

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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)
 3 DEVAN GRINER,)
)
 4 Plaintiff,)
)
 5 vs.)
)
 6 JOSEPH R. BIDEN, in his official)
 capacity as the President of the)
 7 United States of America; the)
 UNITED STATES OF AMERICA; UNITED)
 8 STATES DEPARTMENT OF HEALTH AND)
 HUMAN SERVICES; XAVIER BECERRA, in)
 9 his official capacity as Secretary)
 of the United States Department of)
 10 Health and Human Services; CENTERS)
 FOR MEDICARE AND MEDICAID SERVICES;))
 11 CHIQUITA BROOKS-LASURE, in her)
 official capacity as Administrator)
 12 for the Centers for Medicare and)
 Medicaid Services; MEENA SESHAMANI,))
 13 in her official capacity as Deputy)
 Administrator and Director of)
 14 Center for Medicare; and DANIEL)
 TSAI, in his official capacity as)
 15 Deputy Administrator and Director)
 of Center for Medicaid and CHIP)
 16 services.)
)
 17 Defendants.)
 -----)

Case No.
2:22-CV-149 DAK

BEFORE THE HONORABLE DALE A. KIMBALL

DATE: JULY 6, 2022

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARINGS

Reporter: REBECCA JANKE, CSR, RMR
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1 JULY 6, 2022

SALT LAKE CITY, UTAH

2 P R O C E E D I N G S

3 * * *

12:26:32 4 THE COURT: All right. We're here this morning in
5 the matter -- on Zoom in the matter of Griner vs. Biden, et
12:35:24 6 al. It's 2:22-CV-149. Let's see.

7 Plaintiff is represented by Mr. George Wentz; is
12:36:00 8 that correct?

9 MR. WENTZ: That's correct, Your Honor, with the
10 Davillier Law Group.

11 THE COURT: And defendants are represented by
12 Mr. Joel McElvain; is that correct?

12:36:12 13 MR. MC ELVAIN: Yes, Your Honor.

14 THE COURT: I have about an hour and a half, which
15 ought to be plenty. I've read the materials. Let's see.
16 We have a motion to dismiss and a motion for preliminary
12:37:46 17 injunction. Mr. McElvain, why don't you start and tell
12:37:59 18 me -- tell me why you think the motion should be -- your
19 motion should be granted to dismiss, and as you're telling
20 me that, you'll tell me why plaintiff shouldn't have a
21 preliminary injunction.

22 And then, Mr. Wentz, you'll tell me the opposite.
23 And if you each don't take too long, you'll have some time
12:38:27 24 to rebut. So you've got 45 minutes each total.

25 Mr. McElvain, go ahead.

1 MR. MC ELVAIN: Thank you, Your Honor. Covid 19
2 has over taken the 1918 Influenza Pandemic as the deadliest
3 disease in American history. It has been particularly
12:38:56 4 deadly for patients at hospitals, nursing homes and other
5 facilities funded by the Medicare and Medicaid programs. In
6 the face of this crisis, perhaps the most basic function
12:39:29 7 that the Secretary of Health and Human Services performs, as
8 the Supreme Court put the matter earlier this year, quote:
9 Is to ensure that the healthcare providers who care for
12:39:51 10 Medicare and Medicaid patients protects their patients'
11 health and safety.

12 That is a quote from the Supreme Court's decision
12:40:52 13 in Biden vs. Missouri from earlier this year. The Secretary
14 exercised this basic function by finding that vaccination of
15 healthcare workers against Covid 19 was necessary for the
12:41:26 16 health and safety of the individuals to whom care and
17 services are furnished. That, again, is a quote from the
18 Biden vs. Missouri decision, which in turn is quoting the
12:42:17 19 Secretary's Federal Register Notice. That determined --
12:43:42 20 excuse me. That determination, was based on data showing
21 that the Covid 19 virus can spread rapidly amongst
12:44:50 22 healthcare workers and from them to patients.

23 THE COURT: When you --

12:45:57 24 MR. MC ELVAIN: And that such --

25 THE COURT: Excuse me, Mr. McElvain.

1 MR. MC ELVAIN: Yes, Your Honor.

2 THE COURT: When you're reading something, you
3 might have to slow down. Remember we have a reporter that
4 has to take down everything that you say.

5 MR. MC ELVAIN: Thank you, Your Honor. I will try
6 to do that.

12:46:26 7 That determination was based on data showing that
8 the Covid 19 virus can spread rapidly amongst healthcare
12:46:56 9 workers, and from them to patients, and that such spread is
10 more likely when healthcare workers are unvaccinated.

11 Again, I am quoting from the Supreme Court's
12:47:11 12 decision in Biden vs. Missouri. On the basis of these
13 findings, the Secretary issued a rule that conditions
12:47:56 14 federal funding for a healthcare facility on that facility's
15 development of policies to ensure its healthcare staff
16 either obtain vaccination or claim an exemption from doing
12:48:16 17 so. The Supreme Court has upheld both the Secretary's
18 statutory authority to issue that rule and his rational
19 basis for doing so. Again in the Biden vs. Missouri
20 decision.

12:49:00 21 THE COURT: Mr. McElvain, let me ask you to comment
22 on the --

23 MR. MC ELVAIN: Yes, Judge.

24 THE COURT: -- on the plaintiff's apparent position
25 that -- that these are not really vaccinations, they are

12:49:21 1 some form of a medical treatment.

12:50:22 2 MR. MC ELVAIN: Yes, Your Honor. So, as the Court
3 is aware, under the Jacobson decision from the Supreme
4 Court, which is a 1905 decision of the Supreme Court, which
5 is still good law today, there is no due process right to
6 avoid vaccination. And to apply modern day constitutional
7 law parlance to the Jacobson holding, the Supreme Court
12:50:56 8 applied rational basis review to a vaccination requirement.
9 The Secretary's rule here easily satisfies rational basis
12:51:28 10 review because there is ample evidence to show that the
11 vaccines are effective in protecting against Covid 19 and
12:51:39 12 preventing the spread of Covid 19.

13 Now, as I understand the plaintiff's argument, the
12:52:26 14 plaintiff argues that the Jacobson rule should not apply
15 because in his view the Covid 19 vaccinations are more akin
12:52:55 16 to medical treatment rather than vaccines. So the plaintiff
17 cites the Supreme Court's decision in Cruzan, C-r-u-z-a-n,
12:53:27 18 which recognized, at least in dicta, a due process interest
12:54:28 19 in avoiding unwanted medical treatment. But even the Cruzan
20 case itself, in that case the Supreme Court cited Jacobson
21 for the proposition that any such liberty interest is
22 outweighed by the government's interest in preventing
12:54:48 23 disease by requiring or encouraging vaccinations.

12:55:57 24 The plaintiff argues that Covid 19 vaccinations are
25 medical treatment rather than vaccinations because the

1 vaccines are not, in his view, effective. But the central
12:56:17 2 point of the Jacobson case itself is that Courts lack the
3 institutional capacity to second-guess policy makers as to
12:56:52 4 whether vaccines are effective in preventing disease. Enter
5 the facts of the Jacobson case itself. That case involved a
6 criminal prosecution, and the defendant there had argued
12:57:26 7 that some doctors did not believe that vaccinations would
8 prevent the spread of smallpox, but the Supreme Court held
12:58:02 9 that it is the role of policy makers, not the Courts, to
10 evaluate opposing theories of how best to, quote, meet and
12:58:22 11 suppress the evil of a smallpox epidemic that imperils an
12 entire population, end quote.

12:59:14 13 The Supreme Court went on to acknowledge the,
14 quote, possibility -- again I am quoting from the Jacobson
15 opinion -- the possibility that this belief may be wrong;
16 that is the belief that vaccines were effective, and that
13:00:24 17 science may yet show it to be wrong, end quote, but held
18 this was -- again, I am quoting -- held this was not
13:01:00 19 conclusive, for the legislature has the right to pass laws
20 which, according to the common belief of the people, are
21 adapted to prevent the spread of contagious diseases.

13:01:31 22 I would refer the Court also to the District of New
23 Mexico opinion in the Valdez case, which was recently
24 affirmed in an unpublished opinion by the Tenth Circuit
25 which analyzed Jacobson along these lines.

