IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEANNA NORRIS,

Plaintiff-Appellant,

v.

SAMUEL STANLEY, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
In Case No. 1:21-cv-00756 before the Honorable Paul Maloney

PLAINTIFF-APPELLANT'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Pursuant to 6th Circuit Rule 27(c), Plaintiff Jeanna Norris, on an emergency basis, seeks:

1. An injunction pending appeal (IPA) of the District Court's October 8, 2021 Order ("PI Order," attached as Exhibit 1), which is the subject of Appellant's Notice of Appeal to this Court (attached as Exhibit 2), restraining and enjoining Defendants-Appellees, Samuel Stanley, Jr., et al., from subjecting Plaintiff to MSU's vaccine mandate ("Directive"), in violation of her constitutional rights to bodily autonomy and to decline unnecessary medical interventions, and her statutory right to informed consent.

2. Pursuant to 6th Circuit Rule 27(f), for an order expediting the briefing, oral argument, and ultimate disposition of her PI appeal, to remedy the irreparable harm being suffered by ongoing pressure placed upon Plaintiff, who is being forced to choose between her job and what she believes to be in her best interests health-wise.

FACTUAL GROUNDS FOR RELIEF

As supported by Plaintiff's First Amended Complaint ("FAC," attached as Exhibit 3) and Motion for Preliminary Injunctive Relief and Brief in Support ("PI Brief," attached as Exhibit 4), good cause and other reasons for the requested relief are shown herein.

Plaintiff Jeanna Norris is an Administrative Associate and Fiscal Officer at Michigan State University (MSU).[1] She has been employed at MSU for 8 years, and has been working remotely since March of 2020.

She recovered from COVID-19 in November 2020 and has naturally acquired immunity as demonstrated by recent serological testing. MSU issued a vaccine mandate ("Directive") in late July and early August, requiring all employees to receive a COVID-19 vaccine by August 31, or face disciplinary action, up to and including termination of employment.[2]

The Directive explicitly refuses to exempt those with naturally acquired immunity to the virus, even though it accepts inferior foreign vaccines such as Sinovac. Challenging the Directive on behalf of herself and similarly situated MSU employees (those with demonstrable naturally acquired immunity), Plaintiff filed a class action lawsuit and requested a Temporary Restraining Order (TRO) and Preliminary Injunction (PI) on August 27, 2021. She raised three claims: (1) MSU's Directive violates her constitutional rights to bodily autonomy and to decline unnecessary medical interventions; (2) the Directive constitutes an unconstitutional condition by premising her employment upon her willingness to surrender these rights; and (3) the Directive

[1] A more detailed statement of facts can be found in Plaintiff's FAC (Ex. 3) at 6-28 and PI Motion (Ex. 4) at 3-11.

[2] A number of employees, including two of the Plaintiffs in the underlying action, have now been fired for declining to receive the vaccine, establishing that MSU's threat is not empty.

violates her statutory right to informed consent by effectively forcing her to take a vaccine authorized only for Emergency Use (an EUA product) for which Congress has provided an absolute right of refusal.

The District Court held a hearing on Plaintiff's PI Motion on September 22, 2021. In a written Order shortly thereafter, the Court denied the Motion. *Norris v. Stanley*, No. 1:21-cv-756, Dkt. # 42 (W.D. Michigan Oct. 8, 2021).

The Court's reasoning was premised in large part on its presumption that Plaintiff was unlikely to succeed on the merits and that the threat of losing her job, should she not get the vaccine, did not warrant a finding of irreparable injury.

With respect to the merits, one of the primary disputed issues was whether rational basis or strict scrutiny analysis applied to Plaintiff's constitutional claims. Citing *Hanzel v. Arter*, 625 F.Supp. 1259, 1261-63 (S.D. Ohio 1985), the Court agreed that Plaintiff "possesses fundamental rights to privacy and bodily integrity under the Fourteenth Amendment," but ultimately determined that "there is no fundamental right to decline a vaccination." *Norris v. Stanley*, No. 1:21-cv-756 (W.D. Michigan Oct. 8, 2021) *3. The Court found Plaintiff's attempts to distinguish *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which it believed established that rational basis review only applied, "unsuccessful." MSU's Directive survived rational basis review, as "even if there is a vigorous ongoing discussion about the effectiveness of natural immunity, it is rational for MSU to rely on present federal and state guidance in creating its vaccine mandate."

According to the Court, Plaintiff's unconstitutional conditions argument was deemed "[s]imilarly unpersuasive" as she had allegedly failed "to identify an enumerated right that the vaccine policy coerces her into giving up." *Id.* at 4-5.

Furthermore, the Court held that Plaintiff would not suffer irreparable harm from denial of the PI motion. Her constitutional rights had not been violated, and if a court eventually deemed her termination unlawful, she could receive monetary compensation. *Id.* at 7-8.

Pursuant to Fed. R. App. P. 8(a)(1)(C), Plaintiff first moved for an emergency IPA in the District Court on October 26, 2021. The District Court denied the motion on October 29, 2021, finding that it was premature as Plaintiff had not yet filed a notice of appeal of the order denying her preliminary injunction. *Norris v. Stanley*, No. 1:21-cv-756, Dkt. 54 (W.D. Michigan Oct. 29, 2021) at 2. The Court nevertheless went on to address the substance of Plaintiff's contentions. It held that because in its opinion, Plaintiff had not demonstrated that she would suffer irreparable harm, she was required to show a likelihood of success on the merits—as opposed to a serious question going to the merits—which, for similar reasons as those underlying the denial of the PI motion, she had not done.

Plaintiff filed a notice of appeal on the denial of the motion for a PI on November 5, 2021. Even if the District Court accurately found that the motion for a stay/injunction pending appeal was premature, given that Plaintiff has now filed a

notice of appeal *and* the District Court made clear that it was denying the stay/injunction on the merits, the matter now is properly before the Court. *See* Fed. R. App. P. 8(a)(2)(A)(ii); *A. Philip Randolph Institute*, 907 F.3d 913, 917 (6th Cir. 2018).[3]

LEGAL ARGUMENT

In determining whether to grant an IPA motion, courts consider the same factors involved in TRO and PI motions: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *A. Philip Randolph*, 907 F.3d at 917, *citing Michigan Coalition of Radioactive Material Users v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

A party may make a motion for injunctive relief pending appeal directly to the Court of Appeals, provided that such motion was first made in the District Court. *A. Philip Randolph*, 907 F.3d at 917. Because this is not an appeal of the lower court decision, review is *de novo* (rather than assessed pursuant to an abuse of discretion standard). *Id.*

In *A. Philip Randolph*, this Court rejected the Defendants' contention that an injunction pending appeal may be granted only if relief is "indisputably clear." *A. Philip Randolph*, 907 F.3d at 918. Those decisions "relate[d] in part to rules and considerations

[3] Plaintiff requested a religious exemption from the vaccine mandate on November 17, 2021.

specific to the Supreme Court, and while they are still persuasive authority … we find that no special burden on a plaintiff is necessitated by the posture of this case for the reasons discussed above." *Id.*

With respect to the four factors, they are "not prerequisites that must be met, but interrelated considerations that must be balanced together." *Id., citing Michigan Coalition*, 945 F.2d at 153. Thus, a movant need not always establish a high probability of success on the merits to obtain an IPA. *Ohio ex rel. Celebrezze v. Nuclear Regulatory Com'n*, 812 F.2d 288, 290 (6th Cir. 1987). Rather, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. *Id.* "Simply stated, more of one excuses less of the other." *A. Philip Randolph*, 907 F.3d at 918.

I. ABSENT AN INJUNCTION PENDING APPEAL, PLAINTIFF WILL SUFFER IRREPARABLE INJURY

Contrary to the District Court's determination, absent an injunction pending appeal, Plaintiff will in fact suffer irreparable harm. Just a few days ago, the Fifth Circuit issued a written order expounding upon its grant, several days prior, of a stay pending briefing and expedited judicial review in *BTS Holdings v. Occupational Safety and Health Administration*, No. 21-60845 (5th Cir. 2021).

The *BTS* Plaintiffs challenged the Biden Administration's vaccine mandate for private companies with 100 or more employees, which it sought to implement through OSHA. Finding that absent the stay, Plaintiffs would suffer irreparable harm in the

form of lost constitutional freedoms, the Fifth Circuit explained that "the Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." *BTS Holdings v. Occupational Safety and Health Administration*, No. 21-60845 (5th Cir. 2021) *17-18. *See also Fraternal Order of Police Chicago Lodge No. 7, et al. v. City of Chicago*, Case No. 2021 CH 5276, at 3 (Circuit Court of Cook County, Ill.) (Nov. 1, 2021)(internal citations omitted), *available at* https://news.wttw.com/sites/default/files/article/file-attachments/FOP%20v.%20City%20of%20Chicago%2011.1.21%20Order.pdf (last visited Nov. 3, 2021) ("An award of back pay or reinstatement cannot undo a vaccine. Nothing can. … An award in favor of the police unions would be an 'empty victory.' 'Obey now, grieve later' would be transformed into 'obey now and forever' without a meaningful opportunity to arbitrate. That constitutes irreparable injury."); *Magliulo v. Edward*, __F.Supp.3d __2021 WL 3679227 (W.D. Louisiana 2021) ("In addition to showing constitutional harm, Plaintiffs have shown irreparable harm because of their inability to complete curriculum requirements, disclosure of their 'unvaccinated' status, and excessive restrictions."). *See also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020) (holding that injunctive relief was "called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange."); *Grutter v. Bollinger*, 247 F.3d 631, 633 (6th Cir. 2001) ("applicants are likely to accept admissions at other schools, thus diminishing the University's ability to compete

with other selective law schools …This harm cannot be undone and therefore is irreparable.").

Notably, the District Court here, in denying Plaintiff's requested TRO, PI, and then motion for an IPA, rejected precisely this framing of irreparable harm, which mere weeks later the Fifth Circuit recognized was the appropriate lens through which to view this prong of the analysis.

No different from the *BTS* Plaintiffs, Plaintiff here is under enormous pressure to surrender her constitutional rights and receive the vaccine due to the prospective loss of salary and even employment. *See Michigan State A. Philip Randolph Institute v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed."); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F.Supp.3d 758 (M.D. Tenn. 2015) ("When an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary."); *Jessen v. Village of Lyndon Station*, 519 F. Supp. 1183, 1189 (W.D. Wis. 1981) (finding irreparable injury where plaintiff stood to lose a property right without due process). It is this very dilemma—being put in the position of choosing between job and jab—that the Fifth Circuit found constituted irreparable harm and thereby warranted an injunction.

On similar grounds, an IPA is needed to protect Plaintiff from the unconstitutional conditions to which MSU's Directive has subjected her. *See Alliance*

for Open Soc. Int'l, Inc. v. USAID, 651 F.3d 218 (2d Cir. 2011) (upholding grant of preliminary injunction in unconstitutional conditions case). An IPA is also warranted to protect Plaintiff's statutory rights, which are being infringed upon by a Directive that is preempted by federal law. *See Edgar v MITE Corp.*, 457 U.S. 624 (1982) (affirming in case where lower court had issued preliminary injunction against a state statute allegedly preempted by federal law); *National Steel Corp. v. Long*, 689 F. Supp. 729 (W.D. Mich. 1988) (noting that preliminary injunction was initially entered in preemption case).

In sum, for several reasons, ongoing enforcement of MSU's Directive is harming Plaintiff—immediately, concretely, and irreversibly.

II. PLAINTIFF'S CASE PRESENTS, AT A MINIMUM, SERIOUS QUESTIONS BEARING ON THE MERITS

In denying her motion for a preliminary injunction, the Court found that Plaintiff does not have a substantial likelihood of success on the merits. *See Norris*, No. 1:21-cv-756. Nevertheless, and without conceding this point, the standard that she must meet to obtain an IPA is lower than the requisite showing for a preliminary injunction, as discussed above. Plaintiff need show only a "serious question going to the merits" to succeed on this application. *Michigan Coalition*, 945 F.2d at 153, *quoting In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

Undoubtedly, such a question is presented here. In determining that rational basis level review applies in this case when denying the PI motion, and citing *Hanzel v. Arter*, 625 F. Supp. 1259, 1261-63 (S.D. Ohio 1985), the District Court stated that

"Plaintiff is absolutely correct that she possesses [rights to privacy and bodily integrity under the Fourteenth Amendment], but there is no fundamental right to decline a vaccination." *Norris*, No. 1:21-cv-756 at 3. Based on its reliance on *Hanzel*, it appears that while the District Court acknowledged the existence of these rights, it considered them non-fundamental and thereby not subject to strict scrutiny. Moreover, it also appeared to believe that forced vaccination does not implicate a privacy right. *See Hanzel*, 625 F.Supp. at 1262 ("Yet it does not necessarily follow … that bodily autonomy *per se* has been deemed 'fundamental' by the Supreme Court's rulings.").

With all due respect to the Court, *Hanzel* preceded *Cruzan v. Dir., Mo. Dep't of Public Health*, 497 U.S. 261, 278 (1990), *Washington v. Harper*, 494 U.S. 210, 223 (1990), *Washington v. Glucksberg,* 521 U.S. 702, 722 n.17 (1997), and *Vacco v. Quill*, 521 U.S. 793, 807 (1997). All of those Supreme Court cases recognized fundamental rights under the Fourteenth Amendment to refuse medical care, derived from rights to bodily integrity and freedom from unwanted touching. Given that *Hanzel* was a District Court decision that predated these cases, to the extent it is inconsistent with those cases, *Hanzel* is no longer viable and the Court incorrectly found that only rational basis level review applies here.[4] At the very least, the tension between the Court's decision here and the line of Supreme Court cases mentioned above raises a serious question bearing on the merits.

[4] To the extent that another District Court found that rational basis level review applies in cases involving plaintiffs with natural immunity, it is important to note that the issue has not yet been addressed by an appellate court and therefore remains unresolved. *See Kheriaty v. Regents of the University of California*, No. 8:21-cv-01367 (C.D. Cal. Sept. 29, 2021).

MSU's Directive cannot survive strict scrutiny analysis, for reasons discussed extensively in the Complaint and PI. *See* FAC at ¶¶ 119-156; PI at 12-20. The Fifth Circuit in *BTS* queried whether COVID-19 "poses the kind of grave danger [that the OSHA statute] contemplates . . . . for the more than *seventy-eight* percent of Americans aged 12 and older either fully or partially inoculated against it, the virus poses—the Administrations assures us—little risk at all." *BTS*, Case No. 21-60845 at 11. Put otherwise, even the Biden Administration acknowledges that the virus does not pose a significant risk to the vaccinated, calling into question the rationale for mandates. In constitutional terms, the Government cannot show a compelling interest in mandating COVID-19 vaccines, since those who choose to get vaccinated can thereby protect themselves. At a bare minimum, this raises yet another serious question going to the merits.

Like the OSHA mandate, MSU's Directive is "staggeringly overbroad." *See BTS*, Case No. 21-60845 at 13.

The Fifth Circuit observed that:

> a 28-year-old trucker spending the bulk of his workday in the solitude of his cab is simply less vulnerable to COVID-19 than a 62 year-old prison janitor. Likewise, a naturally immune unvaccinated worker is presumably less at risk than an unvaccinated worker who has never had the virus. The list goes on, but one constant remains—the Mandate fails almost completely to address, or even respond to, much of this reality and common sense. *Id.*

MSU's vaccine Directive suffers from the same staggeringly overbroad deficiencies. Plaintiff, a 37-year-old naturally immune employee who has been working remotely for the past 20 months, "is presumably less at risk than an unvaccinated worker who has never had the virus." She is also at less risk than a 62-year-old colleague. Given her naturally acquired immunity, she does not pose a threat to others. As the CDC recently conceded in response to a FOIA request, it has no record of a *single* case in which someone with naturally acquired immunity contracted the virus a second time and infected another person. Not one. *See* 11/5/21 CDC Response to FOIA Request (attached as Exhibit 5). This case thus presents the question not only of whether the Directive effectuates a compelling government interest, but also whether it is narrowly tailored to do so. The Government cannot show that it has met its burden in establishing either prong.

Also, in the course of addressing this issue, the District Court here observed that it had "heard the battle of the experts, and they essentially presented that there is ongoing scientific debate about the effectiveness of naturally acquired immunity versus vaccine immunity." *Norris*, No. 1:21-cv-756 at 5. The *incontrovertible evidence,* however, establishes that there is no logical reason to assign vaccine acquired immunity greater validity than that attained through natural infection. But even if this case boils down to a "battle of the experts," as the Court put it, that alone renders this a "serious question" of fact bearing on the merits of her claim. For if Plaintiff's position and the opinions

of her experts are correct, then MSU's Directive cannot surmount even rational basis level review. That is yet more evident given that MSU accepts vaccines such as Sinovac, which the Defense does not dispute are no more than fifty percent effective.

Furthermore, the Court opined that because Plaintiff did not have a constitutional right to her employment at MSU—as she acknowledged—the Directive did not violate her rights. But the question of whether a mandate that predicates employment upon medically unnecessary immunization constitutes an unconstitutional condition is both an unresolved and a serious one. Notably, the Court premised its holding that MSU's Directive did not constitute an unconstitutional condition on Plaintiff's alleged failure to "identify an enumerated right that the vaccine policy coerces her into giving up." *Norris*, No. 1:21-cv-756 at 5. Plaintiff respectfully submits that this determination is based upon a misapprehension of unconstitutional conditions case law, as established by *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974). There, the right at issue was that of interstate travel—which is not explicitly enumerated. Once again, this demonstrates the existence of a "serious question" warranting a stay pending appellate review.

For these reasons, along with all of those presented in the brief supporting the motion for a PI, at the very least this case presents numerous "serious questions" on the merits. Given that she has unequivocally shown that she will suffer irreparable harm otherwise, she has established her entitlement to an IPA.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH IN PLAINTIFF'S FAVOR

The Court found in *BTS* that "a stay will do *OSHA* no harm whatsoever. Any interest OSHA may claim in enforcing an unlawful (and likely unconstitutional) ETS is illegitimate. Moreover, any abstract 'harm' a stay might cause the Agency pales in comparison and importance to the harms the absence of a stay threatens to cause countless individuals and companies."

The same holds true here. MSU has no legitimate interest in enforcing its unconstitutional Directive. Practically speaking, Plaintiff works remotely, and has demonstrated that she has naturally acquired immunity to COVID-19. There is zero evidence in the record or in the literature that those with natural immunity spread COVID-19, let alone spread it more than those who have been vaccinated. In fact, and despite CDC's best efforts to couch the results of the prevailing research otherwise, all studies unequivocally establish that naturally acquired immunity to COVID-19 is more robust and durable than that induced through vaccination. Accordingly, the MSU community will suffer no harm whatsoever if this Court grants an IPA to Ms. Norris.

Furthermore, as the District Court observed at the PI hearing, Plaintiff has been working remotely since March of 2020, a point which defense counsel did not dispute, although she maintained that Plaintiff could theoretically be called back to campus at any time. *See* Minutes of October 12, 2021, Hearing (attached as Exhibit 6) at 121. The Court indicated that perhaps the remote nature of Plaintiff's work "change[d]" the

calculus, and asked "what is the compelling government interest to force her to get the vaccine when she is working from home?" until she is ordered back to campus (Ex. 6 at 122-23). The defense's response was to "have[] [MSU's] policy remain intact," while she acknowledged that "[i]f the question is, should there be an injunction on one single person who is not coming to campus, then I agree with you that could be different" (Ex. 6 at 122-23).

Given that Plaintiff is not working on campus, even putting natural immunity issues aside, she poses no risk to the campus community so long as she continues to work remotely. While the defense argued at the hearing that at any moment Plaintiff could be ordered to return to campus, there is no indication that such a decree is on the verge of being handed down. And Plaintiff asks only that enforcement of the Directive be halted as applied to her at this time. For that reason, the potential harm MSU posited at the hearing does not exist for purposes of this inquiry.

Likewise, an injunction is firmly in the public interest. As in *BTS*, the public is "served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps *particularly*, when those decisions frustrate government officials." *Id.* In sum, the balance of equities and the public interest clearly favor granting a stay pending determination of the appeal of the preliminary injunction.

CONCLUSION

Plaintiff respectfully requests that the Court grant this request for an IPA while the appeal of the PI motion is under consideration.

Dated: November 18, 2021

Respectfully,

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I hereby certify that this Brief contains 3,744 words, as produced by and counted by the Microsoft Word Office 365 software.

_____/s/ *Jenin Younes*

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEANNA NORRIS, Plaintiff,	)	
-v-	)	No. 1:21-cv-756
SAMUEL L. STANLEY, JR., ET AL., Defendants.	)	Hon. Paul L. Maloney

OPINION DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiff Jeanna Norris's motion for preliminary injunction (ECF No. 4). Plaintiff seeks to enjoin Defendants from enforcing the Michigan State University ("MSU") vaccine mandate policy. This Court previously denied Plaintiff's motion for a temporary restraining order, which sought the same relief (ECF No. 3).

I.

A trial court may issue a preliminary injunction under Federal Rule of Civil Procedure 65. A district court has discretion to grant or deny preliminary injunctions. *Planet Aid v. City of St. Johns, Mich.*, 782 F.3d 318, 323 (6th Cir. 2015). A court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (quoting *Northeast Ohio Coalition for Homeless & Service Employees Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)).

The four factors are not prerequisites that must be established at the outset but are interconnected considerations that must be balanced together. *Northeast Ohio Coalition*, 467 F.3d at 1009; *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) (internal citation omitted); *see Patio Enclosures, Inc. v. Herbst*, 39 F. App'x 964, 967 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)).

The purpose of a preliminary injunction is to preserve the status quo. *Smith Wholesale Co., Inc. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 873 n. 13 (6th Cir. 2007) (quoting *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004)). The Sixth Circuit has noted that "[a]lthough the four factors must be balanced, the demonstration of some irreparable injury is a *sine qua non* for issuance of an injunction." *Patio Enclosures*, 39 F. App'x at 967 (citing *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)).

II.

A. Factor I: Substantial Likelihood of Success on the Merits

The likelihood of success on the merits of Plaintiff's claim hinges in significant measure on the standard of review that this Court must apply given existing appellate authority. "If a protected class or fundamental right is involved, [the court] must apply strict scrutiny, but where no suspect class or fundamental right is implicated, [the court] must apply rational basis review." *Midkiff v. Adams Cty. Reg'l Water Dist.*, 409 F.3d 758, 770 (6th Cir.

2005). Because this Court finds that no fundamental right is implicated in the present matter, the Court must apply a rational basis standard.

Under rational basis, the burden is on the Plaintiff to prove that the policy in question is not rationally related to a legitimate government interest. Under rational basis review, the governmental policy at issue "will be afforded a strong presumption of validity" and must be upheld as long as there is a rational relationship between the policy in question and some legitimate government purpose. *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Further, "a plaintiff faces a severe burden and must 'negate all possible rational justifications for the distinction.'" *Midkiff*, 409 F.3d at 770 (quoting *Gean v. Hattaway*, 330 F.3d 758, 771 (6th Cir. 2003)).

