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

On Appeal from the U.S. District Court for the Northern District of Indiana, Case No. 1:21-cv-00238-DRL-SLC, Honorable Damon R. Leichty, District Judge

Reply in Support of Appellant Students' Opening Brief

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Introduction

Students do not seek to "upend" "a century-old Supreme Court precedent." Appellee Br. 1. Students do seek to correctly apply the last 116 years of constitutional jurisprudence regarding forced medical treatments that interfere with the Students' constitutional rights to bodily integrity and autonomy. Students challenged the IU 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, as well as religious objections. Students are free adults and are entitled to the protections the U.S. Constitution affords related to forced medical treatments.

IU's Mandate is an unconstitutional condition because it cannot directly force medical treatments upon its students directly without their consent. Thus, it cannot do so indirectly, by threatening virtual expulsion unless the Students "agree" to give up their right to refuse medical treatment.

Jacobson and *Zucht* are most often cited in vaccine cases of any sort. But to apply those cases here presupposes that the mandate involves a public health measure, not a medical treatment. This presupposition fails here, since the Covid vaccination operates as a preventative medical treatment, not a public health measure, which means that the controlling precedent is not *Jacobson* and *Zucht*, but rather *Cruzan* and related forced medical treatment cases.

The COVID vaccine has been labeled as a "vaccine," but it does not prevent people from either getting or transmitting the COVID virus, as is necessary for a public health measure, though it may be effective at mitigating symptoms, hospitalizations and deaths, as medical treatments and prophylactics do. The erroneous presupposition that the COVID "vaccine" would

stop the spread of the COVID virus forms the basis of the district court's conclusion that *Jacobson*'s and *Zucht*'s rational basis scrutiny applies.

However, that presupposition is erroneous, and, since the IU Mandate involves forced medical treatment to which *Cruzan* and related cases apply, heightened scrutiny is required. Therefore, IU must meet its burden of proof that its Mandate serves a sufficiently important government interest and is sufficiently tailored to meet that interest. The court below did not require this, because it erroneously applied rational basis scrutiny instead of the heightened scrutiny appropriate to infringements of the rights at stake here. Under proper heightened scrutiny, the IU Mandate cannot be justified and should be enjoined.

Argument

Preliminary Injunction Standard

A party seeking a preliminary injunction must establish that: (1) its claim has some likelihood of success on the merits; (2) without preliminary relief, it will suffer irreparable harm before final resolution of its claims; and (3) legal remedies are inadequate. *See Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018). If the moving party establishes its motion on those factors, the court balances the harms to the moving party, other parties, and the public. *Id.*

Based upon the district court's analysis, its holding on the likelihood of success on the merits was the linchpin for its decision to deny Students' motion for a preliminary injunction. Dist. Op., App. 149a - 151a. Since that analysis applied the incorrect level of constitutional scrutiny and Students are likely to prevail when the correct, heightened scrutiny is applied, the court's decision below should be reversed.

I. Students are likely to prevail on the merits.

The district court did not apply the Court's developed substantive due process analysis to this case. Continued application of the incorrect constitutional standard will leave Students without proper protection of their important constitutional rights, now and in the future.

As the IU Mandate violates Students' 14th Amendment due process rights of bodily integrity and autonomy, and of medical treatment choice, and, since IU cannot prove that the IU Mandate survives intermediate or strict scrutiny, the Students are likely to prevail upon the merits of their claim.

A. The IU Mandate is an unconstitutional condition.

IU argues Students' "reliance on the unconstitutional conditions doctrine is misplaced because that doctrine merely prevents the government from doing indirectly under the Constitution what it cannot do directly." Appellee's Br. 28. IU stated the doctrine correctly but errs in its dismissal of the doctrine's applicability here.

This doctrine protects individuals from government coercion—recognizing that the government cannot coerce individuals to give up their constitutional rights by threatening the loss of a discretionary benefit. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 607 (2013) (collecting cases).

