No. 21A- _____

In the Supreme Court of the United States

Ryan Klaassen, Jaime Carini, Daniel J. Baumgartner, Ashlee Morris, Seth Crowder, Macey Policka, Margaret Roth, and **Natalie Sperazza**,
Applicants,

v.

The Trustees of Indiana University
Respondent

Emergency Application for Writ of Injunction, Relief Requested by Friday, August 13, 2021

To the Honorable Amy Coney Barrett
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Seventh Circuit

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Questions Presented

I. Whether heightened scrutiny applies to Indiana University's Mandate that all IU students take the COVID vaccine in violation of their constitutional rights to bodily integrity and autonomy and medical treatment choice so that IU must prove that its Mandate is justified, which the courts below erroneously failed to do.

II. Whether IU failed to prove that its Mandate is justified under heightened scrutiny.

Parties to the Proceeding

The caption contains the names of all parties.

Corporate Disclosure Statement

No party is a corporation, so none has a parent corporation or stock.

Related Proceedings Below

U.S. Court of Appeals for the Seventh Circuit:

- *Ryan Klaassen, et al. v. Trustees of Indiana University*, No. 21-2326 (7th Cir.) — appeal pending; motion for an injunction pending appeal was denied Aug. 2, 2021.

U.S. District Court for the Norther District of Indiana:

- *Ryan Klaassen, et al. v. Trustees of Indiana University*, No. 1:21-cv-238 DRL-SLC (N.D. Ind.) — preliminary injunction denied Jul. 18, 2021.

- *Ryan Klaassen, et al. v. Trustees of Indiana University*, No. 1:21-cv-238 DRL-SLC (N.D. Ind.) — motion for an injunction pending appeal denied Jul. 21, 2021.

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To the Honorable Amy Coney Barrett, Associate Justice of the Supreme Court and Circuit Justice for the Seventh Circuit:

Pursuant to Supreme Court Rules 22 and 23, and 28 U.S.C. § 1651, Applicants ("Students") respectfully request a writ of injunction by ***Friday, August 13***— related to Indiana University ("**IU**") mandating that all students receive a COVID vaccine ("**IU's Mandate**") in violation of Students' Fourteenth Amendment[1] rights.

Students thus respectfully request that this Circuit Justice grant the requested relief or refer this application to the Court.

Introduction

Students challenged IU's Mandate requiring students to take COVID vaccinations, despite their objection. Students' refusal is based on legitimate concerns including underlying medical conditions, having natural antibodies, and the risks associated with the vaccine. All students are adults, are entitled to make their own medical treatment decisions, and have a constitutional right to bodily integrity, autonomy, and of medical treatment choice in the context of a vaccination mandate. IU, however, is treating its students as children who cannot be trusted to make mature decisions and has substituted itself for both the student and her attending physician, mandating a choice which is the student's to make, based on her physician's advice.

The only way such rights can be infringed is for IU to justify its override of the student's choice within the boundaries of the U.S. Constitution. The courts below,

[1] App. 109a.

however, did not require this, because they erroneously applied rational basis scrutiny instead of the heightened scrutiny appropriate to infringements of the rights at stake here. Under proper heightened scrutiny, IU's Mandate cannot be justified and should be enjoined.

Decisions Below

The district court Opinion and Order denying preliminary injunctive relief to Students is yet unreported but at App. 8a (**Prelim. Inj. Op.**). Its denial of an injunction pending appeal is unreported but at App. 5a (**Dist. Ct. Den. Mot. Inj. Pending Appeal**). The Seventh Circuit's denial of an injunction pending appeal is unreported but at App. 1a (**7th Cir. Den. Mot. Inj. Appeal**).

Jurisdiction

On July 18, 2021, the U.S. District Court for the Northern District of Indiana issued an Order denying preliminary injunctive relief to Students, App. 8a, though holding that Students have standing for their constitutional claim. On July 20, 2021, Students filed their notice of appeal and District Court motion for injunction pending appeal, which was also denied on July 21, 2021, App. 5a. The Seventh Circuit denied Students' motion for an injunction pending appeal on August 2. App. 1a. This Court has jurisdiction over this Application under 28 U.S.C. § 1651(a).

Constitutional and Statutory Provisions Involved

This case involves the Fourteenth Amendment to the U.S. Constitution. App. 109a.

Factual Background

A. IU's Mandate

On May 21, 2021, IU announced that faculty, staff, and students would be required to take a COVID vaccine. Compl., App. 114a, ¶¶17-20, Prelim. Inj. Op., App. 18a-19a. If a student refuses to take the vaccine, IU has promised the student will suffer "strong consequences" which amount to virtual expulsion, including: canceled class registration, terminated IU identification cards, and restrictions from participation in any on-campus activity. Compl., App. 114a, ¶21; *see also* Prelim. Inj. Op., App. 19a.

IU students can apply for an exemption to IU's Mandate under "extremely limited" criteria, which only include a religious exemption, a documented allergy to the vaccine, medical deferrals, and an online-only student exemption.[2] Compl., App. 114a-115a, ¶¶22-24; *see also* Prelim. Inj. Op., App 19a. It does not include an exemption for those with natural immunity, including those who have previously been infected and fully recovered or for many medical contra-indications. Compl., App. 115a, ¶24.

Those who qualify for and are granted an exemption are still subject to additional requirements ("**Extra Requirements**"), including *inter alia* participating in twice a week testing and mandatory face masks in public spaces.[3]

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[2] On or about July 20, 2021, IU added an "ethical exemption" to their website but has given no other information about this new exemption or stated who would qualify.

