

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VICTOR M. BOOTH, <i>et al.</i> ,)	
Plaintiff,)	
v.)	
MURIEL BOWSER, <i>et al.</i> ,)	No. 1:21-cv-01857-TNM
Defendants.)	

**AMICUS CURIAE BRIEF OF ASSOCIATION OF AMERICAN
PHYSICIANS & SURGEONS IN SUPPORT OF PLAINTIFFS’ MOTION
FOR PRELIMINARY INJUNCTION AND IN OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS**

Andrew L. Schlafly
General Counsel
Ass’n of American Physicians & Surgeons
939 Old Chester Rd.
Far Hills, NJ 07931
Tel: (908) 719-8608
Fax: (908) 934-9207 (fax)
Email: aschlafly@aol.com

Lawrence J. Joseph, D.C. Bar No. 464777
Law Office of Lawrence J. Joseph
1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amicus Curiae Association of
American Physicians & Surgeons*

TABLE OF CONTENTS

Table of Authorities i

Certificate Required by Local Rules LCVR 7(o)(5) and 7.1 iv

Introduction.....1

Summary of Argument1

Factual Background2

Argument4

I. The Act is unconstitutional.4

 A. The Act violates parents’ fundamental right to raise their children.....4

 B. The Act violates First Amendment religious freedom.....6

 C. *Jacobsen* does not save the Act from constitutional scrutiny.7

 D. Vaccines’ undisputed harms to *some* people require individual informed consent from *all* people.9

II. The approach taken by the AMA *Amici* brief would open the door to the slippery slope of exploitation.....12

Conclusion14

TABLE OF AUTHORITIES

CASES

Bellotti v. Baird, 428 U.S. 132 (1976)5

Bellotti v. Baird, 443 U.S. 622 (1979)5

Bristol Reg’l Women’s Ctr., P.C. v. Slatery, 7 F.4th 478 (6th Cir. 2021)9

Bolling v. Sharpe, 347 U.S. 497 (1954).....9

Buck v. Bell, 274 U.S. 200 (1927).....7

City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983).....5

Fields v. Palmdale School District, 427 F.3d 1197 (9th Cir. 2005). 5-6

Hodgson v. Minnesota, 497 U.S. 417 (1990).....5

Jacobson v. Massachusetts, 197 U.S. 11 (1905)..... 7-8

Kozup v. Georgetown Univ., 851 F.2d 437 (D.C. Cir. 1988)9

L. v. Matheson, 450 U.S. 398 (1981).....5

Meyer v. Nebraska, 262 U.S. 390 (1923) 1, 5-6

Nat’l Fed’n of Indep. Bus. v. DOL, 142 S.Ct. 661 (2022) 6, 11-12

Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990).....5
Phillips v. City of New York, 775 F.3d 538 (2d Cir. 2015)..... 7-8
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 1, 5-6
Planned Parenthood Ass’n v. Ashcroft, 462 U.S. 476 (1983)5
Planned Parenthood Fed’n, Inc. v. Schweiker, 559 F.Supp. 658 (D.D.C. 1983).....5
Roman Catholic Diocese v. Cuomo, 141 S.Ct. 63 (2020).....4
Skinner v. Oklahoma, 316 U.S. 535 (1942)7
Troxel v. Granville, 530 U.S. 57 (2000) 4-5
Union P.R. Co. v. Botsford, 141 U.S. 250 (1891).....9
Washington v. Glucksberg, 521 U.S. 702 (1997)9
Workman v. Mingo Cty. Bd. of Educ., 419 F. App’x 348 (4th Cir. 2011)8

STATUTES

U.S. CONST. amend. I.....6
 U.S. CONST. amend. V9
 U.S. CONST. amend. V, cl. 49
 U.S. CONST. amend. XIV4
 U.S. CONST. amend. XIV, §1, cl. 4.....4, 9
 D.C. CODE § 38-506(1).....6
 Minor Consent for Vaccinations Amendment Act of 2020, 2019 D.C. Adv. Leg. Serv. 532
 (Dec. 23, 2020)..... 1, 4-9, 12-14
 N.Y. PUB. HEALTH LAW § 2504 (2012)14