1 So essentially the Supreme Court in Jacobson
13:02:30 2 applies purely rational basis review and, again, the
3 Secretary has ample grounds, certainly at least a rational
4 basis to conclude that vaccines are effective in controlling
13:02:53 5 the spread of SARS-CoV-2, the virus that causes Covid 19.
6 And, again, the Supreme Court has already essentially told
7 us that because the Supreme Court upheld a challenge to this
8 same rule on arbitrary and capricious grounds when it
13:04:21 9 followed that if the Rule was not arbitrary or capricious
10 for purposes of the Investigative Procedure Act, the same
11 analysis leads to the conclusion that the Rule is -- is
13:04:57 12 rational for purposes of due process review.

13 So, just to briefly recount the evidence -- and let
14 me pause. Can you still hear me, Your Honor?

13:05:30 15 THE COURT: I can.

16 MR. MC ELVAIN: Okay. Thank you, Your Honor. So
17 to briefly review the evidence, as the Secretary recounted
18 in the Rule itself, the Covid 19 vaccines are effective in
19 preventing serious outcomes of the disease. They offer
20 strong protection against hospitalization and death. They
13:05:57 21 are particularly effective in preventing infection among
22 front line workers and vaccinated people with breakthrough
23 infections may be less infectious than unvaccinated
24 individuals, resulting in fewer transmission opportunities
13:06:17 25 for the virus. These are from pages 61565, 61585, 61558 of

1 the Federal Register Notice that the Secretary issued in
13:06:38 2 November of last year, and we cited portions of the Rule in
3 our brief.

4 Even after November, 2021, when the Rule was
5 issued, the evidence continues to show that vaccines are
13:15:57 6 effective. The vaccinated are better protected against the
7 virus than are unvaccinated. Even today the evidence
8 continues to show the Covid 19 hospitalization rate for
13:16:28 9 unvaccinated adults even after the emergence of the Omicron
13:17:24 10 variant this year, it's five times higher than that for
11 fully vaccinated people without a booster. And that's the
12 evidence that we have cited to in our brief that I refer you
13:17:43 13 to in our motion to dismiss.

14 The vaccines also protect against reinfection for
15 persons who have previously been affected with the Covid 19
13:18:29 16 virus under the April 15, 2022 study that we cited in our
17 briefs to that effect. And furthermore, the most recent
18 evidence also indicates that the vaccinated are less likely
19 to transmit the virus, including the Omicron variant of the
13:18:53 20 virus, than are the unvaccinated. Again, we have cited
21 numerous studies in our briefs to this effect.

22 So the plaintiff responds -- as I understand the
23 plaintiff's argument, the plaintiff responds with -- with
13:19:19 24 some, you know, scientific data of his own, and I think I
25 should begin by noting that nothing that the plaintiff cites

1 changes the analysis here one way or the other. Even if --
13:19:56 2 even if you take the plaintiff's argument at his own terms,
3 all he has shown is there may be some dispute within the
4 scientific community as to how effective the vaccines are.
5 Under the Rule of Jacobson, this is simply irrelevant. Only
6 rational basis review applies here, and so long as the
7 Secretary has a reason to believe that there is some
13:20:22 8 evidence out there that supports the view that are
9 vulnerable patients will be protected, that is really all
10 that matters for rational basis review.

13:20:52 11 In any event, the plaintiff mis-cites his own
12 sources. For example, he relies heavily on recent documents
13:21:14 13 from the FDA from December 2020 when the vaccines were being
14 presented for their initial proof or initial authorization.
15 But, again, that's data from December 2020, and the fact
16 that it's not yet known at that time how effective the
17 vaccines were in preventing transmission is simply beside
13:21:58 18 the point because this is a rule that was issued 11 months
19 later, on November 20, 2021, at which time substantial
20 evidence of protection against transmission had been
21 developed.

22 Plaintiff also refers to a study that he claims
13:22:25 23 shows that the vaccines have negative efficacy; that is,
24 that the vaccines actually increase the likelihood a person
25 would transmit -- would come down with Covid 19. This is

1 Exhibit T to plaintiff's reply brief. But the study simply
2 does not say that. What the study says is that it initially
13:22:53 3 found a negative result which was based on data anomalies,
4 and a fuller, broader review of the data actually confirmed
5 that the vaccines are effective. I would urge the Court to
6 look at pages 11 and 12 of Exhibit T to plaintiff's reply
7 which demonstrates that point.

13:24:54 8 So at bottom plaintiff's argument seems to be
9 impercibly based on the notion that a vaccine must be 100
13:25:17 10 percent effective to qualify as a vaccine. But this isn't
13:26:28 11 the standard, and no vaccine, even the one against smallpox
12 at issue in Jacobson, could possibly meet that standard.
13 Instead, the important point here is that the vaccines help
13:27:00 14 to protect vulnerable populations, patients in hospitals,
15 residents in nursing homes and other patients at other
16 facilities funded by the Medicare and Medicaid programs.
17 And they protect them from the deadliest disease in American
18 history. At the very least, the Secretary could rationally
13:27:28 19 so conclude. It defeats plaintiff's due process claim.

20 THE COURT: Let me ask you this. I think you
21 mentioned this, but one of plaintiff's arguments, as I
22 understand it, is that even if it's reasonable and legal to
13:27:59 23 require vaccinations for people who have not been previously
24 affected with Covid that, since he has, then he shouldn't be
13:28:12 25 required to be vaccinated.

13:28:55 1 MR. MC ELVAIN: That is a fair statement of
2 plaintiff's claim that is incorrect, both from the evidence
3 we know today, and even the evidence that was available to
4 the Secretary in November 2021. We know that the vaccines
5 are effective in preventing Covid 19 or helping to prevent
6 Covid 19, even among those who were previously infected.

13:29:27 7 The Secretary so found that in his rule, as we have cited to
8 the portions of the Rule in the briefs based on the
9 scientific evidence available to him at the time, and there
10 is an April 15, 2022 study which confirms this point, that
11 vaccines protect against reinfection for persons who have
12 previously been affected with the SARS-CoV-2 virus. That
13:29:59 12 cite specifically is ENT Plumb, et al., P-l-u-m-b. The
13:30:15 13 cite specifically is ENT Plumb, et al., P-l-u-m-b. The
14 title of the study is Effectiveness of Covid 19 MRNA
15 Vaccination in Preventing Covid 19 Associated
13:30:59 16 Hospitalizations Among Adults With Previous SARS-CoV-2
17 Infections, United States June 21 to February 2022.

13:31:20 18 That's a mouthful, I acknowledge, but that full
19 citation appears in our brief, so I would refer you to our
13:31:53 20 briefs for the citation there. So the bottom line is there
21 is evidence there is at least a rational basis, but there is
22 certainly quite a bit of evidence to show that the vaccines
23 are effective in -- in preventing Covid 19 both among people
24 who have never had the disease before and among people who
13:32:30 25 have experienced a prior infection.

1 THE COURT: Don't you also argue about standing and
2 ripeness here?

3 MR. MC ELVAIN: Yes, Your Honor. I'll turn to that
4 if the Court so prefers. To begin with standing, standing
5 requires an actual or threatened injury that is both real
13:32:59 6 and immediate. If you look at the allegations of the
7 Complaint, the Complaint alleges simply that the hospital in
8 which he, plaintiff, has a right to practice, receives EMS
13:33:23 9 funding, that's paragraph 41 of the Complaint. That's it.
10 That is the only allegation of the Complaint. This is not
13:33:36 11 enough because an Article III injury must be more than a
12 possibility. That's a quote from the Essence, Ink case of
13:34:46 13 the Tenth Circuit.

14 Rather, a plaintiff must show that his -- it has
15 sustained or is immediately in danger of sustaining some
13:35:59 16 direct injury.

17 The Complaint does not contain any allegations that
18 any hospital has suspended or revoked plaintiff's practice
13:36:26 19 privilege or even has discussed with him whether his
20 privileges would continue if he does not obtain vaccination
21 for Covid 19.

22 So the Complaint simply does not, within its four
23 corners, show any injury in fact. And I refer the Court
13:36:53 24 again to the Essence Ink case in which the Tenth Circuit
25 held that where a plaintiff's claim involved suspension for

1 revocation of a right or privilege, which is what the claim
13:37:23 2 is here, on an allegedly unconstitutional basis, the
3 plaintiff must allege either that a party has sought to
4 suspend or revoke the privilege or has threatened to do so
5 or any fact indicating that suspension or revocation may be
13:37:58 6 imminent or that the plaintiff has altered behavior as a
7 result of the challenged provision in order to show the
13:38:12 8 plaintiff's standing.