Although Plaintiff advocates that strict scrutiny should apply because MSU's vaccine policy violates her fundamental rights to privacy and bodily integrity under the Fourteenth Amendment, this argument is without merit. Plaintiff is absolutely correct that she possesses those rights, but there is no fundamental right to decline a vaccination. *See Hanzel v. Arter*, 625 F. Supp. 1259, 1261-63) (explaining that "contraception, abortion, and vaccination" all involve bodily autonomy, yet bodily autonomy has not been deemed a "fundamental" right). She also does not have a constitutionally protected interest in her job at MSU, which Plaintiff's counsel conceded. The MSU vaccine policy does not force Plaintiff to forgo her rights to privacy and bodily autonomy, but if she chooses not to be vaccinated, she does not have the right to work at MSU at the same time (*see* ECF No. 7 at PageID.347-48) (discussing that Plaintiff, as an at-will employee, does not have a constitutionally protected property

interest in her job). The MSU vaccine policy does not violate any of Plaintiff's fundamental rights.

Plaintiff attempted to distinguish her case from *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) but was unsuccessful. She argues that her case is different because *Jacobson* never considered natural immunity, and because the policy in *Jacobson* was subject to bicameralism and presentment to the Massachusetts legislature, while the MSU policy was not. First, the asserted factual differences between *Jacobson* and Plaintiff's case are not relevant. Over the last year and a half, courts have looked to *Jacobson* to infer that a rational basis standard applies to generally applicable vaccine mandates; the facts of the case are obviously not going to be identical to every COVID vaccine case that has been or is currently being litigated. *See, e.g.*, *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) ("Plaintiffs assert that the rational-basis standard used in *Jacobson* does not offer enough protection for their interests and that courts should not be as deferential to the decisions of public bodies as *Jacobson* was, but a court of appeals must apply the law established by the Supreme Court."); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) (stating that *Jacobson* essentially applied a rational basis standard); *Harris v. Univ. of Mass., Lowell*, No. 21-cv-11244-DJC, 2021 WL 3848012 (D. Mass. Aug. 27, 2021) (applying rational basis to the university's "generally applicable public health measure[]"). This Court must apply the law from the Supreme Court: *Jacobson* essentially applied rational basis review and found that the vaccine mandate was rational in "protect[ing] the public health and public safety." 197 U.S. at 25-26. The Court cannot ignore this binding precedent.

Similarly unpersuasive is Plaintiff's unconstitutional conditions argument. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."). To succeed under this argument, Plaintiff would first have to identify an enumerated right that the vaccine policy coerces her into giving up. *See id.* at 604. As stated above, the MSU vaccine mandate does not violate any of Plaintiff's fundamental rights, so this argument cannot succeed.

Given that rational basis applies to this case, the burden is on Plaintiff to show that the MSU vaccine mandate is not rationally related to a legitimate government interest. Plaintiff provided evidence in the form of testimony and declarations from an expert witness who stated that naturally acquired immunity is just as effective as vaccine immunity (*see* ECF No. 12). She thus argued that it was irrational for MSU to not carve out an exemption in its vaccine mandate for individuals like herself who have naturally acquired immunity from a previous COVID infection. On the other hand, Defendants presented competing evidence from their own expert witness that refuted the effectiveness of naturally acquired immunity (*see* ECF No. 9-1, 17). The Court heard the battle of the experts, and they essentially presented that there is ongoing scientific debate about the effectiveness of naturally acquired immunity versus vaccine immunity. In creating its vaccine policy, Defendants relied on guidance from the CDC, FDA, MDHHS, and other federal and state agencies that have extensively studied the COVID-19 vaccine. Put plainly, even if there is vigorous ongoing discussion about the effectiveness of natural immunity, it is rational for MSU to rely on

present federal and state guidance in creating its vaccine mandate.[1] Thus, Plaintiff has failed to show that the MSU vaccine mandate does not meet rational basis. She is unlikely to succeed on the merits of her claim.[2]

Finally, the Court notes a recent case out of the Central District of California: *Kheriaty v. Regents of the University of California*, No. 8:21-cv-01367 (C.D. Cal. Sept. 29, 2021). The facts of this case are very similar to the present case. In *Kheriaty*, a professor at the University of California claimed to be naturally immune to COVID-19 due to a COVID infection he suffered in 2020, just as Ms. Norris. *Id.* at 1. He sought an injunction preventing the University from enforcing its vaccine mandate against him because he alleged his prior infection gave him superior immunity to COVID than vaccinated individuals. *Id.* In denying Mr. Kheriaty's injunctive relief, the district court applied a rational basis standard under *Jacobson* and found that despite competing studies and evidence on natural immunity, it was not irrational for the University to implement a vaccine mandate. *Id.* at 8. The University relied on CDC guidance and clinical trials that supported the effectiveness of the COVID

[1] *See, e.g., New CDC Study: Vaccination Offers Higher Protection Than Previous COVID-19 Infection*, CDC (Aug. 6, 2021, 1:00 PM), https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html. The Court also notes the letter from U.S. Senator Roger Marshall of Kansas, himself an M.D., and co-signed by fellow Doctors Caucus members of the House and Senate, urging the CDC to recognize COVID-19 natural immunity in future guidance policies. The letter references studies identifying the efficacy of natural immunity.

[2] Plaintiff makes two alternative arguments for why she is likely to succeed on the merits. First, she argues that MSU did not have the power to implement its vaccine mandate in the first place because it is exercising police power in doing so, and the Michigan legislature has never delegated such power to MSU. This argument is completely without merit because the Michigan Constitution gives MSU's "governing board[] authority over 'the absolute management of the University.'" Mich. Const. art. 8 § 5. MSU certainly has the power to implement its vaccine policy because the Board of Trustees has the broad power to govern the university. Second, Plaintiff argues that the MSU vaccine policy is preempted under the federal Emergency Use Authorization ("EUA") statute. *See* 21 U.S.C. § 360bbb-3. She argues that the vaccine mandate "actually conflicts" with the EUA, and it is thus preempted (ECF No. 4-1 at PageID.210). The basis of Plaintiff's argument is that the EUA requires medical providers to obtain informed consent from individuals receiving an EUA vaccination and to provide those individuals the option to accept or refuse administration of that vaccine. *See* 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(II). MSU's policy does not preclude Plaintiff from receiving informed consent, nor does it prevent her from accepting or refusing administration of the vaccine. Rather, the vaccine is a condition of employment, which Plaintiff does not have a constitutionally protected interest in. There is no preemption issue here.

vaccine, which is enough to meet rational basis. *Id.* at 3. Specifically regarding competing evidence on natural immunity versus vaccine immunity, the court stated, "merely drawing different conclusions based on consideration of scientific evidence does not render the Vaccine Policy arbitrary and irrational." *Id.* at 10. Although the Court recognizes that *Kheriaty* is merely persuasive authority, it strengthens the Court's position that a rational basis standard applies to the present matter and that a university policy choice in its vaccine mandate is not irrational.

B. Factor II: Irreparable Harm

An irreparable harm is an extraordinary harm that cannot be properly compensated by money damages. *See Winter v. NRDC*, 555 U.S. 7, 22 (2008). Plaintiff's only contention of irreparable harm is that she will be deprived of at least one constitutional right if MSU enforces its vaccine mandate against her. First, as stated above, Plaintiff's constitutional rights are not violated by MSU's vaccine mandate. Second, if Plaintiff was eventually unlawfully terminated, she would have proper money damages (*see* ECF No. 7 at PageID.349-50). Plaintiff's damages would be her lost wages, cost of health insurance coverage, and other compensable benefits that she receives from her job. *See Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 579 (6th Cir. 2002) ("[T]he loss of a job is quintessentially reparable by money damages."). The Court appreciates and does not discredit that if Plaintiff was improperly terminated, she would face a great financial burden in waiting for this case to be fully litigated and receive these damages. But that is not an irreparable harm. Because Plaintiff faces no constitutional violation and she would have proper monetary compensation

in the event of a wrongful termination, Plaintiff cannot show that she will face an irreparable harm without an injunction.

C. Factors III & IV: The Equities

The equities weigh in favor of denying Plaintiff's motion for preliminary injunction. If MSU's vaccine mandate is not enforced, the harm to others and the public could be serious, according to health officials. The goal of the mandate is to prevent the spread of COVID-19 and keep people safe. Enjoining MSU's policy would increase risk based on the current record. This factor weighs in favor of Defendants.

D. Balancing the Factors

All factors weigh in favor of denying Plaintiff's motion for preliminary injunction, so Plaintiff's motion must be denied. This denial maintains the status quo by keeping the existing vaccine mandate in place at MSU, which is the purpose of a preliminary injunction.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's motion for preliminary injunction (ECF No. 4) is **DENIED**.

Date: October 8, 2021

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

EXHIBIT 2

United States District Court for the Western

District of Michigan

Jeanna Norris

Plaintiff,

vs. Case No. 1:21-cv-756

Samuel Stanley, et al

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Jeanna Norris,
Name all parties taking the appeal

hereby appeal to the United States Court of Appeals for the Sixth Circuit from

Order Denying Preliminary Injunction
The final judgment, from an order describing it

entered in this action on the 8th day of October, 2021.

(s) Jenin Younes

Address: New Civil Liberties Alliance
1225 19th Street, NW
Washington, DC 20036

Attorney for Plaintiff

Note to inmate filers: If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.

cc: Opposing Counsel ☑
Court of Appeals ☑

6CA-3
11/16

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JEANNA NORRIS, KRAIG EHM, and D'ANN ROHRER, *Plaintiffs*, v. **SAMUEL L. STANLEY, JR., in his official capacity as President of Michigan State University; DIANNE BYRUM, in her official capacity as Chair of the Board of Trustees, DAN KELLY, in his official capacity as Vice Chair of the Board of Trustees; and RENEE JEFFERSON, PAT O'KEEFE, BRIANNA T. SCOTT, KELLY TEBAY, and REMA VASSAR, in their official capacities as Members of the Board of Trustees of Michigan State University, and JOHN and JANE DOES 1-10,** *Defendants*.	**CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** JURY TRIAL DEMANDED

Plaintiffs and those similarly situated, by and through their attorneys at the New Civil Liberties Alliance ("NCLA"), hereby complain and allege the following:

INTRODUCTORY STATEMENT

a. By the spring of 2020, the novel coronavirus SARS-CoV-2, which can cause the disease COVID-19, had spread across the globe. Since then, and because of the federal government's "Operation Warp Speed," three separate coronavirus vaccines have been developed and approved more swiftly than any other vaccines in our nation's history. The Food and Drug Administration ("FDA") issued an Emergency Use Authorization ("EUA") for the Pfizer-

BioNTech COVID-19 Vaccine ("BioNTech Vaccine") on December 11, 2020.[1] Just one week later, FDA issued a second EUA for the Moderna COVID-19 Vaccine ("Moderna Vaccine").[2] FDA issued its most recent EUA for the Johnson & Johnson COVID-19 Vaccine ("Janssen Vaccine") on February 27, 2021 (the only EUA for a single-shot vaccine).[3]

b. FDA fully approved the Pfizer Comirnaty Vaccine ("Comirnaty Vaccine") on August 23, 2021. Though both are affiliated with Pfizer, the BioNTech Vaccine and the Comirnaty Vaccines are legally distinguishable. Upon information and belief, they are also factually distinguishable.

c. The EUA statute, 21 U.S.C. § 360bbb-3, explicitly states that anyone to whom an EUA product is administered must be informed of the option to accept or to refuse it, as well as alternatives to receiving the product and the risks and benefits of receiving it.

d. Michigan State University ("MSU") announced "COVID directives" for the Fall 2021 semester by email and on its website on July 30, and then provided an expanded version via its website on August 5, 2021. The directives include a "Mandatory COVID-19 Vaccine" ("the Directive").

e. According to the Directive, all faculty, staff, and students must either be fully vaccinated or have received one of a two-dose series by August 31, 2021, unless they obtain a religious or medical exemption, both of which are limited in nature and application. The Directive specifically excludes natural immunity as a basis for a medical exemption. Even employees who work remotely are subject to the Directive.

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[1] *Pfizer-BioNTech Vaccine FAQ*, FDA, bit.ly/3i4Yb4e (last visited August 26, 2021).

[2] *Moderna, About Our Vaccine*, bit.ly/2Vl4lUF (last visited August 26, 2021).

[3] *EUA for Third COVID-19 Vaccine*, FDA, bit.ly/3xc4ebk (last visited August 26, 2021).

f. MSU's Directive recognizes all vaccines currently approved by the World Health Organization ("WHO"), including the Janssen Vaccine and others which the FDA has not approved, such as the Sinovac and Sinopharm Vaccines.

g. Those who do not comply with the Directive face potential disciplinary action, including termination of employment, as demonstrated by Plaintiff Ehm's recent termination.

h. Plaintiffs have already contracted and fully recovered from COVID-19. As a result, they have naturally acquired immunity, confirmed unequivocally by recent SARS-CoV-2 antibody tests. Immunologist Dr. Hooman Noorchashm has advised them that it is *medically unnecessary* to undergo a vaccination procedure at this point (which fact also renders the procedure and any attendant risks medically unethical).

i. Yet, if Plaintiffs follow Dr. Noorchashm's advice and elect not to take the vaccine, they face adverse disciplinary consequences. Indeed, Plaintiffs Ehm and Rohrer are undergoing disciplinary proceedings due to remaining unvaccinated, culminating in Ehm's termination just yesterday. In short, the Directive is unmistakably coercive and cannot reasonably be considered anything other than an unlawful mandate. Furthermore, it represents an unconstitutional condition being applied to Plaintiffs' constitutional and statutory rights to bodily integrity and informed consent, respectively.

j. Plaintiffs bring this action on behalf of a class of similarly situated individuals – employees of MSU who have naturally acquired immunity to COVID-19 and for whom the Directive represents a violation of their constitutional rights to bodily autonomy and to decline medical treatment.

k. Given their naturally acquired immunity, MSU cannot establish a compelling governmental interest in overriding the personal autonomy and constitutional rights of Plaintiffs

and those who are similarly situated by forcing them either to be vaccinated or to suffer adverse professional consequences.

l. Naturally acquired immunity is at least as robust and durable as that attained through the most effective vaccines, and it is significantly more protective than some of the inferior vaccines that MSU accepts. Studies further indicate that naturally acquired immunity is significantly longer lasting than that acquired through the best vaccines. As a result, MSU's Directive is designed to nullify informed consent and infringes upon Plaintiffs' rights, and the rights of those who are similarly situated, under the Ninth and Fourteenth Amendments to the United States Constitution.

m. For similar reasons, the Directive constitutes an unconstitutional condition, because it is poorly calibrated to protect the public health, yet it imposes disproportionate risks on some of its targets. That renders the Directive an unlawful condition insufficiently germane to its purported purpose. Furthermore, the disciplinary action that MSU is using to leverage ostensibly voluntary compliance with its Directive is not proportional to MSU's purported public health aims.

n. Even beyond its constitutional defects, MSU's unlawful Directive is irreconcilable with and frustrates the objectives of the statute governing administration of medical products authorized for emergency use only. Pursuant to the Supremacy Clause of the United States Constitution, federal law overrides conflicting state law and action by agents of the State of Michigan. Accordingly, the Directive is preempted by the EUA statute and must be enjoined.

o. In a highly publicized opinion recently made public, the U.S. Department of Justice's Office of Legal Counsel ("OLC") argues that public and private entities can lawfully

mandate that their employees receive one of the EUA vaccines.[4] The opinion is silent on preemption, however, and thus cannot be read to prevent the EUA statute from having its ordinary preemptive effect. This is especially true in light of the fact that Congress never assigned any role to OLC to administer the EUA statute. The OLC Opinion, as explained in detail in Count III below, is also deeply flawed on multiple additional legal grounds.

p. Regardless of whether Pfizer recently received full FDA approval for the Comirnaty Vaccine, the remaining vaccines "approved" for use by MSU have not. As Pfizer itself acknowledges, the Comirnaty Vaccine is not widely available in the United States. And despite its attempts to create equivalence between its BioNTech and Comirnaty Vaccines, the two are legally distinguishable (and, on information and belief, are factually distinguishable as well). And, as the federal government has acknowledged, many individuals cannot be guaranteed access to a specific COVID-19 vaccine. Thus, even after the Comirnaty Vaccine's approval, the Directive still essentially forces individuals, including Plaintiffs and those who are similarly situated, to take an EUA vaccine.

q. In sum, the Directive violates *both* the constitutional *and* federal statutory rights of Plaintiffs and those who are similarly situated because it undermines their bodily integrity and autonomy and conditions their employment on their willingness to take a medically unnecessary vaccine. Forcing Plaintiffs and others to take this vaccine will provide no discernible, let alone compelling, benefit either to Plaintiffs or to the MSU community. Although obtaining the vaccine could elevate Plaintiffs' antibody levels, their levels are already high enough to be equivalent to most vaccinated people, so any augmented benefit is negligible and does not translate into a clinical

[4] Evan Perez & Tierney Sneed, *Federal Law Doesn't Prohibit COVID-19 Vaccine Requirements, Justice Department Says*, CNN (July 26, 2021), *available at* https://cnn.it/3iWxH42, last visited (August 26, 2021).

benefit. The unconstitutional conditions doctrine exists precisely to prevent government actors from clothing unconstitutional objectives and policies in the garb of supposed voluntarism when those actors fully intend and expect that the pressure they are exerting will lead to the targets of such disguised regulation succumbing to the government's will. Plaintiffs invoke this Court's Article III and inherent powers to insulate them from this pressure and to vindicate their constitutional and statutory rights.

PARTIES

1. Plaintiff Jeanna Norris (37 years old) is a supervisory Administrative Associate and Fiscal Officer at MSU. She resides in Portland, Michigan, which is located in the Western District of Michigan, Southern Division.

2. Plaintiff Kraig Ehm (57 years old) is a video producer for MSU and resides in Laingsburg, Michigan, which is located in the Eastern District of Michigan.

3. Plaintiff D'Ann Rohrer (51 years old) is an Extension Educator at MSU and resides in Ludington, Michigan, which is located in the Western District of Michigan.

4. Defendant Samuel L. Stanley is President of MSU, a public research institution located in East Lansing, Michigan. He is sued in his official capacity.

5. Defendant Dianne Byrum is Chair of the Board of Trustees at MSU.[5] She is sued in her official capacity.

6. Defendant Dan Kelly is Vice Chair of the Board of Trustees. He is sued in his official capacity.

[5] The Board of Trustees "have general supervision over the university and its funds." "Board of Trustees," *Michigan State University*, *available at* https://trustees.msu.edu (last visited Aug. 27, 2021).

7. Defendants Renee Jefferson, Pat O'Keefe, Brianna T. Scott, Kelly Tebay and Rema Vassar are Members of the Board of Trustees. They are sued in their official capacities.

8. John and Jane Does 1-10 are as-yet-unidentified MSU officials involved in setting the policy embodied in the Directive.

9. MSU, for whom the Defendants are agents, is principally located in the Western District of Michigan.

STATUTORY AND NONSTATUTORY JURISDICTION AND VENUE

10. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3)-(4) (equitable relief), and 42 U.S.C. §§ 1983 and 1988, as well as under nonstatutory equitable jurisdiction. That is because the claims here arise under the Constitution and statutes of the United States and because Plaintiffs seek prospective redress against state actors in their official capacity to end the deprivation, under state law, of their rights, privileges, and immunities secured by federal law.

11. Venue for this action properly lies in this District pursuant to 28 U.S.C. § 1391. Plaintiff Norris resides in this judicial district, a substantial part of the events, actions, or omissions giving rise to the claim occurred in this judicial district, and MSU is located in this judicial district.

12. The Western District of Michigan is comprised of both a Southern and a Northern Division. MSU is located in the Southern Division. *See* Civ. L. R. 3.2.

13. This Court's equitable powers permit it to issue nonstatutory injunctions to protect Plaintiff against wayward state actors engaged in unlawful conduct. *See Trump v. Vance*, 140 S. Ct. 2412, 2428-29 (2020) ("*Ex parte Young*, 209 U.S. 123, 155–156 (1908) (holding that federal

courts may enjoin state officials to conform their conduct to federal law).").[6] The only limitation is that a defendant subject to such an injunction must possess a connection to the establishment and enforcement of MSU's vaccine mandate. Defendants in this action have the requisite connection. *See, e.g., Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015) (finding that, in action brought by business owners alleging that electioneering statute violated their First Amendment rights, Attorney General could be sued under *Ex parte Young*, since he fielded and investigated complaints of impermissible electioneering and threatened criminal sanctions). *See generally Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 n.2 (2010) (collecting cases in the vein of *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the *jurisdiction* of federal courts to issue injunctions to protect rights safeguarded by the Constitution") (emphasis added)); *Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights*, 572 U.S. 291 (2014) (Board of Trustees was initially named defendant in Equal Protection claim against Michigan State University).

14. In addition, this Court may issue declaratory relief pursuant to 28 U.S.C. § 2201. "Further necessary or proper relief based on a declaratory judgment may [also] be granted …," including via injunction. *See Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A declaratory judgment can then be used as a predicate to further relief, including an injunction. 28 U.S.C. § 2202 ….").

[6] *See* Erwin Chemerinsky, FEDERAL JURISDICTION, 8th ed. (2021) (*Ex parte Young* "has been heralded as 'one of the three most important decisions the Supreme Court of the United States has ever handed down.'"), *quoting Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 564 (E.D. Ohio 1979) (citations omitted).

STATEMENT OF FACTS

I. BACKGROUND PERTAINING TO THE CORONAVIRUS PANDEMIC AND COVID-19 VACCINES

15. The novel coronavirus SARS-CoV-2, which can cause the disease COVID-19, is a contagious virus spread mainly from person-to-person, including through the air.

16. It is well settled that the coronavirus presents a significant risk primarily to individuals aged 70 or older and those with comorbidities such as obesity and diabetes. Bhattacharya and Kulldorff Joint Decl. ¶¶ 10-14 ("Joint Decl.") (Attachment A). *See* Smiriti Mallapaty, *The Coronavirus Is Most Deadly If You Are Older and Male*, NATURE (Aug. 28, 2020) (individuals under 50 face a negligible threat of a severe medical outcome from a coronavirus infection, akin to the types of risk that most people take in everyday life, such as driving a car).

17. In fact, a meta-analysis published by the WHO concluded that the survival rate for COVID-19 patients under 70 years of age was 99.95%. Joint Decl. ¶ 12.

18. CDC estimates that the survival rate for young adults between 20 and 49 is 99.95%, and for people ages 50-64 is 99.4%. Joint Decl. ¶ 12.

19. A seroprevalence study of COVID-19 in Geneva, Switzerland, reached a similar conclusion, estimating a survival rate of approximately 99.4% for patients between 50 and 64 years old, and 99.95% for patients between 20 and 49. Joint Decl. ¶ 13.