RULES AND REGULATIONS

Local Rule 7(o)(5).....1
 FED. R. APP. P. 29(a)(4)(E)1

OTHER AUTHORITIES

1 *Corinthians* 3:176
An in-depth look at kids and COVID vaccines with Sandra Fryhofer, MD, AMA
 (Nov. 8, 2021)11
 Sara Berg, “What to tell patients about myocarditis after COVID-19 vaccination”
 (July 13, 2021).....4
 Emily J. Brown, *Note: When Insiders Become Outsiders: Parental Objections to Public
 School Sex Education Programs*, 59 DUKE L.J. 109 (2009) 5-6

Roger Collier, “American Medical Association Woes Continue,” 183 CMAJ E713 (Aug. 9, 2011).....13

Tara Dahl, *Surveys in America’s Classrooms: How Much Do Parents Really Know?*, 37 J.L. & EDUC. 143 (2008)5

Elliott M. Davis, *Recent Case: Unjustly Usurping the Parental Right: Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), 29 HARV. J. L. & PUB. POL’Y 1133 (2006).....5

Maxine Eichner, *School Surveys and Children’s Education: The Argument for Shared Authority Between Parents and the State*, 38 J.L. & EDUC. 459 (2009)5

FDA, Coronavirus (COVID-19) Update: July 13, 2021 3-4

Scott Mclachlan, *et al.*, “Analysis of COVID-19 vaccine death reports from the Vaccine Adverse Events Reporting System (VAERS) Database Interim: Results and Analysis” (June 2021).....3

Matthew Oster, M.D., *et al.*, *Myocarditis Cases Reported After mRNA-Based COVID-19 Vaccination in the US From December 2020 to August 2021*, 327 JAMA 331 (Jan. 25, 2022)..... 9-10

CERTIFICATE REQUIRED BY LOCAL RULES LCVR 7(o)(5) AND 7.1

Consistent with FED. R. APP. P. 29(a)(4)(A) and Local Rule 7(o)(5), I, the undersigned counsel of record for *amicus curiae* Association of American Physicians & Surgeons (“AAPS”) certify that, to the best of my knowledge and belief: (1) AAPS has no parent corporation; and (2) no publicly traded company owns stock in AAPS. These representations are made in order that judges of this Court may determine the need for recusal.

Dated: February 4, 2022

Respectfully submitted,

Andrew L. Schlafly
General Counsel
Ass’n of American Physicians & Surgeons
939 Old Chester Rd.
Far Hills, NJ 07931
Tel: (908) 719-8608
Fax: (908) 934-9207 (fax)
Email: aschlafly@aol.com

Lawrence J. Joseph, D.C. Bar No. 464777
Law Office of Lawrence J. Joseph
1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amicus Curiae Association of
American Physicians & Surgeons*

INTRODUCTION

For the reasons set forth in the accompanying motion, *amicus curiae* Association of American Physicians & Surgeons (“AAPS”) seeks leave to file this *amicus* brief in support of the plaintiffs’ motion for a preliminary injunction (ECF #33) and their opposition (ECF #39) to the defendants’ motion to dismiss (ECF #36).¹ The challenged law, the District of Columbia’s Minor Consent for Vaccinations Amendment Act of 2020, 2019 D.C. Adv. Leg. Serv. 532 (Dec. 23, 2020) (the “Act”), is unconstitutional and should be enjoined.

SUMMARY OF ARGUMENT

The requirement of informed consent is as fundamental to medical ethics as it is to law. A medical procedure without informed consent constitutes battery, and minors are generally incapable of making legal decisions or providing informed consent. Constitutional rights of due process, free exercise of religion, and *Meyer-Pierce* doctrine protect families against infringement on this essential liberty. Nothing in the *amicus* brief submitted by the American Medical Association (“AMA”) and its ideologically aligned medical groups (“AMA *Amici*”) justifies the violation of these rights by the Act, which should therefore be enjoined.

The Act improperly bypasses and overrides parental informed consent concerning a medical injection (a Covid vaccine) of children as young as 11 years. There is no emergency justification for this. Moreover, if this were allowed, there is no stopping point against future infringements with other medical injections or treatments. The Act is conceptually similar to the notorious mandatory sterilization of a woman a century ago, pursuant to Virginia law, because she

¹ Consistent with FED. R. APP. P. 29(a)(4)(E) and Local Rule 7(o)(5), counsel for the *amicus curiae* authored the motion and brief in whole, and no counsel for a party authored the motion or brief in whole or in part, nor did any person or entity, other than the *amicus* and its counsel, make a monetary contribution to preparation or submission of the motion or brief.

was perceived not to be smart enough. Robust individual rights today stand against that sort of collectivism.