9 Again, the Complaint contains no such allegation.
10 Now, the plaintiff has in fact submitted some new evidence
13:38:57 11 with his opposition to the motion to dismiss, and I would
12 begin by noting that this is simply immaterial to a facial
13 challenge to the Complaint. On a motion to dismiss for lack
14 of jurisdiction, a facial challenge to jurisdiction, the
15 Complaint itself must show the plaintiff's standing. If the
16 four corners of the Complaint do not show that standing, any
13:39:29 17 later submitted evidence is simply beside the point. But,
18 in any event, even this new evidence does not carry
19 plaintiff's burden.

20 Although plaintiff asserts that HCA, HCA Hospitals
21 have told him that they will revoke his privileges, none of
13:40:00 22 the submitted notices from HCA actually state that. And I
23 would refer the Court to Exhibits B, C, D and E of
13:40:16 24 plaintiff's opposition memorandum, ECF number 22-3-4-5
25 and-6. And although plaintiff asserts that he received an

13:41:17 1 email informing him that his requested medical exemption was
2 denied, the record email doesn't say that either. Again,
13:41:53 3 please look directly at Exhibit T. Rather, what happened
4 was is that the attachment that plaintiff submitted as proof
5 for his reason for declining Covid 19 vaccination has been
6 reviewed and rejected, seemingly because it was signed by
13:42:29 7 plaintiff himself and not by a separate healthcare provider.

8 So the email invited the plaintiff to fill in the
9 medical exemption form and to resubmit it, to have it signed
13:42:57 10 by another doctor to resubmit it. So, again -- so nothing
11 happened to plaintiff. At least in the evidence that we
12 have before us, all we have is an email saying: Please
13 resubmit your exemption request.

13:43:27 14 We don't know what, if anything, happened then.
15 The plaintiff simply has not carried his burden for
16 standing.

17 For similar reasons, the claim is not ripe. I know
13:58:50 18 that the Court is familiar with the standard Black Letter
19 formulation for ripeness. A claim is not ripe for
20 adjudication if it rests upon contingent future events that
13:59:25 21 may not occur as anticipated or indeed may not occur at all.
22 That's from the Texas vs. United States decision in 1998.
23 Under the ripeness inquiry, the Court looks both to the
13:59:57 24 fitness of the issues for decision and the hardship to the
14:00:56 25 parties of withholding court consideration at this time.

1 Again, the vaccination rule does not directly
2 impose any obligation on individual practitioners. Instead
14:01:28 3 the Rule applies to facilities, like hospitals, requires
4 them to develop their own plans and policies to ensure their
14:01:46 5 staff are fully vaccinated unless found to be exempt. So we
6 simply don't know how those policies will be applied by the
7 hospitals at issue here. The hospital may end up
8 determining that plaintiff could be exempt or they may
9 otherwise determine that he is not included in the category
14:02:17 10 of staff to whom a vaccination protocol would apply. So,
11 without that -- being aware of how this will actually be
12 applied, plaintiff's claim is unfit. And for the same
13 reason, there is no hardship from the Court's
14:02:52 14 (unintelligible) review at this time.

15 So that resolves the issue of subject matter
16 jurisdiction for plaintiff's Complaint. But of course his
17 Complaint also fails to state a claim.

18 THE COURT: What else do you want to tell me?

19 MR. MC ELVAIN: Well, I'll turn next to the
20 statutory authority claim, if I may.

14:03:29 21 THE COURT: Sure.

22 MR. MC ELVAIN: Thank you, Your Honor. The
23 Complaint alleges that the Rule is invalid and that it,
24 quote, rests upon a general police power asserted by the
14:03:44 25 federal government. This is incorrect. The Secretary has

1 express statutory authority for the Rule, and the Supreme
14:04:05 2 Court has upheld the Secretary's use of this authority. The
3 Supreme Court noted that the Secretary has the, quote,
4 general statutory authority to promulgate regulations as may
5 be necessary to the efficient administration of the function
6 with which he is charged. That's the Biden vs. Missouri
7 decision quoting 42 U.S.C. Section 1302(a).

14:04:59 8 As I've already quoted at the outset of my
9 presentation, one such function, perhaps the most basic
10 given the Department's core mission is to ensure that the
11 healthcare providers who care for Medicare and Medicaid
14:05:26 12 patients protect their patients' health and safety. To that
13 end, Congress authorized the Secretary to promulgate, as a
14 condition of all facilities' participation in the program --
14:05:59 15 excuse me, Your Honor -- such requirement as he finds
16 necessary in the interest of the mental health and safety of
17 individuals who are furnished services at the institutions.
18 That, again, is a quote from Biden vs. Missouri, in turn
14:06:20 19 quoting 42 U.S.C. Section 1395x, subsection (e), paragraph
20 9. And that is the provision that deals specifically with
21 hospitals.

22 So here the Secretary found that his role was
23 necessary to promote and protect patient health and safety,
14:06:56 24 and the Supreme Court accordingly held that the Rule thus
25 fits neatly within the language of the statute. It would be

1 the very opposite of efficient and effective administration
2 for a facility that is supposed to make people well to make
14:07:27 3 them sick with Covid 19.

4 So the Secretary has express statutory authority
5 under the Medicare and Medicaid statute, and this disposes
14:07:59 6 of the plaintiff's police power claim as well. The Rule was
7 issued as a condition of funding under the Medicare and
14:08:18 8 Medicaid programs. Congress has the power under the
9 spending clause to impose conditions on the use of federal
14:08:48 10 funds, even where it legislates in an area historically of
11 state concern. This is the Sabri case from the Supreme
14:09:07 12 Court, S-a-b-r-i. It is in our brief. In this case -- I'm
13 sorry, not in this case -- in Biden vs. Missouri, the
14:10:00 14 Supreme Court saw the vaccine rule as a predictable exercise
15 of the Secretary's health and safety authority and that, in
14:10:30 16 keeping with other CMS regulations, such as those requiring
17 hospitals to maintain effective infection prevention and
14:10:59 18 control programs.

19 I would refer the Court to page 651 of the Supreme
20 Court's decision in Biden vs. Missouri.

21 So this rule no more intrudes on the states' police
22 power anymore than the existing infection control
14:11:30 23 regulations do. Thus the Secretary is able to prescribe
24 standards to make sure that, say, a doctor with the flu
25 doesn't report to work that day. The Secretary is also --

14:11:50 1 is also within the Secretary's authority to prescribe
2 standards for vaccination, to be sure that the vulnerable
3 patients are protected at facilities funded by the Medicare
14:12:48 4 and Medicaid programs.

5 I've already addressed the due process claim
14:12:59 6 although I'd be happy to answer any further questions the
7 Court may have on that. And that would leave the equal
8 protection claim, which I will touch on briefly. There is
14:13:11 9 no fundamental right or suspect class involved here as we
10 have already discussed. There is no fundamental right to a
14:13:49 11 avoid vaccination. So, therefore, rational basis review
12 applies for purposes of the equal protection claim in the
13 same way that it applies for the due process claim. And the
14:14:26 14 Rule is certainly rational for purposes of equal protection
15 for the reasons that we have already discussed.

16 It is plainly reasonable for the Secretary to
17 distinguish between the vaccinated and unvaccinated because
18 the latter are significantly more likely to contract,
19 spread, be hospitalized for and die of Covid 19. And for
20 this reason, the Court has uniformly rejected equal
14:15:04 21 protection claims challenging Covid 19 vaccination
14:15:41 22 requirement. There is the Does case, Does 1 through 6 case
14:15:57 23 of the First Circuit in which the Supreme Court denied
24 certiorari. There's the Valdez case from the District of
25 New Mexico that I've already mentioned, which was recently

14:16:19 1 affirmed in an unpublished opinion from the Tenth Circuit.

2 That leaves us with the remaining factors for
14:17:43 3 preliminary injunction. Of course if the motion to dismiss
4 is granted, then that would solve the PI motion.

14:18:25 5 Plaintiff's cannot show a likelihood of success. That
6 concludes the inquiry as to the request for a preliminary
7 injunction. They cannot satisfy the remaining factors

14:18:45 8 either. And, again, I believe that the Court is aware,

14:19:10 9 under the Dine' Citizens case in the Tenth Circuit, each of
10 the four elements for preliminary injunction must be met

11 independently. The prior standard under prior law, a

12 sliding approach to preliminary injunctions, has been

14:19:56 13 overruled, and the plaintiff's must prove that it is able to

14 satisfy each of the four elements for preliminary

15 injunction; first, the likelihood of success, which we have

14:20:28 16 already discussed; second, the existence of an irreparable

17 harm. But the plaintiff's alleged harms here are purely

18 economic.

