

1 Richard B. Fox, J.D., M.D.  
State Bar Number 283447  
2 1875 S. Bascom Avenue, Ste. 2400  
Campbell, CA 95008  
3 Tel: 408-402-2452  
Fax: 669-221-6281  
4 [drfox@drfoxlawoffice.com](mailto:drfox@drfoxlawoffice.com)  
Attorney for Plaintiffs  
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7 **UNITED STATES DISTRICT COURT**  
8 **EASTERN DISTRICT OF CALIFORNIA**  
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11 Free Now Foundation, Brave And Free  
Santa Cruz, D.Q., by his Next Friend, Alix  
12 Mayer, A.R., by his Next Friend, Alix  
Mayer, T.E., by his Next Friend, Kathleen  
13 Lynch, and N.D., by his Next Friend  
Kathleen Lynch;

14 Plaintiffs;

15 vs.

16 Erica Pan, In Her Official Capacity As  
Director Of The California Department Of  
17 Public Health;

18 Defendants  
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**CASE NO. 2:24-cv-03523-DJC-SCR**

**PLAINTIFFS' SUPPLEMENTAL BRIEFING  
RE: RECENT NINTH CIRCUIT *EN BANC*  
DECISION IN *HEALTH FREEDOM  
DEFENSE FUND V. CARVALHO***

**Date:**

**Time:**

**Courtroom: 7**

**Judge: Hon. Daniel J. Calabretta**

**Action Filed: December 16, 2024**

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**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) ..... [4](#), [6](#)

*Health Freedom Defense Fund v. Carvalho*, 22-55908 (9th Cir. Jul 31, 2025) ..... [3-6](#)

*Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) ..... [3-6](#)

*Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L. Ed. 2772 (1997) ..... [6](#)

*Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)..... [5](#), [6](#)

**FEDERAL STATUTES**

National Childhood Vaccine Injury Act of 1986 ..... [6](#)

1 **1. THE PROCEDURAL POSTURE OF DEFENDANT PAN’S MOTION TO DISMISS**

2 Currently pending before the Court is Defendant Pan’s Motion To Dismiss Plaintiffs’ Second  
3 Amended Complaint on several grounds, filed on July 16, 2025. ECF #51. Defendant Pan set that  
4 motion for hearing on August 21, 2015. Plaintiffs filed their Opposition on July 30, 2025. ECF #53.

5 Defendant Pan filed her Reply on August 8, 2025. ECF #54. In that Reply, Defendant Pan  
6 cited, extensively, the recent Ninth Circuit Court of Appeals *en banc* decision in *Health Freedom*  
7 *Defense Fund v. Carvalho*, 22-55908, 2025 WL 2167401 (9th Cir. Jul 31, 2025) (hereafter “*Health*  
8 *Freedom*”). Copy attached.

9 On August 13, 2025 this Court issued a Minute Order ordering that, “Defendant’s [51] Motion  
10 to Dismiss is ORDERED submitted without appearance and without oral argument pursuant to Local  
11 Rule 230(g). As such, the hearing on said motion, set for 8/21/2025, is VACATED.” ECF #55.

12 On August 14, 2025 the Plaintiffs filed a motion for oral argument, requesting either oral  
13 argument or additional briefing for the purpose of addressing the Ninth Circuit’s *en banc* decision in  
14 *Health Freedom*, which was decided after Plaintiffs had filed their Opposition. ECF #56.

15 On August 14, 2025 the Court ordered the parties to file additional briefing within fourteen  
16 days limited to *Health Freedom Defense Fund v. Carvalho* and the Defendant’s pending Motion To  
17 Dismiss. ECF #57.