Here, IU is coercing Students to submit to forced medical treatment in exchange for the discretionary benefit of matriculating at IU. IU compares forcing medical treatments upon unwilling students to requiring students to pay tuition or complete calculus assignments. *See* Appellee's Br. 28. Surely IU would not compare forcing students (whether currently sexually active or not) to take birth control against their will (based upon the chance sexual activity could lead to unplanned pregnancies impacting others) to paying this semester's tuition bill. Students

recognize forced birth control is a hyperbolic example, but the fact remains that IU cannot force medical treatments upon its students directly without their consent. Thus, it cannot do so indirectly, by threatening virtual expulsion unless the Students "agree" to give up their right to refuse medical treatment.

B. *Jacobson* and *Zucht* do not control—*Cruzan* and subsequent forced medical treatment cases do.

IU's entire argument supporting its Mandate relies on this Court's application of *Jacobson*'s rational basis review as the controlling precedent. *See* Appellee Br. 12. In support, IU primarily references two cases—*Jacobson v. Commonwealth of Massachusetts*, which involved a question of whether a state's police powers extended to forcing citizens to take a small pox vaccine, *see* 197 U.S. 11, 39 (1905), and *Zucht v. King*, which affirmed a school's ability to require vaccinations. 260 U.S. 174, 176-77 (1922). At first glance, *Jacobson* and *Zucht* seem directly on point to the question in front of this Court. However, this presupposes that the underlying reason why the Court affirmed the states' police powers in those cases is equivalent to the attainable outcome if IU retains similar police powers here. This presupposition fails, which means that the controlling precedent is not *Jacobson* and *Zucht*, but rather *Cruzan*, which controls on questions involving forced medical treatment.

1. IU's erroneous presuppositions regarding its Mandate do not support rational basis review generally afforded to vaccine mandates for public health.

Competent individuals have a "constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). The *Jacobson* case involved public health measures and found that Massachusetts had the police power to mandate its citizens take the small pox vaccine because the small pox

vaccine prevented transmission of the spread of the deadly small pox disease. 197 U.S. 11 at 39. Likewise, the *Zucht* Court, following *Jacobson*, affirmed the state's police power to require school children to be vaccinated against several common diseases because those vaccines prevented the transmission of those diseases most dangerous to school-aged children. 260 U.S. at 177–78.

Thus, the Court's jurisprudence, in *Jacobson* and *Zucht*, concerns vaccines used as a public health measure to prevent the transmission of a disease. As the American Public Health Association explains, "Public Health promotes and protects the health of people and communities where they live, learn, work and play. While a doctor treats people who are sick, those of us working in public health try to prevent people from getting sick or injured in the first place."[1] Thus, public health professionals promote vaccines for "vaccine-preventable diseases that can be a threat to our health."[2] This understanding of public health is long-standing. For instance, in 1920, public health was defined as:

> the science and art of preventing disease, prolonging life, and promoting physical health and efficiency through organized community efforts for the sanitation of the environment, the control of community infections, the education of the individual in principles of personal hygiene, the organization of medical and nursing service for the early diagnosis and preventive treatment of disease, and the development of the social machinery which will ensure to every individual in the community a standard of living adequate for the maintenance of health.[3]

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[1] *What is Public Health?*, AMERICAN PUBLIC HEALTH ASSOCIATION, https://www.apha.org/what-is-public-health (last visited November 17, 2021).

[2] *Vaccines*, AMERICAN PUBLIC HEALTH ASSOCIATION, https://www.apha.org/Topics-and-Issues/Vaccines (last visited November 17, 2021).

[3] Office of Teaching & Digital Learning, Boston University School of Public Health, *What is Public Health?*, BOSTON UNIVERSITY MEDICAL CAMPUS (October 21, 2015) , https://sphweb.bumc.bu.edu/otlt/MPH-Modules/PH/PublicHealthHistory..