[3] On August 4, 2021, IU announced it would require all IU students, faculty, staff, and visitors to wear masks indoors, regardless of vaccination status.

Compl., App. 115a-116a, ¶¶28-30; Prelim. Inj. Op., App 20a. IU does not allow for any exemptions from these Extra Requirements. Compl., App. 116a, ¶¶31-32, 197, 199.

B. The Context Surrounding IU's Mandate

1. IU's Mandate Is Contrary to FDA Emergency Use Authorization.

Currently, all three publicly-available COVID vaccines have only "Emergency Use Authorization" ("**EUA**") status, and have not received full FDA approval. Compl., App. 118a-119a, ¶¶44-47; Prelim. Inj. Op., App. 22a-28a. A vaccine authorized under EUA requires complete, informed, and voluntary consent. Compl., App. 119a-120a, ¶¶48-51; Prelim. Inj. Op., App. 59a-61a. Indeed, as a condition of authorization under the Emergency Use Authorization provisions, the Secretary is required:

> to ensure that individuals to whom the product is administered are informed—
>
> (I) that the Secretary has authorized the emergency use of the product;
>
> (II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and
>
> (III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

21 U.S.C.A. § 360bbb-3(e)(1)(A)(ii)(I)-(III) (emphases added).

Here, the risk of serious morbidity and mortality from COVID for those under 30 is virtually zero. *See infra* p. 8-9. To Students, the known and unknown risks associated with COVID vaccines, particularly in their age group, outweigh the risks

to that population from the disease itself, so they do not consent to the vaccine.[4] Despite this, IU Mandates the vaccine for them.

While IU is not a provider and is not directly subject to the informed consent statute, the principle supports voluntary informed medical consent from IU students—not coercion from IU's administration. Accordingly, the same processes should be used, and consents obtained, when suggesting that students take a vaccine that has only been approved for emergency use.

Students believe the required consent is undermined by IU's Mandate and rendered a nullity for them. IU's Mandate is contrary to these principles, processes, and consents. It does not inform students that (1) the vaccines are only authorized for emergency use, (2) that there are "significant known and potential benefits and risks of such use" (or "the extent to which such benefits and risks are unknown") or (3) that students have the "option to accept or refuse administration of the product[.]" 21 U.S.C.A. § 360bbb-3(e)(1)(A)(ii)(I)-(III).

2. IU's Mandate Is Contrary to Modern Medical Ethics.

IU's Mandate is contrary to the fundamental tenet of medical ethics which require voluntary and informed consent for any procedure, or drug that imposes a medical risk to an individual. "A person may freely choose to accept medical risks for the benefit of others . . . we don't harvest organs without consent, even if doing so would save many lives. Those who make such sacrifices for others must truly be

[4] The district court elaborated on the vaccines risks, including those to Students' age group. Prelim. Inj. Op., App. 29a-31a. *See also* p. 9 (discussing vaccine risks).

volunteers, not conscripts drafted by college administrators."[5]

Here, the risk of serious morbidity and mortality from COVID for those under 30 is close to zero. *See infra* p. 8-9. The known and unknown risks associated with COVID vaccines, particularly in those under 30, outweigh the risks to that population from the disease itself. *Id*. at p. 9. "Protection of others," does not relieve our society from the central canon of medical ethics requiring voluntary and informed consent.

The FDA requirement of voluntary and informed consent is based on medical ethics. However, history is replete with societies which violated this central tenet of medical ethics. In 1932, the United States did not receive voluntary and informed consent from African Americans for a study in conjunction with the Tuskegee Institute on syphilis. The Tuskegee Study intentionally refused to reveal to the participants that they had syphilis, intentionally withheld widely available treatments, like penicillin, from them, and intentionally failed to get their informed consent to participate in the study. Centers for Disease Control and Prevention, *U.S. Public Health Service Syphilis Study at Tuskegee Timeline*, https://www.cdc.gov/tuskegee/timeline.htm.

Of course, the historical example of the Tuskegee Study differs from IU's Mandate because IU has no intent to risk harm to its students and they are not conducting a "study." Plaintiffs do not claim otherwise. However, IU's Mandate does

[5] Aaron Kheriaty and Gerard V. Bradley, University Vaccine Mandates Violate Medical Ethics, Wall Street Journal (June 14, 2021, 12:47 PM), https://www.wsj.com/articles/university-vaccine-mandates-violate-medical-ethics-11623689220.

not provide for voluntary and informed consent to the taking of the vaccine, a fundamental tenet of medical ethics, which the Tuskegee Institute also failed. Thus, IU's Mandate is contrary to modern medical ethics.

3. IU's Mandate Is Contrary to CDC's Recommendations.

Currently, the CDC's guidance for unvaccinated people is to wear a mask, social-distance at least six feet apart from other individuals, avoid any sort of crowd whether it be outside or inside, and sanitize often. Compl., App. 124a, ¶¶ 69-71. The CDC suggests that people get vaccinated, but does not recommend that vaccinations be required, making IU's Mandate contrary to CDC recommendations. *Id*.

