No. 21-2326

In the
United States Court of Appeals
for the Seventh Circuit

RYAN KLAASSEN, JAIME CARINI, DANIEL J. BAUMGARTNER, ASHLEE MORRIS, SETH CROWDER, MACEY POLICKA, MARGARET ROTH, AND NATALIE SPERAZZA,
Plaintiffs-Appellants

v.

THE TRUSTEES OF INDIANA UNIVERSITY,
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 1:21-cv-00238-DRL-SLC
The Honorable Damon R. Leichty, Judge

APPELLEES' RESPONSE IN OPPOSITION TO PLAINTIFF-APPELLANTS' EMERGENCY MOTION FOR INJUNCTIVE RELIEF

I. Introduction

Over a century ago, in *Jacobson*, the Supreme Court upheld a law that required the smallpox vaccine against a substantive due process challenge. The debate over the necessity and safety of the vaccine requirement there is no different in kind than the debate over the vaccine requirement here. But the Supreme Court concluded that it was not its job to determine "which one of two modes was likely to be the most effective for the protection of the public against disease." *Jacobson*, 197 U.S. at 30. So long as the law bears a "real or substantial relation" to protecting public health and is not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law," the law must be upheld. *Id*. at 31. For the State has the right to impose requirements "which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases." *Id*. at 35. "The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone." *Id*.

Stemming the tide of COVID-19 "is unquestionably a compelling [governmental] interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). Requiring vaccines, and masks and routine

testing for those who are exempt from Indiana University's vaccine requirement, is likewise unquestionably rationally related to that compelling governmental interest. The evidence establishes that vaccines are currently the most effective way to prevent severe illness and death from COVID-19. That should, quite literally, end the analysis.

Since *Jacobson*, vaccine mandates have been repeatedly upheld, and *Jacobson* repeatedly cited. Indeed, only recently the Seventh Circuit recognized *Jacobson* as good law and followed it in another COVID-19 case. *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020) (The district court appropriately looked to *Jacobson* for guidance, and so do we."), *cert. denied*, 141 S. Ct. 1754 (2021).

Even so, IU has attempted to accommodate the objections of the plaintiffs and others so far as is practicable. Seven of the eight plaintiffs qualify for a religious exemption, which IU automatically grants upon request. IU also provides a medical exemption, which, in practice, applies to individuals who are allergic to the vaccine or its components and those who have a medical condition that their doctor believes nonetheless contraindicates the vaccine. In addition, certain people may

qualify for a medical deferral, which allows them to put off the vaccine under certain circumstances. And just recently, shortly after the district court issued its order denying injunctive relief, IU implemented a new exemption for individuals who object to being vaccinated on ethical grounds.

If granted an exemption—as seven of the eight plaintiffs are or could be—each plaintiff may attend school this fall, in person, at an Indiana University campus, without having received the COVID-19 vaccine. They need only wear a mask and undergo regular, non-invasive saliva testing. This is nothing new. Last year, everyone at IU had to wear a mask and undergo regular testing, including every one of the plaintiffs who attended IU last year. Thus, the imposition on these plaintiffs' claimed rights to bodily integrity and to refuse medical treatment is, as in *Jacobson*, "relatively modest." *Roman Catholic Diocese*, 141 S. Ct. at 71 (Gorsuch, J., concurring). It easily passes rational basis review.

Plaintiffs' Emergency Motion nevertheless asks the Court to be the first in the nation to depart from a century's worth of precedent applying rational basis scrutiny to mandatory vaccination

requirements. To do so, the Court would also be the first to hold that such requirements implicate some fundamental right possessed by plaintiffs. Upon a thorough analysis of historical precedent and persuasive authority, the district court twice in the last ten days has concluded otherwise. Dkts. 34, 40. This Court should do the same.

II. Legal Standard

In analyzing a request for injunctive relief pending appeal, the Court employs the same factors the district court considered in assessing a preliminary injunction motion—namely, whether the movants have met their "heavy burden" of proof to obtain the "extraordinary" relief they seek with (1) "a strong showing that [they are] likely to succeed on the merits"; (2) that they "will be irreparably injured" absent the injunction; and, if they make that showing, that (3) the balance of the harms, and (4) the public interest weigh in their favor. *Hilton v. Braunskill*, 481 U.S. 770 (1987); *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983); *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers); *see also, e.g.*, *Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (citing *Hilton*).