Prior to August of this year, the CDC defined "vaccine" in conformance with the traditional understanding that vaccines are a public health measure: "a product that stimulates a person's immune system to produce immunity to a specific disease, protecting the person from that disease."[4] However, the CDC recently changed the definition of "vaccine" to "[a] preparation that is used to stimulate the body's immune response against diseases."[5] Thus, the CDC eliminated the public health component of producing "immunity to a specific disease, protecting the person from that disease." As a result, the CDC's revised definition of "vaccine" no longer conforms with the understanding that *Jacobson* and subsequent cases assumed, that a vaccine is public health measure, which is why the Court afforded the government great deference. As will be shown, the COVID "vaccines" are not a public health measure, but a medical treatment.[6]

And for constitutional review, the difference between a public health measure and a medical treatment is critical. Constitutional jurisprudence over the last century shows that courts historically grant higher deference (and rational basis review) to decisions to mandate vaccines that are public health measures, but not to forced medical treatments. The reason for this different treatment is rooted in the differences in purpose behind such mandates. A personal decision to refuse a "vaccine" that is a medical treatment does not create a risk to other people to whom the disease might spread. *See Jacobson*, 197 U.S. at 35 (holding deference applies to those

[4] *Immunization: The Basics*, CENTERS FOR DISEASE CONTROL, July 18, 2021, archived at https://web.archive.org/web/20210718162209/https://www.cdc.gov/vaccines/vac-gen/imz-basics.htm (last visited November 16, 2021).

[5] *Immunization: The Basics*, CENTERS FOR DISEASE CONTROL, September 1, 2021, https://www.cdc.gov/vaccines/vac-gen/imz-basics.htm (last visited November 16, 2021).

[6] Contrary to IU's assertion, Students have never "insist[ed]" that substantive due process rights preclude government-mandated vaccination requirements absent satisfying strict scrutiny. Appellee's Br. 2. Students were referring to this requirement within the context of the COVID "vaccination" only. Appellants' Br. 9.

requirements "adapted to prevent the spread of contagious diseases"). Instead, declining medical treatment impacts only the health of the individual making refusing the medical treatment.

The COVID "vaccine" appears to be effective at mitigating symptoms, hospitalizations and deaths, as all medical treatments and prophylactics do, but it does not prevent individuals from either getting or transmitting the COVID virus. According to CDC Director Dr. Rochelle Walensky, "what [the COVID vaccines] can't do anymore is prevent transmission."[7] The British Government also confirmed that these products are ineffective in preventing transmission of COVID. The Honorable Boris Johnson, Prime Minister of Great Britain, confirmed that these products do not prevent infection by or transmission of the virus that causes COVID.[8]

The district court determined that *Jacobson* controlled, based largely on the supposition that these products would be effective in meeting IU's stated goal of slowing the spread of the COVID virus and thereby protecting the public at large. Dist. Op., App. 91a –102a. And IU argued its Mandate "unquestionably is reasonably related to a legitimate, even compelling, government interest: stemming the spread of COVID-19." Appellee Br. 12. However, those presuppositions are inaccurate,[9] and the COVID vaccines are properly understood as a medical treatment.

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[7] Madeline Holcombe and Christina Maxouris, *Fully Vaccinated Poeople Who Get a CoVID-19 Breakthrough Infection Transmit the Virus, CDC Chief Says*, CNN HEALTH (August 6, 2021), https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday/index.html (last visited November 15, 2021).

[8] Embedded video found at: Amy Coles, *COVID-19: Boris Johnson Urges Those Eligible to Get Coronavirus Booster Jabs This Winter*, SKY NEWS (October 23, 2021), https://news.sky.com/story/covid-19-boris-johnson-urges-those-eligible-to-get-coronavirus-booster-jabs-this-winter-12442495 (last visited November 15, 2021).

[9] In fact, IU officials admit as much. When IU's President Whitten, who is fully vaccinated, contracted COVID in July of 2021, she acknowledged that "the vaccine is not 100% effective," but "protected from more serious symptoms." Email from Indiana University President Whitten, ECF No. 6-9.

2. Constitutional jurisprudence related to forced medical treatment, outside of the penal context, requires heightened scrutiny.

