The Ninth Circuit's Nod to Anti-Vaccine Advocates

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I. INTRODUCTION

On June 7, 2024, a three-judge panel of the Ninth Circuit issued a decision that, while it did not go as far as anti-vaccine activists claimed, clearly drew on anti-vaccine tropes, and suggested a retreat from important public health precedents.[1]

This Article explains the decision and the way in which it can undermine public health law. In short, the decision is problematic in two ways. First, it accepts claims that are untrue on their face. By ignoring the evidence and facts provided by public health authorities and experts, the opinion demonstrates further erosion of the high deference to expertise embodied in the classic *Jacobson v. Massachusetts*.[2] Second, it seeks to limit *Jacobson* in seemingly innocuous, but dangerous ways. Specifically, it implies a fundamental right to refuse vaccination in the workplace for public employees, at least in relation to COVID-19 vaccines.

This commentary will introduce the case, explain the *Jacobson* standard, and then explain the Ninth Circuit's decision and its problematic implications for public health law.

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[1] Health Freedom Def. Fund, Inc. v. Carvalho, 104 F.4th 715 (9th Cir. 2024), *vacated*, 127 F.4th 750 (9th Cir. 2025).

[2] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

II. *HEALTH FREEDOM DEFENSE FUND V. CARVALHO*

The case centers on the Los Angeles Unified School District's (LAUSD) COVID-19 vaccination policy changes. The district, as summarized in the decision, went back and forth between requiring vaccines, allowing employees to vaccinate or test, or most recently, completely rescinding the mandate.[3] The specific mandate at issue here was adopted on August 13, 2021, requiring employees of LAUSD to vaccinate or get an exemption.[4] The specific plaintiffs in the lawsuit were denied exemptions, and the court stated that this rendered "any exemptions 'illusory.'"[5] However, denying specific people exemptions does not mean that exemptions were not provided—just that these people were not exempt.

The Health Freedom Defense Fund is an organization led by Leslie Manookian, a long-standing anti-vaccine activist. The fund brought the case in its own name, several district employees, and another organization called California Educators for Medical Freedom.[6] The plaintiffs, as summarized by the Ninth Circuit, argued that:

> [A] "traditional vaccine" must provide immunity and prevent transmission, meaning that it must "prevent the spread" of COVID-19. Plaintiffs allege that the vaccine does not effectively prevent spread, but only mitigates symptoms for the recipient. And Plaintiffs claim that something that only does the latter, but not the former, is like a medical treatment, not a "traditional" vaccine. This interpretation distinguishes *Jacobson*, thus presenting a different government interest.[7]

The district court dismissed the case, finding that the mandate survived review under the *Jacobson* standard, and the plaintiffs appealed to the Ninth Circuit.[8] The Ninth Circuit's panel held oral argument on September 14, 2023.[9] As mentioned in the decision, during oral argument plaintiffs' lawyer mentioned that the mandate may be rescinded, but LAUSD's lawyer refused to state what the district would do.[10] The day of oral argument, LAUSD's superintendent

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[3] *Carvalho*, 104 F.4th at 718–20.

[4] *Id.* at 719–20.

[5] *Id.* at 720.

[6] Linh Tat, *LAUSD Sued over COVID-19 Employee Vaccination Mandate*, L.A. DAILY NEWS (Nov. 8, 2021), https://www.dailynews.com/2021/11/08/lausd-sued-over-covid-19-employee-vaccination-mandate [https://perma.cc/XVW5-X5TP]; William Rivers Pitt, *Mask Mandate for Flights was Axed by a Trump-Appointed Judge*, TRUTHOUT (Apr. 19, 2022), https://truthout.org/articles/mask-mandate-for-flights-was-axed-by-a-trump-appointed-judge/ [https://perma.cc/Q6G9-48AC].

[7] *Carvalho*, 104 F.4th at 724.

[8] *Id.* at 718, 725.

[9] *Id.* at 721.