20. This past winter, FDA approved three vaccines pursuant to the federal EUA statute, 21 U.S.C. § 360bbb-3.

a. FDA issued an EUA for the BioNTech Vaccine on December 11, 2020.

b. Just one week later, FDA issued an EUA for the Moderna Vaccine.

c. FDA issued its most recent EUA, for the Janssen Vaccine, on February 27, 2021.

d. The Comirnaty Vaccine received full FDA approval on August 23, 2021.

21. In a letter to Pfizer, FDA states that "the Pfizer-BioNTech COVID-19 Vaccine that uses PBS buffer and COMIRNATY (COVID-19 Vaccine, mRNA) have the same formulation. The products are legally distinct with certain differences that do not impact safety or effectiveness." (emphasis added). FDA, "Letter to Pfizer, Inc." (October 29, 2021), *available at* https://www.fda.gov/media/150386/download (last visited Nov. 4, 2021).

a. The Comirnaty Vaccine is *not* widely available due to limited supply, as Pfizer also notes that "there is not sufficient approved vaccine [the Comirnaty] available for distribution to this population in its entirety at the time of the reissuance of this EUA." *See id.* at p. 9 fn. 7. *See also* FDA, *FDA Approves First COVID-19 Vaccine*, (Aug. 23, 2021), *available at* https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine (last visited Oct. 29, 2021).

b. Indeed, the Task Force Guidance governing the federal mandate warns that meeting the deadlines rests exclusively on the shoulders of the employees, availability problems being no excuse at that point: "Depending on employees' locations, they may not have all types of vaccines available to them. Agencies should encourage employees to plan ahead and allow enough time to receive all required vaccine doses before the November 8 deadline to have their second shot." *See* United States Government, "Safer Federal WorkForce," *available at* https://www.saferfederalworkforce.gov/faq/vaccinations/ (last visited Nov. 3, 2021).

c. Information regarding the differences between the BioNTech Vaccine and the Comirnaty Vaccine is not readily available. Generally speaking certain drugs that the public believes are identical, generic versions of brand name drugs for instance, do not

need to be formulaically identical in actuality. FDA, "Generic Drugs: questions & Answers," *available at* https://www.fda.gov/drugs/questions-answers/generic-drugs-questions-answers#q5 (last visited Nov. 4, 2021). Despite Pfizers' proclamations to the contrary, an analysis of the ingredients in the two indicates they are not, in fact, identical.

22. The EUA status of the vaccines that are available at present in the United States means that FDA has not yet fully approved them but permits their conditional use nonetheless due to exigent circumstances.

23. The standard for EUA review and approval is lower than that required for full FDA approval.

24. Typically, vaccine development includes six stages: (1) exploratory; (2) preclinical (animal testing); (3) clinical (human trials); (4) regulatory review and approval; (5) manufacturing; and (6) quality control. *See* CDC, *Vaccine Testing and the Approval Process* (May 1, 2014), *available at* https://bit.ly/3rGkG2s (last visited August 26, 2021).

25. The third phase typically takes place over years, because it can take that long for a new vaccine's side effects to manifest, and must be followed by a period of regulatory review and approval, during which data and outcomes are peer-reviewed and evaluated by FDA. *Id.*

26. Finally, to achieve full approval, the manufacturer must demonstrate that it can produce the vaccine under conditions that assure adequate quality control.

27. FDA must then determine, based on "substantial evidence," that the medical product is effective and that the benefits outweigh its risks when used according to the product's approved labeling. *See* CDC, "Understanding the Regulatory Terminology of Potential Preventions and Treatments for COVID-19" (Oct. 22, 2020), *available at* bit.ly/3x4vN6s (last visited August 26, 2021).

28. In contrast to this rigorous, six-step approval process that includes long-term data review, FDA grants EUAs in emergencies to "facilitate the availability and use of medical countermeasures, including vaccines, during public health emergencies, such as the current COVID-19 pandemic." FDA, *Emergency Use Authorization for Vaccines Explained* (Nov. 20, 2020), *available at* bit.ly/3x8wImn (last visited August 26, 2021).

29. EUAs allow FDA to make a product available to the public based on the best available data, without waiting for all the evidence needed for FDA approval or clearance. *See id.*

30. The EUA statute lays out the: "Appropriate conditions designed to ensure that individuals to whom the product is administered are informed." This means they must be told:

> that the Secretary has authorized the emergency use of the product;
> 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
> 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. § 360bbb-3(e)(1)(A)(i), (ii).

31. Studies of immunizations outside of clinical-trial settings began in December 2020, following the first EUA for a COVID vaccine.

32. None of the precise EUA vaccines approved for use in the United States has been tested in clinical trials for its safety and efficacy on individuals who have recovered from COVID-19. Indeed, trials conducted so far have *specifically excluded* survivors of previous COVID-19 infections. Noorchashm Decl. ¶ 28 (Attachment B).

33. Recent research indicates that vaccination presents a heightened risk of adverse side effects—including serious ones—to those who have previously contracted and recovered from COVID-19. Noorchashm Decl. ¶¶ 21-26; Joint Decl. ¶ 28; Decl. of Jayanta Bhattacharya ¶30 (Attachment C).

34. The heightened risk of adverse effects results from "preexisting immunity to SARS-Cov-2 [that] may trigger unexpectedly intense, albeit relatively rare, inflammatory and thrombotic reactions in previously immunized and predisposed individuals." Angeli, *et al*., *SARS-CoV-2 Vaccines: Lights and Shadows*, 88 EUR. J. INTERNAL MED. 1, 8 (2021).

II. PRIOR INFECTION LEADS TO NATURALLY-ACQUIRED IMMUNITY TO COVID-19 AT LEAST AS ROBUST AS VACCINE-ACQUIRED IMMUNITY

35. Naturally acquired immunity developed after recovery from COVID-19 provides broad protection against severe disease from subsequent SARS-CoV-2 infection. Joint Decl. ¶¶ 15-24.

36. Multiple extensive, peer-reviewed studies comparing naturally acquired and vaccine-acquired immunity have concluded overwhelmingly that the former provides equivalent or greater protection against severe infection than immunity generated by mRNA vaccines (BioNTech and Moderna). Joint Decl. ¶¶ 18-23.

37. These studies confirm the efficacy of natural immunity against reinfection with COVID-19 and show that almost all reinfections are less severe than first-time infections and almost never require hospitalization. Joint Decl. ¶ 18-24.

38. A study from Israel released several months ago found that vaccinated individuals had 13.1 times greater risk of testing positive, 27 times greater risk of symptomatic disease, and around 8.1 times greater risk of hospitalization than unvaccinated individuals with naturally acquired immunity. Joint Decl. ¶ 20.

39. The authors concluded that the "study demonstrated that natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of SARS-CoV-2, compared to the BNT162b2 [BioNTech's research name] two-dose vaccine-induced immunity." Joint Decl. ¶ 20.

40. Recent Israeli data found that those who had received the BioNTech Vaccine were 6.72 times *more likely* to suffer a subsequent infection than those with natural immunity. David Rosenberg, *Natural Infection vs Vaccination: Which Gives More Protection*? ISRAELNATIONALNEWS.COM (Jul. 13, 2021), *available at* https://www.israelnationalnews.com/News/News.aspx/309762 (last visited Aug. 26, 2021).

41. Israeli data also indicates that the protection BioNTech grants against infection is short-lived compared to natural immunity and degrades significantly faster. In fact, as of July 2021, vaccine recipients from January 2021 exhibited only 16% effectiveness against infection and 16% protection against symptomatic infection, increasing linearly until reaching a level of 75% for those vaccinated in April. *See* Nathan Jeffay, *Israeli, UK Data Offer Mixed Signals on Vaccine's Potency Against Delta Strain*, THE TIMES OF ISRAEL (July 22, 2021), *available at* bit.ly/3xg3uCg (last visited Aug. 26, 2021).

42. Those who received a second dose of the BioNTech Vaccine between January and April of this year were determined to have 39% protection against infection and 41% protection against symptomatic infection. The large number of breakthrough infections likely was the result of waning vaccine protection in the face of the Delta variant's spread. *See* Carl Zimmer, *Israeli Data Suggests Possible Waning in Effectiveness of Pfizer Vaccine*, THE NEW YORK TIMES (July 23, 2021); Kristen Monaco, *Pfizer Vax Efficacy Dips at 6 Months*, MEDPAGE TODAY (July 29, 2021), *available at* https://bit.ly/2VheBxw (last visited Aug. 26, 2021).

43. These findings of highly durable natural immunity should not be surprising, as they hold for SARS-CoV-1 and other respiratory viruses. According to a paper published in *Nature* in August 2020, 23 patients who had recovered from SARS-CoV-1 still possess CD4 and CD8 T

cells, 17 years after infection during the 2003 epidemic.[7] A *Nature* paper from 2008 found that 32 people born in 1915 or earlier still retained some level of immunity against the 1918 flu strain—some 90 years later.[8] Bhattacharya Decl. ¶ 18.

44. A CDC/IDSA clinician call on July 17, 2021, summarized the current state of the knowledge regarding the comparative efficacy of natural and vaccine immunity. The presentation reviewed three studies that directly compared the efficacy of prior infection versus mRNA vaccine treatment and concluded "the protective effect of prior infection was similar to 2 doses of a COVID-19 vaccine."

45. Given that there is currently *more* data on the durability of naturally acquired immunity than there is for vaccine immunity, researchers rely on the expected durability of naturally acquired immunity to predict that of vaccine immunity. Joint Decl. ¶ 23.

46. Indeed, naturally and vaccine-acquired immunity utilize the same basic immunological mechanism—stimulating the immune system to generate an antibody response. Joint Decl. ¶ 16.

47. The level of antibodies in the blood of those who have natural immunity was initially the benchmark in clinical trials for determining the efficacy of vaccines. Joint Decl. ¶ 16.

48. Studies have demonstrated prolonged immunity with respect to memory T and B cells, bone marrow plasma cells, spike-specific neutralizing antibodies, and IgG+ memory B cells following a COVID-19 infection. Joint Decl. ¶ 17.

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[7] Le Bert, N., Tan, A. T., Kunasegaran, K., Tham, C. Y. L., Hafezi, M., Chia, A., Chng, M. H. Y., Lin, M., Tan, N., Linster, M., Chia, W. N., Chen, M. I. C., Wang, L. F., Ooi, E. E., Kalimuddin, S., Tambyah, P. A., Low, J. G. H., Tan, Y. J. & Bertoletti, A. (2020). SARS-CoV-2-specific T cell immunity in cases of COVID-19 and SARS, and uninfected control. *Nature*, *584*, 457-462. doi: 10.1038/s41586-020-2550-z

[8] Yu, X., Tsibane, T., McGraw, P. A., House, F. S., Keefer, C. J., Hicar, M. D., Tumpey, T. M., Pappas, C., Perrone, L. A., Martinez, O., Stevens, J., Wilson, I. A., Aguilar, P. V., Altschuler, E. L., Basler, C. F., & Crowe Jr., J. E. (2008). Neutralizing antibodies derived from the B cells of 1918 influenza pandemic survivors. *Nature*, *455*, 532-536. doi: 10.1038/nature07231

49. New variants of COVID-19 resulting from the virus's mutation do not escape the natural immunity developed by prior infection from the original strain of the virus. Joint Decl. ¶¶ 29-33.

50. In fact, vaccine immunity only targets the spike-protein of the original Wuhan variant, whereas natural immunity recognizes the full complement of SARS-CoV-2 proteins and thus provides protection against a greater array of variants. Noorchashm Decl. ¶ 17.

51. While the CDC and the media have touted a study from Kentucky as proof that those with naturally acquired immunity should get vaccinated, that conclusion is unwarranted. As Drs. Bhattacharya and Kulldorff explain, although individuals with naturally acquired immunity who received a vaccine showed somewhat increased antibody levels, "[t]his does not mean that the vaccine increases protection against symptomatic disease, hospitalizations or deaths." Joint Decl. ¶ 37; Bhattacharya Decl. ¶¶ 47-48. In other words, higher antibody levels do not necessarily translate into a clinical benefit.

52. Similarly, Dr. Noorchashm explains that this study did not actually assess the appropriate groups. Instead of comparing individuals who had naturally-acquired immunity only to those who were only vaccinated, the study compared those with naturally-acquired immunity only to those who had naturally-acquired immunity *and* received the vaccine. Furthermore, the study "did not address or attempt to quantify the magnitude of risk and adverse effects in its comparison groups." Noorchashm Decl. ¶¶ 29-31.

53. The Kentucky study is also problematic because it appears cherry-picked. In other words, the CDC gathered data on this subject from all 50 states, but seems to have chosen to draw attention only to the one state that yielded data that arguably supported its position. *See* Marty Makary, "Covid Confusion at the CDC," *The Wall Street Journal* (Sept. 13, 2021), *available at*

https://www.wsj.com/articles/covid-19-coronavirus-breakthrough-vaccine-natural-immunity-cdc-fauci-biden-failure-11631548306 (last visited Nov. 3, 2021).

54. The CDC has also claimed that another study, of several thousand patients hospitalized with "covid-like illness," demonstrates the superiority of vaccine-achieved immunity. "Laboratory-Confirmed COVID-19 Among Adults Hospitalized with COVID-19 Like Illness," *CDC* (Oct. 29, 2021), *available at* https://www.cdc.gov/mmwr/volumes/70/wr/mm7044e1.htm (last visited Nov. 3, 2021).

55. This study is highly problematic for many reasons experts have pointed out, chief among them that its design meant that it did not actually address the question of whether the covid recovered benefit from being vaccinated. *See* Martin Kulldorff, "A Review and Autopsy of Two COVID Immunity Studies," *Brownstone Institute* (Nov. 2, 2021), *available at* https://brownstone.org/articles/a-review-and-autopsy-of-two-covid-immunity-studies/ (last visited Nov. 3, 2021).

56. Rather, "the CDC study answers neither the direct question of whether vaccination or Covid recovery is better at decreasing the risk of subsequent Covid disease, nor whether the vaccine rollout successfully reached the frail. Instead, it asks which of these two has the greater effect size. It answers whether vaccination nor Covid recovery is more related to Covid hospitalization or if it is more related to other respiratory type hospitalizations." *Id.*

57. Kulldorff explains that the Israeli study discussed above, indicating that naturally acquired immunity provides significantly better protection against reinfection, produced far more reliable results due to its design. *Id.*

58. Indeed, shortly after publishing the results of the study, the CDC (much more quietly) conceded that "A systematic review and meta-analysis including data from three vaccine

efficacy trials and four observational studies from the US, Israel, and the United Kingdom, found no significant difference in the overall level of protection provided by infection as compared with protection provided by vaccination; this included studies from both prior to and during the period in which Delta was the predominant variant." "Science Brief: SARA-CoV-2 Infection-induced and Vaccine-induced Immunity," *CDC* (Oct. 29, 2021), *available at* https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/vaccine-induced-immunity.html (last visited Nov. 3, 2021).

59. In short, contrary to the claims of the CDC and the media, this study did *not* establish a valid reason to vaccinate individuals with naturally-acquired immunity. *See* Joint Decl. ¶ 37; Noorchashm Decl. ¶¶ 29-31.

60. The Janssen Vaccine provides immunity protection of somewhere between 66% and 85%, far below that conferred by natural immunity. Joint Decl. ¶ 16; Noorchashm Decl. ¶ 15.

61. The Chinese Sinovac Vaccine has been approved by WHO (making it adequate to satisfy MSU's policy), which itself determined that this vaccine prevented *symptomatic* disease in just 51% of those who received it. *See WHO Validates Sinovac COVID-19 Vaccine for Emergency Use and Issues Interim Policy Recommendations*, WHO.INT (June 1, 2021), *available at* bit.ly/3yitIW7 (last visited Aug. 26, 2021).

62. Other clinical studies have found that the Sinovac Vaccine offers even lower levels of protection against infection. For instance, a study of Brazilian healthcare workers determined a mere 50.39% efficacy in preventing infection. *See* Elizabeth de Faria et al., *Performance of Vaccination with Coronavac*[9] *in a Cohort of Healthcare Workers (HCW)—Preliminary Report*,

[9] Sinovac and Coronavac are the same. *See* WHO, *Who Validates Sinovac COVID-19 Vaccine For Emergency Use*, (June 1, 2021), *available at* https://www.who.int/news/item/01-06-2021-

MEDRXIV (Apr. 15, 2021), *available at* https://www.medrxiv.org/content/10.1101/2021.04.12.21255308v1 (last visited Aug. 26, 2021).

63. Real-world evidence also suggests that the Sinovac Vaccine provides only minimal protection against the Delta variant. *See* Alexander Smith, *China on 'High Alert' as Variant of Covid-19 Spreads to 5 Provinces*, NBCNEWS.COM (July 30, 2021), *available at* nbcnews.to/2VcK3NB (last visited Aug. 27, 2021); Chao Deng, *As Delta Variant Spreads, China Lacks Data on Its Covid-19 Vaccines*, WALL ST. J. (July 9, 2021), *available at* on.wsj.com/3rMjlXW (last visited Aug. 27, 2021); Matt D.T. Hitchings, et al., *Effectiveness of CoronaVac in the Setting of High SARS-Cov-2 P.1 Variant Transmission in Brazil: A Test-Negative Case-Control Study*, THE LANCET (July 25, 2021), *available at* bit.ly/3C6F41J (last visited Aug. 26, 2021).

64. The Sinopharm Vaccine also is from China and is WHO-approved. Although its reported level of efficacy against symptomatic infection has been reported as reasonably high (78%), real-world experience has generated severe doubts about the accuracy of that estimate. Because of the Sinopharm Vaccine's poor performance, several countries have stopped using it. *See* Yaroslav Trofimov & Summer Said, Bahrain, *Facing a Covid Surge, Starts Giving Pfizer Boosters to Recipients of Chinese Vaccine*, WALL ST. J. (June 2, 2021), *available at* on.wsj.com/3ljM0lX (last visited Aug. 26, 2021).

65. The COVISHIELD vaccine, manufactured by the Serum Institute of India and South Korea's SK Bioscience Co., Ltd., is also WHO-approved and thus recognized as adequate to satisfy MSU's Policy. The WHO itself reported a mere 70.42% efficacy against *symptomatic*

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who-validates-sinovac-covid-19-vaccine-for-emergency-use-and-issues-interim-policy-recommendations (last visited Aug. 26, 2021).

COVID-19 infection, which fell to 62.10% in individuals who received two standard doses. *See Recommendation on Emergency Use Listing on COVISHIELD Submitted by SIIPL*, WHO (Feb. 26, 2021), *available at* bit.ly/3rNjnPo (last visited Aug. 26, 2021); *Recommendation for an Emergency Use Listing of AZD1222 Submitted by AstraZeneca AB and Manufactured by SK Bioscience Co. Ltd*., WHO (Feb. 23, 2021), *available at* bit.ly/3yiQD3s (last visited Aug. 26, 2021). These vaccines have not been approved by the FDA for use in the United States.

66. Early data also suggests that naturally acquired immunity may provide greater protection against both the Delta and Gamma variants than that achieved through vaccination. A recent analysis of an outbreak among a small group of mine workers in French Guiana found that 60% of fully vaccinated miners suffered breakthrough infections compared to *zero* among those with natural immunity. Nicolas Vignier, et al., *Breakthrough Infections of SARS-CoV-2 Gamma Variant in Fully Vaccinate Gold Miners, French Guiana, 2021*, 27(10) EMERG. INFECT. DIS. (Oct. 2021), *available at* https://wwwnc.cdc.gov/eid/article/27/10/21-1427_article (last visited Aug. 26, 2021).

67. In this vein, the CDC recently reported that "new scientific data" indicated that vaccinated people who experienced breakthrough infections carried similar viral loads to the unvaccinated (but not naturally immune), leading the CDC to infer that vaccinated people transmit the virus at concerning levels. *See CDC Reversal on Indoor Masking Prompts Experts to Ask, "Where's the Data?"*, WASHINGTON POST (July 28, 2021), *available at* wapo.st/2THpmIQ (last visited Aug. 26, 2021). For example, 74% of cases in a Cape Cod outbreak occurred in vaccinated individuals, again demonstrating that the vaccines are inferior to natural immunity when it comes to preventing infection. *See* Molly Walker, *CDC Alarmed: 74% of Cases in Cape Cod Cluster*

Were Among the Vaxxed, MEDPAGE TODAY (July 30, 2021), *available at* bit.ly/2V6X3UP (last visited Aug. 26, 2021).

68. As Drs. Bhattacharya and Kulldorff have explained, there is no legitimate public-health rationale for MSU to require proof of vaccination to participate in activities that do not involve care for high-risk individuals:

> Since the successful vaccination campaign already protects the vulnerable population, the unvaccinated—especially recovered COVID patients—pose a vanishingly small threat to the vaccinated. They are protected by an effective vaccine that dramatically reduces the likelihood of hospitalization or death after infections to near zero and natural immunity, which provides benefits that are at least as strong[.] At the same time, the requirement for … proof of vaccine undermines trust in public health because of its coercive nature. While vaccines are an excellent tool for protecting the vulnerable, COVID does not justify ignoring principles of good public health practice.

Joint Decl. ¶¶ 50-51.

III. COVID-19 VACCINES CAN CAUSE SIDE EFFECTS, INCLUDING SEVERE ADVERSE REACTIONS

69. Though the COVID-19 vaccines appear to be relatively safe at a population level, like all medical interventions, they carry a risk of side effects. Those side effects include common, temporary reactions such as pain and swelling at the vaccination site, fatigue, headache, muscle pain, fever, and nausea. More rarely, they can cause serious side effects that result in hospitalization or death. Joint Decl. ¶¶ 25-26.

70. The vaccines could cause other side effects that remain unknown at this time due to their relatively recent development. Joint Decl.¶¶ 26-27.

71. Put differently, as a matter of simple logic, one cannot be certain about the long-term effects of a vaccine that has not been in existence for the long term and thus cannot have been

studied over a span of years. For that reason, "[a]ctive investigation to check for safety problems is still ongoing." Joint Decl. ¶ 26.

IV. PLAINTIFFS HAVE ROBUST NATURALLY ACQUIRED IMMUNITY TO COVID-19

72. Jeanna Norris, age 37, is a supervisory Administrative Associate and Fiscal Officer at MSU. She has been employed at MSU for eight years. Jeanna Norris Declaration ("Norris Decl.") ¶ 1 (Attachment D).

73. Her duties and responsibilities entail approving expenditures, ensuring compliance with financial policy, developing financial reports and budgets, and approving personnel actions. Norris Decl. ¶ 2.

74. Since March of 2020, Ms. Norris has been working remotely. MSU currently has no timetable for her to return to work in person. Norris Decl. ¶ 4.

75. Ms. Norris is the stepmother of her husband's five children, who range in age from 14 to 22. She is the primary breadwinner for the family. Norris Decl. ¶ 3.

76. On November 19, 2020, Ms. Norris became ill with a severe headache and dry cough. The following day she developed body aches and pains that reminded her of the flu. Norris Decl. ¶ 5.