When medical treatment has been **mandated** by the government, contrary to the decision of the person, such mandates uniformly require heightened scrutiny.[10] *See, e.g.*, *Cruzan*, 497 U.S. at 278 (right to consent to or refuse medical treatment for incompetent person); *Humphrey v. Cody*, 405 U.S. 504 (1972); *Vitek v. Jones*, 445 U.S. 480 (1980) (involuntary commitment of mentally ill patients for medical treatment); *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 only exception is for convicted inmates in prison where the Court has applied rational basis review. Even there the Court recognized that inmates still "possess a significant liberty interest in avoiding the unwanted administration of . . . drugs," *Washington v. Harper*, 494 U.S. 210, 222 (1990), but these rights must be balanced with the "legitimate penological interest." *Id.* at 223. Consequently, the Court applies only rational basis review for inmates in prison, but nowhere else.

IU dismisses Students' concerns that applying rational basis review will give it "nearly carte blanche . . . plenary power [that] never ends" by stating that its policies must still be "reasonable" and have a "real [and] substantial relation to [their] objects[.]" Appellee Br. 20–21 (quoting *Jacobson*, 197 U.S. at 31). In the very next section, IU argues it satisfies rational basis review because its Mandate is not "utterly unreasonable." Appellee Br. 22. IU acknowledges, as do Students, that in order to be deemed unconstitutional under rational basis review, Students

[10] IU objects to Students' use of the term "heightened scrutiny." *See* Appellees' Br. 17, n. 7. Students refrained from exclusively using the term strict scrutiny because the medical treatment cases did not always specifically define the scrutiny level applied. However, this line of jurisprudence makes clear that rational basis is not applied in this context, and the Court most often applies a strict scrutiny analysis, regardless of label. *See* Appellants' Br. 19–20 (describing various scrutiny applied in medical treatment contexts).

would bear the burden to negate every conceivable basis which might support it. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). Because of this standard, laws and regulations analyzed using this extremely deferential standard are almost never found to be unconstitutional. Students contend an extremely deferential legal standard that virtually never results in a regulation being found unconstitutional does provide nearly plenary power to the government, no matter the gloss of "reasonableness" that must be applied.

Further, IU argues that if the *Jacobson* Court had "viewed Massachusetts's vaccination requirement as implicating a fundamental right of bodily integrity and autonomy necessitating heightened scrutiny under common law, it would have so held." Appellee's Br. 20. This argument ignores that: (1) the *Jacobson* Court believed the vaccine to be a public health measure, where an important government interest in protecting others from the spread of a deadly disease was obvious, (2) the reality that, in the *Jacobson* era, the Court was much more deferential to the government in areas potentially implicating individual rights; and (3) the substantive due process body of constitutional law, including recognizing substantial constitutional protection for the right of bodily integrity and autonomy, including medical treatment choice, was not developed until much later. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

Thus, since the COVID vaccines do not prevent transmission and acquiring of the COVID disease, but treats its effect, the IU Mandate must analyze its constitutionality as a forced medical treatment. That analysis requires heightened scrutiny.

C. Under heightened scrutiny, IU's Mandate is not justified.

Most importantly, heightened scrutiny imposes on IU the burden of proof. *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 197 (2014) (requiring "State [to] demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary

abridgments of" the right); *see also Sherbert v. Verner*, 374 U.S. 398 (1963) (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). However, IU makes no effort to justify its Mandate under heightened scrutiny in its brief. *See generally* Appellee's Br.

1. IU's interest is not compelling.

As Justice Gorsuch observed, society's interest in slowing the spread of COVID "cannot qualify as [compelling] forever," for "[i]f human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency." *Does 1-3 v. Mills*, --- S. Ct. ---, 2021 WL 5027177, at *3 (Oct. 29, 2021) (Gorsuch, J., dissenting).

The district court asserted that "[s]temming the spread of COVID-19 is unquestionably a compelling interest." Dist. Op., App. 111a (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)).[11] Whether that is the case or not, the COVID vaccines do not prevent the spread of the disease, so IU cannot prove, and hasn't even attempted to do so, that it has a compelling interest at this stage in the pandemic for college-age students.

2. The IU Mandate is not narrowly tailored or the least restrictive means to protect public health.

IU argues Students' view on its interest is "myopic." Appellee's Br. 23. But since the question before this Court relates to the Mandate as applied to college students, IU's interest must be compelling as it relates to those students. Given the lack of serious danger COVID poses to college-age students, the relatively low hospitalization and death rates, even with the Delta variant, the IU Mandate is not justified as applied to this age group.

