No. 25-740

In the Supreme Court of the United States

SUSAN I. HEATH,
Proposed Representative of the
Estate of Henry A. Hurst, III, Deceased,
Petitioner,

v.

ECOHEALTH ALLIANCE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Amici Curiae Brief of America's Frontline Doctors and Dr. Simone Gold, M.D., J.D., in Support of Petitioner for Reversal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION

OTHER AUTHORITIES

A MATTER OF GREAT PUBLIC IMPORTANCE

Allowing no redress for negligence in conducting or mishandling dangerous gain-of-function research cannot be countenanced. This is about saving lives.

The Free Speech Foundation, d/b/a America's Frontline Doctors, and Dr. Simone Gold, M.D., J.D., the founder and physician member ("*Amici Curiae*" or "AFLDS") respectfully file this *amici curiae* brief in support of the Petitioner's petition for *certiorari* in *Heath v EcoHealth Alliance, Inc.*, No. 25-740.[1]

Amici Curiae have also filed *amici curiae* briefs in cases affecting public health such as *Foote v. Ludlow School Committee,* 25-77 (2025); *Lee v. Poudre School District R-1,* 25-89 (2025)*; United States v. Skrmetti,* 145 S. Ct. 1816 (2024); *Mahmoud v. Taylor,* 606 U.S. 522 (2025); *Chiles v Salazar,* 145 S. Ct. 1328 (2025); *Kory v. Bonta,* 24-932 (2024); *Miller v. McDonald,* 25-133 (2025); *Does 1-2 v. Hochul,* 24-1015 (2024); *Stockton v. Brown,* 25-606 (2025); and *Mirabelli v. Bonta,* 25A810 (2025), five of which cases are under consideration at this time.

This brief offers an important *medical and legal* perspective to this Court from thousands of doctors on the frontlines, by illustrating that dangerous gain-of-function research should be disincentivized by holding all negligent parties liable for engaging in or mismanaging dangerous gain-of-function research.

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[1] It is certified that no counsel or any party authored or prepared this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties received timely notice of the filing of this *amici curiae* brief.

INTEREST OF *AMICI CURIAE*

Amici Curiae are the Free Speech Foundation, d/b/a America's Frontline Doctors ("AFLDS"), a non-partisan, not-for-profit organization of thousands of member physicians from across the country, representing a range of medical disciplines and practical experience on the front lines of medicine, and its founder and expert physician and attorney member, Dr. Simone Gold, M.D., J.D., who served as an ER doctor in minority communities for over twenty years.[2]

AFLDS' programs focus on a number of critical issues, including:

- Providing Americans with science-based facts for staying healthy;
- Protecting physician independence from government overreach;
- Combating illnesses with evidence-based approaches without compromising constitutional freedoms;
- Fighting medical cancel culture and media censorship;
- Advancing healthcare policies that protect the physician-patient relationship;
- Expanding healthy treatment options for all Americans who need them; and
- Strengthening the voices of frontline doctors in the national healthcare conversation.

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[2] https://americasfrontlinedoctors.org/about-us

Each of AFLDS' member physicians is deeply committed to the guiding principle of medicine: "FIRST, DO NO HARM." They take their ethical obligations to their patients very seriously. It is axiomatic that a physician's duty is to his or her patient. AFLDS holds sacrosanct the relationship between doctor and patient where informed decisions are to be made, taking into consideration all of the factors relating to the patients' health, risks, co-morbidities and circumstances.

For AFLDS member physicians, the practice of medicine is not merely a job or career. Rather, it is a sacred trust. It is a high calling that often requires a decade or more of highly focused sacrificial dedication to achieve.

America's Frontline Doctors is committed to preserving the voluntary and fully informed doctor/patient relationship, opposes any sort of illegal interference with that relationship, and opposes illegal government overreach by the censorship of medical and other information, or by the "mandating" of incorrect or dangerous medical information or treatments.

