No. 21-295

IN THE

Supreme Court of the United States

In re AMERICA'S FRONTLINE DOCTORS, et al.,

Petitioners,

ON PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION

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INTRODUCTION

This Amicus Brief is filed pursuant to Rule 37 of the Rules of the Supreme Court, which permit, "An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties..."[1]

The parties to this Amicus Brief are:

> Natural Solutions Foundation, a private association originally organized in Nevada, by its Trustee and Legal Director, Ralph Fucetola JD, and its Trustee and Medical Director, Rima E. Laibow, M.D on behalf of over one hundred thousand associated health freedom advocates.

This Amicus Brief expands upon primary contentions of the Petitioners by bringing to the attention of the Court relevant law asserting the legal proposition that judicial notice of the consensus regarding the applicable science is appropriate and, in this case, ought to lead to judicial intervention in the form of injunctive relief in favor of the Petitioners.

In this context we cite the Petitioners' Petition for Writ of Mandamus, Page ii where it is stated,

> "Petitioners ("Doctors & Immune Students") applied for a narrow TRO upon an undeniable scientific consensus in America, as confirmed by the Respondent UC's own doctor Joseph A. Ladapo, MD, PhD, associate professor with UCLA School of Medicine, whose supporting declaration for Petitioners in this case states, "The indisputable scientific facts are that natural immunity exists and is not arbitrarily limited to 90-days, and current COVID-19 vaccines are a medical intervention that carry both known and unknown risks of injury. Did the District Court commit an extreme departure from law by asserting informed refusal of a genetic vaccine is not a fundamental right requiring strict scrutiny?"

[1] Neither counsel for a party nor any person not associated with the Amici authored the brief in whole or in part; neither such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. Rule 37(6) of the Rules of the Supreme Court. Amici have received written permission from Respondent's Counsel, Emily T. Kuwahara, Esq. to file this Brief.

These Amici are nongovernmental organizations and individuals who advocate for recognition of the value of Natural Immunity in the achieving and maintaining viable public health.

We support the Petitioners' contention that the courts below erred and that error, due to the public importance of the issues presented, must be corrected by the immediate intervention of this honorable Court.

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The Amici urge this honorable Court to consider the arguments of the Petitioners that:

A. There is Reversible Error of Law, by the District Court, Arising from Failure to Respect the Scientific Consensus Regarding the Effectiveness of Natural Immunity. (Petition Factual Basis C.)

B. Respondent College Parties' Failure To Cite Science In Support Of Their Rejection Of Natural Immunity Ought To Shift The Burden To Those Parties. (Factual Basis F.)

I. PRISONER CASES REGARDING COVID AND EARLY RELEASE

In several recent cases, courts have been petitioned by prisoners with various health issues seeking early release due to the threat of COVID-19 in the prison system. In some cases,

these prisoners have been noted by the court to have already contracted and recovered from the disease, and this experience has generally been counted as a weighing against early release.

For example, in the January 2021 decision in *United States v. Tuitele*, (CR. NO. 13-00593 JMS (D. Haw., Jan. 6, 2021) the court noted that the prisoner was "64 years old, and suffers from a number of medical issues," (*Id.* at *9) but deemed her prior recovery from COVID-19 to be "a fact that counsels heavily against a finding of extraordinary or compelling reasons to warrant release." (*Id.* at *10)

The February 2021 decision in *United States v. Carter,* Crim. Act. No. 15-228-1 (E.D. Pa., Feb. 8, 2021), regarding an overweight and mildly asthmatic prisoner, similarly recited the evidence that reinfection was uncommon, and found this to be a factor militating against the grant of the request.