77. Ms. Norris received a positive COVID-19 Rapid test on November 21, 2020 at Ouch Urgent Care in Clinton County, Michigan. Norris Decl. ¶ 6.

78. After approximately four days, Ms. Norris's symptoms began to abate and her health condition improved, but her sense of taste and smell disappeared for a full month. Norris Decl. ¶ 7.

79. Ms. Norris received a positive COVID-19 antibody test on August 17, 2021 at Sparrow Health System, and a second positive COVID-19 antibody test on August 21, 2021 at LabCorp. Norris Decl. ¶ 8; Noorchashm Decl. ¶ 7(f); Joint Decl. 44.

80. The test results confirmed that she contracted and recovered from the SARS-CoV-2 virus. Her recent semi-quantitative antibodies screening test established that her level of immune protection remains high. Noorchashm Decl. ¶ 13. Indeed, her "spike antibody level is highly likely to be above the minimum necessary to provide adequate protection against re-infection from the SARS-CoV-2 virus." Noorchashm Decl. ¶ 7(g).

81. Having consulted with Plaintiff and reviewed her lab results, Dr. Noorchashm concluded that undergoing a full vaccination course would be medically unnecessary, create a risk of harm to her, and provide insignificant or no benefit either to her or the MSU community. Noorchashm Decl. ¶ 12.

82. Plaintiff Kraig Ehm is a video producer for MSU, where he has been employed for 21 years. Oct. 20, 2021 Declaration of Kraig Ehm ("Ehm Decl.") ¶ 2 (Attachment E).

83. He was diagnosed with COVID-19 in April of 2021, and antibody tests from August 21 and October 8, 2021 confirm that he has naturally acquired immunity to the virus. Ehm Decl. ¶ 3; Bhattacharya Decl. ¶ 25.

84. Plaintiff Ehm underwent disciplinary proceedings because he has declined to receive a COVID-19 vaccine. Ehm Decl. ¶ 6. He was terminated on November 3, 2021.

85. Plaintiff D'Ann Rohrer is an Extension Educator at MSU, where she has worked for over 6 years. Declaration of D'Ann Rohrer ("Rohrer Decl.") ¶ 1 (Attachment F).

86. She was diagnosed with COVID-19 in August of 2021, and a serological test from October 4, 2021 confirmed that she has naturally acquired immunity to the virus. Rohrer Decl. ¶ 4; Bhattacharya Decl. ¶ 25.

87. She has been placed on unpaid leave because she has declined to receive a vaccine.

88. Plaintiffs have real, substantial, and legitimate concerns about taking a COVID-19 vaccine in light of their natural immunity and the potential for short- and long-term side effects and potential adverse reactions from the vaccines themselves. Norris Decl. ¶ 15-17; Rohrer Decl. ¶¶ 9, 10; Ehm Decl. ¶ 9.

89. Dr. Noorchashm explains that substantial scientific literature demonstrates that, while the COVID-19 vaccines carry the possibility of side effects, as do all medical procedures, the risk of harm is greater to those who have recovered from the disease. Noorchashm Decl. ¶¶12 -28.

90. Accordingly, mandating that Plaintiffs receive a COVID-19 vaccine violates the rules governing medical ethics. Noorchashm Decl. ¶¶ 8-35.

91. There are other MSU employees who are similarly situated, e.g., they previously contracted COVID-19, they have naturally acquired immunity, and they have real, substantial, and legitimate concerns about taking the COVID-19 vaccine in light of their naturally acquired immunity and the potential for short- and long-term side effects and potential adverse reactions from the vaccines themselves.

92. MSU's Directive applies equally to employees working on or off campus and thus Plaintiffs Norris's, Ehm's, and Rohrer's ability to function as class representatives is not diminished as to class members working on or off campus. many of whom may, from time to time, also work from home. *See also infra* at ¶¶ 92-99.

V. BACKGROUND AND MSU'S IMPOSITION OF A BLANKET VACCINE REQUIREMENT AS PART OF ITS REOPENING POLICY

93. MSU is a public research university located in East Lansing, Michigan, in Ingham County, in the Western District of Michigan.

94. MSU announced its "COVID Directives" for the Fall 2021 semester via email and on its website on July 30, 2021 and, and provided a more detailed version on its website on August 5, 2021, which includes FAQ. (Attachments G-I). MSU's Directives include a vaccine mandate.

95. The Directive requires all faculty, staff, and students to be fully vaccinated or to obtain an approved exemption for the Fall 2021 semester. (Attachments G-I).

96. By August 31, 2021, all faculty, staff, and students must have completed a full COVID-19 vaccination course or received at least one dose of a two-dose series. Employees and students also are required to report their vaccine status using an online form. (Attachments G-I).

97. Those who have not completed a full vaccine course (but only a partial one) by August 31, 2021 are subject to various restrictions pursuant to the "Early Detection Policy," including testing and quarantining requirements. (Attachment H).

98. MSU accepts all FDA-authorized as well as all WHO-approved vaccines. (Attachments G-I).

99. In order to obtain a medical exemption, an individual must demonstrate:

a. A documented anaphylactic allergic reaction or other severe adverse reaction to any COVID-19 vaccine;

b. A documented allergy to a component of a COVID-19 vaccine;

c. Another documented medical condition that constitutes a disability under the Americans with Disabilities Act; or

d. A limited-term inability to receive a vaccine such as pregnancy or breastfeeding. (Attachment H).

100. In its "FAQs" Section pertaining to the Directive, MSU states that the rationale for its policy is that, *inter alia*, "new studies demonstrate[] both unvaccinated and vaccinated individuals can transmit the disease to those who cannot currently be vaccinated, including children less than 12 years old and immunocompromised individuals" and "new data reveal[s] the Delta variant can create breakthrough infections in vaccinated individuals." (Attachment I).

101. Employees who do not comply with the vaccine requirements are subject to disciplinary action, including termination from the university. (Attachment I).

102. One of the questions posed in the FAQ section is "I have had COVID-19 in the past and have laboratory evidence of antibodies. Do I need to be vaccinated?" The answer is "Even those who have contracted COVID-19 previously are required to receive a vaccine, which provides additional protection." (Attachment I). Hence, there is no doubt that MSU does not recognize natural immunity as a basis for getting a medical exemption.

103. In response to the question, "[w]hy should I get a vaccine if the delta variant breaks through the current vaccines," the webpage states that: "[t]he current vaccines remain highly effective in preventing hospitalizations, severe disease and death from the delta variant of COVID-19." (Attachment I).

104. Even employees who have arranged to work remotely during the Fall semester must either be vaccinated or obtain a religious or medical exemption. (Attachment I).

105. Plaintiffs were forced to file their lawsuit and motions for a temporary restraining order ("TRO") and preliminary injunction on a tight timeline because MSU did not announce the Directive until a mere month before the August 31, 2021 deadline it set for employees to receive

the vaccine. (Attachments H-J). Indeed, the email version contained insufficient data from which remote workers, including Plaintiff Norris, and others similarly situated could conclude whether or not they were subject to the mandate. Thus, they were only provided with the final version three weeks before the deadline to receive the vaccine.

106. Potential litigation by those not wishing to be vaccinated was a prospect that was or should have been reasonably foreseeable to the Defendants and other agents of MSU.

VI. PLAINTIFF HAS EXPERIENCED, AND WILL CONTINUE TO EXPERIENCE, CONCRETE AND PARTICULARIZED HARM AS A DIRECT CONSEQUENCE OF MSU'S VACCINE POLICY

107. Plaintiffs either must receive a COVID-19 vaccine or face disciplinary action, including loss of employment. Plaintiff Rohrer is in the midst of such disciplinary proceedings, and Plaintiff Ehm has been terminated. Accordingly, Plaintiffs' personal autonomy is being infringed, and their constitutional rights violated.

108. By threatening adverse professional and personal consequences, MSU's Directive not only directly and palpably harms Plaintiffs' bodily autonomy and dignity, but it forces them to endure the stress and anxiety of choosing between their employment and their health.

109. Should they give in and get the vaccine due to financial pressure or other concerns that accompany loss of a job, they will also suffer irreparable harm. As an Illinois court recently determined:

> But what of the December 31, 2021 vaccination requirement? "Obey now, grieve later" is not possible. If every union member complied and was vaccinated by December 31 (or otherwise exempt), they would have no grievance to pursue and there would be no remedy an arbitrator could award. An award of back pay or reinstatement cannot undo a vaccine. Nothing can. If that aspect of the City's policywas found to violate the collective bargaining agreements, the arbitral process couldnot restore the parties to their original positions. An award in favor of the police unions would be an "empty victory." "Obey now, grieve later" would be transformed into "obey now and forever" -without a meaningful opportunity to arbitrate. That constitutes irreparable injury.

Fraternal Order of Police Chicago Lodge No. 7, et. al v. City of Chicago, Case No. 2021 CH 5276, at 3 (Circuit Court of Cook County, Ill.) (Nov. 1, 2021) (internal citations omitted), *available at* bit.ly/3mHqCaK (last visited Nov. 3, 2021).

110. The risk-avoidance benefits that the Directive provides, compared to the restrictions and intrusive options offered to Plaintiffs, are disproportionate. Similarly, given that naturally acquired immunity confers equal or greater protection than that provided by the vaccines (especially with respect to some of the WHO-approved vaccines that MSU considers adequate to fulfill the Directive's requirements), the Directive is arbitrary and irrational. There is no indication that the Directive is tailored to account for its impact on those who have acquired natural immunity. In fact, official MSU explanations of the Directive specifically refuse to recognize those with natural immunity as posing different issues and requiring different treatment as compared to unvaccinated individuals who lack natural immunity.

CLASS ACTION ALLEGATIONS

111. ***Class Definition.*** Plaintiff brings this action on behalf of herself and all others similarly situated ("the Class"), pursuant to Federal Rule of Civil Procedure 23. The Class is defined as follows:

> (i) All MSU employees employed by the University (ii) on or after August 31, 2021 (the deadline for those employees to become vaccinated against COVID-19), including employees newly hired, whether or not they work on campus, at home, or both (iii) who have naturally acquired immunity demonstrable by antibody testing and where (iv) application of the Directive will invade their rights of bodily integrity, coerce or significantly burden their choices, or deny their rights of informed consent.

112. For purposes of this Complaint, references to Plaintiffs, because this suit is being brought as a class action, should be construed as applying to class members even where not explicitly so stated.

113. ***Numerosity.*** The exact size of the class is unknown. However, by the end of March 2020, 23% of New Yorkers had COVID-19 antibodies and by February of 2021, 45% of Los Angeles residents did. *See* Marty Makary, *The Power of Natural Immunity*, THE WALL STREET JOURNAL (June 8, 2015), *available at* https://www.wsj.com/articles/the-power-of-natural-immunity-11623171303 (last visited August 26, 20210). MSU has around 7,365 staff members and 5,703 faculty, meaning that the size of the class is likely large. Hence, the numerosity requirement in Fed. R. Civ. P. 23(a)(1) is met here.

114. ***Commonality.*** There are multiple questions of law and fact common to the class, including but not limited to:

a. Whether MSU's Directive constitutes an unconstitutional infringement on Plaintiffs' rights to bodily autonomy and to decline medical treatment under the Ninth, and Fourteenth Amendments to the United States Constitution;

b. Whether MSU's Directive creates an unconstitutional condition on the exercise of Plaintiffs' constitutionally protected rights; and

c. Whether MSU's Directive violates Plaintiffs' federal statutory rights under the Emergency Use Authorization (EUA) statute.

As a result, the commonality requirement of Fed. R. Civ. P. 23(a)(2) is met here.

115. ***Typicality.*** Plaintiffs' claims are typical of the Class, as she has naturally acquired immunity to COVID-19, as verified by two recent antibodies tests, she is an employee of MSU, and she objects to the Directive on the grounds that it violates her constitutional and statutory rights as described above. As a result, the typicality requirement of Fed. R. Civ. P. 23(a)(3) is met here.

116. ***Adequacy of Representation.*** Plaintiffs will fairly and adequately protect the interests of the members of the Class. Plaintiffs' interests are aligned with, and not antagonistic to, those of the other members of the Class. Additionally, Plaintiffs are seeking identical declaratory and injunctive relief that would benefit all putative class members. Plaintiffs have also retained counsel competent and experienced in the prosecution of class-action litigation to represent herself and the Class. As a result, the adequacy-of-representation requirement of Fed. R. Civ. P. 23(a)(4) is met here.

117. ***Fed. R. Civ. P. 23(b)(2) Class Type.*** Certification for injunctive and declaratory relief is appropriate under Rule 23(b)(2) because Defendants have both acted (principally by mandating that MSU employees receive the vaccines) and refused to act (via their refusal to recognize natural immunity) on grounds that generally apply to the whole class. This also makes temporary, preliminary, and permanent injunctive relief appropriate "respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

118. ***Class Action Superiority & Efficiency.*** Additionally, though it is not necessary to plead as part of a Rule 23(b)(2) class action, class-wide treatment of the common issues presented by this suit against MSU in a single forum represents a superior means of determining Defendants' liability to each Class Member than potentially hundreds or thousands of individual lawsuits. As a result, class-wide adjudication of Defendants' liability followed by the grant of undifferentiated declaratory and injunctive relief is the most efficient means of adjudication.

CLAIMS FOR RELIEF

COUNT I: VIOLATION OF THE RIGHT TO REFUSE UNWANTED AND MEDICALLY UNNECESSARY CARE

119. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set forth herein.

120. MSU's Directive requires Plaintiffs to take a vaccine without their consent—and against the expert medical advice of an immunologist—thereby depriving them of their ability to refuse unwanted medical care.

121. The Supreme Court has recognized that the Ninth and Fourteenth Amendments protect an individual's right to privacy. A "forcible injection … into a nonconsenting person's body represents a substantial interference with that person's liberty[.]" *Washington v. Harper*, 494 U.S. 210, 229 (1990). The common law baseline is also a relevant touchstone out of which grew the relevant constitutional law. *See, e.g., Cruzan v. Dir., Mo. Dep't of Public Health*, 497 U.S. 261, 278 (1990) ("'At common law, even the touching of one person by another without consent and without legal justification was a battery'"). *See* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON LAW OF TORTS § 9, pp. 39-42 (5th ed. 1984).); *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914) (Cardozo, J.) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.").

122. Subsequent Supreme Court decisions have made explicit that the Constitution protects a person's right to "refus[e] unwanted medical care." *Cruzan*, 497 U.S. at 278; *King v. Rubenstein*, 825 F.3d 206, 222 (4th Cir. 2016) (recognizing same).

123. This right is "so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment." *Washington v. Glucksberg,* 521 U.S. 702, 722 n.17 (1997).

124. The Court has explained that the right to refuse medical care derives from the "well-established, traditional rights to bodily integrity and freedom from unwanted touching." *Vacco v. Quill*, 521 U.S. 793, 807 (1997).

125. To the extent that some courts, including this one, have held otherwise in denying preliminary injunctions for COVID-19 vaccine mandates, it is worth noting that none have made it to Courts of Appeals, let alone the Supreme Court. *See, e.g., Norris v. Stanley*, 1:21 cv 756 (W.D. Mich. Oct. 8, 2021); *Kheriaty v. Regents*, No. 8:21-cv-01367 (C.D. Cal. Sept. 29, 2021).

126. Furthermore, *Jacobson* typically is relied upon for the proposition that rational basis level analysis only applies – generally leading to findings in favor of the Government -- this is the wrong standard, because *Jacobson* differed in crucial respects. First of all, as the Court itself stated, one of the reasons it applied a low level of scrutiny was that the law at issue was the product of legislative action. *See Jacobson*, 197 U.S. at 37.

127. Second, the Court considered the deadliness of smallpox to be pertinent to the inquiry (and presumably its holding), as it was "an epidemic threatening the safety of all." *Id.* at 28. Though COVID-19 is of course a serious disease, it does not present a significant risk to the vast majority of individuals. That is even more true now that those who wish to do so can get immunized.

128. Third, naturally-acquired immunity was not an issue in *Jacobson*: there was no contention that Jacobson had survived smallpox and consequently had immunity to it. Finally, *Jacobson* was determined during an era in which schools often were segregated and states could

ban interracial marriage. It served as one of the justifications for the decision in *Buck v. Bell*, allowing the forced sterilization of mentally ill women. Clearly, our concepts of bodily autonomy have changed since *Jacobson*, making blind reliance upon it misguided.

129. Coercing employees to receive a vaccine (whether approved under an EUA or fully by the FDA) for a virus that presents a near-zero risk of illness or death to them and which they are exceedingly unlikely to pass on to others because those employees already possess natural immunities to the virus, violates the liberty and privacy interests that the Ninth and Fourteenth Amendments protect.

130. "Government actions that burden the exercise of those fundamental rights or liberty interests [life, liberty, property] are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest." *Does v. Munoz*, 507 F.3d 961, 964 (2007).

131. Defendants cannot show that they have a compelling interest in coercing Plaintiffs or others similarly situated into taking a COVID-19 vaccine, because MSU has no compelling interest in treating employees with natural immunity any differently from employees who obtained immunity from a vaccine.

132. Substantial research establishes that a COVID-19 infection creates immunity to the virus at least as robust, durable, and long-lasting as that achieved through vaccination. Noorchashm Decl. ¶¶ 14-17; Joint Decl. at ¶¶ 15-24; Nabin K. Shrestha, et al., *Necessity of COVID-19 Vaccination In Previously Infected Individuals*, MEDRXIV (June 5th, 2021), *available at* https://bit.ly/2TFBGcA (last visited Aug. 26, 2021); *see also* Yair Goldberg, et al., *Protection of Previous SARS-Cov-2 Infection Is Similar to That of BNT162b2 Vaccine Protection: A Three-Month Nationwide Experience from Israel*, MEDRXIV (Apr. 20, 2021), *available at*

https://bit.ly/3zMV2fb (last visited Aug. 26, 2021); Michael Smerconish, *Should Covid Survivors and the Vaccinated Be Treated the Same?*: CNN Interview with Jay Bhattacharya, Professor of Medicine at Stanford University (June 12, 2021), *available at* https://cnn.it/2WDurDn (last visited Aug. 26, 2021); Marty Makary, *The Power of Natural Immunity*, WALL STREET JOURNAL (June 8, 2021), *available at* https://on.wsj.com/3yeu1Rx (last visited Aug. 26, 2021).

133. In recognition of the highly protective character of natural immunity, the European Union has recognized "a record of previous infection" as a substitute for any vaccine passport requirements. Noorchashm Decl. ¶ 38. Even France's controversial new restrictive mandate on the ability to participate in daily life focuses on a person's immunity rather than their vaccine status—treating natural immunity and vaccine immunity equally. *See, e.g.*, Clea Callcutt, *France Forced to Soften Rules After Coronavirus Green Pass Backlash*, POLITICO (July 20, 2021), *available at* https://politi.co/3f9AZzS (last visited Aug. 26, 2021).

134. Similarly, the United States requires everyone, including its citizens, to provide proof of a negative COVID-19 test before returning to the country from abroad. Yet, documentation of recovery suffices as a substitute, although proof of vaccination does not. *See Requirement of Proof of Negative COVID-19 Test or Recovery from COVID-19 for All Air Passengers Arriving in the United States*, CDC (July 6, 2021), *available at* https://bit.ly/3yfcJDM (last visited Aug. 26, 2021).

135. Recent data from Israel suggests that individuals who receive the BioNTech Vaccine can pass the virus onto others a mere few months after receiving it, casting doubt on any claim that the vaccine prevents spread of the virus, or at least any claim that it does so to a greater extent than natural immunity.

136. The blithe statement on MSU's FAQ page to the effect that vaccinating a naturally immune individual provides "additional protection"—without citation to *any* scientific data—does not establish the validity of a vaccine mandate. As Drs. Bhattacharya, Kulldorff, and Noorchashm attest, the study from Kentucky that the CDC has touted as substantiating MSU's proposition has been both wrongly interpreted and incorrectly portrayed by the media. *See* Joint Decl. ¶ 37; Noorchashm Decl. ¶¶ 29-31; Bhattacharya Decl. ¶¶ 47-48. Furthermore, the study "did not address or attempt to quantify the magnitude of risk and adverse effects in its comparison groups," Noorchashm Decl. ¶¶ 29-31, as it did not compare vaccinated individuals to COVID-recovered individuals.

137. Moreover, the study did not establish that vaccinating the naturally immune confers a discernable benefit. Although vaccinating naturally immune individuals may raise their antibody levels, that does not necessarily translated into a clinical benefit either for themselves or for third parties. "[t]his does not mean that the vaccine increases protection against symptomatic disease, hospitalizations or deaths." Joint Decl. ¶ 37. In other words, there is no evidence that vaccinating naturally immune individuals makes them safer either in terms of their personal health or potential for infecting others.

138. Assuming *arguendo* that vaccinating the naturally immune provides some marginal benefit, that is not a justification for a mandate that overrides individuals' rights to make choices about their own medical care, particularly one that accepts as sufficient to fulfill its requirements several inferior vaccines such as the Sinovac and Sinopharm. *See infra* at ¶ 143.

139. This is particularly so given that vaccines can cause injury, and that the risk is even greater to those who are COVID-recovered. Put otherwise, the risk-benefit analysis at that point

ought to be left to the individual and his or her doctor. Noorchashm Decl. ¶¶ 21-26; Joint Decl. ¶ 28; Decl. of Jayanta Bhattacharya ¶30.

140. The CDC has also claimed that another study, of several thousand patients hospitalized with "covid-like illness," demonstrates the superiority of vaccine-achieved immunity. "Laboratory-Confirmed COVID-19 Among Adults Hospitalized with COVID-19 Like Illness," *CDC* (Oct. 29, 2021), *available at* https://www.cdc.gov/mmwr/volumes/70/wr/mm7044e1.htm (last visited Nov. 3, 2021). This study is highly problematic for many reasons experts have pointed out, chief among them that its design meant that it did not actually address the question of whether the COVID-19 recovered benefit from being vaccinated. *See* Martin Kulldorff, "A Review and Autopsy of Two COVID Immunity Studies," *Brownstone Institute* (Nov. 2, 2021), *available at* https://brownstone.org/articles/a-review-and-autopsy-of-two-covid-immunity-studies/ (last visited Nov. 3, 2021). Rather, "the CDC study answers neither the direct question of whether vaccination or Covid recovery is better at decreasing the risk of subsequent Covid disease, nor whether the vaccine rollout successfully reached the frail. Instead, it asks which of these two has the greater effect size. It answers whether vaccination nor Covid recovery is more related to Covid hospitalization or if it is more related to other respiratory type hospitalizations." *Id.*

141. Indeed, shortly after publishing the results of the study, the CDC (much more quietly) conceded that: "A systematic review and meta-analysis including data from three vaccine efficacy trials and four observational studies from the US, Israel, and the United Kingdom, found no significant difference in the overall level of protection provided by infection as compared with protection provided by vaccination; this included studies from both prior to and during the period in which Delta was the predominant variant." "Science Brief: SARA-CoV-2 Infection-induced and Vaccine-induced Immunity," *CDC* (Oct. 29, 2021), *available at*

https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/vaccine-induced-immunity.html (last visited Nov. 3, 2021). In short, contrary to (some of) the claims made by the CDC and the media, these studies do *not* establish a valid reason to mandate vaccination of individuals with naturally acquired immunity. *See* Joint Decl. ¶ 37; Noorchashm Decl. ¶¶ 29-31.