"Informed consent" for medical treatments cannot truly be informed unless there is a full disclosure of all known benefits and risks. Voluntary informed consent can never be coerced, subjected to undue influence, nor distorted by censored and incomplete information.

In this case, Petitioner was denied her right of access to the courts and to a jury trial to hold Respondent accountable for negligence or under strict liability for actions profoundly affecting public health. The physicians of America's Frontline Doctors feel an ethical obligation to speak out

against this, as the erroneous judicial ruling below endangers public health.

The AMA Principles of Medical Ethics support the obligation of physicians to continuously educate themselves and the community:

> III. A physician shall … recognize a responsibility to seek changes in those [legal] requirements which are contrary to the best interests of the patient. …
>
> V. A physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, …
>
> VII. A physician shall recognize a responsibility to participate in activities contributing to the improvement of the community and the betterment of public health.[3]

This case is one such case. Petitioner should be granted her access to courts to redress her grievances against an entity which sponsored gain of function research, dangerous research which has been evaluated by Congress as possibly causing a deadly pandemic, and thus of national importance with respect to public health.

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[3] https://code-medical-ethics.ama-assn.org/principles

SUMMARY OF ARGUMENT

Biological gain-of-function (GOF) research is defined by HHS as "research that improves the ability of a pathogen to cause disease."[4] This definition in and of itself raises multiple red flags. Gain-of-function research has been definitively shown to be dangerous, and was defunded by HHS on October 17, 2014.[5]

However, also in 2014, HHS, through NIH and NIAID, awarded Respondent EcoHealth Alliance, Inc. a grant to outsource such dangerous GOF research to the Wuhan Institute for Virology in China, a laboratory with known safety issues. Dr. Anthony Fauci was the head of NIAID at the time

Petitioner alleges that there is a provable causal connection between the death of her husband and the grant mismanagement and negligence of the Respondent. However, Petitioner was denied her right to petition the courts for redress of her grievances, her access to courts, and her right to a jury trial secured by the First, Fifth and Seventh Amendments to the United States Constitution, by the erroneous rulings of the courts below, which conferred a type of judicial immunity on the Respondent.

Petitioner's case should be allowed to proceed, as this will be a powerful disincentive against entities involved in research acting in a negligent and reckless manner when making decisions which could result in multiple fatalities caused by new pandemics. Respondent and others engaged in

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[4] https://web.archive.org/web/20141020134118/http://www.phe.gov/s3/dualuse/Documents/gain-of-function.pdf

[5] *Id*.

research using dangerous pathogens will be much more likely to exercise due care if *not* insulated from possible liability, which is good public policy.

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ARGUMENT

The ability of Petitioner to redress her grievances by judicially establishing the liability of Respondent under either negligence or strict liability theories should be protected to the utmost. Where there is a right, there should be a remedy.

Allowing Petitioner meaningful redress will incentivize Respondent EcoHealth and other entities involved in health-related research to avoid all negligent and reckless behaviors in creating or dealing with dangerous pathogens via dangerous gain-of-function (GOF) research. This will greatly help safeguard public health by removing a type of *de facto* judicial immunity mistakenly bestowed upon Respondent by the courts below.

No highest court of any state has yet addressed torts arising from negligence or strict liability involving deliberate GOF research on pathogens deadly to humans. Indeed, GOF research and its connection to the creation of deadly pathogens which can subsequently infect humans and escape into the environment appears to have never before been subjected to trial.

EcoHealth is now clearly identified as an entity specifically funding GOF research on pathogens when it knew or should have known they could escape into the environment, endangering human lives.[6] Yet *Amici Curiae* could identify only three

[6] *See, e.g.,* the Final Report of the Select Subcommittee on the

other cases against EcoHealth brought to the federal courts; these cases were dismissed due to failure to establish the district court's personal or subject matter jurisdiction (one brought suit primarily under the Federal Tort Claims Act, codified at 28 U.S.C. Chapter 171).[7]

Here, diversity jurisdiction was established, but despite the novelty of the tort claim and its implication for public health, the Second Circuit failed to certify the liability questions to the highest New York court.