4. IU's Mandate Is Contrary to Indiana State Requirements.

Indiana generally follows CDC guidelines. Compl. App. 124a, ¶¶ 74. However, as of June 30, 2021, Indiana has no mask requirement, testing requirement, or vaccination requirement. *See generally* 2021 Ind. Exec. Order 21-17 (June 30, 2021), https://www.in.gov/gov/files/Executive-Order-21-17-Continuation-of-Limited-Health-and-Welfare-Provsions.pdf; 2021 Ind. Exec. Order 21-19 (July 29, 2021), https://www.in.gov/gov/files/Executive-Order-21-19-Continuation-of-Health-Based-Provisions.pdf. While Indiana encourages citizens to take a COVID vaccine, it has not mandated vaccinations for its citizens, nor its employees. *Id*.

IU's Mandate is thus contrary to Indiana requirements and goes significantly further than any actions of other public universities in Indiana.

5. IU's Mandate Is Contrary to other Indiana Public Universities.

No other public university in Indiana has issued a vaccination mandate.

C. Current Risk to IU Students of COVID Infection and Adverse Outcomes

1. Current State of the Pandemic

The COVID pandemic is in the final stage of "recovery" or "preparation". According to the CDC, the preparation phase "is characterized by low pandemic [ ] activity, although outbreaks might continue to occur[.]" Pls.' Mot. Inj. Pending Appeal, App. 187a-188a. During this phase, the primary focus should be to discontinue community mitigation measures. *Id.*[6]

The CDC suggests that "[a] pandemic is declared ended when evidence indicates [a transition] to seasonal patterns of transmission." *Id.* This has occurred for COVID. While strains might circulate for years after, a pandemic is still considered "ended" when this transition to seasonal patterns occurs. *Id.*

Evidence supports that the pandemic is in the CDC's preparation phase. Cases and deaths have significantly decreased since March 2020. *Id.* at 188a.

Accordingly, community mitigation measures should be discontinued.

2. Risk to the College-Age Group from a COVID Infection

There is little risk of adverse effects of a COVID infection for college and graduate students. As of July 11, 2021, IU had one COVID death case for students over the 18 months of the COVID pandemic. Prelim. Inj. Op., App. 68a.

A study of 100 major universities and colleges indicated that even in the height of the pandemic, there were a mere 17—typically short-term—reported COVID hospitalizations and only one possible COVID death. Compl., App. 135a-136a,

[6] Even if it could be argued that we are only in the deceleration phase, IU should still be planning to discontinue mitigation measures. *Id.*

¶¶131-135.

Furthermore, the overall risk for this age group of developing serious side effects from COVID is extremely low. The district court agreed that "young adults are less likely to experience serious illness or death from infection." Prelim. Inj. Op., App. 68a. In fact, studies show that there is only a .01% chance of dying from COVID for people ages 20-49. Pls.' Reply Mot. Inj. Pending Appeal, App. 206a.

Indeed, while the case fatality rate (CFR) for COVID is at 1.8%, which is already low, (Pls.' Reply Mot. Inj. Pending Appeal 206a), it plummets to 0.01% when stratified for the college-age group.[7] Even with the Delta variant causing current increases in cases, even among vaccinated individuals, CFR remains extraordinarily low. The latest data from Israel (which has a high vaccination rate) and the UK shows that COVID vaccine effectiveness against Delta coronavirus infection and symptomatic ("mild") disease has decreased from about 95% to 40%, whereas effectiveness against hospitalization and severe disease remains at 80% to 90%.[8]

Accordingly, the risks of COVID to college-age students is extremely low and the risk of death is almost non-existent.

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[7] *See*, CDC, *COVID-19 Weekly Cases and Deaths per 100,000 Population by Age, Race/Ethnicity, and Sex* https://covid.cdc.gov/covid-data-tracker/#demographicsovertime.

[8] *See* Swiss Policy Research, *Covid Vaccines: The Good, The Bad, The Ugly* https://swprs.org/covid-vaccines-the-good-the-bad-the-ugly/.

3. Older People Are at a Much Greater Risk of Adverse Effects of a COVID Infection than Young People, Who Are Subject to the Mandate.

IU's Mandate requires the younger population to receive the vaccine, but the older population is at the greatest risk for a COVID infection. Older people can be up to 870 times more likely to die from COVID than the student population. Compl., App. 137a, Pls.' Mot. Inj. Pending Appeal, App. 191a.

4. Known Risks of COVID Vaccination for IU Students

There are emerging trends showing that the vaccine is especially risky for those 18-29, including myocarditis, Bell's Palsy, Pulmonary Embolus, Pulmonary Immunopathology, and severe allergic reaction causing anaphylactic shock. Compl., App. 143a, ¶¶ 154. According to the CDC, 475 cases of pericarditis and myocarditis have been identified in vaccinated citizens aged 30 and younger. Compl., App. 34a, ¶¶ 157.

There is also recent research on the COVID vaccine being dangerous for those who have already had COVID, including higher rates of side effects such as fever, fatigue, myalgia-arthralgia and lymphadenopathy. Compl., App. 146a, ¶¶ 166.

D. Students

Plaintiffs include eight IU students, ranging from undergraduate studies to masters and doctorate studies. *See* Prelim. Inj. Op., App 10a-12a; *see also* Compl. App., 150a-156a, ¶¶ 180-219. Six students (Klaassen, Carini, Baumgartner, Morris, Crowder, and Policka) have received a religious exemption from IU's Mandate, but all have objections to the Extra Requirements (some for religious reasons and some

for general reasons). *Id*. Two students (Roth and Sperazza) have not received any exemptions. *Id*. Roth has a religious objection to IU's Mandate, but has not sought a religious exemption because it does not provide her with the relief she seeks. *Id*. Sperazza does not qualify for any of the exemptions, based upon IU's written criteria for the same. *Id*. Three of the students (Baumgartner, Carini, and Roth) have specific medical conditions or histories that make it unreasonable and unsafe for them to get the vaccine and, in one case, against their attending physician's advice. *Id*. Nevertheless, they do not qualify for IU's medical exemption as written. *Id*.