142. The State of Michigan's public policy, as established by the state legislature, has also traditionally reflected that it lacks any interest in vaccinating persons for a disease to which they carry antibodies. For instance, the law mandating vaccination of school children *explicitly exempts* from the requirements those who can demonstrate existing immunity through serological testing that measures protective antibodies. MICH. ADMIN. CODE r. 325.176 (2021).

143. MSU simply has no compelling interest in departing from the State's typical public policy in this case. There is no question that Plaintiffs possess natural immunity, given their recent antibodies screening tests and as confirmed by Drs. Noorchashm and Bhattacharya. Joint Decl. ¶ 44; Noorchashm Decl. ¶¶ 7(f), (g), 13; Bhattacharya Decl. ¶ 25.

144. In addition to MSU's lack of a valid governmental interest in requiring that already immune employees get vaccinated, Defendants cannot show that the Directive is narrowly tailored to a compelling governmental interest.

145. Any interest that MSU may have in promoting immunity on campus does not extend to those employees who already have natural immunity—particularly those who can demonstrate such immunity through antibody screenings. Naturally immune MSU employees are already as safe to themselves and to other people on campus as vaccinated individuals are, so there is no justification to force vaccinations on them. Doing so does not make anyone else safer, but it does subject naturally immune employees to a disproportionate risk of adverse side effects.

146. Hence, MSU is trying to exert control over individuals' personal health decisions, rather than attempting to promote a legitimate public health aim.

147. Indeed, MSU's Directive—likely inadvertently—acknowledges that it lacks a valid public health basis for its vaccine policy. In explicating the reasoning underlying the Directive on its "FAQ" page, MSU states that the vaccines are "highly effective in preventing hospitalizations, severe disease and death from the delta variant of COVID-19." (Attachment G). Of course, all of these effects are exclusively individual benefits and not public health benefits.

148. In other words, MSU does not even pretend that the mandate is truly about protecting others, since natural immunity also prevents hospitalizations, severe disease and death. Thus, the Directive infringes on Plaintiffs' bodily autonomy with no public health justification.

149. Another ground MSU provides for its Directive is that "new studies demonstrate[] both unvaccinated and vaccinated individuals can transmit the disease to those who cannot currently be vaccinated, including children less than 12 years old and immunocompromised individuals" and that "new data reveal[s] the Delta variant can create breakthrough infections in vaccinated individuals." (Attachment G).

150. However, if vaccinated people can also transmit the disease, as MSU concedes, that only further undercuts any public health rationale for a vaccine mandate. It certainly drives home the arbitrary, nonsensical nature of MSU's position that robust, naturally acquired immunity should not be recognized, while more limited immunity acquired through vaccination should be.

151. Nor does MSU provide any sound reasoning for the claim that its Directive will protect those who cannot be vaccinated.

a. *First*, college campuses are rarely frequented by individuals under 12 years of age. And vaccinations are now available to children 5-11.

b. *Second*, MSU has not provided any information about or otherwise provided any assurance that it has analyzed the number of immunocompromised people living and working on campus, rendering this justification flimsy.

c. *Finally*, as MSU acknowledges, vaccinated individuals can also spread COVID-19. It is thus unclear just how a vaccine mandate will protect immunocompromised individuals. Presumably, anyone who cannot receive the vaccine and is at risk from severe illness already takes measures to protect him or herself, most likely by working or attending school remotely.

152. In sum, MSU's justifications for its Directive are not only speculative, but logically incoherent.

153. Another reason the Directive lacks any constitutional validity is that many of the vaccines that MSU accepts, such as the Janssen, Sinovac, and Sinopharm vaccines are much less effective in preventing infection, compared to natural immunity. That renders Plaintiffs significantly less likely to contract or spread the virus than their colleagues who have been immunized with these inferior vaccines. Yet they are subject to termination while their similarly situated colleagues, who have received these subpar vaccines, are not.

154. By failing to tailor its Directive to only those employees who lack immunity, MSU forces employees like Plaintiffs (and those similarly situated), who have naturally acquired immunity, to choose between their health, their personal autonomy and their careers.

155. Plaintiffs have suffered and will continue to suffer damage from Defendants' conduct. There is no adequate remedy at law, as there are no damages that could compensate Plaintiffs for the deprivation of her constitutional rights. They will suffer irreparable harm unless this Court enjoins Defendants from enforcing their Directive against employees with natural

immunity. Plaintiffs will also suffer irreparable harm if coerced to in fact take the vaccine, because there is no way to undo the effects of a vaccine once it has been administered. Any adverse side effects could be permanent at that point.

156. Plaintiffs are entitled to a judgment declaring that the Directive violates their constitutional rights to refuse medical treatment and an injunction restraining Defendants' enforcement of the Directive.

COUNT II: VIOLATION OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE AND THE FOURTEENTH AMENDMENT'S RIGHT TO DUE PROCESS

157. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set forth herein.

158. The Due Process Clause of the Fourteenth Amendment provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law … ." U.S. Const., amend. XIV, sec. 1.

159. Unconstitutional conditions case law often references the existence of varying degrees of coercion. According to that body of law, MSU cannot impair Plaintiffs' rights to refuse medical care through subtle forms of coercion any more than it could through an explicit mandate. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) ("[U]nconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them"); *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (finding that state residency requirement impinged on the constitutionally guaranteed right to interstate travel, while lacking a compelling state interest, and thus was unconstitutional).

160. Plaintiffs possess a liberty interest in their bodily integrity, a property interest in their careers, and statutory interests in informed consent.

161. Unconstitutional conditions claims do not need to establish that a challenged government policy amounts to coercion. Instead, it is sufficient that the state policy burdens a constitutional right by imposing undue pressure on an otherwise voluntary choice with a nexus to the exercise of a constitutional right.

162. In other words, the presence of some remaining voluntarism after new conditions are imposed on the exercise of a constitutional right does not stand as a barrier to establishing a successful unconstitutional conditions claim.

163. MSU similarly possesses no compelling interest that could justify its defective Directive that will inevitably result in at least some unwarranted medical intrusions into the bodies of members of the MSU community.

164. In *Speiser v. Randall*, 357 U.S. 513 (1958), the Court invalidated a loyalty oath imposed as a condition for veterans to obtain a state property tax exemption, even though (a) California citizens were not required to own real property, of course; (b) California veterans could freely opt not to seek the exemption and simply pay the unadorned tax; (c) California was not even obligated to provide veterans with the exemption but rather the exemption was a mere privilege.

165. Here, the analogue of the criminal defendant rights of "transcending value" referenced in *Speiser* are the liberty rights of all persons to be free of unconsented-to bodily intrusions and medical interventions. This means that unconstitutional conditions doctrine and due process rights *combine* to invalidate the Directive. That result occurs because MSU has not and cannot show that the school's forcing Plaintiffs and those similarly situated to take the vaccine

reduces any risk that they will become infected with and spread the virus to MSU students and personnel.

166. The *Speiser* Court found the oath condition a violation of procedural due process, in part because the burden to establish qualification for the exemption was placed on applicants. *See id.* at 522. The question the Supreme Court saw itself deciding was "whether this allocation of the burden of proof, on an issue concerning freedom of speech, falls short of the requirements of due process." *Id.* at 523.

167. The Court addressed this question by stating the guiding principle that

> Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance …. [But] Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.

Id. at 525-26.

168. This is especially true when a government actor couples an unconstitutional condition with a procedural system stacked against the right-holder, creating a procedural Due Process violation.

169. Similar to the California law in *Speiser* "creat[ing] the danger that … legitimate utterance will be penalized," 357 U.S. at 526, the process MSU has established in relation to taking COVID-19 vaccines poses dangers to Plaintiffs' health (and thus to their liberty interests) as well as threatening them with penalties if they do not comply.

170. Indeed, more so than in *Speiser*, the factual issues involved in this case are complex. "How can a claimant … possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily

produce a result which the State could not command directly." *Id.* There is perhaps no better encapsulation than the preceding sentence by the Supreme Court of how unconstitutional conditions doctrine and Due Process can and do intersect and reinforce one another. *See also id.* at 529 ("The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech.").

171. For these reasons, MSU cannot by means of its Directive effectively flip the burden of proof and require Plaintiffs and others similarly situated to prove that it is safe for them to perform their respective jobs while unvaccinated. And setting up such a process, which is what MSU's directive does, thereby represents a concurrent *procedural* due process of law violation *and* an unconstitutional condition burdening their liberty interests to be free of unwanted medical interventions.

172. *Speiser* also rests on the mismatch between the loyalty oath California required and the grant of a property tax exemption to veterans. "[T]he State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran." *Id.* at 528.

173. In this situation, there is an equally jarring logical incongruity. MSU's Directive is terse. It offers no justifications for why the penalties and other restrictions it establishes are appropriate and tailored to members of the University community who have acquired robust natural immunity. And the rationales it does offer are not logically coherent. Whatever MSU is trying to decree through its unconstitutional-conditions sleight of hand, Plaintiff remains a community member with natural immunity as a matter of pre-Directive fact (just as the *Speiser* veterans remained veterans as a matter of pre-tax-law fact), and the existence of such immunity fully serves the supposed purposes of the public-health protection that MSU says that it is pursuing.

174. The proportionality of the Directive is also deficient because it does not seek to assess the current antibody levels of its targets, something that it is now feasible for medical science to test.[10]

175. The Directive is not a mere initial presumption that vaccination is superior to natural immunity (a contention that would have to be borne out by the science in any event or else MSU had no business adopting its Directive) that Plaintiffs can try to overcome.

176. The Directive is, in essence, *a conclusive presumption* (and thus a procedural due process of law violation) that vaccination is required (even as to vaccines of far-lesser efficacy), unless the risks of the vaccine to a particular recipient warrant a special exception.

177. But Plaintiffs and others with natural immunity possess equal or higher degrees of protection than those who took one or more of the various inferior vaccines that MSU accepts and equivalent levels to those who took the mRNA vaccines approved by the FDA.

178. MSU has deemed all vaccines to be equally protective in the fictitious presumption it has established. There is no scientific basis for the suppositions that MSU has built into its Directive.

179. For the foregoing reasons, the *de facto* presumptions the Directive establishes become another part of MSU's procedural due process of law violations that run afoul of unconstitutional conditions doctrine. In short, by allocating burden of proof responsibility to those with natural immunity like Plaintiffs, coupled with MSU stacking the process deck with

[10] Such antibody testing was not possible more than a century ago when *Jacobson v. Massachusetts* was decided, as diagnostic antibody testing was not invented until the 1970's. 197 U.S. 11 (1905) (upholding a city regulation fining individuals $5 if they refused to take Smallpox vaccine). *See The History of ELISA from Creation to COVID-19 Research*, MOLECULAR DEVICES, *available at* https://www.moleculardevices.com/lab-notes/microplate-readers/the-history-of-elisa (last visited Aug. 1, 2021).

presumptions that Plaintiffs have shown are scientifically unwarranted, MSU contravenes the Due Process Clause. *See Perry v. Sinderman*, 408 U.S. 592, 597 (1972) (holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) ("We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory").

COUNT III: VIOLATION OF THE SUPREMACY CLAUSE

180. Plaintiffs reallege and incorporate by reference all the foregoing allegations as though fully set forth herein.

A. The EUA Statute Preempts MSU's Directive

181. Defendants' Directive requires Plaintiffs and others similarly situated to receive a vaccine in order to continue working for MSU without regard to their natural immunity or the advice of their doctors.

182. Plaintiffs and others must also divulge personal medical information by uploading it into an online form and are threatened with disciplinary action if they decline to comply with these arbitrary mandates.

183. The Directive thus coerces or, at the very least, unduly pressures, Plaintiffs and others like her into getting vaccines that FDA approved only for emergency use.

184. The United States Constitution and federal laws are the "Supreme Law of the Land" and supersede the constitutions and laws of any state. U.S. Const. art. VI, cl. 2.

185. "State law is pre-empted to the extent that it actually conflicts with federal law." *English v. General Elec. Co*., 496 U.S. 72, 79 (1990) (internal citations and quotation marks omitted).

186. Federal law need not contain an express statement of intent to preempt state law for a court to find any conflicting state action invalid under the Supremacy Clause. *See Geier v. American Honda*, 520 U.S. 861, 867-68 (2000).

187. Rather, federal law preempts any state law that creates "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399-400 (2012).

188. The EUA statute mandates informed and voluntary consent. *See John Doe No. 1 v. Rumsfeld*, No. Civ. A. 03-707(EGS), 2005 WL 1124589, *1 (D.D.C. Apr. 6, 2005) (allowing use of anthrax vaccine pursuant to EUA "on a *voluntary* basis"). *See also* 21 U.S.C. § 360bbb-3(e)(1)(A)(ii).

189. It expressly states that recipients of products approved for use under it be informed of the "option to accept or refuse administration," and of the "significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown." *Id.*

190. Since MSU's Directive (a state program) coerces Plaintiffs by making enjoyment of their constitutionally and statutorily protected consent rights contingent upon receiving an experimental vaccine, it cannot be reconciled with the letter or spirit of the EUA statute. *See* 21 U.S.C. § 360bbb-3.

191. The conflict between the Directive and the EUA statute is particularly stark given that the statute's informed consent language requires that recipients be given the "option to refuse"

the EUA product. That is at odds with the Directive effectively forcing Plaintiffs to sustain significant injury to their career if they do not want to take the vaccine.

192. Put differently, the Directive frustrates the objectives of the EUA process. *See Geier*, 520 U.S. at 873 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

B. The OLC Opinion Cannot Save MSU's Directive from Preemption

193. As noted above, OLC made a memorandum available to the public on July 27, 2021 (dated July 6, 2021) opining that the EUA status of a medical product does not preclude vaccine mandates that might be imposed by either the public or private sectors. *See* "Memorandum Opinion for the Deputy Counsel to the President," *Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization* (July 6, 2021) (OLC Op.) at 7-13, *available at* https://www.justice.gov/olc/file/1415446/download (last visited Aug.1, 2021).

194. Of course, the separation of powers dictates that this Court is not bound by the OLC Opinion—an advisory opinion written *by* the Executive Branch *for* the Executive Branch. *See Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 249 F.R.D. 1 (D.C. Cir. 2008) ("OLC opinions are not binding on the courts[; though] they are binding on the executive branch until withdrawn by the Attorney General or overruled by the courts[.]") (cleaned up).

195. Relatedly, the Justice Department until only recently took a very different approach. *See* Attorney General Memorandum, *Balancing Public Safety with the Preservation of Civil Rights* (Apr. 27, 2020), *available at* https://www.justice.gov/opa/page/file/1271456/download (last visited Aug. 26, 2021, 2021) ("If a state or local ordinance crosses the line from an appropriate exercise of authority to stop the spread of COVID-19 into an overbearing infringement of constitutional and statutory protections, the Department of Justice may have an obligation to

address that overreach in federal court."). *See also* Kevin Liptak, CNN, *Biden Jumps Into Vaccine Mandate Debate as VA Requires Health Workers to Get Vaccinated* (July 26, 2021) ("The [new OLC] opinion marks a reversal from the previous administration. Last year, Attorney General William Barr used the Justice Department's legal power to try to fight certain Covid restrictions, including joining some businesses that sought to overturn state mask mandates."), *available at* cnn.it/37bwAbl (last visited Aug. 26, 2021).

196. Moreover, the OLC Opinion is entirely silent on the issue of preemption. As such, it cannot be read even as offering a potentially persuasive legal view on whether the MSU Policy is preempted by the EUA statute or not. In light of what this Count pleads, the OLC opinion is a legal *non sequitur*.

197. The OLC Opinion is also premised on faulty reasoning. While recognizing that EUA products have "not yet been generally approved as safe and effective," and that recipients must be given "the option to accept or refuse administration of the product," the Opinion nevertheless maintains that the EUA vaccines can be mandated. OLC Op. at 3-4, 7.

198. According to OLC, the requirement that recipients be "informed" of their right to refuse the product does not mean that an administrator is precluded from mandating the vaccine. All that an administrator must do, in OLC's view, is tell the recipient they have the *option* to refuse the vaccine. *Id.* at 7-13.[11] That facile interpretation sidesteps the fact that the Directive's (or other similar policies') employment consequences effectively coerce or at least unconstitutionally

[11] The OLC opinion is as irrelevant to the constitutional questions in this case posed by Counts I and II as it is to the preemption questions in Count III. For it was no answer in *Speiser* to the due process and unconstitutional conditions problems created by California's property tax exemption and oath system for the courts to breathe a sigh of relief when the state's tax authorities could simply tell veterans applying for the tax exemption that they could just go away and forgo the tax exemption. The Constitution and the text of congressional statutes cannot be so easily dodged.

leverage the MSU community into taking the vaccine, reducing to nothingness both the constitutional and statutory rights of informed consent. This approach of stating the obvious but ignoring competing arguments is likely why the Opinion remained mum on the doctrine of preemption.

199. Recognizing the illogic of the Opinion and its inability to square its construction with the text of the EUA statute, OLC admits that its "reading … does not fully explain why Congress created a scheme in which potential users of the product would be informed that they have 'the option to accept or refuse' the product." *Id.* at 10. This understatement would be droll but for the serious rights at stake, especially given that the elephant in the room—which the OLC Opinion ignores—is the Supremacy Clause and the preemption doctrine that Clause powers. In truth, Congress called for potential vaccine recipients to be informed precisely so that they could decide whether to refuse to receive an EUA product. OLC's obtuse reading of the statute blinks reality.

200. In other words, nothing in the OLC Opinion addresses the fact that if it were taken as a blanket authorization for state and local governments to impose vaccine mandates, a vital portion of the EUA statute's text would be rendered superfluous. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (cleaned up).

201. Yet, OLC turns around and claims that Congress would have explicitly stated if it intended to prohibit mandates for EUA products. *Id.* at 8-9. But Congress *did* say so. The plain language states that the recipient of an EUA vaccine must be informed "of the option to accept or refuse the product." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii). Especially when read against the backdrop

of what the Constitution requires *and* against the common law rules from which the constitutional protections for informed consent arose, Congress's intent to protect informed consent is pellucid. And Congress "is understood to legislate against a background of common-law … principles," *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991).

202. The EUA statute's prohibition on mandating EUA products is reinforced by a corresponding provision that allows the President, in writing, to waive the option of those in the U.S. military to accept or refuse an EUA product if national security so requires. 10 U.S.C. § 1107a(a)(1). That provision would be redundant if consent could be circumvented merely by telling a vaccine recipient that he or she is free to refuse the vaccine but nonetheless must suffer various adverse employment consequences violating the unconstitutional conditions doctrine.

203. To circumvent the statutory text about the military waiver, OLC spins out a tortured argument under which the President's waiver would merely deprive military members of their rights to *know* that they can refuse the EUA product—rather than waiving their rights to actually refuse the product. OLC Op. at 14-15.

204. Unsurprisingly, OLC's strained reading runs counter to the Department of Defense's understanding of this statutory provision. As the OLC Opinion acknowledges, "DOD informs us that it has understood section 1107a to mean that DOD may not require service members to take an EUA product that is subject to the condition regarding the option to refuse, unless the President exercises the waiver authority contained in section 1107a." *Id.* at 16 (citing DOD Instruction 6200.02, § E3.4 (Feb. 27, 2008)).

205. OLC even acknowledges that its opinion is belied by the congressional conference report, which also contemplated that 10 U.S.C. § 1107a(a)(1) "would authorize the President to waive *the right of service members to refuse administration of a product* if the President

determines, in writing, that affording service members the right to refuse a product is not feasible[.]" *Id.* (quoting H.R. Rep. No. 108-354, at 782 (2003) (Conf. Rep.)).

206. Unlike OLC, this Court must not ignore the plain statutory prohibition on mandating EUA products. Though released to much fanfare in the media, the Court should discount the severely flawed OLC Opinion in its entirety, affording it no weight in this litigation.

C. The FDA's Approval of the Comirnaty Vaccine Does Not Save MSU's Directive from Preemption

207. The other defense that we anticipate MSU mounting is premised on the recent FDA approval of the Comirnaty Vaccine.

208. That the Comirnaty Vaccine has received full FDA approval does not foreclose the preemption argument presented in this Count, since this approval does not extend to the BioNTech Vaccine, which is actually available. Indeed, even Pfizer acknowledges that the two vaccines are "legally distinct." (Attachment C).

209. The two Pfizer vaccines are legally distinct and include differences. For example, the two vaccines have different number of ingredients: Comirnaty has eleven (11) ingredients while Pfizer-BioNTech has just ten (10) ingredients. FDA, Vaccine Information Fact Sheet for Recipients and Caregivers about COMIRNATY (COVID-19 Vaccine, mRNA) and Pfizer-BioNTech COVID-19 Vaccine to Prevent Coronavirus Disease 2019 (COVID-19) (Aug. 23, 2021), *available at* https://www.fda.gov/media/151733/download (last viewed Nov. 4, 2021).

210. The approval announcement posted on the FDA's website reads, "On August 23, 2021, the FDA approved the first COVID-19 vaccine. The vaccine has been known as the PfizerBioNTech COVID-19 Vaccine, and will now be marketed as Comirnaty, for the prevention of COVID-19 disease in individuals 16 years of age and older."

211. While Pfizer's Comirnaty approval letter states that its two vaccines share the same formulation, the FDA concedes that "the products are legally distinct with certain differences . . ." *Id.* (emphasis added).

212. To date, no entity has revealed, nor have Plaintiffs been able to obtain, any evidence indicating what those "certain differences" may be. Despite this, the FDA asserts that the two formulations can be used interchangeably.

213. For example, in the FDA's fact sheet for recipients and caregivers, for example, it reads, "The FDA-approved COMIRNATY (COVID-19 Vaccine, mRNA) and the FDA authorized Pfizer-BioNTech COVID-19 Vaccine under Emergency Use Authorization (EUA) have the same formulation and can be used interchangeably to provide the COVID-19 vaccination series." *Id.*

214. In a press release announcing Pfizer's collaboration with Brazil's Eurofarma to manufacture COVID-19 vaccine doses, Pfizer wrote, "COMIRNATY® (COVID-19 Vaccine, mRNA) is an FDA-approved COVID-19 vaccine made by Pfizer for BioNTech" and "PfizerBioNTech COVID-19 Vaccine has received EUA from FDA." The press release continued, stating, "This emergency use of the product has not been approved or licensed by FDA, but has been authorized by FDA under an Emergency Use Authorization (EUA) to prevent Coronavirus Disease 2019 (COVID-19) . . ." *Pfizer, Pfizer and BioNTech Announce Collaboration with Brazil's Eurofarma to Manufacture COVID-19 Vaccine Doses for Latin America* (Aug. 26, 2021), *available at* https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-announce-collaboration-brazils (last visited Nov. 3, 2021).