By arguing against traditional parental informed consent, the AMA *Amici* brief (ECF #38) takes an approach that could justify all sorts of atrocities under the guise of medicine. What is allowed today in the name of forced vaccination of children could be justified tomorrow in the name of sexual identity, eugenics, or population control. The safeguard against such abuses is the requirement of individual informed consent, which must be first obtained from parents about their own children. Constitutional individual rights reinforce this well-established principle of medical ethics that requires informed consent before performing a medical procedure on a patient.

FACTUAL BACKGROUND

It is undisputed that the Covid-19 vaccine causes some harm to some people. The AMA *Amici* brief does not and cannot deny this. As of January 21, 2022, the Vaccine Adverse Event Reporting System (“VAERS”) maintained by the federal Food and Drug Administration (“FDA”) showed reported deaths from the Covid-19 vaccine as more than doubling the reported deaths reported on all other vaccines combined since 1990. Although the VAERS data are not posted in an easy-to-read format,² a reliable website posts the data in summary form as follows:³

Category of Harm Reported after Covid-19 Vaccination	COVID19 vaccines (Dec. 2020 – present)
Number of Adverse Reactions	1,071,856

² The VAERS data are available here: <https://vaers.hhs.gov/data.html> (last viewed Feb. 4, 2022).

³ <https://vaersanalysis.info/2022/01/28/vaers-summary-for-covid-19-vaccines-through-01-21-2022/> (last viewed Feb. 4, 2022).

Category of Harm Reported after Covid-19 Vaccination	COVID19 vaccines (Dec. 2020 – present)
Number of Life-Threatening Events	25,776
Number of Hospitalizations	121,597
Number of Deaths	22,607
Permanent Disabilities after Vaccination	40,069
Office Visits after Vaccination	166,737
Emergency Room/Department Visits	115,237
Birth Defects after Vaccination	870

Rational decision-makers should consider these government-reported data in choosing whether to receive the Covid-19 vaccine. The AMA *Amici* do not argue that there is anything unreliable about the VAERS data. The AMA *Amici* do not assert any kind of anti-vax conspiracy theory that would somehow inflate these massive VAERS numbers. Rather, British researchers analyzed the VAERS data and published a report in June 2021 confirming the reliability of this data, “[c]ontrary to claims” of unreliability.⁴ Although the AMA would ignore these data, ignoring the government data does not make it go away.

The FDA itself has expressly relied on VAERS data,⁵ and thus parents may properly rely

⁴ Scott McIlachlan, *et al.*, “Analysis of COVID-19 vaccine death reports from the Vaccine Adverse Events Reporting System (VAERS) Database Interim: Results and Analysis” (June 2021) (available at https://www.researchgate.net/publication/352837543_Analysis_of_COVID-19_vaccine_death_reports_from_the_Vaccine_Adverse_Events_Reporting_System_VAERS_Database_Interim_Results_and_Analysis, last viewed Feb. 4, 2022).

⁵ FDA, Coronavirus (COVID-19) Update: July 13, 2021 (discussing concerns over VAERS reports of Guillain-Barre syndrome following vaccination) (available at [https://www.fda.gov/coronavirus/coronavirus-covid-19-update-july-13-2021](#)) (Footnote cont'd on next page)

on VAERS, too. Although the VAERS system and data are frequently referenced in state and federal litigation, a public-school administrator or health-care employee may have no awareness of or interest in the VAERS injury data concerning the Covid-19 vaccine. On its website, the AMA admitted on July 13, 2021, that in only about two months there were more than 1,000 cases reported in VAERS of myocarditis and pericarditis after Covid-19 vaccination in the United States, many in teenage recipients, “with more than 300 cases confirmed.”⁶ That is a confirmation rate of 30% of the VAERS data, which is sufficient to justify parental concern about potential harm from the Covid-19 vaccine for their children, whose risk of being harmed by Covid-19 itself is very small.

ARGUMENT

I. THE ACT IS UNCONSTITUTIONAL.

As the Supreme Court recently explained in another Covid-related case, “even in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Catholic Diocese v. Cuomo*, 141 S.Ct. 63, 68 (2020). The Act is unconstitutional in several respects and should be enjoined.

A. The Act violates parents’ fundamental right to raise their children.

The Act violates the Constitution by negating parental consent for medical treatment. “It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000). “The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of

<https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-july-13-2021>, last viewed Feb. 4, 2022).