Procedural Background

On July 18, 2021, the U.S. District Court for the Northern District of Indiana issued an Order denying preliminary injunctive relief to Students. On July 20, 2021, Students filed their notice of appeal and District Court motion for injunction pending appeal, which was denied on July 21, 2021. The Seventh Circuit denied Students' motion for an injunction pending appeal on August 2, 2021.

Reasons for Granting the Application

Affirmative injunctions may be issued by Circuit Justices "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987). As "[a] Circuit Justice's issuance of an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,'

it 'demands a significantly higher justification' than that required for a stay." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J.) (citation omitted). Generally, "[t]o obtain injunctive relief from a Circuit Justice, an applicant must demonstrate that 'the legal rights at issue are 'indisputably clear.'" *Id*. at 1306 (citation omitted). Additionally, the Court may issue injunctions, "based on all the circumstances," without having that "construed as an expression of the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171, 1171 (2014).

The circumstances here are clear—Students are required to comply with IU's Mandate in order to receive a government benefit (matriculating at IU). The substantive due process rights to bodily integrity, autonomy, and medical choice are equally clear. Within this context, Students meet either the *Lux* or *Little Sisters* standard. Students should be granted injunctive relief.

I.

There Is a "Significant Possibility" this Court Would Grant Certiorari and Reverse Because the Violation of Students' Rights Are "Indisputably Clear."

This case presents this Court with the opportunity to address important constitutional issues and to provide needed guidance to the lower courts regarding the flood of COVID vaccine mandate-related cases already pending and expected, regarding the historically unique, but now ubiquitous, situation where state officials, as here, claim the authority to compel vaccination based upon precedent that is over a century old, despite this Court's developed jurisprudence regarding

substantive due process rights since 1905. This Court has developed doctrines to protect the infringement of fundamental rights of bodily integrity, autonomy, and medical choice, and the scrutiny level that should be applied to these constitutional questions, depending on the context involved. Now this Court has the opportunity to decide in this case whether Students are protected by these doctrines. This is particularly urgent because lower courts are not applying this Court's developed substantive due process doctrine in the context of COVID-related vaccine cases and Students are facing IU's imminent demand that they relinquish their constitutional rights in order to start school this fall. Continued application of the incorrect constitutional standard will leave Students, and other similarly situated litigants, without proper protection of important rights. This Court can provide this needed guidance by granting this motion and by ultimately granting certiorari—it is likely that this Court will do so and reverse the lower courts herein.

As IU's Mandate violates Students' 14th Amendment due process rights of bodily integrity, autonomy, and of medical treatment choice, and since IU cannot prove that the Mandate survives intermediate or strict scrutiny, the violation of these rights is indisputably clear.

A. IU's Mandate Is an Unconstitutional Condition.

Students allege that IU's Mandate violates Students' fundamental rights of bodily integrity, autonomy, and of medical treatment choice by IU's threat of a "loss of an education," if the student does not comply with its Mandate. Pls.' Mot. Inj. Pending Appeal, App. 186a. While IU argued that Students were arguing for a right

to attend college rather than a right to consent to COVID vaccines, the district court below correctly found that the "'unconstitutional conditions doctrine' forbids the university from pulling the rug out from under the students in a roundabout way." Prelim. Inj. Op., App. 55a.

It is well established that "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1983). Here, IU will withhold a benefit, an IU education, if a student exercises her constitutional rights. This principle "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (collecting cases).

Here, IU is coercing students to give up their rights to bodily integrity, autonomy, and of medical treatment choice in exchange for the discretionary benefit of matriculating at IU. Even if "someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury," *id.* at 607, where the U.S. Supreme Court has "often concluded that denials of government benefits were impermissible under the unconstitutional conditions doctrine." *id.* at 606, even where there is "no entitlement to that benefit." *Id.* at 608. This is the situation here.

The Seventh Circuit seems to equate a normal bargained-for exchange in the context of higher education with the state coercing Students to give up their constitutional substantive due process rights by requiring them to take an EUA

vaccine with risks that may very well outweigh the benefits for Students. *See* 7th Cir. Den. Mot. Inj. Pending Appeal, App. 3-4 (finding Students "must part with at least $11,000 a year" for tuition and must read what a professor assigns). Those examples are false analogies. IU could not expel Students for exercising their First Amendment rights within the framework of the relevant constitutional jurisprudence. Nor can IU demand Students relinquish their rights to bodily integrity, autonomy, and of medical treatment choice outside of the relevant constitutional jurisprudence.

The relevant constitutional jurisprudence here demands heightened scrutiny. Such scrutiny should apply to the review of IU's Mandate because, under modern constitutional jurisprudence, an infringement on now-recognized fundamental rights of bodily integrity, autonomy, and of medical treatment choice exists here by IU's conditional denial of benefits, seeking to coerce IU students into forfeiting their fundamental rights on the threat of virtual expulsion. Under the heightened scrutiny now required, IU's Mandate comprises an unconstitutional condition on Students.

B. IU's Mandate Infringes on Substantial Constitutional Rights, Requiring Heightened Scrutiny.

1. *Jacobson* and Post- *Jacobson* Constitutional Jurisprudence

The courts below relied on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) for the proposition that IU has plenary power over Students to protect the public against disease, by having nearly *cart blanche* to impose what is necessary to keep other students safe in a congregate setting. 7th Cir. Den. Mot. Inj.