215. Then, in a September 6, 2021, press release announcing a submittal to a request by the European Medicines Agency (EMA) to update its Conditional Marketing Authorization (CMA) for a booster dose, BioNTech–Pfizer's co-partner in the production of the Pfizer-BioNTech

COVID-19 vaccine–clearly states, "The Pfizer-BioNTech COVID-19 vaccine has not been approved or licensed by [FDA]" but has been authorized under an EUA. Press Release, *Pfizer and BioNTech Submit a Variation to EMA with the Data in Support of a Booster Dose of COMIRNATY®, BIONTECH* (Sept. 6, 2021), *available at* https://investors.biontech.de/node/10581/pdf (last visited Nov. 3, 2021).

216. The claim that the two vaccines are interchangeable comes from a Guidance document, which does not carry force of law and is contradicted by Pfizer's own reissuance letter. *See Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."); *Appalachian Power v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (guidance documents that agencies treat as *de facto* law are void because they did not run the notice-and-comment gauntlet) (setting aside an agency guidance document in its entirety); *see also Maple Drive Farms Ltd. v. Vilsack*, 781 F.3d 837, 857 (6th Cir. 2015) (instructing USDA to carefully consider on remand whether its approach to the term "prior-converted wetlands" ran afoul of *Appalachian Power*).

217. The FDA cannot convert a legally distinct product that is available (the BioNTech vaccine) into a fully approved vaccine (Comirnaty) that is not yet widely available. The FDA, via a mere guidance document, is improperly trying to establish equivalence between what are two legally distinct vaccines. That is improper as a general matter of administrative law. It is yet more improper since it is a maneuver conducted to override federal statutory rights to informed medical consent.

218. MSU cannot be permitted to rely on mere FDA-issued guidance documents, especially not where doing so would vitiate clear statutory rights.

219. Moreover, specifically referring to the Comirnaty Vaccine, Pfizer has admitted that there "is not sufficient approved vaccine available for distribution to this population in its entirety at the time of the reissuance of this EUA." (Attachment C).

220. Since the Comirnaty Vaccine, being the only FDA-approved vaccine, is not widely available, and certainly is not available to all members of the population, per the manufacturer's own admission, the EUA statute's sphere of preemption continues to apply to override MSU's Directive. Worse yet, no publicly released documents from MSU indicate that MSU has even considered the issue of federal preemption and whether the full approval granted to the unavailable Comirnaty Vaccine has any significance to the rights of Plaintiffs and the Class.The federal government, in issuing its own mandate, acknowledges that "Depending on employees' locations, they may not have all types of vaccines available to them. Agencies should encourage employees to plan ahead and allow enough time to receive all required vaccine doses before the November 8 deadline to have their second shot." *Id.*

221. Thus, even if the Comirnaty and BioNTech are factually identical—which it should be the Government's burden to establish and which it has not done—MSU cannot show that MSU employees have access to the Comirnaty. Therefore, they may be forced to take only EUA-approved vaccines, contravening the informed consent provision of the EUA statute.

D. The Supremacy Clause, the Nuremburg Code, and Related Sources of Law

222. Just as Congress prohibited the federal government from mandating EUA products, the state governments cannot do so, for the Supremacy Clause dictates that the EUA statute must prevail over conflicting state law or policy.

223. Defendants' Directive is thus preempted by federal law. *See* U.S. Const. art. VI, cl. 2; *see also Kindred Nursing Ctrs. Ltd P'ship v. Clark*, 137 S. Ct. 1421 (2017) (holding that Federal Arbitration Act preempted incompatible state rule); *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1297 (2016) ("federal law preempts contrary state law," so "where, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" the state law cannot survive).

224. For similar reasons, the Directive violates the 1947 Nuremberg Code, a multilateral agreement between the United States, USSR, France, and the United Kingdom, governing human experimentation and inspired, of course, by events that took place during the Holocaust. The Nuremberg Code expressly states that "[t]he voluntary consent of the human subject is *absolutely essential*" and prohibits experimental treatments on anyone using "force, fraud, deceit, duress, overreaching, or other ulterior forms of constraint or coercion." United States Holocaust Museum, *Nuremburg Code*, https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/doctors-trial/nuremberg-code (last visited Aug. 26, 2021) (emphasis added).

225. Title 45 of the Code of Federal Regulations part 46 is to similar effect. As is the Helsinki Declaration and the International Covenant on Civil and Political Rights adopted by the United Nations, to which the United States is a party. *See* International Covenant on Civil and Political Rights, pt III, art. 7, *available at* https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last visited Aug. 26, 2021); World Medical Association, *WMA Declaration of Helsinki – Ethical Principles for Medical Research Involving Human Subjects*, *available at* https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/ (last visited Aug. 26, 2021).

226. Defendants' Directive is invalid pursuant to Article VI, Cl. 2 of the United States Constitution, and must be enjoined and set aside.

ADDITIONAL LEGAL CLAIMS

227. Plaintiffs have suffered and will continue to suffer damage from Defendants' conduct. There is no adequate remedy at law, as there are no damages that could compensate Plaintiffs or class members for the deprivation of their constitutional and statutory rights. They will suffer irreparable harm—both to their constitutional rights and to their physical well-being if coerced into taking the vaccine—unless this Court enjoins Defendants from enforcing their Directive.

228. 42 U.S.C. § 1983 provides a civil right of action for deprivations of constitutional protections taken under color of law.

229. Plaintiffs (and those similarly situated) are entitled to declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 because they are being deprived of "rights, privileges, or immunities secured by the Constitution and laws." Section 1983 thus supports both Plaintiffs' constitutional and statutory causes of action against MSU defendants because Section 1983 protects rights "secured by the Constitution *and* laws." 42 U.S.C. § 1983 (emphasis added).

230. Likewise, Plaintiffs are entitled to injunctive relief pursuant to *Ex parte Young*'s nonstatutory equitable right of action. *See Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 648 (2002) ("We conclude that 28 U.S.C. § 1331 provides a basis for jurisdiction over Verizon's claim that the Commission's order requiring reciprocal compensation for ISP-bound calls is pre-empted by federal law. We also conclude that the doctrine of *Ex parte Young* permits Verizon's suit to go forward against the state commissioners in their official capacities.").

231. In sum, Plaintiffs are entitled to a judgment declaring that the Directive violates the Supremacy Clause and an injunction restraining Defendants' enforcement of the Directive, since it is preempted by federal law.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that the Court find the Defendants have committed the violations alleged and described above, and issue in response the following:

A. A declaratory judgment that MSU's Directive infringes upon Plaintiffs' constitutionally protected rights to protect their bodily integrity and autonomy and to refuse unnecessary medical treatment.

B. A declaratory judgment that MSU's Directive represents an unconstitutional condition, especially in light of a set of explicit and implicit procedures that violate the Due Process Clause of the Fourteenth Amendment.

C. A declaratory judgment that MSU's Directive is preempted under the Supremacy Clause because the Policy, a state program, conflicts with the federal EUA Statute; AND

D. Temporary, preliminary and permanent injunctive relief restraining and enjoining Defendants, their agents, servants, employees, attorneys, and all persons in active concert or participation with them (*see* Fed. R. Civ. P. 65(d)(2)), and each of them, from enforcing coercive or otherwise pressuring policies or conditions similar to those in the Directive that act to compel or try to exert leverage on MSU employees with natural immunity to get a COVID-19 vaccine.

E. Plaintiffs seek nominal damages of $1.

JURY DEMAND

Plaintiffs herein demands a trial by jury of any triable issues in the present matter.

November 5, 2021

Respectfully submitted,

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EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JEANNA NORRIS, on behalf of herself and all others similarly situated,	
Plaintiffs,	
v.	
SAMUEL STANLEY, JR., in his official capacity as President of Michigan State University; DIANNE BYRUM, in her official capacity as Chair of the Board of Trustees, DAN KELLY, in his official capacity as Vice Chair of the Board of Trustees; and RENEE JEFFERSON, PAT O'KEEFE, BRIANNA T. SCOTT, KELLY TEBAY, and REMA VASSAR in their official capacities as Members of the Board of Trustees, of Michigan State University, and John and Jane Does 1-10,	CIVIL ACTION NO._____ (ORAL ARGUMENT REQUESTED)
Defendants.	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION (ORAL ARGUMENT REQUESTED)

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INTRODUCTION

Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, Plaintiff Jeanna Norris seeks preliminary injunctive relief in this matter on behalf of herself and similarly situated individuals,[1] against the Defendants identified above (collectively, "Defendants"), who are governing officials or managers of Michigan State University ("MSU" or "the University"), including the President and Chair of the Board of Trustees ("the Board"). They are sued in their official capacities for purely prospective injunctive and declaratory relief. Plaintiff, Jeanna Norris, also seeks a temporary restraining order ("TRO") (or administrative stay) to prevent Defendants from implementing MSU's vaccine mandate ("the Directive") due to her natural immunity to COVID-19.

The Directive requires all employees to receive a COVID-19 vaccine (permitting *any* that has been approved by the World Health Organization ["WHO"]) unless they receive a religious or medical exemption. MSU expressly excludes natural immunity as a basis for a medical exemption. Those who do not comply with MSU's Directive by August 31, 2021, are threatened with disciplinary action, including termination of employment.

Plaintiff possesses robust natural immunity following a COVID-19 infection, as confirmed in two recent antibody tests. In fact, the level of protection conferred by her natural immunity is *stronger* than that provided by many of the vaccines that MSU accepts, including the Sinovac, Sinopharm, and Janssen vaccines. Plaintiff's doctor, immunologist Hooman Noorchashm, M.D., Ph.D., attests that vaccinating an individual who has recovered from COVID-19, especially with

[1] Plaintiff is prepared to quickly brief class-certification issues but is also confident that if this Court orders preliminary injunctive relief against MSU here, MSU will cease applying its unlawful Directive as a general matter while any such preliminary injunction is in force. Freezing the *status quo* while this litigation goes forth as to class certification and on the merits is entirely appropriate.

the antibodies levels she possesses, is not merely fruitless, but presents a risk of harm. Vaccinating her thus violates fundamental tenets of medical ethics, which prohibit unnecessary medical interventions.

1. Invasion of the Right of Medical Consent. MSU states on its website that it refuses to exempt Plaintiff from the vaccine requirement based on her naturally acquired immunity. Under the Ninth and/or Fourteenth Amendments to the United States Constitution, Plaintiff has a right to decline medical treatment absent a compelling state interest. No such interest can be shown here, since she is immune to a COVID-19 re-infection to an equal or greater extent than vaccinated personnel. Thus, the Directive constitutes an unlawful infringement upon her constitutional rights.

2. Unconstitutional Conditions. In addition to the Directive's flat incursions on bodily autonomy, the unconstitutional conditions doctrine prohibits state actors from burdening the Constitution's enumerated rights by withholding benefits from those who exercise them. Here, MSU's Directive requires Plaintiff to surrender her Ninth and Fourteenth Amendment rights, or face termination and other disciplinary action. It therefore constitutes an unlawful set of conditions. Relatedly, as most applicable unconstitutional conditions case law reveals, the system MSU has established to resolve applications for medical exemptions runs afoul of the Fourteenth Amendment's Due Process Clause.

3. Federal Preemption. Finally, the three COVID-19 vaccines available in the United States have been approved only under the Emergency Use Authorization ("EUA") statute.[2] This

[2] While the Pfizer Comirnaty Vaccine has been granted full FDA approval, it appears that particular vaccine is *not* widely available due to limited supply, and is legally distinct from the Pfizer BioNTech, which is the vaccine actually in circulation. *See* "FDA Approves First COVID-19 Vaccine," *US Food & Drug Administration* (Aug. 23, 2021), *available at* https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine (last visited Aug. 25, 2021); FDA, *Fact Sheet for Health Care Providers Administering Vaccine (Vaccination Providers*) (Pfizer) (Aug. 23, 2021) (Attachment C).

federal law requires the free and informed consent of individuals who receive products authorized for use under it. The coercive nature of the Directive conflicts with the objective and spirit of the statute, and accordingly is preempted by the Supremacy Clause of the United States Constitution.

Plaintiff is likely to prevail on the merits. Given that she is being forced to choose between her health (a core liberty interest) and damage to her career, including possible termination of her employment, and that her constitutional rights are being blatantly violated, if the Court does not issue a TRO and/or a preliminary injunction, Plaintiff will suffer irreparable harm, including infringement of her Ninth and/or Fourteenth Amendment rights to bodily autonomy, due process, and other statutory and privacy interests. At the same time, neither Defendants nor the public will be harmed in any way by issuance of a TRO and/or preliminary injunction, as Plaintiff possesses natural immunity to COVID-19, and thus is exceedingly unlikely to infect anyone. Moreover, the public has an interest in seeing Plaintiff's constitutional rights vindicated. Accordingly, this Court should issue a TRO and/or preliminary injunction to protect the *status quo* while this matter works its way through the legal process.

I. FACTS

A. BACKGROUND PERTAINING TO THE CORONAVIRUS PANDEMIC AND COVID-19 VACCINES

The novel coronavirus, SARS-CoV-2, which can cause the disease COVID-19, is a contagious virus spread mainly through person-to-person contact.[3] FDA approved three vaccines pursuant to the federal EUA statute, 21 U.S.C. § 360bbb-3, between December of 2020 and February of 2021: (1) the Pfizer BioNTech, (2) Moderna, and (3) Johnson & Johnson (Janssen)

[3] More background is laid out in Complaint ¶¶ 12-16.

vaccines. The EUA statute states that individuals to whom the product is administered must be informed: (1) that the Secretary has authorized emergency use of the product; (2) of the significant known and potential benefits and risks of such use, and the extent to which such benefits and risks are unknown; and (3) 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. *See* 21 U.S.C. § 360bbb-3(e)(1)(A)(ii). Inherently, the EUA system confers on all individuals, in consultation with their respective doctors, the risk-benefit choice of deciding for themselves whether to accept or reject a given EUA medical treatment.

B. Prior Infection Confers Natural Immunity to COVID-19 at Least as Robust as Vaccine Immunity

As explained by Dr. Jayanta Bhattacharya of Stanford University (M.D., Ph.D.), and Dr. Martin Kulldorff (Ph.D.), of Harvard University, multiple, extensive, peer-reviewed studies comparing natural and vaccine immunity have concluded overwhelmingly that natural immunity provides equivalent or greater protection against severe infection than immunity generated by mRNA vaccines (Pfizer and Moderna). (Joint Decl. ¶ 18). Natural and vaccine immunity utilize the same basic immunological mechanism—stimulating the immune system to generate an antibody response. (Joint Decl. ¶ 16). In fact, the level of antibodies in the blood of those who have naturally acquired immunity was initially the benchmark in clinical trials for determining the efficacy of vaccines. (Joint Decl. ¶ 16). And, as there is currently more data on the durability of natural immunity than there is for vaccine immunity, researchers rely on their findings with respect to naturally acquired immunity to predict the durability of vaccine-acquired immunity. (Joint Decl. ¶ 23).

As time passes, data demonstrating that naturally acquired immunity is more durable and longer lasting than vaccine immunity is accumulating. A study from Israel, released only days ago, found that vaccinated individuals had 13.1 times higher risk of testing positive, 27 times greater risk of symptomatic disease, and around 8.1 times higher risk of hospitalization than unvaccinated individuals with naturally acquired immunity. (Joint Decl. ¶ 20). The authors concluded that the "study demonstrated that natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of SARS-CoV-2, compared to the BNT162b2 two-dose vaccine-induced immunity." (Joint Decl. ¶ 20). *See* David Rosenberg, *Natural Infection vs. Vaccination: Which Gives More Protection*? ISRAELNATIONALNEWS.COM (July 13, 2021), *available at* https://www.israelnationalnews.com/News/News.aspx/309762 (last visited Aug. 1, 2021) (those who received BioNTech Vaccine were 6.72 times more likely to suffer subsequent infection than those with natural immunity); Nathan Jeffay, *Israeli, UK Data Offer Mixed Signals on Vaccine's Potency Against Delta Strain*, THE TIMES OF ISRAEL (July 22, 2021), *available at* bit.ly/3xg3uCg (last visited Aug. 4, 2021) (declining efficacy of Pfizer protection against infection).

Prolonged immunity also stems from memory T- and B-cells, bone marrow plasma cells, spike-specific neutralizing antibodies, and IgG+ memory B-cells following a COVID-19 infection. (Joint Decl. ¶ 17). *See* Interview with Dr. Harvey Risch, Yale School of Medicine, *Ingraham Angle* (July 26, 2021), *available at* https://bit.ly/3zOL6Sx (last visited Aug. 27, 2021). In short, these studies confirm the efficacy of natural immunity against reinfection of COVID-19 and show that almost all reinfections are less severe than first-time infections and virtually never require hospitalization. (Joint Decl. ¶ 19).

New variants of COVID-19 resulting from the virus's mutation do not escape the natural immunity developed by prior infection from the original strain of the virus. (Joint Decl. ¶¶ 29-33). In fact, vaccine immunity only targets the spike-protein of the original Wuhan variant, whereas natural immunity recognizes the full complement of SARS-CoV-2 proteins and thus provides protection against a greater array of variants. (Noorchashm Decl. ¶ 17).

While the CDC and the media have touted a study from Kentucky as proof that those with naturally acquired immunity should get vaccinated, that study is being misconstrued and misleadingly characterized. That is because the Kentucky study compared individuals who had only natural immunity to those who had natural immunity *and* had received the vaccine. The proper approach would have been to compare those with only naturally acquired immunity to those with only vaccine-acquired immunity. Hence, the CDC's conclusion from the Kentucky study is unwarranted. As Drs. Bhattacharya and Kulldorff explain, although individuals with naturally acquired immunity who received a vaccine showed increased antibody levels, "[t]his does not mean that the vaccine [further] increases protection against symptomatic disease, hospitalizations or deaths." (Joint Decl. ¶ 37; Noorchashm Decl. ¶ 29, 31). Furthermore, as discussed at length in the complaint, many of the vaccines that MSU considers acceptable are far inferior to natural immunity. *See* Complaint ¶¶ 51-56.

Drs. Bhattacharya and Kulldorff explain, that there is no valid public-health rationale for MSU to require proof of vaccination to participate in activities that do not involve care for high-risk individuals:

> Since the successful vaccination campaign already protects the vulnerable population, the unvaccinated—especially recovered COVID patients—pose a vanishingly small threat to the vaccinated. They are protected by an effective vaccine that dramatically reduces the likelihood of hospitalization or death after infections to near zero and natural immunity, which provides benefits that are at least as strong[.] At the same time, the requirement for … proof of vaccine

> undermines trust in public health because of its coercive nature. While vaccines are an excellent tool for protecting the vulnerable, COVID does not justify ignoring principles of good public health practice.

(Joint Decl. ¶¶ 50-51).

C. COVID-19 VACCINES' SIDE EFFECTS, THE PRINCIPLE OF MEDICAL NECESSITY, AND PLAINTIFF'S NATURAL IMMUNITY

All medical procedures carry some risk of adverse effects, and the COVID-19 vaccines are no exception. For this reason, a fundamental tenet of medical ethics is that of "medical necessity," which requires public health agents to utilize "the least intrusive" means possible to achieve a given end, because every medical procedure carries some risk. (Noorchashm Decl. ¶ 19; Joint Decl. ¶¶ 25-28, 43). *See* Complaint ¶¶ 73-75.

Although the COVID-19 vaccines appear to be relatively safe at a population level, like all medical interventions, they carry a risk of side effects. Those include minor side effects, as well as rarer ones requiring hospitalization or causing death. (Joint Decl. ¶¶ 26-28). Other side effects may occur that remain unknown at this time. (Joint Decl.¶¶ 26-28). As Drs. Bhattacharya and Kulldorff observe, "[a]ctive investigation to check for safety problems is still ongoing." (Joint Decl. ¶ 26). Thus, COVID-19 recovered patients with detectable levels of antibodies should not be required to receive vaccines, as "[f]or them, it simply adds a risk[.]" (Joint Decl. ¶ 9).

None of the three vaccines in use in the United States has been tested in clinical trials for its safety and efficacy on individuals who have recovered from COVID-19. (Noorchashm Decl. ¶30, Attachment B). Indeed, trials conducted so far have *specifically excluded* survivors of previous COVID-19 infections. (Noorchashm Decl. ¶ 28). Existing clinical reports and studies indicate that individuals with a prior infection and natural immunity face an *elevated* risk of adverse effects from the vaccine, compared to those who have never contracted COVID-19. (Noorchashm Decl. ¶¶ 21-28; Joint Decl. ¶ 27). This is consistent with general immunological

understandings, which recognize that "vaccinating a person who is recently or concurrently infected [with any virus] can reactivate, or exacerbate, a harmful inflammatory response to the virus. This is NOT a theoretical concern." (Noorchashm Decl. ¶ 27). The heightened risk of adverse effects appears to result from "preexisting immunity to SARS-CoV-2 [, which] may trigger unexpectedly intense, albeit very rare, inflammatory and thrombotic reactions in previously immunized and predisposed individuals." Angeli *et al.*, *SARS-CoV-2 Vaccines: Lights and Shadows*, 88 EUR. J. INTERNAL MED. 1, 8 (2021).

Plaintiff is a supervisory Administrative Assistant and Fiscal Officer at MSU, where she has been employed for eight years. (Norris Decl. ¶ 1). She is stepmother to her husband's five children, and the family's primary breadwinner. (Norris Decl. ¶ 3). In November of 2020, she contracted COVID-19 (Norris Decl. ¶ 8).

On August 20, 2021, Plaintiff consulted with Dr. Hooman Noorchashm, an immunologist who previously worked at Harvard University and University of Pennsylvania. Dr. Noorchashm prescribed Plaintiff a full COVID-19 serological screening, which confirmed her previous diagnosis (Noorchashm Decl. ¶ 7(f), (g) & 13). Dr. Noorchashm, as well as Dr. Bhattacharya, concluded that Plaintiff is protected by natural immunity. (Noorchashm Decl. ¶ 7(g) & 13; Joint Decl. ¶ 44). Dr. Bhattacharya explained that Plaintiff's lab results "indicate the presence of both spike-protein and nucleocapsid protein antibodies; the latter is a reliable sign of previous natural infection." Concluding that "there is no good reason that [Plaintiff] should be vaccinated," he opines that "[a]t the very least, the decision should be left to [Plaintiff] and her doctors without coercion applied by the University." (Joint Decl. ¶ 44).

Based on his analysis of Plaintiff's antibodies screening test and overall medical history, Dr. Noorchashm concluded that *it is medically unnecessary* for Plaintiff to undergo a full-course

vaccination procedure to protect herself or the community from infection. (Noorchashm Decl. ¶¶ 12-35). Because every medical procedure carries a risk of adverse consequences, and due to the heightened risk as a result of her naturally acquired immunity, vaccinating Plaintiff violates the rules governing medical ethics (Noorchashm Decl. ¶ 34-35).