14:20:39 19 The plaintiff has not shown that any harm is

20 imminent for the reasons that I've already discussed, and

14:21:28 21 furthermore, the delay in bringing the suit and in bringing

22 the preliminary injunction motion and in prosecuting the

23 preliminary injunction motion undercuts any claim of

24 imminent harm that would support a claim of irreparable

14:22:18 25 harm. The Complaint was filed two weeks after the deadline

14:23:10 1 in Utah for full compliance with -- for facilities full
2 compliance with the Rule, and plaintiff took the full time
3 to brief the PI, which does not support a claim that there
4 is any imminent injury claim here.

5 And, finally, the public interest and the balance
14:24:00 6 of the equities weigh in favor of the Secretary here. There
7 is no doubt of course that stemming the threat of Covid 19
14:24:11 8 is a compelling safety threat. The Supreme Court has so
9 acknowledged. And the balance of equities weighs sharply in
10 favor of minimizing the spread of a deadly virus in
11 federally funded hospitals. And I would refer the Court
14:25:28 12 again to the analysis of the Valdez opinion in the District
13 of New Mexico which was recently affirmed by the Tenth
14 Circuit.

14:25:54 15 And with that, I would rest, but I would invite any
16 questions that the Court might have.

17 THE COURT: Well, I don't have any right now.
18 Thank you, Mr. McElvain.

19 MR. MC ELVAIN: Thank you, Your Honor.

20 THE COURT: Mr. Wentz.

21 MR. WENTZ: Thank you, Your Honor.

14:26:28 22 THE COURT: I do have -- I assume you'll cover
23 these. I want you to explain how you get around Missouri V.
24 Biden.

25 MR. WENTZ: Yeah.

1 THE COURT: And I'm also interested in -- in
2 ripeness, standing, injury. But you're going to cover all
3 that anyway, so go ahead.

4 MR. WENTZ: Well, Your Honor, I was hoping I would
14:27:00 5 get that done. So, I see that you have seized on what I
6 think is probably the main issue in the case in your first
7 question, which is that every time that we argue that there
8 is a fundamental right at stake here, the defendant
9 transforms our Complaint and converts it into a claim that
10 we are not making. So I just want to make it really clear
14:27:30 11 to the Court that we are not saying, and have never said
12 that Dr. Griner enjoys a substantive due process right to
13 not take a vaccine.

14 What we are saying is, Judge, this is not, as a
15 matter of fact, a factual assertion. This is not a vaccine.
16 And if this is not a vaccine, and what the government has
14:28:00 17 said during the -- during its presentation, is that it
18 reduces the symptoms, it makes it less likely you will be
19 hospitalized. All of the language there doesn't focus on
20 the true definition of a vaccine. What it focuses on is the
21 definition of a treatment. And I'd like to walk the Court
22 through all the evidence before it that shows that this is
14:28:27 23 not, as a matter of fact, a vaccine but is indeed a
24 treatment. And in doing so --

25 THE COURT: How does that -- but doesn't Jacobson

1 cover that -- I mean. Excuse me. Doesn't Missouri V. Biden
2 cover that? I mean, they have upheld the Rule.

3 MR. WENTZ: They have upheld the Rule, but no one
4 made the argument that this is not a vaccine. There has
14:28:58 5 never been a factual assertion made in any case I'm aware of
6 that this is not a vaccine, so we have two different motions
7 under two different standards before the Court as I know you
8 obviously know, but with regard to what was starting, what
9 the government started was it motion to dismiss. I want to
10 point out to the Court that what the government did there
11 was argue facts. They say it really does do this or it
14:29:29 12 really does do that, or, Judge, here's a study that shows.
13 Right?

14 So what the Court has before it with regard to the
15 motion to dismiss is a huge factual issue that, on a motion
16 to dismiss, is beyond the scope. So, what we are saying is
17 that, as a factual issue, this is a -- this is not a
14:29:56 18 vaccine. And this is -- this is a really significant
19 distinction. This was never argued in Biden V. Missouri,
20 Your Honor. This never came up. It's not in the Complaint.
21 You can look through the Complaint and see that it was never
22 argued. So, if in fact -- and that's why a rational basis
23 was applied, because the government's correct that in Biden
14:30:26 24 V. Missouri there was no fundamental right at issue. They
25 do have that right, Your Honor.

1 No one claimed what we are claiming. That's the
2 distinction that we have here. No one claimed. We can not
3 be asserted -- that can't be a res judicata on us because it
4 was never even argued. It was never even touched on it.
5 The Court did a statutory analysis. The same is true with
14:31:00 6 the constitutional argument that we make, which is not a
7 statutory argument at all. I mean, what the government
8 keeps doing is rewriting our Complaint for us. But, Your
9 Honor, we're the plaintiffs, and we get to make the claims
10 that we want to make, and we want to get the facts that we
11 want to make here.

12 And so, what we're not saying is that it's an ultra
14:31:30 13 vires claim on the basis of the statute. The statute does
14 give the authority. That's as far as the Supreme Court ever
15 got in Biden. What we're saying, Your Honor, harkens back
16 to NFIB V. Sebelius, and in that case, what the Court said
14:31:59 17 was that we have a dual sovereignty structure of our nation.
18 The structure of the constitution diffuses power between
19 various governmental centers to protect individual liberty.
20 Justice Roberts gives quite an eloquent statement of the
14:32:32 21 function of dual sovereignty and, in that case, finds that
14:33:28 22 the federal government does not have the police power to
23 push a medical result, mandate someone to buy insurance,
24 medical insurance. That's the holding of that case.

25 Now, that was never touched on and never argued in

1 Biden vs. Missouri, and I think it's still a live issue, and
14:33:52 2 that's what we're asserting there. With the equal
3 protection argument, going back to the motion to dismiss
4 aspect of it, if we do have a fundamental right to not take
5 a medical treatment, which is the argument being made, then
6 there is a fundamental right at stake. So, what happens is
7 the government just keeps assuming away the primary factual
14:34:32 8 issue before the Court which is, is this a treatment or is
9 it a vaccine? With regard to the motion to dismiss, as long
10 as that fundamental factual issue remains, then it's not
11 within the province of the Court at this stage of the
12 proceedings to make those factual determinations and dismiss
14:34:59 13 the case. That's our fundamental position, Your Honor, with
14 regard to the motion to dismiss.

15 I need to hit -- which would you rather have me do,
16 Your Honor? I'll take your guidance. Should I go through
17 the motion for preliminary injunction factors and show you
18 why we have a high likelihood of success on the merits at
14:35:25 19 this point in time and come back and hit the standing issues
20 after that?

21 THE COURT: That's all right.

22 MR. WENTZ: Is that okay with you, sir?

23 THE COURT: Yes. Just don't take forever.

24 MR. WENTZ: I'm going to try not to, sir. So --

25 THE COURT: I know what the standards are. I just

1 want to know how you think you meet them.

14:35:57

2 MR. WENTZ: So -- and I think you are clear on our
3 claim. We are not claiming that we have a fundamental due
4 process right to not take a vaccine. We're claiming under
5 Cruzan we have a fundamental right not to be forced to take
6 a medical treatment. That's the key issue. And I would
7 point out that they don't challenge that. The government is
8 not challenging that.

14:36:27

9 So, I'd like to refer the Court to footnote 3 of
10 the Complaint. This is a critical issue. This is the CDC's
11 definition of immunity and vaccine that was taken from its
12 website before it was changed on September 1, 2021. And
13 this is the definition upon which all of the law regarding
14 mandatory vaccines has been decided. This definition is
15 also the basis of the statutes regarding vaccination and the
16 creation of the vaccine court as we point out in our
17 Complaint. So this definition is critical.

14:36:59

18 Here's what the CDC defined the word "immunity" as
19 prior to September 1, 2021. Here's the definition:
20 Protection from an infectious disease. If you are immune to
21 a disease, you can be exposed to it without becoming
22 infected.

14:37:29

23 That's the definition of immunity. Then they move
24 on to define "vaccine." And it says: A product that
25 stimulates a person's immune system to produce immunity to a

1 specific disease, protecting the person from that disease.