Pending Appeal, App. 3a. This plenary power never ends, as IU contends both that "its application does not depend on the existence of a pandemic" and, in any event, "[s]temming the tide of COVID-19 is unquestionably a compelling [governmental] interest," regardless of "the current circumstances of the COVID pandemic[]" Pls.' Reply Mot. Inj. Pending Appeal, App. 198a.

Some language in *Jacobson*, taken out of context, might support such an extreme interpretation. The *Jacobson* Court upheld a state-authorized vaccine requirement imposed on Cambridge residents in response to a smallpox outbreak, unless they fit an exemption, or pay a $5 fine. Jacobson challenged that the authorizing statute "was in derogation of the rights secured by the 14th Amendment . . . ." 197 U.S. at 12, 14. *Jacobson* held, however, that any individual liberty interest involved may be overridden in such circumstances by "laws for the common good." *Id.* at 26-27. The Court found no error in the trial court's refusal to hear evidence which cast doubt on the efficacy and safety of the vaccine, because "the legislature must be assumed to have known the opposing theories," and "[i]t is *no part of the function* of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease." *Id.* at 30 (emphasis added).

This extreme deference to decision-makers and no-evidence/"no . . . function" role of the courts is the plenary authority that IU seeks and what it claims that *Jacobson* requires. This extreme view of *Jacobson* led directly to the infamous decision in *Buck v. Bell*, 274 U.S. 200 (1927), upholding the involuntary sterilization

of those with mental retardation. The *Buck* Court cited *Jacobson*: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson*, 197 U. S. 11. Three generations of imbeciles are enough." 274 U.S. at 207. Not satisfied with their extreme interpretation of *Jacobson*, IU also maintains that *Buck v. Bell* remains good law, *see* Pls.' Reply Mot. Inj. Pending Appeal, App. 199a, demonstrating the scope of the plenary power they claim. However, constitutional jurisprudence has developed since 1905—*Jacobson*'s extreme deference to public health officials does not hold under precedent directly relevant to this issues at stake here.

The district court conferred, and the Seventh Circuit affirmed, the same plenary power over their student's medical treatment decisions that is excised by a prison over its inmates. *See* Prelim. Inj. Op., App. 49a*; Washington v. Harper*, 494 U.S. 210 (1990). In *Harper*, while the Court recognized a prisoner "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause," "the extent of the prisoner's right . . . must be defined in the context of the inmate's confinement," "where the proper standard is . . . whether the regulation is 'reasonably related to legitimate penological interests.' This is true even when the constitutional right . . . is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." *Id.* at 222 (citations omitted). This is the rational basis review the district court employed which results in the plenary power that IU seeks.

This interpretation is not the reasonable one. While unremarkably acknowledging that a local community has the power to protect itself against an epidemic, *Jacobson* recognized that such police powers could be *exercised* to violate the federal constitutional or statutory law, "in . . . an arbitrary, unreasonable manner," or in a way to go "beyond what [i]s reasonably required for the safety of the public." 197 U.S. at 28. This left judicial review of the *exercise* of those police powers to subsequent courts.

If violations of constitutional rights occur in exercise of those powers, as here, then, under *Jacobson*, the government needs to show the exercise passes constitutional muster. IU cannot do so here when the proper heightened constitutional scrutiny is applied.

Justice Gorsuch, concurring in *Roman Catholic Diocese v. Cuomo*, agreed and highlighted this sea-change, noting that *Jacobson* was a "modest decision" and not "a towering authority that overshadows the Constitution during a pandemic." 141 S. Ct. 63, 71 (2020). Regarding *Jacobson*'s modest nature, Justice Gorsuch observed that it was over a century old and involved: (1) an old mode of analysis instead of modern rational-basis review; (2) a "bodily-integrity" right emanating from the Fourteenth Amendment that was asserted to "avoid not only the vaccine but *also* the $5 fine (about $140 today) *and* the need to show he qualified for an exemption," *id.* at 70 (emphasis in original), and (3) "an imposition on [Jacobson's] claimed right to bodily integrity [that] was avoidable and relatively modest." *Id.* at 71.[9] He

[9] *Cf. Jacobson*, 197 U.S. at 39 ("We now decide only that the statue covers the present case, and that nothing clearly appears that would justify this court in hold-

further remarked that "no Justice now disputes any of these [three] points," none argued that normal constitutional rules should not apply in a pandemic. Chief Justice Roberts agreed, downplaying an earlier comment in concurrence citing *Jacobson* to the effect that such matters are usually left to the states. *Id.* at 71.

Roman Catholic Diocese was preceded by a similar case (church occupancy limits in the pandemic) in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (Mem. Op.), where the Court had denied injunctive relief. There Justice Alito dissented, joined by Justices Thomas and Kavanaugh, noting that "at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules," "[b]ut a public health emergency does not give . . . public officials *carte blanche* to disregard the Constitution as long as the medical problem exists." *Id.* at 2605. Rather, "[a]s more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights." *Id.* Which, of course, is the precise situation here.

Justice Alito's dissenting view was essentially adopted by *Roman Catholic Diocese*, meaning that "blunt rules" may be permitted initially, but fine-tuning to actual scientific evidence is then required—requiring an *evidence-focused* inquiry in judicial review. Applying the normally-required, current jurisprudence in that case required the government to justify itself under strict scrutiny, which eschews blunt rules and requires narrow tailoring to the least restrictive means to further a

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ing it to be unconstitutional and inoperative in its application to the plaintiff in error.").

compelling interest.