D. MSU's Imposition of a Blanket Vaccine Requirement as Part of Its COVID-19 Directives for Fall 2021

MSU is a public research university located in East Lansing, Michigan. On July 30, 2021, the University announced via email and on its website, its "COVID directives" for the Fall 2021 term. (Attachment E). The directives were finalized on MSU's website on August 5, 2021, and included a vaccine mandate ("the Directive"), and "FAQs" to address individuals' concerns. (Attachments F-G).

According to the Directive, by August 31, 2021, all faculty, staff, and students must have completed a full COVID-19 vaccine course or received at least one dose of a two-dose series. (Attachments E-G). Employees and students also are required to report their vaccine status using an online form. (Attachments E-G).

MSU accepts all FDA-authorized as well as all WHO-approved vaccines. (Attachments E-G). To obtain a medical exemption, an individual must demonstrate: (1) A documented anaphylactic allergic reaction or other severe adverse reaction to any COVID-19 vaccine; (2) A documented allergy to a component of a COVID-19 vaccine; (3) Another documented medical condition that constitutes a disability under the Americans with Disabilities Act; or (4) A limited-term inability to receive a vaccine such as pregnancy or breastfeeding. (Attachment H).

In its "FAQs" Section pertaining to the Directive, MSU states that the rationale for its policy is that, *inter alia*, "new studies demonstrate[] both unvaccinated and vaccinated individuals can transmit the disease to those who cannot currently be vaccinated, including children less than

12 years old and immunocompromised individuals" and "new data reveal[s] the Delta variant can create breakthrough infections in vaccinated individuals." (Attachment G). Employees who do not comply with the vaccine requirements are subject to disciplinary action, including termination of employment. (Attachment G).

One of the questions posed in the FAQ section is "I have had COVID-19 in the past and have laboratory evidence of antibodies. Do I need to be vaccinated?" The answer is "Even those who have contracted COVID-19 previously are required to receive a vaccine, which provides additional protection." (Attachment G).

Also, in response to the question, "[w]hy should I get a vaccine if the delta variant breaks through the current vaccines," the webpage states that: "[t]he current vaccines remain highly effective in preventing hospitalizations, severe disease and death from the delta variant of COVID-19." (Attachment G). Even employees who have arranged to work remotely during the fall semester must either be vaccinated or obtain a religious or medical exemption. (Attachment G).

Plaintiff requires relief on a tight timeline because MSU did not announce even an early-peek, truncated version of its Directive until a mere month before the August 31, 2021 deadline that it set for employees to receive the vaccine. (Attachments E-G). The earlier versions contained less information than that posted on MSU's website only three weeks before the deadline. And Plaintiff was not informed that the Directive applied to her, as a remote employee, until August 5.

E. Plaintiff Has Experienced, and Will Continue to Experience, Concrete and Particularized Harm as a Direct Consequence of MSU's Directive

MSU's Directive places Plaintiff in the position of having to choose between her health, her bodily autonomy, and her career. Either she must ignore the advice of her doctor and receive the vaccine—a prospect that endangers her health and is causing her significant emotional distress—or she faces disciplinary action, including termination of her employment, upon which

her family relies. The Directive unmistakably places such coercive pressure on Plaintiff to subject herself to receiving the vaccine that it amounts to an ineluctable mandate. It is obviously designed for that purpose and to have that impact. By threatening adverse professional and personal consequences, MSU's Directive harms Plaintiff's bodily autonomy and dignity; it forces her to endure the stress and anxiety of choosing between her career and her health.

II. ARGUMENT

A. JURISDICTION AND EQUITABLE RELIEF

This court possesses federal question jurisdiction on numerous grounds—constitutional, statutory, and nonstatutory. *See* 28 U.S.C. §§ 1331, 1343(a)(3)-(4); *Ex parte Young*, 209 U.S. 123, 155–156 (1908) (holding that federal courts may enjoin state officials to conform their conduct to federal law); Complaint ¶¶ 8-12; *cf* 28 U.S.C. § 2201-2202 (making available declaratory and related injunctive relief); 42 U.S.C. § 1983 (providing a cause of action against state actors).

Rule 65(a) of the Federal Rules of Civil Procedure allows a court to issue a preliminary injunction after notice has been provided to an adverse party. A preliminary injunction is appropriate if: (1) there is a substantial likelihood of success on the merits; (2) it is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the preliminary injunction would cause the other litigant; and (4) the preliminary injunction would not be averse to the public interest. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *Liberty Coins v. Goodman*, 748 F.3d 682, 689-90 (6th Cir. 2014).

Because MSU has threatened disciplinary action imminently if Plaintiff does not comply, she also requests that the Court issue a TRO to immediately preserve the *status quo*, as otherwise she will suffer immediate and irreparable injury, including but not limited to the loss of her constitutional rights and bodily autonomy (*see* Norris Decl. ¶¶ 10, 15-17). *See* Fed. R. Civ. P.

65(b)(1)(A). Alternatively, she requests an "administrative stay" for the same reasons (irreparable harm). *See, e.g., KindHearts for Charitable Humanitarian Dev. v. Geithner*, 676 F. Supp. 2d 649 (N.D. Ohio 2009) ("The power to stay administrative action is similar to the power to stay judicial action").

To be clear, Plaintiff is requesting that a TRO (or administrative stay), especially of the proof-of-vaccination mandate, be entered before August 31, 2021, to run until a preliminary injunction can be briefed and entered. This would allow this Court to schedule the remainder of preliminary-injunction briefing as befits its schedule and other matters on its docket. And Plaintiff further prays that as soon as possible after August 31, 2021, a preliminary injunction be issued, designed to stay in place pending the full merits resolution of this litigation.

B. Plaintiff Has a Substantial Likelihood of Success on the Merits

1. MSU's Policy Violates Plaintiff's Constitutional Rights to Refuse Unwanted and Unnecessary Medical Care

The Supreme Court has recognized that the Ninth and Fourteenth Amendments protect an individual's right to privacy. A "forcible injection … into a nonconsenting person's body represents a substantial interference with that person's liberty[.]" *Washington v. Harper*, 494 U.S. 210, 229 (1990). The common law baseline is also a key touchstone out of which grew the relevant constitutional law. *See, e.g., Cruzan v. Dir., Mo. Dep't of Public Health*, 497 U.S. 261, 278 (1990) ("At common law, even the touching of one person by another without consent and without legal justification was a battery."). *See also* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed. 1984).); *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914) (Cardozo, J.) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon

who performs an operation without his patient's consent commits an assault, for which he is liable in damages.").

Subsequent Supreme Court decisions are explicit that the Constitution protects a person's right to "refus[e] unwanted medical care." *Cruzan*, 497 U.S. at 278. This right is "so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment." *Washington v. Glucksberg,* 521 U.S. 702, 722 n.17 (1997). The Court has explained that the right to refuse medical care derives from the "well-established, traditional rights to bodily integrity and freedom from unwanted touching." *Vacco v. Quill*, 521 U.S. 793, 807 (1997).

"Government actions that burden the exercise of those fundamental rights or liberty interests [life, liberty, property] are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest." *Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007). Coercing employees to receive a vaccine—especially those that have been authorized only for emergency use (*see infra*, Point III)—for a virus that presents a near-zero risk of illness or death to them and which they are exceedingly unlikely to pass on to others, because they already possess natural immunity to that virus, violates the liberty and privacy interests that the Ninth and Fourteenth Amendments protect. And coercing employees to do so when a vaccine could also *cause harm* to a recipient with natural immunity adds injury to constitutional insult. The goal of Defendants' Directive is clear: to improve the prevalence of immunity to COVID-19 on campus. The focus should therefore be on *immunity,* by whatever mechanism it is acquired.

The blithe statement on the FAQ page to the effect that vaccinating a naturally immune individual provides "additional protection"—without citation to *any* scientific data—cannot overcome the vast amount of scientific literature that Plaintiff has provided to establish otherwise. And, as all three of the experts weighing in on this issue attest, the study from Kentucky that the

CDC has touted as substantiating MSU's proposition has been both wrongly interpreted and incorrectly portrayed by the media, and it does not establish any discernible additional benefit from vaccinating individuals who possess naturally acquired immunity. (Joint Decl. ¶ 37; Noorchashm Decl. ¶ 29-31). *See* US Centers for Disease Control (2021) "Frequently Asked Questions About COVID19 Vaccination." *Centers for Disease Control* (Aug. 19, 2021), *available at* https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html (last visited Aug. 26, 2021).

Nor can Defendants show that the Directive is narrowly tailored to a compelling governmental interest. Any benefit that MSU may gain in promoting *immunity* on campus does not extend to vaccinating those individuals who *already have immunity* from the virus—particularly those who can demonstrate such immunity through antibody screenings. To hold otherwise forces us into a never-ending loop: if one shot of the vaccine is good, a second shot of the vaccine is even better, a third shot will provide even more benefits (allegedly), and a fourth cannot be far behind. If *vaccination* is the goal rather than *immunity*, what will prevent the University from ordering an ever-increasing number of booster shots per COVID season? By contrast, focusing on the degree of immunity does not make vaccines an end in themselves but instead recognizes that they are but one means to the praiseworthy end of promoting immunity.

Indeed, MSU's Directive implicitly acknowledges that it lacks a valid public-health basis. In explicating the reasoning underlying the Directive on its "FAQ" page, MSU states that the vaccines are "highly effective in preventing hospitalizations, severe disease and death from the delta variant of COVID-19." (Attachment G). In other words, MSU does not even pretend that the mandate is about protecting others, Plaintiff's natural immunity aside. Thus, the Directive infringes on Plaintiff's bodily autonomy without even providing a public health justification.

Another reason MSU provides for its Directive is that "new studies demonstrate[] both unvaccinated and vaccinated individuals can transmit the disease to those who cannot currently be vaccinated, including children less than 12 years old and immunocompromised individuals" and that "new data reveal[s] the Delta variant can create breakthrough infections in vaccinated individuals." (Attachment G). If vaccinated people can also transmit the disease, as MSU concedes, that only further undercuts any public health rationale for a vaccine mandate. It certainly drives home the arbitrary nature of the University's position that naturally acquired immunity cannot be recognized, but even inferior vaccine-acquired immunity will be.

Nor does MSU provide any sound reasoning for the claim that its Directive will protect those who cannot be vaccinated. *First*, college campuses are rarely frequented by individuals under 12 years of age. *Second*, MSU has not provided any information about the number of immunocompromised people living and working on campus, rendering this justification flimsy. *Finally*, as MSU acknowledges, vaccinated individuals can also spread COVID-19. It is thus unclear just how a vaccine mandate will protect the unspecified individuals who are too immunocompromised to receive the vaccine and yet are living or working on campus. In sum, MSU's justifications for its Directive are not only speculative, but logically incoherent.

Another reason the Directive lacks any constitutional validity is that many of the vaccines that MSU accepts (Janssen, Sinovac, and Sinopharm) vaccines have lower efficacy rates—when it comes to preventing infection—than does naturally acquired immunity. That renders Plaintiff far less likely to contract or spread the virus than those in the MSU community who have been immunized with these inferior vaccines that MSU readily accepts. Yet she is subject to termination while her colleagues who have received these vaccines, and thus pose a *greater* danger, are not.

Furthermore, as Drs. Bhattacharya and Kulldorff attest, the CDC's statement that "we do not know how long [natural immunity] will last" is "specious," as we have no more evidence about the duration of vaccine immunity. Worse yet for MSU's position, scientists estimate the length of vaccine-induced immunity *based upon their observations about the durability of natural immunity*. (Joint Decl. ¶ 23). The CDC provides no evidence or studies to refute the extraordinary amount of evidence establishing that a COVID-19 infection creates immunity to the virus at least as robust, durable, and long-lasting as that achieved through vaccination. (Noorchashm Decl. ¶¶ 14-17, 37; Joint Decl. at ¶¶ 15-24).[4]

The State of Michigan's public policy has also traditionally reflected that it lacks any interest in vaccinating persons for a disease to which they carry antibodies. For instance, Michigan's law passed by the state legislature mandating the vaccination of school children *explicitly exempts* from the requirements those who can demonstrate existing immunity through serological testing that measures immunity. MICH. ADMIN. CODE R. 325.176 (2021). It is difficult to see even the rational basis for a merely administrative Directive that lacks a natural-immunity exemption where the State permits such an exception from public-school vaccine requirements.

Not only does MSU lack interest in requiring naturally immune employees to receive a COVID-19 vaccine, but Defendants cannot show that the Directive is narrowly tailored to any compelling governmental goal. Any interest that MSU may have in promoting immunity on campus does not extend to those employees who already have natural immunity—particularly those who can demonstrate such immunity through antibody screenings.

[4] *See* Complaint ¶¶ 116-17.

By failing to tailor its Directive to only those individuals who lack immunity, MSU forces employees, such as Plaintiff, who have robust natural immunity, to choose between their health, their personal autonomy, and their careers.

The Government is likely to argue that vaccine mandates are permitted under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in which the Court held that a city could fine people who refused to get a vaccine for smallpox. *Jacobson*, however, differed in several crucial respects. The penalty for declining the smallpox vaccine was a one-time, $5 fine, about $146 in today's currency. *See The Inflation Calculator*, https://westegg.com/inflation/infl.cgi?money=5&first=1905&final=2020 (last visited Aug. 4, 2021). It is certainly very different from the punishment here, which imposes permanent damage to Plaintiff's career and her livelihood, upon which her family relies.

Moreover, in *Jacobson*, the city was held to have established a cognizable and compelling interest in mandating the vaccine. While Jacobson had a rational fear due to a vaccine injury he had suffered as a child, Jacobson *had not consulted a doctor and did not have natural immunity*.[5] Moreover, the smallpox vaccine was highly effective at preventing spread of a disease that was *killing approximately 30%* of those infected and disfiguring a large proportion of survivors. *See Smallpox*, WIKIPEDIA, *available at* https://en.wikipedia.org/wiki/Smallpox (last visited Aug. 2, 2021). Surely, courts recognize that the government must have *some* legitimate interest before it can mandate vaccines. For instance, if a state actor required all employees be injected with saline solution, courts undoubtedly would consider those employees' rights to bodily autonomy to prevail over such a policy, since no interest in enforcing it would exist.

[5] James Stoner, "Vaccination, the Law, and the Common Good," *Law and Liberty* (Aug. 26, 2021), *available at* https://lawliberty.org/vaccination-the-law-and-the-common-good/ (last visited Aug. 27, 2021).

Here, Plaintiff possesses natural immunity, so neither she nor the community would benefit from her receiving the vaccine. Moreover, as discussed, it is evident that the COVID-19 vaccines are less effective at preventing infection (and thereby spread of the disease) than natural immunity is at preventing re-infection, and the disease has a significantly lower infection fatality rate. Indeed, *Jacobson itself* recognized that "it is easy, for instance, to [imagine] the case of an adult who is embraced by the mere words of the act," but where administering the mandated vaccination to such an adult, with a "*particular condition of his health or body*[,] *would be cruel and inhuman.*" (emphasis added). 197 U.S. at 38.[6] That is precisely the situation presented here: accordingly, even *Jacobson* militates in Plaintiff's favor. Medically unnecessary interventions are inhumane interventions.

It should also be noted that Justice Holmes later used the ruling in *Jacobson* to justify the holding in *Buck v. Bell*, a decision infamous as it upheld a Virginia law permitting the forced sterilization of mentally ill women. 274 U.S. 200 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."). While that egregious precedent alone does not invalidate *Jacobson*, the fact that we now recognize forced

[6] From that perspective—avoiding what would otherwise be "cruel and inhuman" coercion, *Jacobson*'s $5 fine served merely to test whether a potential vaccine recipient truly harbored a well-founded fear that taking the vaccine could worsen his or her health. (Compare to the reason why insurance companies require co-pays; they demand that patients share healthcare costs with insurers and thus do not overuse medical services.) But the consequences that Plaintiff faces here for noncompliance are not remotely on the order of paying to MSU a less than $150 fee in today's dollars designed to disincentivize irrational refusals to get vaccinated. Plaintiff's desire to avoid taking the vaccine is objectively more than well-founded; indeed, it is the better view of the state of the science. MSU's mandate thus crosses the line over into the "cruel and inhuman" constitutional territory into which *Jacobson* dared not tread. This is why Dr. Noorchashm sees the issues presented by this case as deeply implicating medical ethics. (Noorchashm Decl. ¶¶ 8-42).

sterilization crosses *Jacobson*'s line into "cruel and inhuman" territory certainly should give pause to those advocating for a broader reading of *Jacobson* or, worse yet, to those advocating that *Jacobson* resolved, for all time, any and every legal dispute about mandatory-vaccination policies of any stripe. For no less than Justice Holmes thought that the power to forcibly sterilize flowed directly from the logic of *Jacobson*. ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . . Three generations of imbeciles are enough."). *Buck* cannot possibly still be good law, and if *Jacobson* dictated the outcome in *Buck*, then *Jacobson* is also far from unimpeachable precedent.

Nor is the holding in *Klaassen*, 2021 WL 3073926 (order denying preliminary injunction), another case that opposing counsel is likely to cite as resolving the matter in MSU's favor, persuasive here. That was a case in which several student plaintiffs challenged Indiana University's vaccine mandate. But the question of natural immunity was not a significant issue in *Klaassen*. Although one student alleged his natural immunity should exempt him from the university's vaccine mandate, the issue was not litigated extensively, and there was no expert testimony as to the additional harms that the vaccine could cause him, rendering that case distinguishable from this one. *See id.* at 27.

Moreover, that *Klaassen* was brought on behalf of students, not university employees, implicates a different set of issues. Both the District Court and Court of Appeals' decisions addressed the fact that students are often required to provide proof of vaccination, and to follow various rules and procedures as a condition of enrollment and attendance. *See Klaassen v. Trustees of Indiana Univ.*, No. 20-2326, 2021 WL 3281209 (7th Cir. August 2, 2021) (affirming denial of preliminary injunction); *see also Klaassen*, 2021 WL 3073926 at *45-46. Finally, there is a fundamental difference, on the one hand, between students having to enroll in a different university

and, on the other, terminating an existing employee who refuses to undergo an unnecessary medical procedure that poses a risk of harm to her.

The paucity of any legitimate rationale whatsoever for forcing Plaintiff to receive the vaccine, juxtaposed with the lack of medical necessity and infringement upon her bodily autonomy and liberty interests, establishes that she has a substantial likelihood of prevailing on the merits as to this claim.

2. MSU's Directive Constitutes an Unconstitutional Condition, Burdening Plaintiff's Enumerated Rights by Coercively Withholding Benefits If She Exercises Them

Unconstitutional conditions case law often references the existence of varying degrees of coercion. According to that body of law, MSU cannot impair Plaintiff's right to refuse medical care through subtle forms of coercion any more than it could through an explicit mandate. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) ("[U]nconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."); *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (holding unconstitutional a state residency requirement impinging on the constitutionally guaranteed right to interstate travel, in the absence of a compelling state interest).

The Due Process Clause of the Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law …." U.S. Const., amend. XIV, sec. 1. Plaintiff possesses both a liberty interest in her bodily integrity and a property interest in her career. *See Perry v. Sinderman*, 408 U.S. 592, 597 (1972) (explaining that it was impermissible for a college to "refuse[] to renew the teaching contract … as a reprisal for the exercise of constitutionally protected rights."). Often less appreciated in legal circles is that, to prevail, unconstitutional conditions claims do not need to establish that a challenged government policy

amounts to coercion. Instead, it is sufficient that the challenged state policy burdens a constitutional right by imposing undue pressure on an otherwise voluntary choice with a nexus to the exercise of a constitutional right. This is especially true when a government actor couples an unconstitutional condition with a procedural system stacked against the right-holder.

For example, in *Speiser v. Randall*, 357 U.S. 513 (1958), the Court invalidated a loyalty oath imposed as a condition for veterans to obtain a state property tax exemption, even though (a) California citizens were not required to own real property, of course; (b) California veterans could freely opt *not* to seek the exemption and simply pay the unadorned tax; and (c) California was not even obligated to provide veterans with the exemption but rather the exemption was a mere privilege. The *Speiser* Court deemed the oath condition unconstitutional in part because the burden to establish qualification for the exemption was placed on applicants. *See id.* at 522. The question the Supreme Court saw itself deciding was "whether this allocation of the burden of proof, on an issue concerning freedom of speech, falls short of the requirements of due process." *Id.* at 523.

> The Court answered that question by stating the guiding principle that
>
> > Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance …. [For] Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.

Id. at 525-26.

Here, the unconstitutional conditions doctrine and due process rights *combine* to invalidate the Directive. MSU has not and cannot show that Plaintiff being forced to take the vaccine reduces any risk that she will become infected with and spread the virus to MSU students and personnel.

See also Lawrence v. Texas, 539 U.S. 558, 562 (2003) (Due Process Clause protects "liberty of the person both in its spatial and in its more transcendent dimensions.").

Similar to the California law in *Speiser*, which "create[d] the danger that … legitimate utterance will be penalized," 357 U.S. at 526, the process MSU has established in relation to taking COVID-19 vaccines poses dangers to Plaintiff's health (and thus to her liberty interests) as well as threatening her with various forms of penalties and other detriments (which impinge on her property interests). Indeed, more so than in *Speiser*, the factual issues involved in this case are complex. As *Speiser* asks: "How can a claimant … possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly." *Id.* There is perhaps no better encapsulation than this by the Supreme Court of how unconstitutional conditions doctrine and Due Process intersect. *See also id.* at 529 ("The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech."). Michigan State similarly possesses no compelling interest that could justify its flawed Directive that, without due process, will inevitably result in at least some unwarranted medical intrusions into the bodies of members of the MSU community.

Perhaps nowhere is this more apparent than in MSU's unsubstantiated statement that those who have previously contracted COVID-19 must receive the vaccine because it provides "additional protection." (Attachment G). Drs. Bhattacharya and Dr. Martin Kulldorff easily pierce this thin assertion via their assessment of the CDC's similar claim and the recent Kentucky study, as failing to "address any of scientific evidence we have provided in our declaration, herein, about the lack of necessity for recovered COVID patients to be vaccinated." (Joint Decl. ¶ 38). The doctors also note that even the CDC website acknowledges that "[w]e don't know how long

protection lasts for those who are vaccinated." (Joint Decl. ¶ 41). Furthermore, this webpage "help[s] people understand that it is safer to attain immunity against SARS-CoV-2 infection via vaccination rather than via infection. This is a point not in dispute. Rather, the question is whether someone who already has been infected and recovered will benefit on net from the additional protection provided by vaccination. On this point, the CDC's statement in its FAQ is non-responsive, and ignores the scientific evidence." (Joint Decl. ¶ 42).