[10] *Id.*

submitted to the Board a proposal to repeal the mandate.[11] The board repealed the mandate twelve days later.[12]

Although the majority saw this as an "intentional manipulation of federal courts,"[13] the dissent described the Board's decision as considered and unrelated to the litigation.[14]

A threshold question before the court was whether the policy's repeal meant the case was moot. United States courts do not hear cases on abstract questions, only real controversies.[15] The majority held that the case was not moot in light of the supposed probability that the district would revive the mandate.[16] The dissent disagreed, believing that "LAUSD is not reasonably expected to reenact the Policy."[17] We will not focus on that question here.

This commentary will focus on the court's application of the *Jacobson* standard and its acceptance of arguments contrary to basic scientific evidence and facts.

III. WHAT STANDARD DID *JACOBSON* ESTABLISH?

Swedish minister Henning Jacobson immigrated to the U.S. in 1869, arriving in Cambridge, Massachusetts, where smallpox vaccination had been mandated since 1855.[18] In 1901, an aggressive strain of smallpox led to an outbreak in Boston.[19] Under the prevailing state law, local health boards were empowered to enforce immunization during such outbreaks.[20] In March 1902, the Cambridge board of health responded to the outbreak by requiring vaccination for individuals who had not been vaccinated in the past five years, with a $5 fine for non-compliance.[21]

When the chairman of the Cambridge board visited Reverend Jacobson to offer vaccination, he declined based on his previous negative experiences with vaccines. Having grown up in Sweden where smallpox vaccination was

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[11] *Id.*

[12] *Id.*

[13] *Carvalho*, 104 F.4th at 730 (Hawkins, C.J., dissenting). The language is the dissent's, but it is a fair characterization of what the majority said. *See id*. at 715–17 (majority opinion).

[14] *See id.* at 730–31 (Hawkins, C.J., dissenting).

[15] Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2239–40 (1999).

[16] *Carvalho*, 104 F.4th at 718.

[17] *Id*. at 731.

[18] James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 850–51 (2002).

[19] Michael R. Albert, Kristen G. Ostheimer & Joel G. Breman, *The Last Smallpox Epidemic in Boston and the Vaccination Controversy*, *1901-1903*, 344 NEW ENG. J. MED. 375, 375 (2001).

[20] Hodge, *supra* note 18, at 854.

[21] MICHAEL WILLRICH, POX: AN AMERICAN HISTORY 285 (2011).

compulsory, he alleged that he suffered adverse reactions from the vaccine and harbored a lifelong aversion to the practice.[22]

As the smallpox epidemic worsened in the summer of 1902, police accompanied healthcare workers during community vaccinations. After a complaint was filed against him, Jacobson challenged the Massachusetts law all the way to the Supreme Court on the grounds that it violated "the inherent right of every freeman to care for his own body and health in such way as to him seems best."[23]

Justice John Marshall Harlan, writing for the majority, noted that restraints on individual liberty are manifold, that disorder and anarchy would result if each member of society could shape the laws to suit himself.[24] The Court reasoned that society can regulate, including to protect the public health, so long as the regulation is reasonable.[25] In response to Jacobson's challenge to the science behind vaccination, the Court noted it favored "common belief" and "high medical authority" and that health departments, not courts, decide the means for controlling outbreaks.[26]

In holding that the state exercise of police powers to compel vaccination is not only lawful but may override liberty interests, the court applied the equivalent of what we know today as rational basis scrutiny. Justice Harlan sought a logical connection between public health measures and a legitimate goal, and that, beyond that connection, the measure is not arbitrary, unreasonable, or excessive.[27] For instance, where a person is not a "fit subject" for vaccination, perhaps due to a medical contraindication, the Court acknowledged that the state cannot compel vaccination.[28]

IV. UNPACKING MODERN STANDARDS OF JUDICIAL REVIEW

The Supreme Court first articulated the concept of "levels of judicial scrutiny" in 1938 in "Footnote 4" of its decision in *United States v. Carolene Products Co*.[29] This case was part of a series of rulings that challenged the

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[22] Hodge, *supra* note 18, at 841; Wendy K. Mariner, George J. Annas & Leonard H. Glantz, Jacobson v. Massachusetts, *It's Not Your Great-Great-Grandfather's Public Health Law*, 95 AM. J. PUB. HEALTH 581, 582 (2005).