Plaintiffs cite *Cavel International, Inc. v. Madigan*, 500 F.3d 544 (7th Cir. 2007), for the proposition that, in this context, they must show only "some likelihood of success" on the merits, rather than a "strong" likelihood of success of the merits, along with irreparable harm to warrant an injunction under the familiar "sliding scale" approach. *See* App. Dkt. 6-1 at 5. But in *Nken*, decided after *Cavel*, the Supreme Court reiterated *Hilton*'s application requiring a heightened standard in evaluating (and denying) a request for an injunction pending appeal. *See, e.g.*, *Pritzker*, 973 F.3d at 762-63; *see also* Dkt. 34 at 31. And this heightened standard is particularly appropriate here because the district court has already denied plaintiffs' request, and that decision "is entitled to considerable deference." *Ruckelshaus*, 463 U.S. at 1316; *see also, e.g.*, *Matter of Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7th Cir. 1997) ("[W]here the applicant's arguments have already been evaluated on the success scale, the applicant must make a stronger threshold showing of likelihood of success to meet his burden."). In particular, while the Court reviews the district court's legal conclusions *de novo*, it reviews the court's findings of fact for clear error, and its balancing of the injunction factors for only an abuse of discretion. *See*

Cassell v. Snyders, 990 F.3d 539, 545 (7th Cir. 2021); *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006).

In any event, plaintiffs have not made the required showing that they are likely to succeed on the merits, and the remaining factors favor IU.

III. Argument

A. Appellants are unlikely to succeed on the merits because IU's mandatory vaccination policy is constitutional.

In its order on plaintiffs' motion for emergency injunctive relief pending appeal in the district court, the district judge remarked that "the students say their constitutional claim is strong, but it isn't." Dkt. 40 at 2. This reflects the fact that plaintiffs' constitutional argument has never before been accepted by any federal court at any level, so far as we are aware. *Id.* at 31-91. Rational basis scrutiny applies to mandatory vaccination requirements, and IU's policy easily passes that test.

1. Courts apply *Jacobson* to mandatory vaccination requirements.

Plaintiffs barely acknowledge that the Supreme Court long ago confirmed that mandatory vaccination requirements are a constitutional exercise of the state's police powers to establish

reasonable health laws to "protect the public health and the public safety." *Jacobson*, 197 U.S. at 25-26; *see also* Dkt 34 at 36-39. The *Jacobson* Court, and many others in the nearly 120 years since, have held that mandatory vaccination laws that have a "real or substantial relation to the protection of the public health and the public safety," are reasonable and, therefore, are constitutional. *Jacobson*, 197 U.S. at 31; *see also, e.g.*, Dkt. 34 at 51-52 (collecting cases).

Essentially ignoring this binding Supreme Court precedent, plaintiffs argue that the Court should disregard it in favor of analyzing IU's mandatory vaccination policy under strict scrutiny. *See, e.g.*, App. Dkt. 6-1 at 13 (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997), to argue incorrectly that the Supreme Court has "signal[ed] that heightened scrutiny" may apply even where a challenged policy does not implicate a fundamental right). But the authority plaintiffs cite does not support their claim that "heightened scrutiny" applies. *Id.* at 13. Instead, *Glucksberg* reiterates that "the Court's substantive-due-process jurisprudence . . . [has] establish[ed] a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify

the action [that] avoids the need for complex balancing of competing interest in every case." 521 U.S. at 722, 728 (applying rational basis scrutiny to Washington's assisted-suicide ban because "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause"); *see also* Dkt. 34 at 49.

Similarly, no court has held that mandatory vaccination requirements implicate fundamental rights that trigger strict scrutiny. *See, e.g.*, Dkt. 34 at 36-47. Plaintiffs rely on authority addressing the right to bodily integrity and the right to choose medical treatment in other contexts, while largely ignoring the body of law that directly controls their claim. Unlike plaintiffs, the Court may not disregard directly applicable Supreme Court precedent. *See, e.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 746 (7th Cir. 2021) ("We simply do not survey non-majority opinions to count likely votes and boldly anticipate overruling of Supreme Court precedents. . . . As we are frequently reminded, only the Supreme Court itself can overrule its own decisions." (citing *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989))).

Plaintiffs categorize the "the bodily integrity and autonomy" law into two groups: (1) cases they describe as concerning government rules prohibiting "an important personal choice"; and (2) those they contend concern government mandates on "important personal choices." App. Dkt. 6-1 at 12. IU's vaccination policy implicates neither.