By contrast, in the June 2021 case of *United States v. Saunders*, 2:07-cr-00294 (W.D. Pa., June 23, 2021), the court noted the state's contention that the prisoner was "'afforded at least some protection' from COVID-19 'due to antibodies he likely developed when he contracted and recovered from the virus,'" (*Id.* at *4) but found that reinfection was "plausible given the inherent risks of infection in a congregate prison setting and past COVID-19 infection rates" in specified prisons. (*Id.* at *12)

As increasing knowledge develops in understanding the relative strength of antibody responses to the disease, it may eventually be the case that tests will be able to pinpoint with greater accuracy the robustness of the antibody response of a given individual. Ultimately, it may be possible to determine that some candidates for vaccination already have an immune response to the disease comparable to what vaccination would provide, rendering vaccination superfluous. At that point, in fact, the question might arise as to whether governments or private entities can continue to have any legally cognizable interest in requiring a medical procedure that can confer only marginal benefits to its recipients.

II. BODILY INTEGRITY

A brief review of a representative sampling of the numerous cases relating to Bodily Iintegrity and medical treatment mandates indicates that this Honorable Court takes this issue very seriously. In this context the Amici urge the Court to consider these cases:

Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251 (1891): plaintiff in a personal injury suit could not be ordered "to submit to a surgical examination as to the extent of the injury sued for." Holding the judge to be without authority under the common law to require such an invasion, the Court famously stated, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942): struck down a statute that mandated the sterilization of habitual criminals convicted of crimes of moral turpitude. Although the Supreme Court's analysis was couched in equal protection terms, the Court nevertheless observed that the invasive medical procedure of sterilization performed without the consent of the patient, "forever deprived [the individual] of a basic liberty."

Rochin v. California, 342 U.S. 165 (1952): forced stomach pumping of an arrested person to obtain evidence of illegal drug possession violated the Due Process Clause.

Vitek v. Jones, 445 U.S. 480, 494 (1980) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests).

Parham v. J.R., 442 U.S. 584, 600 (1979) ("[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment").

Winston v. Lee, 470 U.S. 753, 755 (1985): compelled surgical intrusion into an individual's body for evidence would violate that individual's "right to be secure in his person" and be "unreasonable" under the Fourth Amendment.

Washington v. Harper, 494 U.S. 210, 221-222 (1990): prison inmate with a serious mental illness treated with antipsychotic drugs against his will.

> "We have no doubt that, in addition to the liberty interest created by the State's Policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."

Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990), 278:

> "The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions. In Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905), for instance, the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. Decisions prior to the incorporation of the Fourth Amendment into the Fourteenth Amendment analyzed searches and seizures involving the body under the Due Process Clause and were thought to implicate substantial liberty interests. See, e.g., Breithaupt v. Abram, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed.2d 448 (1957) ("As against the right of an individual that his person be held inviolable . . . must be set the interests of society . . .").
>
> Just this Term, in the course of holding that a State's procedures for administering antipsychotic medication to prisoners were sufficient to satisfy due process concerns, we recognized that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." Washington v. Harper, 494 U.S. 210, 221-222, 110 S.Ct. 1028 1036, 108 L.Ed.2d 178 (1990); see also id., at 229, 110 S.Ct., at 1041 ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"). Still other cases support the recognition of a general liberty interest in refusing medical treatment. Vitek v. Jones, 445 U.S. 480, 494 (1980) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests)."

Albright v. Oliver, 510 U.S. 266, 272 (1994): "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."

Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("the 'liberty' protected by the Due Process Clause [of the Fourteenth Amendment] includes the right[] . . . to bodily integrity").

Winters v. Miller, 446 F.2d 65 (2nd Cir. 1971): committed patient brought an action under 42 USC § 1983 claiming her first amendment right to freedom of religion had been violated by forcible medication. The patient, in Winters, had never been found mentally incompetent and there was no presumption of incompetence under New York law comparable to § 64. The circuit court refused to recognize any public policy argument that because of the nature of the illness as mental, the patient should be denied the right to give an informed consent to the treatment.

*Schneider v. Rivic*i, 817 F.2d 987 (2nd Cir. 1987): informed consent. "While a patient should be encouraged to exercise care for his own safety, we believe that an informed decision to avoid surgery and conventional chemotherapy is within the patient's right 'to determine what shall be done with his own body'".