18 **2. THE RECENT NINTH CIRCUIT *EN BANC* DECISION IN *HEALTH FREEDOM V.***  
19 ***CARVALHO* IS BREATHTAKINGLY SWEEPING AUTHORITY FOR MANDATORY**  
20 **MEDICAL TREATMENTS OF ALL KINDS FOR ANY PURPORTED PUBLIC**  
21 **HEALTH PURPOSE**

22 As Circuit Judges Lee and Collins wrote in dissent in *Health Freedom*, “[t]he majority’s  
23 opinion comes perilously close to giving the government carte blanche to require a vaccine or even  
24 medical treatment against people’s will so long as it asserts—even if incorrectly—that it would  
25 promote ‘public health and safety.’” *Health Freedom*, at p. 34, Lee, J., dissenting. In that dissent,  
26 Judge Lee went on to state that:

27 The majority reads *Jacobson* broadly to empower the government to impose any vaccine  
28 mandate so long as it believes the mandate would “protect public health and safety.” Maj. Op.  
23. Under the majority’s reading, “alleged scientific uncertainty over a vaccine’s efficacy is  
irrelevant under *Jacobson*.” *Id.* In other words, if the government believes a vaccine will  
protect “public health and safety,” that is the end of the story. The majority adopts a sweeping  
definition of “public health and safety” such that the government can mandate a vaccine—and

1 potentially any medical treatment—if the required measure just “lessen[s] the severity of  
2 symptoms,” whether or not it prevents transmission and contraction of the disease. *Id.*

3 I disagree with the majority’s overly broad reading of *Jacobson*.

4 *Health Freedom*, at p. 38.

5 Nor was the majority persuaded by the Health Freedom plaintiffs’ argument under *Cruzan*<sup>1</sup>  
6 that the plaintiffs had a fundamental right to refuse such medical treatments. *Health Freedom*, at p.  
7 27-28.

8 Plaintiffs in this case made the same argument in their Opposition. Opposition, at pp. 8, 10,  
9 13, 15, 19, 20, ECF #53.

10 Indeed, the *Health Freedom* majority placed no limits at all on government powers to order  
11 medical treatments for any ostensible public health or safety reason under *Jacobson*,<sup>2</sup> as Judge Lee  
12 noted (“In other words, if the government believes a vaccine will protect ‘public health and safety,’  
13 that is the end of the story.”) *Health Freedom*, at p. 38, Lee, J., dissenting.

14 While the *Health Freedom* majority decision emphasized the government’s powers to mandate  
15 medical treatments of all kinds to “protect public health and safety,” it completely failed to recognize  
16 or discuss any limitations on those powers due to individual injuries and deaths resulting from those  
17 mandated treatments, such as, in this case, Sudden Unexpected Infant Deaths and cases of regressive  
18 autism as alleged by Plaintiffs.

19 Under the majority’s opinion in *Health Freedom*, such unlimited powers could be used for  
20 indisputably improper, indeed unconscionable, purposes. An extreme hypothetical example would be  
21 mandating the injection of children suffering from measles infections with a hypothetical drug that  
22 prevented them from spreading it to others by killing the measles virus, but where, hypothetically, that  
23 drug also killed half of the children. If that would be unconscionable, what if the drug only killed 25%,  
24 or 1%, or one in a hundred, or one in a thousand? How about one in every twelve boys becoming  
25 autistic, now the case for fully vaccinated California boys? Who decides? On what basis? The Ninth

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27 <sup>1</sup> *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d  
28 224 (1990).

<sup>2</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905).

1 Circuit’s *en banc Health Freedom* decision under *Jacobson* fails, quite conspicuously, to address these  
2 issues. Under that decision, the only thing that matters is whether the government in power at the  
3 moment merely purports to “believe” that, overall, the mandated drug would “protect public health  
4 and safety.” This is, quite literally, a prescription for totalitarianism, not just medical totalitarianism  
5 but as to all other aspects of life, as we learned from the mandated COVID tests and shots leading to  
6 loss of employment, education, freedom of movement, freedom of worship, public meetings, and so  
7 much more.

8 As the Plaintiffs argued in their Opposition to the Defendant’s Motion To Dismiss (ECF #51),  
9 the Supreme Court’s decision in *Washington v. Harper*<sup>3</sup> did address the issue of mandated medical  
10 treatments that can cause serious, permanent injury and death. Opposition, at pp. 8, 10, 11, 13-15, 19,  
11 20, 24. ECF #53.