Despite the government's interest in public health during a pandemic, *Roman Catholic Diocese* required *normal* scrutiny levels instead of defaulting to *Jacobson*'s analysis. Thus, the lower courts were bound to analyze the contexts in which heightened scrutiny applies to cases involving bodily integrity, autonomy, and of medical treatment choice.

2. Constitutional Jurisprudence Related to Bodily Integrity, Autonomy, and of Medical Treatment Choice

The Court's recent constitutional jurisprudence gives greater weight to the protection of bodily integrity, autonomy, and of medical treatment choice than it did a century ago.[10] During modern times, the Court has applied heightened scrutiny in two lines of cases regarding the right to bodily integrity and autonomy:

> (1) When an important personal choice has been **prohibited** by the government. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Roe v. Wade*, 410 U.S. 113 (1973), modified by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (abortion), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriage); or
>
> (2)When an important personal choice has been **mandated** by the government, contrary to the decision of the person. *See, e.g.*, *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (right to consent to or refuse medical treatment for incompetent person); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Sell v. United States*, 539 U.S. 166, 186 (2003) (pre-trial forced administration of antipsychotic drugs).

The district court failed to recognize this since it limited its analysis in two

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[10] *See* Weiler, *Bodily Integrity: A Substantive Due Process Right to Be Free from Rape by Public Officials*, 34 Calif. West. L. Rev. 591, 596-604 (1998) (compilation and analysis of modern bodily integrity and autonomy cases).

ways: (1) by ignoring all of the prohibition cases, except *Glucksberg*, Prelim. Inj. Op. Op., App. 56a-59a, which established fundamental rights to bodily integrity and autonomy in certain important circumstances of personal choice; and (2) by limiting its review of the mandate cases to searching in vain for the magic words "fundamental right." *See id.* at 40a. This Court, however, signals that heightened scrutiny is applied by:

> (1) either the description of the right involved (i.e., "fundamental," "significant liberty interest");
>
> (2) the weight of the government interest that is needed to overcome the right (i.e. "essential" or "overriding"); or
>
> (3) the procedural burdens placed on the government when acting to advance its interest (i.e., "clear and convincing evidence" or robust procedural requirements).

See e.g.,*Washington v. Glucksberg*, 521 U.S. 702 (1997); *Cruzan*, 497 U.S. 261; *Sell*, 539 U.S. 166. In these instances of heightened scrutiny, the key difference is the shift in the burden of proof to the government, from the Plaintiff, to justify its mandate.

Significant, even compelling, rights of bodily integrity and autonomy and medical treatment choice are infringed here, requiring heightened, even strict scrutiny, that have been recognized since *Jacobson*. Most important are the government mandate cases where a medical treatment decision is overridden by the government. These cases involve: forced "stomach pumping" to obtain evidence of narcotics, *Rochin v. California*, 342 U.S. 165 (1952); involuntary commitment to a mental hospital for treatment, *Humphrey v. Cody*, 405 U.S. 504 (1972); *Addington*

v. Texas, 441 U.S. 418 (1979); *Vitek v. Jones*, 445 U.S. 480 (1980); medical treatment decisions by incompetent patients, *Cruzan*, 497 U.S. at 278; forced pre-trial administration of antipsychotic drugs, *Riggins*, 504 U.S. at 135; *Sell*, 539 U.S. at 186. Each of these cases involve the significant right to refuse medical treatment and the Court required heightened scrutiny to overcome. The district court recognized IU's Mandate could infringe on Students' rights, under the unconstitutional condition doctrine, Prelim. Inj. Op., App. 55a, but incorrectly applied rational basis review. The Seventh Circuit did not recognize the unconstitutional doctrine was applicable here. See 7th Cir. Den. Mot. Inj. Pending Appeal 3a-4a.

C. Under Heightened Scrutiny, the Burden Shifts to IU to Justify its Mandate Under Strict Scrutiny.

If rational basis review applies, as the courts below applied here, "the burden is on the one attacking [the regulation] to [negate] every conceivable basis which might support it." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). However, *Griswold*, *Roe*, *Casey*, *Glucksberg*, *Obergefell*, *Cruzan*, *Harper*, *Riggins*, and *Sell*[11] all required the *government*, not the challenger, to prove it meets the heightened standard of review for interference with the individual's right to bodily integrity and autonomy at issue, which the district court fail to require.

Two levels of heightened scrutiny exist—intermediate scrutiny and strict scrutiny. Under intermediate scrutiny, the Court applies a "rigorous standard of

[11] The substantive due process requirements for involuntary commitment to a mental hospital for treatment follows the same path. *See Humphrey*, 405 U.S. 504; *Addington*, 441 U.S. 418; *Vitek*, 445 U.S. 480.

review" that requires "the State [to] demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgments of" the right. *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 197 (2014). Under strict scrutiny, the government has the burden of proof to establish the law is necessary to advance a compelling governmental interest by narrowly tailored and least restrictive means. *Sherbert v. Verner*, 374 U.S. 398 (1963). Both levels impose on IU the burden of proof which, critically, the courts below did not require.

Sell is the latest and most comprehensive case establishing a strict scrutiny framework for government medical treatment mandates and its analysis should not be dismissed. *See* Pls.' Reply Mot. Inj. Pending Appeal , App. 203a.