2 So, up until September 21 -- September 1, 2021,
14:37:56 3 vaccines create immunity, and if you're immune you don't get
4 the disease if you're exposed to it. The government has now
5 changed that long-standing definition of what a vaccine is
6 to remove the concept of immunity altogether, but, at the
7 same time, the government is relying on cases that assume
14:38:19 8 the old definition. So all the public policy, all the
9 statutory, everything, it all talks about immunity. There's
10 cases that say vaccination is the gold seal of immunity.
11 Well, they are. This is not a vaccination because it
12 doesn't even create immunity. So, that's the fact issue.

14:38:58 13 And here's -- here's what I think is interesting
14 about this case and where we are, Your Honor. The
15 government urges you, and I think quite rightly, not to
16 become a scientist, not to become a policy maker. They say
17 you can't step in and do that. But you don't need to do
18 that, Your Honor. You're not going to have to replace your
19 judgment for the judgement of the government agencies to see
14:39:29 20 that this vaccine does not create immunity, this so-called
21 vaccine. You don't need to dive into the science because
22 all you need to do is take the word of the manufacturers of
23 the injections together with documents produced by
24 government agencies and statements made by government
25 officials to see that these so-called vaccines do not create

1 immunity.

14:39:59

2 The Court could also just watch the news where
3 everyday someone like Dr. Fauci or the President or the
4 Queen of England, who is fully vaccinated comes down with
5 the virus.

14:40:27

6 I would like to quickly walk you through the
7 evidence that shows why we have a likelihood of success on
8 the merits of showing the Court that this is not a vaccine,
9 it's a treatment.

14:40:57

10 First. The FDA itself classifies the injections as
11 treatments, not vaccines. And the documentation for that is
12 in footnote 24 of the Complaint in paragraph 53.

13 Second. Both Moderna and Pfizer have filed
14 documents with the Securities & Exchange Commission, public
15 documents, pointing out that their injections are considered
16 gene therapies, as we state in paragraph 54 of the
17 Complaint. Obviously a therapy is a treatment, Your Honor,
18 not a vaccine.

14:41:27

19 Third. As we show the Court in our reply brief,
20 the trials conducted by the FDA for the emergency use and
21 authorization of the injections did not even attempt to see
22 if the injection created immunity as the CDC had always
23 defined it prior to September 1, 2021. It based its
24 effectiveness on reduced symptoms, not immunity.

25 Fourth. Here's Moderna's Chief Medical Officer.

14:41:56 1 He says that the EUA trials, the emergency use authorization
2 trials, Your Honor, don't show that the vaccine prevents
3 transmission of the virus. That's a direct quote. They
4 don't show the vaccine prevents transmission of the virus.
5 That's in paragraph 52 of our Complaint.

6 Fifth. The fact that the CDC had to change its
7 definition on September 1, 2021, to exclude the word
8 "immunity" is telling.

14:42:28 9 Sixth. We recount in our Complaint many public
10 statements by government officials, including Dr. Fauci,
11 including the Director of the CDC itself, and including the
12 chief scientist of the World Health Organization, who
13 admitted, and they admit again, that the injections do not
14 prevent the transmission of the virus. They do not create
15 immunity.

14:43:05 16 Seventh. This is the CDC website. It says -- this
17 is a direct quote: The CDC expects that anyone with Omicron
18 infection can spread the virus to others, even if they are
19 vaccinated or don't have symptoms. See paragraph 49 of the
20 Complaint, Your Honor.

21 Finally, the Court can just look at the CMS mandate
22 itself. And that says, quote: The effectiveness of the
23 vaccines to prevent disease transmission by those vaccinated
24 is currently not known. Close quote. So the CMS itself
14:43:56 25 doesn't even know if this prevents transmission. That's

1 paragraph 38 of the Complaint, Your Honor.

14:44:03

2 So, looking at official statements and evaluating
3 what they say is squarely within the millhouse of the Court.
4 It's right in your comfort zone. What they are asking you
14:44:56 5 to do is look at the science, get into detailed reports. We
6 provide those because we want to have a well-pleaded
7 Complaint, but you don't have to become a scientist, all you
8 need to do is look at these statements that the policy
9 makers themselves are making because they are telling you
10 what we are telling you. These injections do not create
11 immunity.

14:45:30

12 And they were aware of this to the extent that they
13 changed the very definition of what a vaccine is to make
14 this vaccine fit in it. And those are the facts.

14:45:59

15 But the law, Your Honor, hasn't changed. The law
16 from congressional statutes to case law still assumes that a
17 vaccine creates immunity. Indeed that's the only reason to
18 force people to take a vaccine. It's the common good of
19 preventing transmission of the disease, other people from
20 getting infected. So what we ask the Court to do with
21 regard to the motion to dismiss, to dismiss, is to give us
22 the benefit of our well-plead facts, and with regard to the
23 likelihood of success on the merits in terms of our
24 preliminary injunction, to look at the overwhelming evidence
25 as stated by everyone we just cited and determine that an

1 injunction does not -- an injection, an injection that does
2 not create an immunity is not a vaccine but is some other
3 kind of thing.

14:46:29

4 And you also don't have to become a scientist to
5 figure out what other kind of thing it is because the same
6 policy makers and the same officials go on to tell you what
7 it is, Your Honor. What they say is that it reduces
8 symptoms. That's the classic definition of a treatment.
9 But they actually do more than that because they call it a
10 therapy themselves. We start with the fact that the
11 manufacturers --

14:46:59

12 THE COURT: I thought the classic definition of a
13 treatment or the better definition of a treatment was it
14 cures something.

14:47:25

15 MR. WENTZ: Well, that would be true. That would
16 be true, Your Honor. I give the example in our papers of a
17 headache. If I went out and imbibed too much the night
18 before and I had a headache the next day, if I took aspirin
19 and it reduces my symptoms that's a treatment. That's the
20 classic treatment for a hangover. But if I could take those
21 pills the night before and I would never get a hangover,
22 I've got a vaccine. I'm immune. That's the fundamental
23 distinction.

14:47:57

24 And there's a heck of a slippery slope argument
25 that we can get into, Your Honor, because if we can mandate

1 treatments for the reasons that the government wants to
2 mandate these treatments, then my goodness gracious, there's
3 no end to what the government can do. A lot of the
4 government's arguments, there's no end to what the
5 government can do. They might be able to tell me, because
6 they want to reduce hospitalizations, that if I didn't eat a
14:48:29 7 Big Mac, I'm not gonna -- likely to have a coronary and end
8 up in the hospital. They might tell me I shouldn't have
9 salt. They might tell me I should go to a daggone (as
10 spoken) exercise class and ride a cycle every morning, which
11 my wife tells me as well. But no one has the authority to
14:48:58 12 mandate that, and certainly not the federal government.

13 But if we allow this slippery slope -- this is the
14 whole reason for Cruzan, I think, Your Honor, is that you
15 have to -- you have to make a distinction between the
16 treatments that help people and make them better, make
17 symptoms less severe, maybe make them stay out of the
14:49:28 18 hospital -- we even give them that -- and a vaccine, which
19 because it eliminates transmission of the disease to others,
20 there's a third-party societal benefit to mandating it.

21 If you don't eliminate transmission, that
22 third-party societal benefit is simply not present. That's
23 critical. That's the critical thing here.

24 THE COURT: Basically all your arguments hinge
14:49:59 25 on -- well, except perhaps for injury, and we'll get to

1 that, I suppose, but they really hinge on whether this thing
2 is an vaccine or a treatment; is that correct?

3 MR. WENTZ: Your Honor, that's the biggest fact
4 question, and that is before the Court. We want to put that
5 on trial. We think we have a right to go forward.

6 THE COURT: All right. What about -- what about
7 standing, ripeness and injury?

14:50:28

8 MR. WENTZ: All right. Well, Judge, they don't
9 want to allow you to look at any of the emails because they
10 say they are not within the four corners of the Complaint,
11 but they are the ones that are raising the fact issues.
12 They are the ones coming back factually saying -- raising
13 fact issues. Number 1. We can respond to those, and you
14 have the authority under 12(b)(1) to look at those. You can
15 do that. That's what the rule says.