[23] Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

[24] *Id.*

[25] *Id.* at 26.

[26] *Id.* at 30.

[27] *See id.* at 27–28.

[28] *Id.* at 12, 38–39.

[29] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

constitutionality of New Deal laws.[30] With time, these levels have taken shape as three levels of scrutiny.[31]

Strict scrutiny is the highest, most exacting and difficult level of review for a law to survive. It demands that a law must further a compelling governmental interest, must be narrowly tailored, and must be the least restrictive means for achieving the intended result.[32] This level of scrutiny is reserved by courts for fundamental rights such as freedom of speech, discrimination based on religion, or suspect classifications based on race or national origin are at issue.[33]

Intermediate or heightened scrutiny is the middle level of judicial review.[34] According to this standard, it is necessary to show that the law or policy being contested furthers an important governmental interest by means that are substantially related to that interest.[35] It is typically applied by courts where the rights at issue are related to Equal Protection violations, sex discrimination or restrictions on speech.[36]

While *Jacobson* predated these formal standards, it is widely recognized as applying rational basis scrutiny, requiring only that a law must bear a rational relationship to a legitimate governmental purpose.[37] Applying the test today means asking whether the state has a legitimate government interest in preventing the spread and severity of disease and is compulsory vaccination rationally related to that interest.

V. THE NINTH CIRCUIT DECISION AND *JACOBSON*

Citing *Jacobson* and ruling that the district's policy satisfied rational basis scrutiny—as courts routinely do in such cases—the district court upheld the

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[30] David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251, 1253–54 (2010).

[31] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 587–88 (6th ed. 2019); Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. PITT. L. REV. 1, 3 (2010).

[32] Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989).

[33] CHEMERINSKY, *supra* note 31, at 588–89; Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275, 280–81 (2017).

[34] *See* CHEMERINSKY, *supra* note 31, at 587–88, and *see also* Gerstmann & Shortell, *supra* note 31, at 3 (2023).

[35] CHEMERINSKY, *supra* note 31, at 587–88.

[36] *Intermediate Scrutiny*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny [https://perma.cc/J6PH-X9WA].

[37] *See* Richard Hughes IV, *The Supreme Court and the Future of State Vaccine Requirements*, HEALTH AFFAIRS FOREFRONT (July 7, 2022), https://www.healthaffairs.org/content/forefront/supreme-court-and-future-state-vaccine-requirements [https://perma.cc/X7XA-B85B].

policy.[38] The Ninth Circuit reached an entirely different answer, representing perhaps the highest court decision in American history to do so.[39]

The Ninth Circuit's decision rested on three determinations. First, the court stated that it must take the plaintiffs' claims as true at the motion to dismiss stage, and the plaintiffs argued that the vaccine "does not effectively prevent spread, but only mitigates symptoms for recipients," and is therefore "like a medical treatment, [and] not a 'traditional' vaccine."[40]

Second, the court concluded that if a vaccine does not prevent the spread of disease, *Jacobson* does not apply.[41] *Jacobson*, in the court's view, applies only to vaccines designed to prevent the spread of the disease.[42] Finally, the court accepted plaintiffs' rationale that the mandate amounted to "'forced medical treatment' for the recipient's benefit"—something a concurrence by Judge Collins doubled down on, highlighting the common law tradition reflecting the understanding that forced or unwanted medical treatment is unlawful, constituting battery.[43]

The Ninth Circuit's decision is problematic on both factual and legal grounds.