IU cannot prove that the IU Mandate would stop the spread of COVID as that view is

[11] The district court never considered whether the IU Mandate passed strict scrutiny. Instead, all facts were considered through the lens of whether the IU Mandate satisfied rational basis. Dist. Op., App. 99a.

directly countered by the CDC Director's own recent statements surrounding efficacy in stopping transmission. *See supra* at 8. Lessening the risk of hospitalization and death from COVID for this age group cannot be a compelling interest, when severity of the infection for this age group is already minimal and deaths almost nonexistent.

IU continues to require masking indoors, regardless of vaccination or exemption status. There are emerging risks of the COVID vaccines, including some that primarily effect students. *See, e.g.*, Dist. Op., App. 77a–79a. Under heightened scrutiny, IU bears the burden to prove that the vaccines are safe and effective for this age group, which it has failed to do.

The IU Mandate is thus not the least restrictive means to accomplish IU's interest.

D. The IU 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 argues that "any under-inclusiveness on the fringes of [its] policy would not render it unconstitutional," because rational basis review generally survives underinclusive classifications. Appellee's Br. 26–27 (citing *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1010 (7th Cir. 2019)). Students don't disagree with IU's analysis—if rational basis applied. Since the Mandate requires heightened scrutiny, underinclusiveness must be considered.

IU has recently expanded its exemptions. First, IU's medical exemption "in practice," is being applied, contrary to its plain language, also to "those who have a medical condition that

their doctor believes nonetheless contraindicates the vaccine[]" Pls.' Reply Mot. Inj. Pending Appeal, ECF No. 12, 10–11, substantially increasing who can avoid the IU Mandate. Second, IU has recently added an ethical exemption. *Id.* at 11. While IU does not define this exemption, it appears to mirror the religious exemption, which IU "automatically grants upon request." *Id.*

IU radically expanded exemptions, including broad medical exemptions "in practice" and an undefined "ethical exemption." *See* Pls.' Reply Mot. Inj. Pending Appeal, ECF No. 12, 10–11. IU's expansion has virtually guaranteed anyone can get an exemption, and its Mandate is now woefully underinclusive as a result and fails to effectively advance its claimed compelling interest. The IU Mandate, therefore, fails heightened scrutiny.

II. Students have suffered irreparable harm and legal remedies are inadequate to resolve students' claim.

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," Dist. Op., App. 146a, and likewise, there would be "no adequate remedy at law," *id*. at 149a.

IU argues Students have no irreparable injury because their claim fails under rational basis review. Appellee's Br. 28. But if, as Students argue, their likelihood of success is great due to the proper application of heightened scrutiny precedent related to forced medical treatments, Students will have shown a constitutional injury. It would necessarily follow that they have suffered irreparable harm as a result of IU's violation of their constitutional rights and no adequate remedy at law exists.

III. The balance of equities weighs in students' favor.

Likewise, IU argues that Students' lack of a "meritorious constitutional claim" causes the balance of harms to favor the university. Appellee's Br. 29. But given the significant constitutional injury here, the balance of harms and public interest favor Students.

Since the COVID treatments are acknowledged by the CDC to not stop the transmission of the virus, IU's stated interest in decreasing the risk of transmission can no longer support its balance of harms analysis. In contrast, the public can protect themselves from the COVID virus by voluntary vaccination, social distancing, and masking. Thus the public is not harmed by the Students' decision not to be vaccinated.

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." Dist. Op., App. 151a. 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.

Conclusion

For the reasons detailed herein, this Court should find that heightened scrutiny applies to the IU Mandate under constitutional jurisprudence related to forced medical treatments. Likewise, this Court should find that IU failed to prove that the IU Mandate is justified under heightened scrutiny. Finally, this Court should find that the IU Mandate is unconstitutional and reverse the district court's decision.

November 17, 2021

Respectfully submitted,

/s/ James Bopp, Jr.

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November 17, 2021

/s/ James Bopp, Jr.
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/s/ James Bopp, Jr.
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