⁶ Sara Berg, “What to tell patients about myocarditis after COVID-19 vaccination” (July 13, 2021) (available at <https://www.ama-assn.org/delivering-care/public-health/what-tell-patients-about-myocarditis-after-covid-19-vaccination>, last viewed Feb. 4, 2022).

the fundamental liberty interests recognized by this Court.” *Id.* at 65.

There is no exception to this rule here for a so-called “mature minor,” which is a concept used by the Supreme Court only in the abortion context concerning bypassing parental consent when the minor is pregnant.⁷ The theory of “mature minor” as argued by the AMA *Amici* brief here has no application to the issue of vaccination, which entails medical issues of contraindication of which most children would be unaware. (AMA Br. 10, relying heavily on “mature minor” doctrine; citing the Guttmacher Institute, which focuses on the abortion issue, for bypassing parental consent for minors); *see also Planned Parenthood Fed’n, Inc. v. Schweiker*, 559 F.Supp. 658, 670 (D.D.C. 1983) (Planned Parenthood Federation of America member affiliates use Title X funds to supply “unemancipated *mature minor* patients age 17 or under”) (emphasis added). The term “mature minor” was based in part on alleged fear by a pregnant child of potential harm by a parent, but no comparable harm exists in this context of the pending challenge to the Act.

The *Troxel* Supreme Court decision in favor of parental rights built on a pair of two early 20th-century decisions known as *Meyer-Pierce* doctrine. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In a widely criticized statement never adopted by the Supreme Court,⁸ the Ninth Circuit sought to establish that *Meyer-Pierce* doctrine

⁷ *See Bellotti v. Baird*, 443 U.S. 622, 646 n.27 (1979); *L. v. Matheson*, 450 U.S. 398, 408 (1981); *Bellotti v. Baird*, 428 U.S. 132, 145 (1976); *Hodgson v. Minnesota*, 497 U.S. 417, 430 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 523 (1990); *Planned Parenthood Ass’n v. Ashcroft*, 462 U.S. 476, 491 (1983); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 468-70 (1983).

⁸ *See, e.g.,* Tara Dahl, *Surveys in America’s Classrooms: How Much Do Parents Really Know?*, 37 J.L. & EDUC. 143 (2008); Maxine Eichner, *School Surveys and Children’s Education: The Argument for Shared Authority Between Parents and the State*, 38 J.L. & EDUC. 459 (2009); Elliott M. Davis, *Recent Case: Unjustly Usurping the Parental Right: Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), 29 HARV. J. L. & PUB. POL’Y 1133 (2006); Emily J. Brown, *Note: When Insiders Become Outsiders: Parental Objections to Public School Sex Education*

(Footnote cont’d on next page)

does not extend “beyond the threshold of the school door.” *Fields v. Palmdale School District*, 427 F.3d 1197, 1207 (9th Cir. 2005). Even if that were correct statement of Supreme Court doctrine—and it is not—*Fields* would not aid Defendants here. As the Supreme Court recognized in staying the Occupational Safety and Health Administration (“OSHA”) vaccine mandate, “vaccination[s] ... cannot be undone at the end of the workday.” *Nat’l Fed’n of Indep. Bus. v. DOL*, 142 S.Ct. 661, ___ (2022) (interior quotation marks omitted). As in the OSHA context, a school-based mandate imposes irreversible medical treatment that extends far beyond the threshold of the school door.

B. The Act violates First Amendment religious freedom.

Meyer-Pierce doctrine is not the only constitutional flaw in the Act. The Free Exercise Clause also stands against it, as substantial numbers of families have religious objections to vaccination, including vaccines derived from aborted fetuses. District of Columbia law generally recognize the validity of a religious objection to vaccination, D.C. CODE § 38-506(1), yet the Act denies the ability of parents to assert it on behalf of their children. A young child cannot be expected to know how to assert a religious objection to a vaccine along with the theological bases for it. This is a basic religious right concerning the Covid-19 vaccine as an irreversible procedure on the body, which some consider to be the temple of God: “If anyone destroys God’s temple, God will destroy him. For God’s temple is holy, and you are that temple.” 1 *Corinthians* 3:17 (ESV). The Act directly infringes on the ability of parents to assert the religious rights of their own family against this invasion of their bodily integrity considered to be holy.