VI. FAILURE TO ACCEPT SCIENTIFIC EXPERTISE AND EVIDENCE

Although a court is supposed to take plaintiffs' views as true at the motion to dismiss stage, a court is not required to accept every implausible claim plaintiffs make as fact.[44] In fact, courts have a history, including in the vaccine context, of rejecting claims against the scientific consensus as accepted by policy makers—as we mentioned, *Jacobson* did just that.[45] Unlike the *Jacobson* Court, the Ninth Circuit has disfavored "common belief" and "high medical authority," accepting instead what the *Jacobson* court rejected—fringe arguments.[46] Nor did the *Jacobson* Court supplant the judgment of public health officials and policy makers. Rather, it concluded that policy makers, not courts, decide the means for controlling outbreaks.[47]

The Ninth Circuit's decision does not comport with accepted scientific evidence concerning epidemiology and vaccine effectiveness. The decision is problematic because it accepts the plaintiffs' reasoning, which inaccurately

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[38] Health Freedom Def. Fund v. Carvalho, 104 F.4th 715, 724 (9th Cir. 2024), *vacated*, 127 F.4th 750 (9th Cir. 2025).

[39] *Id.* at 724.

[40] *Id.* at 724–25.

[41] *Id.* at 725.

[42] *See id.*

[43] *Id.*; *see also id.* at 728 (Collins, J., concurring).

[44] *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

[45] *See* Jacobson v. Massachusetts, 197 U.S. 11, 23–24 (1905).

[46] *Id.* at 30.

[47] *See id.* at 35.

construes vaccine effectiveness.[48] The court did give a nod to the district's citation to CDC materials to support the basis of its policy, but it dismisses it, suggesting the district only referred to a CDC statement that vaccines are safe and effective.[49] But the CDC website does reference transmission—stating that the vaccines reduce the risk of infection—while it also states that the vaccines reduce the risk of severe disease and death.[50] The court essentially cherrypicked information and accepted flawed logic that assumes that the singular reason for compelling vaccination is to completely stop transmission between individuals.

To the contrary, broad vaccination is intended to reduce the overall incidence, mortality and morbidity of disease, as well as to mitigate suffering, health care spending, and economic costs.[51] Indeed, this is consistent with the evidence used by the Food and Drug Administration (FDA) to assess the efficacy of COVID vaccines.[52] In recognition of the public health need for vaccines at the beginning of the pandemic, the FDA required clinical trials designed with primary endpoints such as "risk of infection, symptoms, and severity of COVID-19," along with secondary endpoints like "hospitalization length, supplemental oxygen requirement, mechanical ventilation."[53]

Moreover, the court attempts to distinguish the vaccine at issue in *Jacobson*, suggesting that a "'traditional vaccine' must provide immunity and prevent transmission, meaning that it must 'prevent the spread' of COVID-19."[54] This is not only inconsistent with vaccine science and the common public health purpose of vaccination, but also not in accordance with the scientific understanding of smallpox vaccination at the time.[55] Indeed, it was known that some smallpox cases "occurred in persons who were vaccinated" in the

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[48] *See id.*; *see also* Marc Lipsitch & Rebecca Kahn, *Interpreting Vaccine Efficacy Trial Results for Infection and Transmission*, 39 VACCINE 4082, 4082 (2021).

[49] *See* Health Freedom Def. Fund v. Carvalho, 104 F.4th 715, 742–43 (9th Cir. 2024), *vacated*, 127 F.4th 750 (9th Cir. 2025).

[50] *COVID–19 Vaccine Effectiveness*, U.S. CTRS. FOR DISEASE CTRL. & PREVENTION, (Feb. 1, 2024), https://www.cdc.gov/ncird/whats-new/covid-19-vaccine-effectiveness.html#:~:text=Getting%2520vaccinated%2520now%2520can% [https://perma.cc/6LA9-JD6P].

[51] Mitra Saadatian-Elahi et al., *Beyond Efficacy: The Full Public Health Impact of Vaccines*, 34 VACCINE 1139, 1142–43 (2016).

[52] Ibrahim Mohammed et al., *The Efficacy and Effectiveness of the COVID-19 Vaccines in Reducing Infection, Severity, Hospitalization and Mortality: A Systematic Review*, HUM. VACCINES & IMMUNOTHERAPEUTICS, Dec. 31, 2022, Article No. e2027160, at 1, 7–11, https://pmc.ncbi.nlm.nih.gov/articles/PMC8862168/pdf/KHVI_18_2027160.pdf [https://perma.cc/CDV5-SVBQ].