Government Prohibitions. While our "liberty" interest under the Fourteenth Amendment no doubt includes a right to "privacy," the Supreme Court "has confined the label 'privacy' mainly to sexual and reproductive rights, such as the right to use contraceptives or have an abortion or engage in homosexual acts." *Wolfe v. Schaefer*, 619 F.3d 782, 784 (7th Cir. 2010). Plaintiffs cite no authority expanding the right to bodily integrity beyond this context, let alone to mandatory vaccination requirements. *See* App. Dkt. 6-1 at 12 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992), and *Obergefell v. Hodges*, 576 U.S. 644 (2015), and acknowledging that each relates to sexual or reproductive rights).[1]

[1] Plaintiffs incorrectly complain that the district court ignored this line of authority in denying their preliminary injunction motion. *See* App. Dkt. 6-1 at 7-8. It did not. *See* Dkt. 34 at 34.

Government Mandates. Plaintiffs' attempt to contort *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 277 (1990), to fit their strict-scrutiny narrative also is unsuccessful. *Cruzan* did not concern a mandatory-vaccination requirement; instead, the Court considered whether an individual has a constitutional right to require a medical provider to withdraw life-sustaining treatment under certain circumstances. *Cruzan*, 497 U.S. at 269. And the *Cruzan* court "assume[d]" that an individual "has a constitutionally protected liberty interest in refusing unwanted medical treatment" from the Court's prior holding in *Jacobson*, which it characterized as "balanc[ing] an individual's liberty interest in declining an unwanted . . . vaccine against the State's interest in preventing disease." *Id.* at 278, 279. In other words, *Cruzan* did not displace *Jacobson*'s rational basis framework; instead, *Cruzan* applied it in a different context based on the Court's conclusion that, unlike in *Jacobson*, "the right to refuse unwanted medical treatment was so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment." *Glucksberg*, 521 U.S. 721 n.17; *see also* Dkt. 34 at 49-51.

Conversely, plaintiffs have "offer[ed] no preliminary record of such historic rules, laws, or traditions that would facilitate the court's announcement . . . that a right to refuse a vaccine is anything more than a significant liberty under the Fourteenth Amendment." Dkt. 34 at 50. If anything, given the long history of vaccine laws in this country, and the fact that every state in the nation currently has some form of vaccine requirement for publicly funded schools, the evidence establishes there is no fundamental liberty interest at stake here. Moreover, as plaintiffs appear to concede, nowhere did the *Cruzan* Court indicate that it was applying strict scrutiny in that case, so even if the Court were to find *Cruzan* instructive, it does not favor plaintiffs' position.[2] *See, e.g.*, App. Dkt. 6-1 at 14 (characterizing *Cruzan* as "describing a right that demanded heightened scrutiny"); *Cruzan*, 497 U.S. at 282-83.

[2] *Sell v. United States*, 539 U.S. 166 (2003), another inapplicable, factually distinguishable case on which plaintiffs rely, also did not apply strict scrutiny. App. Dkt. 6-1 at 10. Rather, the *Sell* court used a four-part test unique to the penal framework to identify the circumstances in which the government may involuntarily administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial. *Sell*, 539 U.S. at 179.

The district court also already aptly debunked plaintiffs' misplaced reliance on *Roman Catholic Diocese*. *Compare* Dkt. 34 at 42-45, *with* App. Dkt. 6-1 at 14-15. *Roman Catholic Diocese* did not involve mandatory vaccination requirements or the Fourteenth Amendment; it concerned a First Amendment challenge to an executive order that restricted attendance at religious services in areas that were COVID-19 hot spots. *See Roman Cath. Diocese*, 141 S. Ct. at 65-66. Contrary to plaintiffs' inaccurate characterization, Justice Gorsuch's concurrence recognized that *Jacobson* "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction." *Id.*, 141 S. Ct. at 70 (Gorsuch, J., concurring); App. Dkt. 6-1 at 19.[3] Thus, plaintiffs' unsupported argument that the majority's analysis in *Roman Catholic Diocese* somehow modified *Jacobson* is no basis for the Court to ignore *Jacobson* here. *See also* Dkt. 34 at 43-44.

[3] To the extent plaintiffs rely on and *Cassell v. Snyders*, 990 F.3d 539, 544 (7th Cir. 2021), it is distinguishable for the same reason. *See* App. Dkt. 6-1 at 20-21. Moreover, in upholding the district court's denial of a request to enjoin an executive order limiting religious gatherings even under strict scrutiny, the *Cassell* court emphasized that "the scientific uncertainty surrounding the pandemic further cautions against enjoining state coronavirus responses unless absolutely necessary." 990 F.3d at 549.