The right of due process is also violated by the Act, as public schools and other governmental entities are plainly state actors. By authorizing medical treatment on children

Programs, 59 DUKE L.J. 109, 121-124 (2009) (citing *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005)).

without a notice and opportunity for the parents to object, the Act denies a liberty interest, without due process of the law. Horrific abuses become possible by state actors if this violation of the due process rights of parents were allowed as a matter of constitutional law, as discussed further in Point II below. A young child cannot ever be expected to assert his or her full constitutional rights, and it is doubtful that governmental authorities would be persuaded by arguments by a young child anyway. Schools are designed to tell students what to do, rather than defer to the students' own preferences. Notice and opportunity to be heard by a child, without involvement by his parents, is plainly insufficient.

C. Jacobsen does not save the Act from constitutional scrutiny.

Defendants rely heavily on *Jacobson v. Massachusetts*, where a divided Supreme Court upheld a state law that merely imposed a small fine on adults who declined to be vaccinated. 197 U.S. 11 (1905). *Jacobson* was then used to justify inhumane mandatory sterilization under Virginia law, in *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.”) (citing *Jacobson*). These decisions do not survive the expansion in individual rights during the last century, and within decades of *Buck v. Bell* the Supreme Court itself was implicitly rejecting its approach. See *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring) (“There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority ...”).

Defendants and the AMA *Amici* notably omit any reference to *Buck v. Bell*, while the authorities cited by Defendants do not support the Act's deprivation of due process, religious freedom, and other constitutional rights of parents with respect to their children. Defendants quote *Phillips v. City of New York*, for the proposition that “New York could constitutionally require that all children be vaccinated in order to attend public school.” 775 F.3d 538, 543 (2d Cir. 2015).

Similarly, Defendants rely on *Workman v. Mingo Cty. Bd. of Educ.*, quoting it for “following the reasoning of *Jacobson* and *Prince*,” where the court stated, “we conclude that the West Virginia statute requiring vaccinations as a condition of admission to school does not unconstitutionally infringe [the plaintiff’s] right to free exercise.” 419 F. App’x 348, 353–54 (4th Cir. 2011). Neither *Phillips* nor *Workman* insulate the Act. Unlike the front-door requirements in *Phillips* and *Workman* that barred enrollment without the required immunizations, the Act purports to allow back-door vaccination of minors without informed parental consent or notice. That denies parents the option to decline the vaccination or to transfer their children to another school. Thus, the Act goes far beyond the “condition of admission” in *Phillips* and *Workman* and instead imposes a medical treatment without informed consent and without even informing parents.

In the instances where courts allow the public welfare to override individual autonomy, courts have relied on medical procedures recognized as safe:

The only ‘competent evidence’ that could be presented to the court to prove these propositions was the testimony of experts, giving their opinions. ... [The judge] would have considered this testimony of experts in connection with the facts that *for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox; that while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity.*

Jacobson, 197 U.S. at 23-24 (emphasis added). Moreover, the *Jacobson* statute had an exception for adolescents: “the statute, as interpreted by the state court, [made] an exception in favor of children.” *Id.* at 30. Here, as elaborated below, the Covid vaccines have nothing like the century of safe use that formed the basis for *Jacobson*.

D. Vaccines’ undisputed harms to some people require individual informed consent from all people.

Both the Due Process Clause and the common law protect the right to bodily integrity. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (discussing “traditional right to refuse unwanted lifesaving medical treatment”);⁹ *Union P.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (“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.”). Performing a medical procedure without informed consent is an assault, and—for minors—“the relevant consent is that of the parents.” *Kozup v. Georgetown Univ.*, 851 F.2d 437, 439 (D.C. Cir. 1988) (citing *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941)). As recently restated by a Sixth Circuit opinion in reliance on testimony by a professor in academic medicine:

informed consent in the medical context generally requires ensuring that (1) the patient is given information about the procedure or treatment, (2) the patient is competent to consent to or refuse treatment, and (3) coercion has not been employed to obtain assent.

Bristol Reg’l Women’s Ctr., P.C. v. Slatery, 7 F.4th 478, ___, 2021 U.S. App. LEXIS 23221, at *33-34 (6th Cir. 2021) (Moore, J., dissenting) (No. 20-6267). Informed consent is required for vaccinations, and the Act seeks to short circuit that consent.