[53] Jonaid Ahmad Malik et al., *SARS-COV-2 Vaccines: Clinical Endpoints and Psychological Perspective: A Literature Review*, 15 J. INFECTION & PUB. HEALTH 515, 515 (2022).

[54] *Carvalho*, 104 F.4th at 724.

[55] *See* William M. Welch, *Remarks on the Present Mild Type of Smallpox; The Symptoms and Diagnosis*, 16 TEX. MED. J. 341, 346 (1901).

Jacobson era.[56] It was generally accepted then that vaccination against smallpox could lessen the severity of infection and reduce mortality.[57]

Smallpox vaccines also reduced transmission, of course—and so do COVID-19 vaccines.[58] A vaccine can reduce transmission without completely preventing infection, for example, if less vaccinated people have the disease, if vaccinated people have lower levels of virus, or if they are symptomatic for shorter times than unvaccinated people or have less aggressive symptoms.[59] Reducing the incidence of disease justifies a mandate, even if it is not completely prevented.

In other words, a vaccine does not have to completely prevent transmission to justify a mandate and the application of *Jacobson*; it is enough if it reduces it.

VII. FAILURE TO CONTRAST VACCINATION AS A PUBLIC HEALTH MEASURE, FORCED MEDICAL TREATMENT

Resting further on its flawed distinction between a "traditional vaccine" and COVID-19 vaccines, the court veers from the common law understanding of what constitutes forced medical treatment and the overriding interests of a state adopting public health measures.[60] It equates a workplace vaccination mandate with forced, unwanted medical treatment in a manner that is both analytically wrong and dangerous.

The common law of tort has long recognized that the "intentional infliction of harmful bodily contact on the person" constitutes a battery.[61] The Supreme

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[56] *See id.*

[57] *See, e.g.*, Stefan Riedel, *Edward Jenner and the History of Smallpox and Vaccination*, 18 PROC. BAYLOR UNIV. MED. CRT. 21, 22–25 (2005); *see also* Noel A. Humphreys, *English Vaccination and Small-Pox Statistics; With Special Reference to the Report of the Royal Commission, and to Recent Small-Pox Epidemics*., 60 J. ROYAL STATISTICAL SOC'Y 503, 503–51 (1897).

[58] *See* Toon Braeye, *Vaccine Effectiveness Against Transmission of Alpha, Delta, and Omicron SARS-COV-2-Infection, Belgian Contact Tracing*, 2021–2022, 41 VACCINE 3292, 3293 (2023); Ivan Martínez-Baz et al., *Effect of COVID-19 Vaccination on the SARS-CoV-2 Transmission Among Social and Household Close Contacts: A Cohort Study*, 16 J. INFECT PUB. HEALTH 410, 411 (2023); Sophia T Tan et al., *Infectiousness of SARS-CoV-2 Breakthrough Infections and Reinfections During the Omicron Wave*, 29 NATURE MED. 358, 358 (2023).

[59] Carolyn T Bramante et al., *Vaccination Against SARS-CoV-2 Is Associated With a Lower Viral Load and Likelihood of Systemic Symptoms*, OPEN F. INFECTIOUS DISEASES., May 5, 2022, Article No. ofac066, at 1; Puhach et al., *Infectious Viral Load in Unvaccinated and Vaccinated Individuals Infected with Ancestral, Delta or Omicron SARS-CoV-2*, 28 NATURE MED. 1491, 1491 (2022); *see generally* Volker Vetter et al., *Understanding Modern-Day Vaccines: What You Need to Know*, 50 ANN. MED. 110 (2018).

[60] Health Freedom Def. Fund, Inc. v. Carvalho, 104 F.4th 715, 720–725 (9th Cir. 2024), *vacated*, 127 F.4th 750 (9th Cir. 2025).

[61] Don S. Smith, *Battery in Medical Torts*, 16 CLEV.–MARSHALL L. REV.