12 However, the *en banc* decision in *Health Freedom* held that, where the issue is mandatory  
13 immunizations, *Jacobson* controls over all other Supreme Court decisions:

14 We also reject Plaintiffs’ argument that a heightened standard of review applies based on a  
15 more recent line of cases that, according to Plaintiffs, recognize a fundamental right to refuse  
16 unwanted medical treatment. Plaintiffs primarily rely on *Cruzan ex rel. Cruzan v. Director,*  
17 *Missouri Department of Health*, 497 U.S. 261 (1990) (stating that “a competent person has a  
18 constitutionally protected liberty interest in refusing unwanted medical treatment,” *id.* at 278),  
19 and *Washington v. Glucksberg*, 521 U.S. 702 (1997) (noting that the Court “ha[s] also  
20 assumed, and strongly suggested, that the Due Process Clause protects the traditional right to  
21 refuse unwanted lifesaving medical treatment,” *id.* at 720 (citing *Cruzan*, 497 U.S. at  
22 278–79)).

23 Whatever the reach of these cases, they did not overrule *Jacobson*.<sup>13</sup>

24 *Health Freedom*, at pp. 27-28.

25 **3. The *En Banc* Decision in *Health Freedom* Is Likely Not Final But Will Be Granted**  
26 **Certiorari**

27 The above quotation from *Health Freedom* concluded with footnote #13:

28 Moreover, these cases do not address the circumstances addressed in *Jacobson*: a due process  
challenge to a vaccine policy imposed to protect the public’s health and safety. So we do not  
read these cases as undermining *Jacobson*. But even if we did, we would still need to apply  
*Jacobson*. See *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525, 529 (9th Cir. 2018) (per  
curiam) (“Where Supreme Court precedent ‘has direct application in a case,’ the Supreme  
Court has instructed ‘the Court of Appeals [to] follow the case which directly controls,’ even  
if it ‘appears to rest on reasons rejected in some other line of decisions,’ and thereby to  
‘leav[e] to th[e] Court the prerogative of overruling its own decisions...’” (alterations in

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<sup>3</sup> *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).

1 original) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997))).

2 *Health Freedom*, at footnote #13.

3 Thus, one could conclude from this footnote that the *Health Freedom* majority may be asking  
4 that the Supreme Court grant certiorari in that case in order to set the metes and bounds of its decisions  
5 in *Jacobson*, *Cruzan*, *Glucksberg*,<sup>4</sup> *Harper*, and others as to the issue of mandated medical treatments.  
6 If so, then the *en banc* decision in *Health Freedom* is not yet final. If such is the case, then, if this  
7 Court grants the Defendant's Motion To Dismiss, Plaintiffs respectfully request that it do so with leave  
8 to amend.

9 **4. CONCLUSION**

10 Because the *en banc* decision in *Health Freedom* did not consider the possibility of injury and  
11 even death resulting from mandated vaccinations, injuries and deaths known to occur under the  
12 National Childhood Vaccine Injury Act of 1986, Plaintiffs respectfully request that the Court deny  
13 Defendant's Motion To Dismiss Without Leave To Amend (ECF #51).

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15 Dated: August 22, 2025

Respectfully submitted,

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18 Richard B. Fox, Counsel for Plaintiffs  
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<sup>4</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997)

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**CERTIFICATE OF SERVICE**

**Case Name: Free Now Foundation, et al. v Pan**

No. 2:24-cv-03523-DJC-SCR

I hereby certify that on August 22, 2025, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**PLAINTIFFS' SUPPLEMENTAL BRIEFING RE: RECENT NINTH CIRCUIT *EN BANC* DECISION IN *HEALTH FREEDOM DEFENSE FUND V. CARVALHO***

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct, and that this declaration was executed on August 22, 2025 at Pacific Grove, California.



Richard B. Fox, J.D., M.D.  
Law Office Of Richard B. Fox  
1875 S. Bascom Avenue  
Suite 2400  
Campbell, CA 95008  
Tel: 408-402-2452  
Fax: 669-221-6281  
Email: [drfox@drfoxlawoffice.com](mailto:drfox@drfoxlawoffice.com)