In considering the applications of the Petitioners herein, the Amici urge the Court to give due weight to the significance of this Honorable Court's Bodily Integrity jurisprudence.

III. UNAVOIDABLY UNSAFE VACCINES AND INFORMED CONSENT

In a world where neither logistical issues nor vaccine hesitance (declining Informed Consent), had influenced outcomes, the reported greater degree of effectiveness of vaccine-mediated immunity might prove dispositive of the question. However, it seems counterproductive to ignore the availability of effective COVID-19 antibody tests in setting priorities for distribution of the vaccines, and perhaps more importantly, in determining whether vaccination mandates should be applied. In populations slated for mandatory vaccination, such as

university students and employees of health care providers, it would be reasonable to permit individuals to provide positive COVID-19 antibody tests in lieu of immediate vaccination.

This is specially so considering that our Courts have held that vaccines are "unavoidably unsafe"[2] and may therefore be reasonably assumed to increase risk of harm, and, as this Court indicated in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) the Courts are "not without power to intervene..." Indeed, the law is clear, courts must intervene,

"…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."

This was the law even prior to the development of the Law of Informed Consent, starting in 1914 when Judge (later Supreme Court Justice) Benjamin Cardozo validated the concept of voluntary consent in *Schloendorff v. Society of New York Hosp*.,105 N.E. 92, 93 (N.Y. 1914) when he deemed any medical intervention without Informed Consent an unlawful trespass:

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages."

The Law of Informed Consent was further developed through the Nuremburg Trials and Customary International Law[3] and acknowledged by this Court as recently as 2013 in the case of *Missouri vs McNeely*, 569 US 141, 15 (2013) where this Court held,

> Even a "…diminished expectation of privacy does not diminish the… privacy interest in preventing a government agent from piercing the… skin. And though a blood test conducted in a medical setting by trained personnel is less intrusive than other bodily invasions, this Court has never retreated from its recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests…"

[2] See Justice Sotomayor's 2011 dissent in *Bruesewitz vs Wyeth*, where she discusses the history of "unavoidably unsafe." https://www.law.cornell.edu/supct/html/09-152.ZD.html
[3] https://jme.bmj.com/content/31/3/173.full

Restrictions on such interests ought to be subject to strict scrutiny.

Unchanged since its issuance in June 2020 is EEOC guidance finding that an antibody test "constitutes a medical examination under the ADA" (which prohibits such examinations of employees absent a demonstration of business necessity),[4] and therefore that the ADA "does not allow employers to require antibody testing before allowing employees to re-enter the workplace."[5]

This may come to be overridden by state laws, as it has been for several other diseases. For example, Maryland law requires hospital workers to provide evidence of being vaccinated for rubella, but provides as an alternative "proof of immunity by blood test for antibody to rubella."[6] Massachusetts requires personnel assigned to hospital maternal-newborn areas to demonstrate immunity to both measles and rubella, but allows both to be done with antibody tests.[7] California,[8] Michigan,[9] and Washington[10] each have provisions requiring employers to offer hepatitis B vaccination to employees, but lifting this requirement with respect to employees who are able to demonstrate the presence of the relevant antibodies. New Jersey has a unique provision for students, the New Jersey Antibody Titer Law, which allows those who have received a first MMR dose to have an antibody test in lieu of receiving the second dose[11]

IV. FOOD AND DRUG ADMINISTRATION ALLEGED "VACCINE" APPROVALS

Amici further wish to bring to the attention of the Court recent developments in the Food and Drug Administration (FDA) approval of the COVID injections. By letter dated August 23,

[4] EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (May 28, 2021), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
[5] EEOC, "EEOC Issues Updated COVID-19 Technical Assistance Publication Addressing Antibody Testing" (June 17, 2020), https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance-publication-addressing-antibody-testing
[6] Md. Code Regs. 10.06.01.15 (2018).
[7] 105 Mass. Code Regs. § 130.626 (2017).
[8] Cal. Code Regs. tit. 8, §5193 (2018)
[9] Mich. Admin. Code r. 325.70013 (2018)
[10] Wash. Admin. Code §296-823-13005, 296-823-130 (2018).
[11] NJSA 26:2N-8-11 (2018).