In fact, since *Roman Catholic*, at least two courts have cited *Jacobson* in upholding mandatory school vaccination requirements. *See, e.g.*, *Kiel, J.D. v. The Regents of the Univ. of Cal.*, No. HG20-072843, 2020 WL 9396579, at *5 (Cal. Super. Dec. 04, 2020); *Doe v. Zucker*, No. 1:20-CV-840, 2021 WL 619465, at *22 (N.D.N.Y. Feb. 17, 2021) ("It is well-settled that it is within a state's police power to establish regulations implementing mandatory vaccine laws and vest local officials with enforcement authority.").[4] And other federal appellate courts have cited *Jacobson* in upholding measures instituted to stem the tide of COVID-19. *See, e.g.*, *Big Tyme Invs., L.L.C. v. Edwards*, No. 20-30526, 2021 WL 118628 (5th Cir. Jan. 13, 2021); *Hayes v. Oregon*, 849 F. App'x 209 (9th Cir. 2021). The Court should do the same.

Finally, plaintiffs' reliance on the "unconstitutional conditions" doctrine merely begs the ultimate question: whether IU's policy is constitutional or not. App. Dkt. 6-1 at 16. Because IU's vaccination policy is constitutional, as the district court concluded, there can be no

[4] After the New York district court denied the *Doe* plaintiffs' request to enjoin the state's mandatory school vaccination laws based on many of the same arguments plaintiffs advance here, *see Doe v. Zucker*, 496 F. Supp. 3d 744, 754 (N.D.N.Y. 2020), the *Doe* plaintiffs petitioned the Supreme Court for emergency injunctive relief, which the Supreme Court denied. *Doe v. Zucker*, 141 S. Ct. 1512 (2021).

corresponding "unconstitutional conditions" claim. *See, e.g.*, *Reedy v. Werholtz*, 660 F.3d 1270, 1277 (10th Cir. 2011).

2. IU's policy is reasonably related to stemming the spread of COVID-19.

The Court need look no further than the district court's thorough factual findings and analysis to conclude that IU's policy is unquestionably reasonably related to a compelling government interest—stemming the spread of COVID-19. *See* Dkt. 34 at 55-91; *see also, e.g.*, *Hinrichs*, 440 F.3d at 396 (instructing that district court's findings of fact are reviewed for clear error); *Roman Catholic Diocese*, 141 S. Ct. at 67 ("Stemming the spread of COVID–19 is unquestionably a compelling interest . . ."). Indeed, plaintiffs do not appear to dispute that IU's vaccination mandate passes rational basis scrutiny or contend that a fundamental right is implicated by IU's COVID-19 masking and testing policies. *See generally* App. Dkt. 6-1. Accordingly, because plaintiffs have failed to establish any likelihood of success on the merits, the Court may deny their motion without any additional analysis. *See, e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517093, at *1 (7th Cir., May 16, 2020).

3. IU's vaccination policy also passes strict scrutiny.

Plaintiffs also are unlikely to succeed on the merits of their claim even if the Court were to apply strict scrutiny because, contrary the plaintiffs' argument, IU's policy is narrowly tailored to the current circumstances of the COVID-19 pandemic. Disagreeing with the plaintiffs, the district court reiterated that, even as of the date of its original order, CDC and Indiana State Department of Health standards "favor vaccination" at the current stage of the pandemic. Dkt. 34 at 57. And it made ample factual findings rejecting plaintiffs' premise that only IU's "older population," not its "younger, student age population," need to receive the COVID-19 vaccination before returning to campus this fall, App. Dkt. 6-1 at 26, including:

- The heightened risk unvaccinated individuals, particularly on college campuses, pose for spreading COVID-19, *see* Dkt. 34 at 7, 25, 64;
- The risk new variants present to our overcoming the COVID-19 pandemic, particularly due to unvaccinated individuals, *see id.* at 7, 58;
- That young adults aged 20-29 represent the highest proportion of all age populations to test positive for COVID-19, and Delta cases among this age group are surging, *see id.* at 7, 59,
- That federal and state governmental agencies have confirmed that COVID-19 vaccination is the best tool institutions of

higher education have to address the COVID-19 pandemic, and IU's approach is not inconsistent with these agencies' recommendations, *see id.* at 9-10, 81-82;

- That neither IU nor Indiana more broadly has reached herd immunity, and the point at which they may do so remains undetermined, *see id.* at 24, 82; and
- That even the plaintiffs' proffered expert's proposed COVID-19 mortality rate for healthy individuals age 20-49 means that, absent vaccination, IU stands to lose at least 135 students, not factoring in those students who are older, unhealthy, or immunocompromised, or IU's faculty or staff, *see id.* at 61-62.