14:50:49

16 THE COURT: Well, has your client been denied any
17 privileges yet at the hospital?

14:51:30

18 MR. WENTZ: It's right there in the emails. He has
19 been denied privileges at two hospitals, two HCA hospitals.
20 The other thing is that those emails say specifically that
21 the hospitals implemented those policies directly as the
22 result of the CMS mandate. They actually say: We didn't
23 want to do this. We wanted to avoid this, but with the CMS
24 mandate in place we're forced to do it.

14:51:55

25 THE COURT: Forced to do what? I thought they said

1 he could apply for an exemption or fill out more forms or
2 something, that their decision is not complete.

14:52:28

3 MR. WENTZ: Well, he filed for an exemption. What
4 they are saying -- and it was denied. And that's a factual
5 issue, too, Judge. I mean, they raise all these facts, but
6 they are trying -- they are trying to get you to throw this
7 case out, obviously, and that's what I would do if I was on
8 the other side. I'd try to get you to throw it out at the
9 beginning. But I think they are trying to also make you sit
10 as a finder of fact, which I don't think you're supposed to
11 do at this point in the case.

14:52:59

12 Now, with regard to the -- with regard to the
13 evidence, they are saying you shouldn't even look at these
14 emails, but, Judge, I don't know if you read them, but they
15 are pretty clear. They say you don't have privileges unless
16 you are fully vaccinated. And then when he applies for a
17 medical exemption on the basis of his having previously been
18 infected. They rejected that as well. Now, today the
19 government is arguing other things, but those are facts, and
20 we would like to -- we would like to have the opportunity to
21 put our man on trial.

14:53:28

14:53:56

22 I mean, before -- these are -- you know, you have
23 the authority under 12(b)(12) to have an evidentiary hearing
24 on this issue, and if you are taking it as seriously as I
25 believe you might be, that might be the best result, and we

14:54:22 1 would applaud that because we think that we can show all the
2 Lujan factors, Your Honor. We've got concrete injury. The
3 concrete injury is the direct result of the defendant that
14:54:57 4 we have sued, and we have you sitting in the chair being
5 able to resolve it for us. Those are the three Lujan
6 factors, and we have shown them all.

7 They say that it's not ripe. They say that there's
8 no concrete injury, that nothing has actually happened yet.
9 They say in their papers, well, Dr. Griner hasn't actually
14:55:27 10 scheduled a patient and come in and been arrested and had
11 that patient not be able to be operated on.

12 And, Judge, I don't know if you've read his
13 declarations -- and, plus, his declarations contain
14 additional allegations, and they were included with the
15 Complaint, his initial declaration. That's another point,
16 Your Honor. He goes through very carefully and he lists the
14:55:59 17 hospitals where he works, and he says: I can't work there.

18 He makes those allegations under oath, integrated
19 in the four corners of the Complaint because it's Exhibit A
20 thereto. That's a critical point as well, Your Honor. So,
21 what they are saying about having him to schedule, if this
14:56:28 22 is the standard, this just doesn't make any sense. Your
23 Honor, this guy's a doctor. He's spent his entire life
24 healing kids. He set up a foundation to heal kids. He has
25 people that go and talk to kids and counsel kids because

1 they have had post-traumatic stress because the injuries
14:57:00 2 they were born with are so traumatic.

3 And the government is saying that we've got to take
4 one of those kids and the family of that kid and we have to
14:57:24 5 knowingly set up an operation that we know we cannot do
6 because we have been told we can't do it in writing by the
7 hospital itself, and we've got to put that family through
8 all that stress and we've got to do all that? The poor kid
9 is sitting there saying: Oh, my Lord, I'm about to
14:58:00 10 be healed. Thank God. My cleft lip, my cleft pallet. I'll
11 be able to eat. I'll be able to gain weight. Maybe I'll be
12 able to go to school and be a normal human being.

14:58:29 13 All those hopes and aspirations in that little
14 kid's head. And then, all the stress about a hospital.
15 He's got to go through all that? They're saying we have to
16 put a kid through all that to prove that there's a concrete
17 injury? That just can't be the standard, Your Honor. This
14:58:56 18 reminds me of the old villain movies where the villain would
19 put the heroine on the railroad tracks. Well, we've got the
20 heroine on the railroad tracks. We've got Snidely Whiplash
21 standing there, and we've got the train coming, Your Honor.
14:59:29 22 That's an imminent threat.

23 We don't have to have the heroine run over by the
24 daggone train before we know there's an imminent threat of
25 injury. And that's what we have. We have an imminent

1 threat of injury right here. He cannot go in. You want him
14:59:56 2 to go get arrested? I don't think he has to do that on
3 these facts, Your Honor. That's not the standard. And
15:00:25 4 that's not the standard of ripeness either. We have a ripe
5 case. We have concrete injury. We have all the Lujan
6 factors.

7 Then I'll point out, Judge, that at the same time
8 that the government is telling us that we're not ripe,
9 they're saying that we sat on our rights, and they are
15:00:56 10 making some sort of a laches argument. I think they have to
11 pick their poison. They are saying that we delayed, but
12 they are saying that we don't have a case; we either filed
13 it too soon or we filed it too late. They claim, Judge --
14 and this goes to irreparable harm. They claim that -- they
15:01:28 15 claim that we filed the suit two weeks after the thing went
16 into effect. But that's not the case. It was delayed until
17 February 28. Now that's in Dr. Griner's declaration and
18 it's in our pleadings.

19 And we filed on March 4, so that's a four-day
20 delay. That's my fault if there's a delay. We wanted to
15:01:54 21 get you a good case. We wanted to write the best possible
22 case that we could. And the same thing for the motion for
23 preliminary injunction. So we just respect the Court's
24 time. The other thing is, they are saying that you
25 should -- there is no irreparable harm because we allowed

15:02:27 1 the Court to have its normal procedure. But that's really
2 honestly the best way for the Court to make the best
3 decision is on full briefing. That's one of the reasons why
4 the Biden vs. Missouri decision doesn't do anything for us.
5 It was a preliminary injunction motion. The Court was only
6 opining on, you know, what might succeed, likelihood of
15:02:59 7 success. Even at the Supreme Court, that was the standard.

8 That's not a final determination on anything.

9 That's another reason Griner -- I mean Biden vs. Missouri is
10 distinguishable from what's before the Court today. So, I
15:03:25 11 believe I've hit everything except for -- do you have
12 anymore questions on the standing and the ripeness?

13 THE COURT: No.

14 MR. WENTZ: I'll shut up on that. Clear signal,
15:03:54 15 Judge. Thank you. But I -- I would -- I would direct the
16 Court to the evidence before it that this is a treatment,
17 and the FDA's emergency authorization use trials only tested
18 for it being a treatment. Your Honor's chief medical
15:04:30 19 officer said the trial results show that the vaccine can
20 prevent someone from getting sick or severely sick; however,
21 the results don't show the vaccine prevents transmission.
22 That's our Complaint in paragraph 52. It was treated as a
23 therapy the whole time, the statements by governmental
15:04:57 24 officials in documents that discuss the fact that the
25 injections reduce symptoms, not transmission, which are at

1 length in our Complaint.

2 The CDC website, it says, quote: Current vaccines
3 are expected to protect against severe illness,
4 hospitalizations and death due to the infection with the
15:05:29 5 Omicron variant. However, breakthrough infections in people
6 who are vaccinated are likely to occur. People who are
7 up-to-date with their Covid 19 vaccines and get Covid 19 are
8 less likely to develop serious illness than those who are
9 unvaccinated and get Covid 19.

15:05:59 10 So, once again, it is a treatment. It is not
11 creating immunity. So you don't have to become a scientist.
12 All you got to do is look at the very statements that
13 government officials have made, all of which you're entitled
14 to do, and you can see that we have presented the Court with
15:06:22 15 a fact issue that this is a treatment under Cruzan, not a
16 vaccine under Jacobson. And, if that's the case, then the
17 case survives the motion to dismiss, and because we're using
18 all of the evidence on this issue from the government
19 itself, and from officials, then I think we have a high
15:06:58 20 likelihood of success on the merits because we are taking
21 their own word for it. They are going to have to contradict
22 themselves to come up with anything that controverts their
23 very own statements.

24 As to a fundamental right, I direct the Court to
25 Washington vs. Glucksberg, which I note was cited at length

15:07:25 1 by the Court's recent decision in Dobbs. And it says the
2 Fourteenth Amendment forbids the government to infringe
3 fundamental liberty interests at all, no matter what process
4 is provided, unless the infringement is narrowly tailored to
5 serve a compelling state interest.