Judicial technicalities, rationalization, or speculation about the tort law of a given state should not be allowed to endanger public health. This Court has stated that justice is not served by a federal court's speculation about state law and its application to novel circumstances. "Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when … the state courts stand willing to address questions of state law on certification from a federal court." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985). (O'Connor, J., concurring). Speculation about the

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Coronavirus Pandemic Committee on Oversight and Accountability, "After Action Review of the COVID-19 Pandemic: the Lessons Learned and a Path Forward." December 4, 2024, pp. 1–2; https://oversight.house. gov/wp-content/uploads/2024/12/2024.12.04-SSCP-FINAL-REPORT-ANS.pdf.

[7] *Strickland v. Ecohealth All., Inc.*, 2024 WL 4187144 (E.D.N.C. 2024) (no jurisdiction over EcoHealth), *Cosola v. Ecohealth All.*, 2024 WL 2166914 (W.D.Tex. 2024) (no jurisdiction over EcoHealth), and *Dykes v. Nat'l Insts. of Health*, 2024 WL 6951650 (W.D.Mo. 2024), *aff'd* 2025 WL 1143242 (8th Cir. 2025) (no subject matter jurisdiction under the FTCA).

application of existing state tort law to a novel tort claim involving death from an engineered pathogen is equally gratuitous when the state court stands willing to address those questions, as demonstrated by Petitioner.[8]

Right to remedy

The "right to a remedy" has long been integral to the common law. As Sir Edward Coke, speaking on the "the rights of subjects in their private relations with one another,"[9] stated in the 17th century:

> [E]very subject of this realm, for injury done to him in goods, lands, or person, by any other subject, be he ecclesiastical, or temporall, ... or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.[10]

Sir William Blackstone described the right to a remedy as one of the critical means through which a civilized society serves its aims of preserving the rights to life, liberty and property. He noted that such rights mean nothing if the subordinate right to a remedy is not guaranteed. The right to a remedy dictates that courts exercising general common law jurisdiction must be open for all cases involving

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[8] See Petition, p. 28, citing the Rules of the Court of Appeals, at § 500.27(a) and the Second Circuit's Local Rule 27.2.

[9] Edward Coke, The Second Part of the Institutes of the Laws of England 46 (London, W. Clarke & Sons 1817) (1641).

[10] *Id*., at 55.

injury to those rights: "[f]or it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress."[11]

It is not just a forum and availability of judicial process that is at issue, but a substantive opportunity to assert claims to protect those rights. Here, Heath's husband lost his life, and asserts claims against EcoHealth as the cause. The fact that EcoHealth funded a subcontractor to conduct the actual GOF research in another country once such research was suspended by HHS demonstrates a deliberate intention to ignore and defy not only the rules concerning its federal funds, but also the intent of those rules to protect the public health.

The Second Circuit likewise circumvented any opportunity to assert claims related to the endangering of the public, and specifically, Heath's husband, by failing to certify the novel liability questions to the state court.

Dangers of GOF Research

The principle of opportunity for remedy is particularly important to follow when dealing with or creating dangerous or deadly weaponized pathogens with the potential to kill millions. Multiple authorities have shown that GOF research is highly dangerous. Such research is most likely subject to strict liability.

The dangerous public health threat posed by GOF research prompted the current administration to issue Executive Order 14292 on May 5th, 2025. Section 1 of that Executive Order states:

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[11] 3 William Blackstone, Commentaries at 109.

> Section 1. Purpose. Dangerous gain-of-function research on biological agents and pathogens has the potential to significantly endanger the lives of American citizens. If left unrestricted, its effects can include widespread mortality, an impaired public health system, disrupted American livelihoods, and diminished economic and national security.[12]

This is the official policy of the United States on GOF. Certainly, extending *de facto* judicial immunity to those corporations and individuals who allegedly injure people by GOF should not be allowed because of the obvious threat to public health. Any parties allegedly injured by entities engaged in GOF should be allowed to attempt to prove their cases in court. There is no exception to the due process right to petition for redress of grievances and for a jury trial, simply because the claims are novel or may be numerous.