2021 the FDA granted partial approval for future production of one of the injections (that of the Pfizer drug company).

Reading the actual letters that the FDA sent to Pfizer it is clear, in the sense that the term "FDA approval" is generally understood, there was no full FDA approval. All available COVID inoculations are still under EUA (Emergency Use Authorization). They are still experimental drugs clearly subject to Informed Consent and not subject to any "mandating" either by governmental agencies or private actors (such as employers and educational institutions) acting under color of law.

The Agency sent two letters. The first one was a letter of BLA (Biologics License Application) approval, and the second was a letter of EUA extension to COMIRNATY.[12]

The first letter approves Pfizer's application for a license to label its COVID-19 drug with the brand name COMIRNATY. It also states the terms and requirements for nine additional clinical trials over five years, with yearly status reports, to study the acknowledged occurrences of myocarditis and pericarditis following administration of the Pfizer drug. The license to label and manufacture is not a full approval of the drug, still subject to years of clinical trials.

The EUA extension letter extends the term of the EUA for the current drug and authorizes (licenses) the experimental use of the brand-name drug COMIRNATY.

The Agency commanded the manufacturer to continue to study the adverse events that are to be expected from this class of drugs, stating on Page 6,

> We have determined that an analysis of spontaneous postmarketing adverse events reported under section 505(k)(1) of the FDCA will not be sufficient to assess known serious risks of myocarditis and pericarditis and identify an unexpected serious risk of subclinical myocarditis.
>
> Furthermore, the pharmacovigilance system that FDA is required to maintain under section 505(k)(3) of the FDCA is not sufficient to assess these serious risks.

[12] BLA Approval: https://www.fda.gov/media/151710/download and EUA Extension: https://www.fda.gov/media/150386/download

> Therefore, based on appropriate scientific data, we have determined that you are required to conduct the following studies: [Redacted.]"[13]

Thus the COVID injections remain either subject to the Emergency Use Authorization, which is specifically conditioned upon respect for Informed Consent or, when produced under the new approval, will remain in an experimental state clearly subject to Informed Consent. The use of sanitary masks and certain medical tests remain under Emergency Use Authorization.

V. GOVERNMENT AGENCIES MISINFORM THE PUBLIC

In considering the trustworthiness of various government agencies pronouncements regarding the existence of a pandemic, these Amici urge the Court to take Judicial Notice of the Morbidity and Mortality Weekly Report of August 27, 2021[14] This reference is to Page 4, Second Footnote which reads:

> "† Persons were considered fully vaccinated ≥14 days after receipt of the second dose in a 2-dose series (Pfizer-BioNTech or Moderna COVID-19 vaccines) or after 1 dose of the single-dose Janssen (Johnson & Johnson) COVID-19 vaccine; partially vaccinated ≥14 days after receipt of the first dose and <14 days after the second dose in a 2-dose series; and unvaccinated <14 days receipt of the first dose of a 2-dose series or 1 dose of the single-dose vaccine or if no vaccination registry data were available."

This means that persons who contract COVID, or have an adverse reaction to the EUA inoculations within 14 days of the inoculation, are deemed to be *unvaccinated*, thereby skewing the statistical record to misinform the public regarding both the number of COVID cases among the vaccinated, and the number of adverse reactions among them as well.

This Honorable Court, following the holding in *Jacobson*, ought to intervene in the case before the Court as modern science does confirm, based upon statistical evidence available to the Court, that the EUA, and indeed all, vaccines must "seriously impair ...health..." Furthermore, the *Jacobson* rationale was squarely based on the existence of an actual pandemic. Amici make

[13] www.fda.gov/media/151710/download?fbclid=IwAR3v2QYh_j__z4VFzDPfG_3szyq3OZxYYePbYj_F4DSlOd9oywMXivlGzP8

[14] MMWR / August 27, 2021 / Vol. 70 / No. 34 US Department of Health and Human Services/Centers for Disease Control and Prevention

no statement to this Court regarding the previous existence of a COVID pandemic, heretofore declared by Executive Authority. However, we do advance the assertion that there is now no pandemic, by any reasonably definition of that term.