All admit, at least tacitly, that it is not in the interest of every child to be vaccinated. Recently the *Journal of the American Medical Association* (“JAMA”) published a report that “the risk of myocarditis after receiving mRNA-based COVID-19 vaccines was increased ... [and] was

⁹ Even if the District of Columbia is not a “state” covered by the Fourteenth Amendment, it remains subject to the same requirements under the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

highest after the second vaccination dose in adolescent males and young men. *This risk should be considered in the context of the benefits of COVID-19 vaccination.*” Matthew Oster, M.D., *et al.*, *Myocarditis Cases Reported After mRNA-Based COVID-19 Vaccination in the US From December 2020 to August 2021*, 327 JAMA 331, 338 (Jan. 25, 2022) (emphasis added). The lead author of that paper, Dr. Oster, works at the Centers for Disease Control and Prevention.

No one denies the existence of individualized medical contraindications to the Covid vaccines, and nearly no one denies the validity of some religious objections. The child’s parents, with the advice of their own family physician, are the ones to make that decision, not a school administrator based on a perception about what might be best for the school overall. The child’s parents bear the entire burden of the consequences of these decisions, while immunity from liability often denies recovery from any harm done.

In light of the harm caused by the Covid-19 vaccine to some recipients, informed consent is essential. Individual medical issues, such as allergies and other contraindications to vaccination, must be considered when deciding whether a particular individual should receive a particular vaccine. The relative lack of evidence about the potential harm caused by the Covid-19 vaccine on fertility is another reason to require informed consent. Is the Covid-19 vaccine causing reproductive or prenatal injuries, or even sterilization? Only individuals can properly assess that risk that for themselves, and only parents can make that decision for their children. Yet the reasoning advocated by the AMA *Amici* brief supports mandating the vaccine if authorities were to speculate that its overall good was greater than its overall harm, despite severe individual harm in some recipients.

In addition to omitting any reference to the VAERS data, the AMA *Amici* brief fails even to address the possibility of “harm” by the Covid-19 vaccine to anyone. Instead, the references to

“harm” in the AMA *Amici* brief are to an alleged, but largely non-existent, harm caused by parents to their *own* children. (AMA Br. 2, 8) On its website the AMA is more candid, admitting that “About half of parents say they’re likely to get their child vaccinated and it’s no big surprise that intent to vaccinate strongly correlated with the parent’s vaccination status. Safety concerns were the most frequent reason for vaccine hesitancy” *An in-depth look at kids and COVID vaccines with Sandra Fryhofer, MD*, AMA (Nov. 8, 2021).¹⁰ Combining the AMA *Amici* brief with its admissions on its own website implies that some think about half of American parents are harming their children simply by rejecting the Covid vaccine for them.

As observed by Justice Alito at oral argument on January 7, 2022, in the employer vaccinate-or-test mandate case, there is undisputed harm caused by the Covid-19 vaccine:

JUSTICE ALITO: [T]hese vaccines and every other vaccine of which I’m aware and many other medications have benefits and they also have risks and that some people who are vaccinated and some people who take medication that is highly beneficial will suffer adverse consequences? Is that not true of these vaccines? And if that is – is that true?

SOLICITOR GENERAL PRELOGAR: That can be true, but, of course, there is far, far greater risk from being – ...

JUSTICE ALITO: Right. There is some risk, do you dispute that?

GENERAL PRELOGAR: There can be a very minimal risk with respect to some individuals, but – but, again, I would emphasize that I think that – there would be no basis to think that these FDA-approved and authorized vaccines are not safe and effective. They are the single-most effective.

JUSTICE ALITO: ... There is a risk, right? Has any other – has OSHA ever imposed any other safety regulation that imposes some extra risk, some different risk, on the employee, so that if you have to wear a hard hat on the job, wearing a hard hat has some adverse health consequences? Can you think of anything else that’s like this?

¹⁰ <https://www.ama-assn.org/delivering-care/public-health/depth-look-kids-and-covid-vaccines-sandra-fryhofer-md> (last viewed Feb. 4, 2022).

GENERAL PRELOGAR: I can't think of anything else that's precisely like this, but I think that to suggest that OSHA is precluded from using the most common, routine, safe, effective, proven strategy to fight an infectious disease at work would be a departure from how this statute should be understood.

Oral Argument Transcript, at 105:21-107:17, *Nat'l Fed'n of Indep. Bus. v. DOL*, 142 S.Ct. 661 (2022) (Nos. 21A244, 21A247).¹¹ By a 6-3 margin, the Supreme Court rejected Solicitor General Prelogar's argument, and enjoined the Biden Administration's mandate through the Occupational Safety and Health Administration (OSHA). *Nat'l Fed'n of Indep. Bus. v. DOL*, 142 S.Ct. 661 (2022). Likewise, the Act mandating vaccination without parental informed consent should be enjoined here.