Marc Lipsitch, of the Departments of Epidemiology and Immunology and Infectious Diseases, Center for Communicable Disease Dynamics, Harvard TH Chan School of Public Health, Boston, Mass., goes so far as to call GOF research "exceptionally dangerous," and supports a complete ban because of its unacceptable and uncontrollable biosafety risks, stating:

> [There is a] case against performing exceptionally dangerous gain-of-function

[12] "Improving the Safety and Security of Biological Research," https://www.whitehouse.gov/presidential-actions/2025/05/improving-the-safety-and-security-of-biological-research/

> experiments that are designed to create potentially pandemic and novel strains of influenza, for example, by enhancing the airborne transmissibility in mammals of highly virulent avian influenza strains. This is a question of intense debate over the last 5 years, though the history of such experiments goes back at least to the synthesis of viable influenza A H1N1 (1918) based on material preserved from the 1918 pandemic. … [E]xperiments to create potential pandemic pathogens (PPPs) are nearly unique in that they present biosafety risks that extend well beyond the experimenter or laboratory performing them; an accidental release could, as the name suggests, lead to global spread of a virulent virus, a biosafety incident on a scale never before seen. In such cases, biosafety considerations should be uppermost in the consideration of alternative approaches to experimental objectives and design, rather than being settled after the fact, as is appropriately done for most research involving pathogens.[13]

Because of these "exceptionally dangerous" and potentially uncontrollable biosafety risks, Congressional attempts at oversight of GOF have intensified. In reviewing H.R. 1864, S. 738, and S. 854, the oversight issues have been described by the Congressional Research Service as follows:

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[13] Marc Lipsitch, "Why Do Exceptionally Dangerous Gain-of-Function Experiments in Influenza?" Abstract, *Springer Nature*, August 28, 2018. https://link.springer.com/protocol/10.1007/978-1-4939-8678-1_29#Sec3

> Some scientists argue that this research is needed to better understand how viruses evolve in order to develop better medical countermeasures and surveillance regimes for emerging pathogens. Others argue that GOF research does not lead to the development of medical countermeasures and that other types of research, such as computer modeling, could be as effective as GOF. They further argue that a laboratory accident or deliberate misuse of GOF research has the potential to impact the larger public, potentially globally. This concern leads some observers to argue that the risks of such research outweigh any potential benefits.[14]

Further, the December 2024 final report of the House Select Subcommittee on the Coronavirus Pandemic concluded that that SARS-CoV-2 and COVID-19 likely originated from Respondent EcoHealth's subcontractor, the Wuhan Institute for Virology in China. Respondent obtained their grant through NIH and NIAID, which was managed by Dr. Anthony Fauci at the time.[15]

This is more evidence that supports the veracity of Petitioner's complaint. Where there is a right, there should always be a corresponding remedy, especially where millions of lives could be at stake. Here, a viable remedy preserving the rights of litigants to petition for redress of provable injuries caused by the alleged negligence of those entities

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[14] Todd Kuiken, Oversight of Gain-of-Function Research with Pathogens: Issues for Congress, CRS Report R47114, July 1, 2025; https://www.congress.gov/crs-product/R47114

[15] *See* FN 6.

engaged in GOF research could be a powerful deterrent to such dangerous negligence.

CONCLUSION

Petitioner should be permitted to redress her grievances by establishing the liability of Respondent under either negligence or strict liability theories. This will incentivize Respondent and others similarly situated to avoid all negligent and reckless behaviors in creating or dealing with dangerous pathogens via gain-of-function research, and greatly safeguard public health by removing the type of *de facto* judicial immunity mistakenly bestowed upon Respondent by the courts below.

The petition for *certiorari* should be granted.

Respectfully submitted,

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January 21, 2026