VI. THE SPLIT AMONG THE COURTS

One of the factors usually considered by the Supreme Court in determining which cases to add to the docket is whether case law developing in various Federal Courts is inconsistent. There is just such a split among the courts developing over the pressing public issue of inoculation mandates. Recently District Courts, spread among several Circuits, in Michigan, New York, and Louisiana made decisions supportive of Informed Consent and Bodily Integrity, while courts in Indiana and California have upheld COVID 19 inoculation mandates.

These cases are:

[1] United States District Court for the Western District of Michigan, Southern Division

Emily Dahl, et al., Plaintiff v. The Board of Trustees of Western Michigan University, et al.,
Defendants, Civil Action No. 1:221-cv-757

Amended Order Granting Motion for Temporary Restraining Order, Filed August 31, 2021, ECF No. 8, Page ID.126

[2] United States District Court for the Western District of Louisiana, Monroe Division

Rachel Lynn Magliulo, et al. Plaintiffs versus Edward Via College of Osteopathic Medicine, Defendant, Civil Action No. 3:21-cv-2304

Memorandum Order (Granting TRO), Filed August 17, 2021, Page ID#: 890

[3] United States District Court for the Northern District of Indiana, South Bend Division

Ryan Klaassen et al., Plaintiffs, v. The Trustees of Indiana University, Defendant, Cause No. 1:21-CV-238

Opinion & Order [Denying TRO], Filed July 18,2021, Document 34

[4] United States District Court for the Central District of California

America's Frontline Doctors, et al., Plaintiffs v. Kim A. Wilcox, et al., Defendants, Case No. EDCV 21-1243

Civil Minutes - General, July 3, 2021: Order Denying Plaintiffs' Ex Parte Application for Temporary Restraining Order (Dkt. No. 8)

[5] United States District Court for the Northern District of New York

Dr. A. et al., Plaintiffs -v- Kathy Hochul, Governor, et al., Case 1:21-CV-1009

Order (Granting Temporary Restraining Order), Filed September 14, 2021, Document 7

The novel assertion of executive authority to mandate Emergency Use Authorized or any inoculation is meeting increasing resistance among the Judges of the United States District Courts in various Districts and Circuits. Some however find that these impositions are not prohibited by law. This question is truly one of the most momentous questions facing our legal system as the Government seeks to inoculate hundreds of millions of Americans. A division among the Courts means that some specific individuals, including parties herein, will suffer a diminishing of their legal interests. This Honorable Court should therefore take jurisdiction to vindicate those privacy and liberty interests.

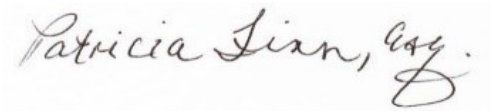
CONCLUSION

Amici seek, by submitting this intervention, to draw the attention of the Court to the crucial role of Natural Immunity in addressing not only the Petitioners' significant, protected interests, but also the significant interests of the public during this period of declared (by Executive Authority), but not scientifically validated, pandemic. The Court can take judicial notice of the most recent Executive Orders mandating Emergency Use Authorized inoculations, in violation of the statute authorizing such use, in violation of a century's worth of this Court's jurisprudence.

Shall the most serious public health challenge in several generations be resolved by Executive Actions and by private acts under color of law without meaningful judicial review?

For the reasons afore stated the Amici respectfully request that this Honorable Court grant the Petitioners' Petition for Mandamus, or in the alternative, Certification, in the public interest and to protect the interests of the Petitioners and Amici.

Respectfully submitted,



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Counsel wishes to acknowledge the assistance of retired attorney at law Ralph Fucetola JD in the researching and initial drafting of this Brief.