Court has explicitly recognized a "constitutionally protected liberty interest in refusing unwanted medical treatment."[62] Earlier this year, the Ninth Circuit expressed skepticism of the contention that *Jacobson* is distinguishable on the basis that vaccines are forced medical treatment.[63] Nonetheless, Judge Collins, in his concurrence in *Carvalho* and dissent last year in a case rejecting similar arguments, urged the acceptance of the comparison.[64]

There is no basis for accepting the plaintiffs' claims that the vaccines are medical treatment. COVID-19 vaccines were licensed and deployed to the public to prevent specific outcomes—overall reduction of morbidity and mortality.[65] While vaccines are simultaneously a clinical and public health intervention, they are not medical treatments. They are given to the healthy, not the sick, with the goal of generating an immune response that would either completely prevent infection or at least lessen its severity.[66]

Moreover, a mandatory vaccination policy is not equivalent to holding someone down and forcibly vaccinating them. In contrast with *Jacobson*, the district did not subject violators of the policy to enforcement visits to their homes or criminal sanctions.[67] It simply conditioned employment in a specific job where workers will be exposed to a vulnerable population: children, some of whom may have medical conditions that make them especially vulnerable to disease, and co-workers who may be elderly or have medical conditions.[68]

Even if the COVID-19 vaccine were a form of unwanted medical treatment, the Supreme Court has recognized in more recent times "that this common-law right to refuse treatment is neither absolute nor always sufficiently weighty to overcome valid countervailing state interests."[69] Indeed, *Jacobson* was grounded in this very balancing act, holding that the state's interest outweighed Jacobson's claim of a right to bodily autonomy.[70] Similarly, in the workplace, people's rights to bodily integrity do not provide an unlimited right to ignore

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22, 22 (1967).

[62] Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 278 (1990).

[63] *See* Johnson v. Kotek, 2024 WL 747022, at *3 (9th Cir. Feb. 23, 2024).

[64] *Carvalho*, 104 F.4th at 728.

[65] *See* Braeye et al., *supra* note 58, at 3293.

[66] Some vaccines can also be given to infected people as prophylaxis, but in that case, it is still given with the goal to prevent the disease or at least generate some immunity that would lessen its severity, not with a goal of treating an existing infection. *E.g.*, Robert J. Arciuolo, Rachel R. Jablonski, Jane R. Zucker & Jennifer B. Rosen, *Effectiveness of Measles Vaccination and Immune Globulin Post-Exposure Prophylaxis in an Outbreak Setting – New York City, 2013*, 65 CLIN. INF. DIS. 1843, 1846 (2017).

[67] Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905).

[68] Kelly Graff et al., *Risk Factors for Severe COVID-19 in Children*, 40 PEDIATRIC INFECTIOUS DISEASE J. 37, 38 (2021); Adam W. Gaffney & David Himmelstein, *Risk for Severe COVID-19 Illness Among Teachers and Adults Living with School-Aged Children*, 173 ANNALS INT. MED. 765, 766 (2020).

[69] Washington v. Glucksberg, 521 U.S. 702, 742 (1997).

[70] *Jacobson*, 197 U.S. at 28–29.

workplace rules intended to protect workers. In fact, workplace mandates have long been upheld in other contexts.[71]

Even if applying strict scrutiny was appropriate, the Ninth Circuit majority in *Pilz*, noted earlier this year, "During the relevant timeframe, the Supreme Court held that '[s]temming the spread of COVID-19 is unquestionably a compelling interest.'"[72] Therefore, the Supreme Court has determined that the justification for public health measures surpasses the requisite legitimate interest under rational basis review, equal to the standard applied in *Jacobson*. *Jacobson* rightly stands for allowing reasonable limits on individual rights that are not identified as individual rights to protect the community.[73] In this case, a vaccine mandate on employees of a school district certainly protects the community. It has the potential of reducing COVID-19 spread in schools and the community, including among teachers, children, and the families of the children, including elderly family members or those with medical conditions, placing them at risk of severe if not deadly illness.[74] But beyond that, reducing disease and severe disease among district employees does not just address their welfare.