II. THE APPROACH TAKEN BY THE AMA *AMICI* BRIEF WOULD OPEN THE DOOR TO THE SLIPPERY SLOPE OF EXPLOITATION.

The arguments by Defendants and the *AMA Amici*, if adopted, would open the door to a slippery slope of exploitation. Their approach would lead to a litany of objectionable actions that schools and other entities could take in the future without parental consent:

- Psychiatric medication
- Irreversible transgender treatments
- Abortion

The Act, if held to be constitutional, would set a harmful precedent for authorizing whatever might be favored by public health authorities, including all of the above, without parental consent.

By arguing against robust parental informed consent for children, the *AMA Amici* misapply the very narrow exceptions to the general requirement of parental informed consent. The decision about the Covid-19 vaccine, which implicates complex individual issues of medical

¹¹ https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21a244_kifl.pdf (last viewed Feb. 4, 2022).

contraindications and potential religious objections, is plainly one that cannot be made in an informed way by children. Nor is this justified by any emergency.

If administering the controversial Covid-19 vaccine to child without his parent's consent is constitutional, then so is unconsented irreversible treatment of a child with transgender or psychiatric medication. Vaccines against sexually transmitted diseases exist and are becoming increasingly available, and there is no principled distinction between bypassing parental consent for a Covid-19 vaccine and bypassing parental consent for an injection relating to sexuality. Indeed, if eugenics becomes fashionable again as it was a century ago, then a ruling affirming the Act now would become a precedent for also allowing, as a matter of constitutional law, sterilization of children without parental consent.

The AMA *Amici* offer no assurances against this slippery slope, and may be unconcerned about where this leads. The AMA has increasingly taken positions outside of traditional medicine, as when last year the AMA called for the removal of the designation of gender from birth certificates.¹² Also last year the AMA published an “Organizational Strategic Plan to Embed Racial Justice and Advance Health Equity” (2021–2023) that contains many partisan positions.¹³ Membership in the AMA plummeted from 75% of physicians in the early 1950s to only about 15% of physicians a decade ago. *See* Roger Collier, “American Medical Association Woes Continue,” 183 CMAJ E713 (Aug. 9, 2011).¹⁴ Far from representing physicians or their patients, the AMA's

¹² <https://www.webmd.com/a-to-z-guides/news/20210616/remove-sex-from-public-birth-certificates-ama-says> (last viewed Feb. 4, 2022).

¹³ <https://www.ama-assn.org/system/files/2021-05/ama-equity-strategic-plan.pdf> (last viewed Feb. 4, 2022).

¹⁴ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3153537/> (last viewed Feb. 4, 2022).

positions and *amicus* brief align more closely with highly partisan political advocacy that is out of step with mainstream medical practice.

Parents, physicians, and patients can reasonably disagree with the AMA's politicized positions, and parents should get the last word about medical treatments for their own children. There is no doctrine of "mature minor" for selling cigarettes or alcohol to children, or allowing underage sexual activity by minors.

This lack of the ability of a minor to consent to a medical procedure should be particularly true in a school setting, where minors are expected to do what they are told. Teachers are not allowed to have sexual relations with minors, even older ones who are of lawful age to do so, because the teacher-student relationship is inherently coercive. Likewise, minors cannot be expected to provide informed consent when told by a school employee to receive a medical treatment, when the minors may fear punishment if they do not act as they are told. Nor should parental objections be overridden. *See, e.g.,* N.Y. PUB. HEALTH LAW § 2504 (2012) ("a person other than one in a parental relation to the child shall not give consent under this subdivision if he or she has reason to believe that a person in parental relation to the child ... objects to the immunization").

CONCLUSION

The Court should grant Plaintiffs' motion for a preliminary injunction against the Act, and deny Defendants' motion to dismiss.

Dated: February 4, 2022

Respectfully submitted,

Andrew L. Schlafly
General Counsel
Ass'n of American Physicians & Surgeons
939 Old Chester Rd.
Far Hills, NJ 07931
Tel: (908) 719-8608
Fax: (908) 934-9207 (fax)
Email: aschlafly@aol.com

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar No. 464777
Law Office of Lawrence J. Joseph
1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amicus Curiae Association of
American Physicians & Surgeons*