6 The government never addresses this in their
7 briefing. It just says no fundamental right is involved.
8 So the issue of treatment -- you say treatment. I same
15:07:58 9 vaccine. You say tomato I say tomato. This is a lot more
10 than that. This is the central fact question of the case.
11 It prevents it from being decided on the government's motion
12 to dismiss, and it shows why we should win on the merits of
13 the case.

14 With regard to irreparable harm, Your Honor, which
15:08:24 15 I have not addressed, the law is clear that once there is a
16 fundamental right established, that, in and of itself,
17 illustrates irreparable harm. The government just avoids
18 our entire argument by saying there is no fundamental right
19 to a vaccine -- to not take a vaccine, but that's not at all
20 what we are saying. We are saying there is a fundamental
15:08:54 21 right not to take a medical treatment, and this is a medical
22 treatment not a vaccine. So, they just skirt the issue.

23 I want to point out that the government cites a
24 Tenth Circuit case involving Dr. Schrier which the Tenth
15:09:25 25 Circuit didn't find a fundamental right. That was a First

1 Amendment case. But the Tenth Circuit gives a great
2 presentation on the very thing I just said, that if there is
3 a fundamental right involved, which there is here, then
4 irreparable harm is shown. So, finally, on this point, Your
15:09:53 5 Honor, the Fifth Circuit in the OSHA matter, the BTA case,
6 which was appealed ultimately to the Supreme Court, the
7 Supreme Court upheld the Fifth Circuit's decision there and
8 struck down the OSHA regulation, the ETS.

9 And the Fifth Circuit said the irreparable harm is
15:10:22 10 exactly what Dr. Griner is presented with here. It's a
11 choice between a jab and a job. And the Court said that
12 cannot take place. And the Supreme Court upheld it. If
13 that was enough to find irreparable harm in that case, then
14 it should be enough to find it here. So, we have shown
15:10:57 15 clearly that he can't practice, that his privileges are
16 revoked. We have shown it in emails. We have shown it in
17 his declarations.

18 With regard to the preliminary injunction motion, I
19 think we win that. We show irreparable harm on both fact as
20 well as law. So there's two ways we get there. With regard
21 to balancing the equities, you raised a very good point when
15:11:30 22 you were talking to counsel on the other side, and you said:
23 What about naturally immunity?

24 I mean, what the government always does in this
25 case is they always come -- in these cases is they always

1 come in and say: Your Honor, if you don't allow us to do
2 this people are going to die.

3 And, you know, sitting in your chair, that's a
15:12:00 4 tough decision. This case is easier for you, Your Honor,
5 because, number 1, the government admits that what it's
6 doing doesn't prevent transmission. So it just doesn't
7 work.

15:12:22 8 Number 2. The man is already naturally immune.
9 And we can look -- once again, you don't have to get into
10 the studies. All you've got to do is look at the CMS
11 itself, the mandate, where it says that natural -- those
12 with natural immunity are only in very rare case infectious
13 and are not considered a source of infection.

15:13:00 14 So that's the CMS's statement with regard to
15 naturally immunity. And they include people with natural
16 immunity in their analysis. We point that out to the Court
15:13:22 17 in the Complaint. And that's at 61, 604 in the mandate.

18 So, I believe we have -- Judge, there is no public policy
19 argument that can support a so-called vaccine that just
20 doesn't work, a vaccine that doesn't prevent transmission
21 and only makes people feel better if they get sick. That's
15:13:50 22 not what the law -- all the law on vaccines has been based
23 on.

24 Final word on Jacobson. If anything, Jacobson
15:14:15 25 supports our Tenth Amendment argument, our dual sovereignty

1 argument, Your Honor, because what it stood for is only the
2 fact that the state of Massachusetts had the legislative
3 authority to pass a law that said a health body, a local
15:14:57 4 health agency could mandate a vaccine. It was totally at
5 the state level, and this is just totally missed by the
6 government. They try to make it look like it held that the
7 federal government could do something. It never held that
8 the federal government could do anything. All it said was
9 the constitution at that time did not prohibit the
10 government, the local, state government from doing what it
15:15:28 11 did. So it didn't have anything to do with this case, which
12 does with the federal government. And the other thing is it
13 only talked to a vaccine, and we're saying it's not a
14 vaccine. Once again, they just assume away our major
15:16:08 15 argument.

16 THE COURT: Thank you.

17 MR. WENTZ: Thank you, Your Honor. I think I hit
18 everything.

19 THE COURT: I can't imagine that you didn't. Thank
20 you, Mr. Wentz.

21 All right. Mr. McElvain.

22 MR. MC ELVAIN: Thank you, Your Honor. I just have
15:16:26 23 a handful of points I'd like to touch on. Apart from this
24 handful of points, I believe I'll rest on my briefs and my
25 prior presentation unless the Court has questions, of

1 course.

2 THE COURT: All right.

3 MR. MC ELVAIN: But just to dive right in, first my
4 colleague questions whether the effectiveness of the vaccine
15:16:56 5 was at issue in the Supreme Court's decision of Biden vs.
6 Missouri, and I would just reiterate that it was directly at
7 issue. The plaintiffs in that case had argued that the
8 vaccines were not effective or that there was not a showing
9 on the record there that the vaccines were effective. The
10 Supreme Court rejected that claim. It applied arbitrary and
15:17:24 11 capricious review under the administrative procedure act and
12 found that the Secretary -- I'm sorry. The Supreme Court
13 held that the Secretary had reasonably found that the
14 vaccines were effective in preventing transmission and that
15 they were necessary to prevent the transmission of the virus
15:18:19 16 to the vulnerable populations at hospitals funded by the
17 Medicare and Medicaid programs, residents of nursing homes
18 funded by the Medicare and Medicaid programs and so on.

19 So that was directly at issue in the Supreme
15:19:26 20 Court's decision, and the Supreme Court upheld the
21 Secretary's finding.

22 Second. This perhaps is just repeating a point
15:19:55 23 that I made earlier, but as I understand plaintiff's
24 argument on the due process point, again they appear to be
25 assuming that a vaccine must be 100 percent effective to

1 qualify as a vaccine under -- under Jacobson, and that just
2 simply is not the law. No vaccine is ever 100 percent
15:20:25 3 effective. There will always be some breakthrough
4 infections. What the Secretary has found, and the Supreme
5 Court again upheld the reasonableness of his findings, is
6 that even in cases where there are breakthrough infections,
15:20:56 7 that the evidence tilts in favor of a finding that the
8 person with the breakthrough infection is less likely to
9 transmit the virus to a patient in a hospital or resident of
10 a nursing home, what have you.

11 So the Secretary erred on the side of caution, on
12 the side of protecting these vulnerable populations as was
15:21:26 13 his statutory duty. And the fact that there is not perfect,
14 100 percent effectiveness is simply beside the point.

15 Third. The plaintiffs have questioned whether we
16 can even get into these facts on a motion to dismiss.
17 Again, I would remind the Court that this is simply rational
15:21:58 18 basis review. The plaintiff's burden on rational basis
19 review is to negate any possible finding that could support
20 the Secretary's conclusion, and that is something that the
21 Court certainly can consider on a motion to dismiss.

15:22:25 22 And, again, Jacobson lays out the Rule here.
23 Jacobson applied what today we would understand to be
24 rational basis review, and the Court was absolutely clear
25 that that is a matter for policy makers, not the Court, not

15:22:56 1 plaintiff to address, to weigh whatever conflicting evidence
2 there may be, and to resolve any uncertainties in scientific
3 evidence as may be necessary to, again, err on the side of
4 caution to protect vulnerable populations.

15:23:30 5 The fourth point I would like to address goes to
6 the Tenth Amendment claim. Again, the plaintiffs assert
7 that -- that the Rule rests on a claimed police power. It
8 does not. Congress has enacted legislation under the

15:24:06 9 Medicare and Medicaid programs. That's spending clause
10 legislation, and it's perfectly within Congress's power to
11 impose conditions on federal funds that may touch on issues

15:24:28 12 like health and safety that are otherwise considered to be
13 within the states' powers. One example would be South
14 Dakota vs. Dole where the Supreme Court upheld a provision
15 relating to drinking age in exchange for Federal

16 Transportation funds. That was considered to be perfectly
17 valid even though the drinking age is something you would
18 consider -- usually consider to be a matter for state
19 legislation.