Public schools are a public service. Insofar as in-person school attendance under healthy conditions contributes to learning, this is in and of itself a legitimate if not compelling interest.[75] So too are the aims of reducing cases of severe disease that affect the healthcare system's capacity.[76]

COVID-19 vaccination is the least restrictive means to accomplish, if not rationally related, to those interests. Elevating these requirements by defining them as impacting a fundamental right would have severe safety implications.

On February 4, 2025, the Ninth Circuit decided that the case would be reheard en banc.[77] That raises the hope that this bad decision will not remain law, but we cannot assume that the Ninth Circuit will overturn it. Worse, the damage has, to a large extent, already been done. Anti-vaccine sites celebrated and lauded the decision, representing it as evidence that COVID-19 vaccines are not vaccines, or as evidence that vaccine mandates are unconstitutional, and that is not surprising.[78] But anti-vaccine groups have also taken the case to

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[71] *See* Teri Dobbins Baxter, *Employer Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks*, 2017 UTAH L. REV. 885, 886–87.

[72] Pilz v. Inslee, No. 22-35508, 2023 WL 8866565, at *2 (9th Cir. Dec. 22, 2023) (quoting Roman Cath.olic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63592 U.S. 14, 67 17–19 (2020)).

[73] *Jacobson*, 197 U.S at 29.

[74] Gaffney et al., *supra* note 68.

[75] Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 U. PA. J. CONST. L. 207, 238 (2018).

[76] *See* Helen S. Webster, *The Future of Jacobson v. Massachusetts and Modern Substantive Due Process for Public Health Preparedness*, 17 ST. LOUIS U. J. HEALTH L. & POL'Y 179, 195–96 (2024).

[77] Health Freedom Def. Fund, Inc. v. Carvalho, 127 F.4th 750 (9th Cir. 2025).

[78] *See, e.g.*, Michael Kane and Leslie Manookian, *Victory in 9th Circuit Against COVID Vaccine Mandates*, CHILDREN'S HEALTH DEFENSE TV (June 11, 2024), https:// live.childrens healthdefense.org/chd-tv/shows/good-morning-chd/victory-in-9th-circuit-against-covid-

provide a blueprint for a general argument that COVID-19 vaccine mandates—and potentially other mandates—are not supported by *Jacobson*, and are preparing to use that argument.[79] This argument, shown once to have potential, is likely to be repeated, and necessitates the development of counterarguments to support *Jacobson*'s survival.

VIII. CONCLUSION

In *Health Freedom Defense Fund v. Carvalho*, a Ninth Circuit panel seemingly affected by anti-vaccine misinformation was deceived into giving enough credence to a claim that COVID-19 vaccines are not vaccines to revive a lawsuit that had no basis under *Jacobson*, in the process, wrongly second-guessing policy makers on the effects of vaccines and the public health needs of the vulnerable populations affected by a school district policy. The decision is both wrong and dangerous.

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vaccine-mandates/?utm_source [https://perma.cc/3FKM-M9C3]; *see also* Saranac Hale Spencer, *Posts Misrepresent Ruling on COVID-19 School Mandate Lawsuit*, FACTCHECK.ORG (June 18, 2024), https://www.factcheck.org/2024/06/scicheck-posts-misrepresent-ruling-on-covid-19-school-mandate-lawsuit/ [https://perma.cc/4GCN-2SM5]; Madison Czopek, *RFK Jr. Claimed the 9th Circuit Ruled Vaccine Mandates Unconstitutional. That's False.*, POLITIFACT (June 18, 2024), https:// www.politifact.com/factchecks/2024/jun/18/robert-f-kennedy-jr/rfk-jr-claimed-the-9th-circuit-ruled-vaccine-manda/ [https://perma.cc/8AYW-LKZ4].

[79] *Leslie Speaks with Jeffrey Tucker About HFDF's Win in the 9th Circuit Court of Appeals*, HEALTH FREEDOM DEF. FUND (June 14, 2024), https://healthfreedomdefense.org/leslie-and-jeffrey-tucker-hfdf-win-in-the-9th-circuit/ [https://perma.cc/Q7HH-NYE4].