that *Jacobson* does not create a watered-down version of judicial review that trumps traditional tiers of scrutiny, the

[3] *See, supra,* Part 1 for an explanation of how the Court did not consider plaintiff's claims as implicating a fundamental right under 1905 constitutional jurisprudence but later recognized similar claims of bodily integrity as a fundamental right.

Court has sided with the dissenters in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) and *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020), who argued that *Jacobson* did not override traditional tiers of scrutiny when fundamental rights such as the free exercise of religion are at stake. It has also joined a growing number of courts of appeal that have come to the same conclusion.

The Sixth Circuit led the way in its decision overturning a restriction on religious gatherings, *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (applying strict scrutiny rather than *Jacobson* deference). The Second Circuit followed, holding in December 2020 that "we grant no special deference to the executive when the exercise of emergency powers infringes on constitutional rights. That is precisely what the three-tiered framework for analyzing constitutional violations is for, and courts may not defer to the Governor simply because he is addressing a matter involving science or public health." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020). This summer, the Ninth Circuit applied strict scrutiny to California's closure of private schools under COVID-19 regulations and overturned them as not narrowly tailored. *Brach v. Newsom*, 6 F.4th 904, 932 (9th Cir. 2021) (ruling that the closures infringed on parents' substantive Due Process right to direct their children's education). Conspicuously absent from the decision in *Brach* was any citation to *Jacobson*, despite the fact that the state had imposed its closures in the name of public health.

Additionally, circuit courts overturned abortion restrictions that states imposed on grounds of public health, showing that *Jacobson* does not displace the traditional tiers of scrutiny. *See Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 927 (6th Cir. 2020) (rejecting "the notion that COVID-19 has somehow demoted *Roe* and *Casey* to second-class rights, enforceable against only the most extreme and outlandish violations. Such a notion is incompatible not only with *Jacobson*, but also with American constitutional law writ large."); *Robinson v. Att'y Gen.*, 957 F.3d 1171, 1182 (11th Cir. 2020) (upholding a district court that contextualized *Jacobson* with cases finding a fundamental right to have an abortion and concluding that the state could not use *Jacobson* to suspend abortion access as a public health measure). Thus, when the fundamental right to bodily integrity is at stake, courts have applied and should continue to apply strict scrutiny. Regardless of how important the government claims its interest to be in promoting public health, it cannot trample over the fundamental constitutional right of bodily integrity.

CONCLUSION

Jacobson is no longer good precedent for the proposition that courts should apply a lower standard of review to government public health measures that infringe fundamental rights. Supreme Court precedent strongly demonstrates that individuals have a fundamental right, protected by substantive Due Process, not to have foreign substances injected into their body against their will. Broad vaccine mandates like that of the Commonwealth of Puerto Rico infringe on this fundamental

right. Therefore, this Court should apply strict scrutiny to the Commonwealth's vaccine mandate.

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Respectfully Submitted,

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