20 Bringing the point even closer to home here, the
21 vaccine rule under the Medicare and Medicaid programs is
15:25:29 22 part of a longer series of regulations that address
23 standards for hospitals and nursing homes, including
24 specifically infection control regulations. It is perfectly
25 valid. It raises no constitutional problems whatsoever for

15:25:52 1 the Secretary to insist, say that a doctor with the flu
2 stays at home that day, that a person with an open wound is
3 not coming into physical contact with a patient; other
4 standards like that, that are designed for infection
15:26:27 5 control. The Supreme Court found that this vaccine rule was
6 essentially the equivalent of another infection control
7 regulation that has long been in place under the Medicare
15:26:49 8 and Medicaid program and causes no greater statutory or
9 constitutional problem than any of these other regulations
10 do.

11 And finally, I would conclude with the point that,
12 you know, we've cited a you great deal of cases, the First
15:27:29 13 Circuit, the Second Circuit, the Seventh Circuit, District
14 Courts throughout the land. There is not a single Court
15 that has found that there is a valid due process claim
15:28:01 16 against either this vaccine rule or other vaccine rules
17 imposed by federal, state or local entities. What the
18 plaintiffs are asking you to do is to be the first Court in
19 the entire country to find that there is a due process claim
15:28:23 20 against these vaccination rules.

21 We urge the Court not to adopt that invitation and,
22 with that, I will rest unless you have any further
23 questions, Your Honor.

24 THE COURT: I have -- let me ask you about the
25 argument that the government's own findings, assertions,

15:29:02 1 comments suggest that this Covid vaccine is really not a
2 vaccine but it's a form of treatment. Mr. Wentz, of course,
3 spoke about that at length. Do you have any comments on
4 that?

5 MR. MC ELVAIN: Yes. That goes back to my prior
15:29:27 6 point that I believe plaintiffs are assuming that a vaccine
7 must be 100 percent effective in order to -- for a rule
8 relating to that vaccine to be legal. And, again, that is
15:29:44 9 simply not the standard. He quoted a passage from the
10 Federal Register Notice wherein the Secretary recited that
15:30:26 11 the effectiveness of the vaccines against transmission is
12 not known, but there are other passages in the Federal
13 Register that say that the evidence tends to indicate that
14 in fact the vaccines are effective against transmission.
15 And that's evidence that has been further confirmed, even
15:30:55 16 after the issuance of the Rule, with new scientific
17 evidence.

18 So, is there perfect scientific knowledge to this
19 effect? No. You know, the studies are ongoing. But it's
20 the Secretary's responsibility, not the Court's
21 responsibility to weigh the conflicting scientific evidence,
15:31:27 22 if there is in fact any conflicting evidence, and make the
23 judgment as to how to proceed in the face of that evidence
24 when he has a statutory duty to protect vulnerable
25 populations like patients in hospitals, residents of nursing

1 homes.

15:31:58

2 The plaintiff's counsel referred also to some
3 statements from the drug manufacturers in December, 2020
4 which, at that time, it was not known as to whether the
5 vaccines would produce immunity. Again that's simply beside
6 the point because these are statements from December, 2020.

15:32:29

7 The Secretary issued his rule on November, 2021. There has
8 been substantial development in the scientific evidence in
9 the meantime that supported the Secretary's findings that
10 the vaccines are effective. And, again, that is a finding
11 that has been specifically upheld by the Supreme Court.

12 THE COURT: Thank you, Mr. McElvain.

15:33:00

13 Mr. Wentz?

14 MR. MC ELVAIN: Thank you, Your Honor.

15 THE COURT: Do you have anything else you want to
16 say? I'll give you five minutes if you have any other
17 rebuttals. I mean you've -- go ahead.

15:33:26

18 MR. WENTZ: I'll be quick, Your Honor. We're
19 not -- we're not saying that it's not a vaccine because it's
20 not 100 percent effective. We never say that. We simply
21 rely on evidence that we presented that it's from the
22 government itself, government websites. With regard to that
23 last point about some of the things that we cited being from
24 2020, that's because the EUA just -- the emergency use
25 authorization took place back then, and it didn't test for

15:33:59 1 transmission. It just tested for symptoms.

2 The other thing is that what I read you from the
3 CDC's own website about Omicron is just sitting there.
4 That's current. And they say it's likely that you'll get
15:34:28 5 infected and what this really does is just make you feel
6 better. So that's valid, regular stuff, right there before
7 the Court.

8 With regard to the rational basis review point, if
9 you assume away a fundamental right, which we assert in our
15:34:57 10 Complaint, and we well-plead in our Complaint, if you just
11 ignore it, then you get a rational basis. I mean, that's
12 true. But we wrote the Complaint, we wrote it the way we
13 did, and we very clearly allege that this is a treatment,
14 not a vaccine. Therefore, as a treatment, we have a
15 fundamental you right to reject it. And that is the
16 fundamental right involved. So, every time you ask that
15:35:28 17 question, they skip over that issue. They don't have a good
18 answer for you, Your Honor.

19 And we're not asking you to be the first Court to
20 hold that there is some due process right to refuse a
21 vaccine, we're not asking you to do that. What we're asking
22 you to do is allow us to explore before the Court the
15:35:58 23 factual issue of whether this is -- what is this thing that
24 people are being forced to take? And is it a Cruzan or is
15:36:17 25 it over on the other side of the fence? We allege it's a

1 Cruzan. We allege it's a treatment. We allege there's a
2 fundamental right.

3 With regard to the tenth amendment, a lot of what
15:36:58 4 the Court -- what the government argues effectively just
5 overrides the checks and balances of the constitution. If
6 the Spending Clause can allow the government, the federal
7 government to take over all of the police powers of the
15:37:20 8 state, then I guess NFIB V. Sebelius just doesn't stand for
9 anything. But that's solid law. And the concept of dual
10 sovereignty, you know, Alexander Hamilton after the
11 convention said: We have split the atom of sovereignty, and
12 what wasn't given by the states was not given, and it was
15:38:00 13 kept back by the states.

14 And the states never gave their police power. This
15 was not argued in the Biden case. It was not addressed in
16 the Biden case. That is not binding on this issue. It's
17 also binding -- not binding because no one in that case ever
18 argued the fact issue before this Court, the differences
15:38:30 19 between a treatment and a vaccine, and that was nowhere
20 addressed. So this is a unique case for the Court. I
21 realize that. And we -- we believe that we meet the
22 burdens, Your Honor.

23 Effectiveness? We're not claiming effectiveness or
15:38:57 24 not effectiveness. That's not -- we're not saying that.
25 What we're saying is it's a treatment, not a vaccine. So,

1 all right. Those are the issues that they said.

2 In closing, Your Honor, I would just like to point
3 out that Dr. Griner, with regard to money damages, is not
4 the kind of guy that can be compensated for what he's
5 devoted his entire life to, his entire life. Read in his
15:39:29 6 declaration, Your Honor, this man is passionate about saving
7 these kids. This is his life. He has created a foundation
15:39:38 8 to raise money to do it. He's dedicated. His family is
9 dedicated to this. He speaks of these kids, when you get to
10 know him, that he heals as his family.

11 Saying that he can be compensated by monetary
12 damages is like saying, if you took away Pavarotti's ability
15:40:29 13 to sing, that his life could be -- would not change. His
14 life would have no meaning if Pavarotti could not sing. And
15 this is the same instance here in this case. This man is
16 passionate about this. There is no monetary compensation.
17 He is being denied his life. We ask you to give it back to
18 him. Thank you, Your Honor.

19 THE COURT: Thank you.

15:41:00 20 Thank you, Mr. McElvain.

21 I'll take these motions under advisement and get a
22 ruling out in due course. We'll be in recess. The hearing
23 will be closed. Thanks.

15:41:35 24 MR. WENTZ: That you.

25 MR. MC ELVAIN: Thank you, Your Honor.

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(Whereupon the proceedings were concluded.)

* * *

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I am a
Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of
the foregoing matter on July 6, 2022, and thereat reported
in Stenotype all of the testimony and proceedings had, and
caused said notes to be transcribed into typewriting, and
the foregoing pages numbered 1 through 52 constitute a full,
true and correct record of the proceedings transcribed.

That I am not of kin to any of the parties and
have no interest in the outcome of the matter;

And hereby set my hand and seal this 20th day of
July, 2022.

REBECCA JANKE, CSR, RPR, RMR