These and other of the district court's findings confirm that mandating the vaccine is necessary to give IU "the best protection" in the fight against COVID-19. *Id.* at 58. Indeed, as the district court observed, IU is not alone in reaching this conclusion—as of July 18, 2021, more than 500 colleges and universities had mandated the COVD-19 vaccination for fall 2021. *See id.* at 9. Moreover, as the district court noted, IU offers exemptions from the policy to ensure that IU is appropriately accounting for material nuances unique to its students' individual circumstances. *See, e.g.*, *id.* at 12 (describing exemptions), 87 (observing religious exemption is "above and beyond that mandated by the Constitution"). IU's policy is thus narrowly tailored to help stem the tide of COVID-19.

B. Plaintiffs have not shown they will suffer irreparable harm.

In any event, plaintiffs fare no better at satisfying the irreparable harm standard. The district court twice determined that plaintiffs have failed to establish that they would suffer irreparable harm if IU's COVID-19 policies are enforced. Dkt. 34 at 91-94; Dkt. 40 at 2 ("For any number of reasons articulated in the court's prior opinion, the students lack irreparable harm or an inadequate remedy at law."). Plaintiffs have cited nothing in this Court to justify upsetting this conclusion.

Plaintiffs admit that six of them are already exempt from IU's vaccination mandate. App. Dkt. 6-1 at 9. Those six will suffer no irreparable harm, even if the mandate is enforced. *See, e.g.*, *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 825 (7th Cir. 2014) (holding "generalized grievance[s]" about policies under which plaintiffs were not harmed were insufficient to establish injury); *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (declining to address merits of appeal where appellants did not stand to be injured under challenged policy). Plaintiff Roth qualifies for an exemption; she too will suffer no irreparable harm. *See, e.g.*, Dkt. 1, ¶ 213; Dkt. 40 at 3, Dkt. 21 at 22-23. And plaintiff Sperazza testified that if the vaccination mandate is

enforced, she will either transfer schools or spend a semester working. *See* Dkt. 21 at 40. Courts have repeatedly held that this type of harm is not irreparable. *See, e.g., Hodges v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, No. CV 20-1456, 2020 WL 5017665, at *3 (E.D. La. Aug. 25, 2020); Dkt. 34 at 92.[5]

Moreover, plaintiffs do not appear to argue that they will suffer irreparable harm if they have to continue COVID-19 masking and testing pending their appeal. *See generally* App. Dkt. 6-1. And the Court should defer to the district court's conclusion that they will not. Dkt. 34 at 92-93.

Nor are plaintiffs entitled to a presumption that they will suffer irreparable harm simply because they have asserted a constitutional claim. *Contra* App. Dkt. 6-1. at 22. Because plaintiffs have not shown they stand to suffer any "constitutional injury," it follows that they have no irreparable harm. Plaintiffs' failure to establish irreparable harm is in itself a sufficient basis for the Court to deny plaintiffs' motion. *See,*

[5] Based on a recent policy update, Sperazza may now have an additional option available to avoid any alleged harm resulting from the vaccine requirement. App. Dkt. 6-1 at 2. If she has an objection to being vaccinated on ethical grounds, she can now claim an exemption on that basis. *https://www.iu.edu/covid/prevention/covid-19-vaccine.html.*

e.g., *E. St. Louis Laborers' Loc. 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 703 (7th Cir. 2005).

C. The balance of the harms and the public interest still favor IU.

Plaintiffs have similarly established no basis for the Court to depart from the district court's balancing of the harms. Dkt. 34 at 94-96; *Hinrichs*, 440 F.3d at 396 (confirming district court's balancing of factors is reviewed only for abuse of discretion). Plaintiffs premise their argument, that the balance of the equities favors them, on their incorrect assertion that they stand to suffer "significant constitutional injury" if the Court permits IU to continue enforcing its COVID-19 vaccination policy. App. Dkt. 6-1 at 28. Because IU's policy is constitutional, because at least seven of the eight plaintiffs are or could be exempt from the requisite vaccination, because the eighth plaintiff may choose to be vaccinated, enroll elsewhere, or take a semester off of school, and because, as the district court observed, the lone plaintiff with "an unexemptible choice[] and . . . [a] low likelihood of success . . . hasn't shown her interest to outweigh the safety of some 90,000 students, 40,000 faculty and staff, or multiple campus communities,"

the balance of harms and public interest continues to favor IU. Dkt. 40 at 3.

IV. Conclusion

IU respectfully requests that Appellants' motion for an injunction pending appeal be denied.

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Date: July 27, 2021

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