Describing the *Sell* test as a strict scrutiny test is fair since it contains all of the essential elements of strict scrutiny, i.e. a protected constitutional right, a sufficiently important state interest to overcome the right, narrow tailoring and less restrictive means, and the requirement that the government must prove it all. *Id.* The *Sell* test is not used within "the penal framework"—Sell was in a mental hospital awaiting trial, not a convicted felon in prison, like *Harper*. That is why *Sell* applied heightened scrutiny, not *Harper*'s rational basis. Surely a medical treatment choice by law-abiding adults, like Students, is entitled to at least the same respect as a medical treatment decision by a person with severe mental illness awaiting trial.

Sell's strict scrutiny test for medical treatment decisions has been applied beyond the narrow confines of involuntary administration of drugs to a mentally ill

defendant facing criminal charges in order to render that defendant competent to stand trial. Multiple circuits have applied the *Sell* test in various contexts. *See, e.g., United States v. Baldovinos*, 434 F.3d 233, 239-241 (4th Cir. 2006) (applying *Sell*'s analysis to forced administration of antipsychotic drugs to render defendant competent to be sentenced); *Witt v. Department of the Air Force*, 527 F.3d 806, 817-821 (9th Cir. 2008) (applying *Sell*'s heightened scrutiny analysis to discharge of Air Force nurse for homosexual relationship); *Russell v. Richards*, 384 F.3d 444, 450 (7th Cir. 2004) (applying *Sell* to involuntary administration of delousing shampoo to inmates).

Thus *Sell* provides the framework for the heightened scrutiny analysis of IU's Mandate and requires IU prove that its Mandate is justified. The courts below did not apply heightened scrutiny—an error which justifies this injunction.

II. Under Heightened Scrutiny, the Students Are Likely to Prevail on Their Due Process Claim That, Under the Current Circumstances and as Applied to this Age Group, IU Has Failed to Prove That Their Mandate Is Justified.

The district court below held that on the preliminary record Students have not shown a likelihood of success that IU lacked a rational basis for its Mandate. *See* Prelim. Inj. Op., App. 62a. The Seventh Circuit likewise applied *Jacobson* in denying Students motion to injunction pending appeal. *See* App. 1a. If the courts would have applied heightened scrutiny, which requires the government to justify its restrictions, Students would have likely to succeeded. Additionally, emerging facts continue to undermine IU's rationale for the Mandate.

Since heightened scrutiny applies, the court should consider both the strength of

the government's interest and the tailoring of its regulations to the current stage of the pandemic.

A. Currently, IU's Interest in Public Health and Safety Is Not Compelling Enough to Justify IU's Mandate.

1. For IU's Interest in Public Health and Safety to be Compelling It Must Prevent Hospitalizations and Death from a Disease, not Just Infections.

It has been assumed that stopping the spread of COVID was a compelling interest that justified draconian government restrictions. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (J. Gorsuch, concurring). Conversely, that assumption has been based in another critical assumption—that the spread of COVID will lead to increased hospitalizations and death. After all, no precedent establishes the government has the authority to mandate extraordinary measures to prevent the common cold or flu, but only serious diseases that result in significant injury and death.

As the mortality rate of a disease increases, so does the government justification for restrictive measures. For instance, *Jacobson*'s smallpox had a case fatality rate (CFR) approaching 30%, across all age groups. Pls.' Reply Mot. Inj. Pending Appeal 206a. The data now shows COVID's CFR is relatively low 1.8%. *Id*.

IU states the vaccine is necessary to "stem[] the spread of COVID-19" and gives IU "the best protection" in the fight against it. *Id*. IU's approach is to reach virtually zero COVID cases—this is irrational and would mean its plenary power lasts forever.

2. IU's Interest in Public Health and Safety is no longer Compelling Enough to Justify the IU Mandate at this Stage of the COVID Pandemic.

As shown above, the COVID pandemic is in the final stage of "recovery" or "preparation". *See supra* p. 8. Accordingly, community mitigation measures should be discontinued. *Id*. Indeed, cases and deaths have significantly decreased since March 2020. *Id*.

Additionally, when stratified for the college-age group, COVID's CFR plummets to 0.01%. *Id*. at 9. Even with the Delta variant, the CFR remains extraordinarily low. The latest data shows that COVID vaccine effectiveness against Delta coronavirus infection and symptomatic ("mild") disease has decreased from about 95% to 40%, whereas effectiveness against hospitalization and severe disease remains at 80% to 90%. *Id*.

Thus, "[a]s more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights." *Calvary Chapel Dayton Valley,* 140 S. Ct. at 2605 (J. Alito, dissenting). Just as the Court recognized that Sell's condition must be evaluated given his current circumstances, *Sell*, 539 U.S. at 186, as the science around the pandemic evolves and the pandemic runs its course, the legal landscape surrounding it evolves as well.

The district court asserted that "[s]temming the spread of COVID-19 is unquestionably a compelling interest." Prelim. Inj. Op., App. 63a (citing *Cuomo*, 141

S. Ct. at 67).[12] However, evidence suggests that stemming the spread may no longer be an achievable goal, no matter the vaccination status of Students. Emerging data from around the world suggests that vaccination may not prevent the spread of COVID, particularly against COVID variants, but may simply lessen the severity of symptoms among those who do contract it. For college-aged students, the risk of severe COVID consequences, such as hospitalizations and death, was already near zero without vaccination (*see* Prelim. Inj. Op., App. 68a), so lessening the risk of death is not a compelling interest.

Under the proper standard of review, IU cannot prove that it has a compelling interest at this stage in the pandemic or for this age group. Given the lack of serious danger COVID poses to college-age students, the relatively low hospitalization and death rates, even with the Delta variant, IU's Mandate is not justified at this stage as applied to this age group. Additionally, IU cannot prove that IU's Mandate would prohibit the spread of COVID, and lessening the risks of COVID for this age group is not a compelling interest when severity was already minimal and deaths almost nonexistent.

B. The IU Mandate Is Not Narrowly Tailored.

1. College-aged Persons Are at a Very Low Risk of Adverse Effects of a COVID Infection.

As shown above, there is little risk of adverse effects of a COVID infection for college and graduate students. *See supra* p. 8-9. For this age group, the risk of death

[12] The district court never considered whether IU's Mandate passed strict scrutiny. Instead, all facts were considered through the lens of whether IU's Mandate satisfied rational basis. Prelim. Inj. Op., App. 64a.

or developing serious side effects from COVID is extremely low. *Id*.

Accordingly, mandating college-aged persons to get vaccinated is not narrowly tailored to protecting public health and safety.

2. Older People, Who Are Not Subject to the Mandate, Are at a Much Greater Risk of Adverse Effects of a COVID Infection than Young People, Who Are Subject to the Mandate.

IU's Mandate requires the younger population to receive the vaccine, but the older population is at the greatest risk for a COVID infection. As shown above, older people can be up to 870 times more likely to die from COVID than the student population. *See supra* p. 10.

Mandating the vaccine for the younger, student age population, rather than those much older, is not narrowly tailored to protect public health and safety.

C. IU's Mandate Is Not the Least Restrictive Means to Protect Health and Safety.

Existing measures (including voluntary vaccination, masking, social distancing, sanitizing, and testing) have already brought IU and Indiana to the CDC's preparation phase, so continuing such measures, rather than a mandate, would be the least restrictive means of accomplishing IU's goal.

Additionally, IU has failed to prove that the vaccines are sufficiently safe and effective to justify mandating their use for this age group. There are emerging risks of the COVID vaccines, including some that primarily effect students. *See e.g.*, Prelim. Inj. Op., App. 29a-31a. Emerging questions exist about the COVID vaccines effectiveness, particularly against COVID variants. Since IU has mandated the vaccines, substituting themselves for students and their attending physicians, it is

IU's burden to prove that the vaccines are safe and effective for this age group, which they have failed to do.

The IU Mandate is thus not the least restrictive means to accomplish IU's interest in public health and safety.

D. IU's Mandate Is Underinclusive and Does Not Legitimately Advance its Claimed Interest.

"A law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotation and alteration marks omitted). In other words, "underinclusiveness diminish[es] the credibility of the government's rationale for restricting speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 52–53 (1994). IU's new exemptions make IU's Mandate woefully underinclusive, defeating IU's stated objective.

IU has recently expanded its exemptions. First, IU's medical exemption "in practice," applies to "those who have a medical condition that their doctor believes nonetheless contraindicates the vaccine[]" Pls.' Reply Mot. Inj. Pending Appeal 207a-208a, substantially increasing who can avoid the Mandate. Second, IU added an ethical exemption. *Id.* at 208a. While IU does not define this exemption, it appears to mirror the religious exemption, which IU "automatically grants upon request." *Id.*

IU's radically expanded exemptions have virtually guaranteed anyone can get an exemption—its Mandate is now woefully underinclusive and belies its claimed interest in the Mandate. Accordingly, IU no longer has a compelling interest

sufficient to justify its Mandate and the exemptions render it underinclusive. IU's Mandate, therefore, fails strict scrutiny.

III. Students Have Suffered Irreparable Harm.

Students have shown irreparable harm and that there is no adequate remedy at law.

The district court correctly held that "[t]o the extent that the students establish a constitutional harm, the law presumes irreparable harm," Prelim. Inj. Op., App. 98a, and likewise, there would be "no adequate remedy at law." *Id*. at 100a.[13] Students have shown a constitutional injury, thus it must follow that there is irreparable harm and no adequate remedy at law.

IV. The Balance of Equities Weighs in Students' Favor.

Given the significant constitutional injury here, the balance of harms and public interest favor Students.

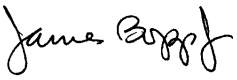
Since Students are likely to succeed on the merits of their claim, the balance of harms does not need to favor them as strongly. *See* Prelim. Inj. Op., App. 101a. Nevertheless, Students have shown that the balance of harm tips in their favor, where their constitutional rights are being violated. In contrast, IU cannot show that it will be harmed, as the risk of COVID has significantly declined and a significant portion of IU's population is already vaccinated. Moreover, anyone that wants to be vaccinated can do so, free of charge, so Students decision to not vaccinate does not harm others.

[13] The Seventh Circuit did not discuss whether Students had shown irreparable harm. *See* 7th Cir. Den. Mot. Inj. Pending Appeal, App. 1a-4a.

This district court correctly held that "[i]f the students had shown a likelihood that the university was unreasonably infringing on their constitutional rights, enjoining that violation would be in the public interest." Prelim. Inj. Op., App. 103a.[14] Students have shown that IU is unreasonably infringing on their constitutional rights when the correct constitutional standard is employed, so enjoining that violation is in the public interest.

August 6, 2021

Respectfully submitted,



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[14] The Seventh Circuit did not consider the balance of equities factor. *See* 7th Cir. Den. Mot. Inj. Pending Appeal, App. 1a-4a.