Additionally, by formulating a Directive without bothering to cite any science whatsoever—though readily understandable on MSU's part, since no such science exists—MSU is saying that even though strong scientific data supports Plaintiff's claims to durable natural immunity, she must prove her position at the level of 100% certainty, which is impracticable and amounts to MSU's imposing an irrebuttable presumption that no one with even robust natural immunity is eligible for a medical exemption. This sort of irrebuttable presumption also violates Plaintiff's rights to procedural due process of law. *See Wieman v. Updegraff*, 344 U.S. 183, 190 (1952) ("If the rule be expressed as a presumption of disloyalty, it is a conclusive one.") (invalidating the state action being challenged). Moreover, no vaccine recipient is held to such a standard, and the evidence accumulates every day that those who have received the vaccine—especially some months ago—are *not* immune to infection.

For these reasons, MSU cannot constitutionally flip the burden of proof and require Plaintiff to establish that it is safe for her to perform her work. By setting up such a process, the Directive boils down to a concurrent procedural due process of law violation coupled with an

unconstitutional condition burdening Plaintiff's liberty interest in remaining free of unwanted medical interventions.

Speiser also rests on the mismatch between the loyalty oath California required and the grant of a property tax exemption to veterans. "[T]he State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran." *Id.* at 528. In this situation, there is an equally jarring logical incongruity. MSU's Directive is terse. It offers no justifications for why the penalties and other restrictions it establishes are appropriate and tailored to members of the University community who have acquired robust natural immunity. Whatever MSU is trying to decree through its unconstitutional-conditions sleight of hand, Plaintiff remains a University community member with natural immunity as a matter of pre-Directive fact (just as the *Speiser* petitioners remained veterans as a matter of pre-tax-law fact). And the existence of such immunity fully serves the purposes of the public-health protection that MSU claims to be pursuing. *See Perry*, 408 U.S. at 597 (holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"); *Updegraff*, 344 U.S. at 192 ("We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."); *see also id.* at 191 ("Indiscriminate classification of innocent with [prohibited] activity must fall as an assertion of arbitrary power" and thus "offends due process.").

The proportionality of the Directive is also deficient because it does not seek to assess the current antibody levels of its targets, something that is it is now feasible for medical science to

test.[7] For the Directive is not a mere presumption that vaccination is superior to natural immunity (a contention that would have to be borne out by the science in any event or else MSU had no business adopting its Directive) that Plaintiff can try to overcome. Rather, the Directive amounts to *a conclusive presumption* and thus a procedural due process of law violation that vaccination (even as to vaccines of far-lesser efficacy) is required unless the risks of the vaccine to a particular recipient warrant a special exception. But what if Plaintiff and others with natural immunity possess equal or higher levels of antibodies than many of those who took one or more of the various inferior vaccines? And why has MSU deemed all vaccines to be equally protective in the fictitious presumption it has established? Finally, is there any scientific basis for the presumptions MSU has built into its Directive? The Directive answers none of these questions. It does not even try.

For these reasons, the *de facto* presumptions the Directive establishes become another part of MSU's procedural due process of law violations that run afoul of unconstitutional conditions doctrine. In short, allocating burden of proof responsibility to those with natural immunity like Plaintiff, coupled with MSU's stacking the process with presumptions that Plaintiff has shown are scientifically unwarranted, contravene the Due Process Clause. *See Perry v. Sinderman*, 408 U.S. 592, 597 (1972) (holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"); *Updegraff*, 344 U.S. at 192 ("[C]onstitutional

[7] Such antibody testing was not feasible more than a century ago when *Jacobson* was decided, as diagnostic antibody testing was not invented until the 1970's. *See also The history of ELISA from creation to COVID-19 research*, MOLECULAR DEVICES, *available at* https://www.moleculardevices.com/lab-notes/microplate-readers/the-history-of-elisa (last visited Aug. 1, 2021).

protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory").

3. MSU's Policy Is Preempted by the Federal EUA Statute and Thus Barred by the United States Constitution's Supremacy Clause

a. **The EUA Statute Preempts MSU's Directive**

Defendants' Directive requires Plaintiff to receive a vaccine to continue working for MSU without regard to her natural immunity or the advice of her doctor. She is threatened with disciplinary action if she declines to comply with these arbitrary mandates. The Directive thus coerces or, at the very least, unduly pressures Plaintiff into getting vaccines that FDA approved only for emergency use.

The United States Constitution and federal laws are the "Supreme Law of the Land" and supersede the constitutions and laws of any state. U.S. Const. art. VI, cl. 2. "State law is pre-empted to the extent that it actually conflicts with federal law." *English v. General Elec. Co*., 496 U.S. 72, 79 (1990) (internal citations and quotation marks omitted). Federal law need not contain an express statement of intent to preempt state law for a court to find any conflicting state action invalid under the Supremacy Clause. *See Geier v. American Honda*, 520 U.S. 861, 867-68 (2000). Rather, federal law preempts any state law that creates "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399-400 (2012).

The federal EUA statute mandates informed and voluntary consent. *See John Doe No. 1 v. Rumsfeld*, No. Civ. A. 03-707(EGS), 2005 WL 1124589, *1 (D.D.C. Apr. 6, 2005) (allowing use of anthrax vaccine pursuant to EUA "on a *voluntary* basis"). *See also* 21 U.S.C. § 360bbb-3(e)(1)(A)(ii). It expressly states (with emphasis) that recipients of products approved for use under it be informed of the "*option to accept or refuse administration*," and of the "significant

known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown." *Id.*

That the Pfizer Comirnaty Vaccine has received full approval does not foreclose this argument since this approval does not extend to the Pfizer BioNTech, the vaccine that is actually available at present. Indeed, even Pfizer acknowledges that the two vaccines are "legally distinct." (Attachment C). The claim that the two vaccines are interchangeable comes from a mere Guidance document, which does not carry force of law and which is contradicted by Pfizer's own reissuance letter. *See Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."); *Appalachian Power v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). *See also Drive Farms Ltd. v. Vilsack*, 781 F.3d 837, 857 (6th Cir. 2015) (instructing USDA to carefully consider on remand whether its approach to the term "prior-converted wetlands" ran afoul of *Appalachian Power*). Pfizer cannot convert a legally distinct product (the BioNTech) into a fully approved vaccine (the Comirnaty).

Moreover, Pfizer states that there "is not sufficient approved vaccine available for distribution to this population in its entirety at the time of the reissuance of this EUA." (Attachment C). And because Comirnaty, the only fully FDA-approved vaccine, is not widely available, and certainly not to all members of the population, per the manufacturer's own admission, the force of Plaintiff's preemption argument under the EUA statute remains nearly as strong as it was prior to Comirnaty's approval.

Since MSU's Directive (a state program) coerces Plaintiff by premising enjoyment of her statutorily protected consent rights contingent upon receiving an experimental vaccine, it cannot

be reconciled with the letter or objectives of the EUA statute. *See* 21 U.S.C. § 360bbb-3. The conflict between the Directive and the EUA statute is particularly stark given that the statute's informed consent language requires that recipients be given the "option to refuse" the EUA product. That is at odds with the Directive's *forcing* Plaintiff to sustain significant injury to her career if she does not want to take the vaccine. Put differently, the Directive frustrates the objectives of the EUA process. *See Geier*, 520 U.S. at 873 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

b. The OLC Opinion Cannot Save MSU's Directive from Preemption

The Department of Justice's Office of Legal Counsel ("OLC") made a memorandum available to the public on July 27, 2021 (dated July 6, 2021) opining that the EUA status of a medical product does not preclude vaccine mandates that might be imposed by either the public or private sectors. *See* "Memorandum Opinion for the Deputy Counsel to the President," *Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization* (July 6, 2021) (OLC Op.) at 7-13, *available at* https://www.justice.gov/olc/file/1415446/download (last visited Aug.1, 2021).

Of course, separation of powers dictates that this Court is not bound by the OLC Opinion—an advisory opinion written by the Executive Branch for the Executive Branch. *See Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 249 F.R.D. 1 (D.C. Cir. 2008) ("OLC opinions are not binding on the courts[; though] they are binding on the executive branch until withdrawn by the Attorney General or overruled by the courts[.]") (cleaned up). Relatedly, the Justice Department until recently took a very different approach. *See* Attorney General Memorandum, *Balancing Public Safety with the Preservation of Civil Rights* (Apr. 27, 2020), *available at* https://www.justice.gov/opa/page/file/1271456/download (last visited Aug. 1, 2021,

2021) ("If a state or local ordinance crosses the line from an appropriate exercise of authority to stop the spread of COVID-19 into an overbearing infringement of constitutional and statutory protections, the Department of Justice may have an obligation to address that overreach in federal court.").

Moreover, the OLC Opinion is entirely silent on the issue of preemption. As such, it does not offer a persuasive legal view as to whether the MSU Policy is preempted by the EUA statute or not. The OLC Opinion is also premised on faulty reasoning. While recognizing that EUA products have "not yet been generally approved as safe and effective," and that recipients must be given "the option to accept or refuse administration of the product," the Opinion nevertheless maintains that EUA vaccines can be mandated. OLC Op. at 3-4, 7.

According to OLC, the requirement that recipients be "informed" of their right to refuse the product does not mean that an administrator is precluded from mandating the vaccine. All that an administrator must do, in OLC's view, is tell the recipient he or she has the *option* to refuse the vaccine. *Id.* at 7-13. That stunted interpretation sidesteps the fact that the Policy's employment consequences effectively coerce or at least unconstitutionally leverage the MSU community into taking the vaccine, reducing to nothingness both the constitutional and statutory rights of informed consent. This approach of stating the obvious but ignoring competing arguments is likely why the Opinion remained mum on the doctrine of preemption.

Recognizing the illogic of the Opinion and its inability to square its construction with the text of the EUA statute, OLC admits that its "reading … does not fully explain why Congress created a scheme in which potential users of the product would be informed that they have 'the option to accept or refuse' the product." *Id.* at 10. This understatement would be droll but for the serious rights at stake. OLC's obtuse reading of the statute blinks reality.

In other words, nothing in the OLC Opinion addresses the fact that if it were taken as a blanket authorization for state and local governments to impose vaccine mandates, a vital portion of the EUA statute's text would be superfluous. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (cleaned up).

Yet, OLC turns around and claims that Congress would have explicitly stated if it intended to prohibit mandates for EUA products. *Id.* at 8-9. But Congress *did* say so. The plain language states that the recipient of an EUA vaccine must be informed "of the option to accept or refuse the product." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii). Especially when read against the backdrop of what the Constitution requires *and* against the common law rules from which the constitutional protections for informed consent arose, Congress's intent to protect informed consent is pellucid. *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) (Congress "is understood to legislate against a background of common-law … principles.").

The EUA statute's prohibition on mandating EUA products is reinforced by a corresponding provision that allows the President, in writing, to waive the option of those in the U.S. military to accept or refuse an EUA product if national security so requires. 10 U.S.C. § 1107a(a)(1). That provision would be redundant if consent could be circumvented merely by telling a vaccine recipient that he or she is free to refuse the vaccine but would nonetheless encounter various adverse consequences that violated unconstitutional conditions doctrine.

OLC spins out a tortured argument under which the President's waiver would merely deprive military members of their rights to *know* that they can refuse the EUA product—rather than waiving their rights to actually refuse the product. OLC Op. at 14-15. This strained reading

runs counter to the Department of Defense's understanding of this statutory provision. As the OLC Opinion acknowledges, "DOD informs us that it has understood section 1107a to mean that DOD may not require service members to take an EUA product that is subject to the condition regarding the option to refuse, unless the President exercises the waiver authority contained in section 1107a." *Id.* at 16 (citing DOD Instruction 6200.02, § E3.4 (Feb. 27, 2008)).

OLC even acknowledges that its opinion is belied by the congressional conference report, which also contemplated that 10 U.S.C. § 1107a(a)(1) "would authorize the President to waive *the right of service members to refuse administration of a product* if the President determines, in writing, that affording service members the right to refuse a product is not feasible[.]" *Id.* (quoting H.R. Rep. No. 108-354, at 782 (2003) (Conf. Rep.)).

Unlike OLC, this Court must not ignore the plain statutory prohibition on mandating EUA products. Though released to much fanfare in the media, the Court should discount the severely flawed OLC Opinion in its entirety, affording it no weight in this litigation.

* * *

Defendants' Policy is thus preempted by federal law. *See* U.S. Const. art. VI, cl. 2; *see also Kindred Nursing Ctrs. Ltd P'ship v. Clark*, 137 S. Ct. 1421 (2017) (holding that Federal Arbitration Act preempted incompatible state rule); *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1297 (2016) ("federal law preempts contrary state law," so "where, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" the state law cannot survive).[8]

[8] For similar reasons, the Directive violates the 1947 Nuremberg Code, a multilateral agreement between the United States, USSR, France, and the United Kingdom, governing human experimentation and inspired, of course, by events that took place in Nazi Germany. The

C. Plaintiff Will Suffer Irreparable Harm Absent a Preliminary Injunction

To satisfy the irreparable harm requirement, Plaintiff need only demonstrate that absent a preliminary injunction, she is "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (citation omitted). "A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 550 (6th Cir. 2007). The deprivation of a constitutional right, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Either Plaintiff gives into MSU's coercion and receives the vaccine, forcing her to endure infringement of her bodily autonomy, mental distress, and potential injury to her health, or she faces the threat of disciplinary action and harm to her career and all the related property interests therein. As discussed at length above, both options constitute violations of Plaintiff's Ninth and Fourteenth Amendment rights. *See Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F.Supp.3d 758 (M.D. Tenn. 2015) ("When an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary."); *Jessen v. Village of Lyndon Station*, 519 F. Supp, 1183, 1189 (W.D. Wis. 1981) (finding irreparable injury where plaintiff stood to lose a property right without due process).

Likewise, a preliminary injunction is needed to protect Plaintiff from the unconstitutional conditions MSU's Directive has placed upon her. *See Alliance for Open Soc. Int'l., Inc. v. USAID*, 651 F.3d 218 (2d Cir. 2011) (upholding grant of preliminary injunction in unconstitutional

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Nuremberg Code expressly states that "[t]he *voluntary* consent of the human subject is *absolutely essential*" (emphasis added) and prohibits experimental treatments on anyone using "force, fraud, deceit, duress, overreaching, or other ulterior forms of constraint or coercion." The Directive likewise violates the Helsinki Declaration. *See* Compl. at ¶ ¶ 192-193.

conditions case). A preliminary injunction is also warranted to protect Plaintiff's statutory rights, which are being infringed upon by a Directive that is preempted by federal law. *See Edgar v MITE Corp.*, 457 U.S. 624 (1982) (affirming in case where lower court had issued preliminary injunction against a state statute allegedly preempted by federal law); *National Steel Corp. v. Long*, 689 F. Supp. 729 (W.D. Mich. 1988) (noting that preliminary injunction was initially entered in preemption case).

Accordingly, MSU's Policy constitutes a direct and unequivocal infringement upon Plaintiff's constitutional rights, and she need make no additional showing to establish irreparable injury.

D. The Balance of Equities (Including the Public Interest) Weighs Heavily in Plaintiff's Favor

A preliminary injunction is proper when "the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken*, 556 U.S. at 435.

"[T]here is a strong public interest in requiring that the plaintiffs' constitutional rights no longer be violated[.]" *Laube v. Haley*, 234 F. Supp. 2d 1227, 1252 (M.D. Ala. 2002); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Republican Party of Minn. v. White*, 416 F.3d 738, 753 (8th Cir. 2005) ("It can hardly be argued that seeking to uphold a constitutional protection ... is not per se a compelling state interest."); *Rodriquez*, 155 F. Supp.3d at 771 ("enforcing constitutional rights serves the public interest and the Court does not find such an obvious point to require much more explanation.").

On the other hand, MSU has no interest whatsoever in forcing Plaintiff to get vaccinated, as discussed at length above.

MSU's Directive is unconstitutional and thus the balance of equities weighs heavily in favor of the preliminary injunction.

III. CONCLUSION

For the reasons set out above, the Court should enter a preliminary injunction against MSU's Directive. A form of order is attached as an exhibit to the preliminary injunction motion.

August 27, 2021

Respectfully submitted,

/s/ Jenin Younes
Jenin Younes
Litigation Counsel
Jenin.Younes@ncla.legal
Admission to this Court forthcoming
* Admitted only in New York. DC practice limited to matters and proceedings before United States courts and agencies. Practicing under members of the District of Columbia Bar.

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Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIV. L. R. 7.2(a)&(b)

I hereby certify that this Brief contains 10,800 words, as produced by and counted by the Microsoft Word Office 365 software.

/s/ Jenin Younes

EXHIBIT 5

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Public Health Service

Centers for Disease Control
and Prevention (CDC)
Atlanta GA 30333

November 05, 2021

SENT VIA EMAIL

Elizabeth Brehm
Attorney
Siri & Glimstad
200 Park Avenue, 17th Floor
New York, New York 10166
foia@sirillp.com

2nd Letter Subject: Final Response Letter

Dear Ms. Brehm:

The Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) received your September 02, 2021, Freedom of Information Act (FOIA) request on September 02, 2021, seeking:

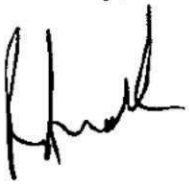
> "Documents reflecting any documented case of an individual who: (1) never received a COVID-19 vaccine; (2) was infected with COVID-19 once, recovered, and then later became infected again; and (3) transmitted SARS-CoV-2 to another person when reinfected."

A search of our records failed to reveal any documents pertaining to your request. The CDC Emergency Operations Center (EOC) conveyed that this information is not collected.

You may contact our FOIA Public Liaison at 770-488-6277 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Deputy Agency Chief FOIA Officer, Office of the Assistant Secretary for Public Affairs, U.S. Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, Suite 729H, Washington, D.C. 20201. You may also transmit your appeal via email to FOIARequest@psc.hhs.gov. Please mark both your appeal letter and envelope "FOIA Appeal." Your appeal must be postmarked or electronically transmitted by February 03, 2022.

Sincerely,



Roger Andoh
CDC/ATSDR FOIA Officer
Office of the Chief Operating Officer
Phone: (770) 488-6399
Fax: (404) 235-1852

#21-02152-FOIA

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEANNA NORRIS, on behalf of herself and all others similarly situated,

Plaintiffs,

v. CASE NO: 1:21-CV-756

PRESIDENT SAMUEL L. STANLEY, JR., in his capacity as President of Michigan State University; DIANNE BYRUM, in her official capacity as Chair of the Board of Trustees, DAN KELLY, in his official capacity as Vice Chair of the Board of Trustees; and RENEE JEFFERSON, PAT O'KEEFE, BRIANNA T. SCOTT, KELLY TREBAY, and REMA VASSAR in their official capacities as Members of the Board of Trustees,

Defendants.

---/

* * * *

HEARING on MOTION FOR PRELIMINARY INJUNCTION

* * * *

BEFORE: THE HONORABLE PAUL L. MALONEY
United States District Judge
Kalamazoo, Michigan
September 22, 2021

APPEARANCES:

APPEARING ON BEHALF OF THE PLAINTIFFS:

HARRIET M. HAGEMAN
Hageman Law
222 East 21st Street
Cheyenne, Wyoming 82001

JENIN YOUNES
New Civil Liberties Alliance
1225 19th Street, N.W., Suite 450
Washington, DC 20036

APPEARING ON BEHALF OF THE DEFENDANTS:

ANNE RICCHIUTO
STEPHANIE L. GUTWEIN
Faegre Drinker Biddle & Reath, LLP
300 North Meridian Street, Suite 2500
Indianapolis, Indiana 46204,

I N D E X

E X H I B I T S

Kalamazoo, Michigan

September 22, 2021

at approximately 9:08 a.m.

PROCEEDINGS

09:08:39 THE COURT: This is File Number 21-756; Jeanna Norris vs. Samuel Stanley, Jr., et al. This matter is before the Court on the plaintiff's motion for a preliminary injunction.

The record should reflect that the plaintiff is 09:08:58 represented by Attorneys Younes and Hageman. The defendants are represented by Attorneys Ricchiuto and Gutwein.

The Court is ready to proceed. I understand the plaintiff has some proofs for this morning.

MS. HAGEMAN: Yes, your Honor.

09:09:14 THE COURT: Good morning.

MS. HAGEMAN: Good morning, your Honor. How are you today?

THE COURT: I'm fine.

MS. HAGEMAN: Wonderful. It's wonderful to be back 09:09:20 in --

THE COURT: Beautiful day in west Michigan.

MS. HAGEMAN: It's wonderful to be back in western Michigan. I used to practice here in the early 1990s with the law firm of Smith, Haughey, Rice, and Roegge out of 09:09:33 Grand Rapids. And so it's good to be back in Michigan and

in front of you today.

Before we begin, your Honor, I would like to quickly memorialize and seek approval from the Court of the arrangement that defense counsel and I have entered into in terms of how we plan to proceed today, just so that everybody has a road map of what we are going to do.

09:09:44

The parties have agreed that each side will have one and a half hours to present our arguments. I am going to provide a few introductory remarks teeing up our first witness, our only witness, which will be the preeminent immunology doctor, Dr. Hooman Noorchashm, to testify on just a couple of medical issues. Our examination will be counted against our time and defendants' cross examination of Dr. Noorchashm, if any, will be counted against their time.

09:10:00

09:10:17

I will then present plaintiff's legal argument preserving approximately 15 minutes of our time for rebuttal to defendants' argument, and then the defendants will present their case. And again, to the extent that they call any witnesses, that will be counted against their time and our cross examination would be counted against ours. And then I would like to provide a brief rebuttal to defendants' arguments after that.

09:10:33

We hope that this meets with the Court's approval, and if so, I will proceed.

09:10:46

THE COURT: Okay. Counsel for the defendants

agreed?

MS. RICCHIUTO: Yes, your Honor.

THE COURT: That's fine with me. Go ahead.

MS. HAGEMAN: Wonderful. There is just a few remarks I would like to make to frame up the information that we will be providing today. First of all, I would like to start by introducing plaintiff, Jeanna Norris, who is here in the courtroom with us. And I also want to introduce my colleague, Jenin Younes. Dr. Hooman Noorchashm is also with us today.

Second, I'd just like to talk about a few of the legal constructs that we will be addressing. The preliminary injunction issue has been briefed extensively, and because we have limited time today, we will not have time to address every single claim or argument that we have raised or that we have brought in opposition to some of the arguments brought through by the defendants. We stand on our briefs and we do not waive any of the arguments that we have made.

Your Honor, and to frame this case, it is important that I think that we lay down a few markers. First of all, the overall -- the overarching issue in this lawsuit is whether the government, MSU in this case, Michigan State University, has the legal authority to force those individuals who are already immune from COVID-19 to be

vaccinated against it. That is the overall case that we have brought against MSU. But the issue before the Court today is more narrowly tailored, and it's whether a preliminary injunction should be issued to protect the status quo and plaintiff's constitutional right to bodily integrity and autonomy while this case is pending before this Court. This case, and especially this motion, are thus not about whether the COVID vaccines are good or bad. We, in fact, agree that the development and roll out of the vaccines have been a resounding success. We are not arguing otherwise.

With that framework in mind, it is important to emphasize and reiterate defendants' stated goal for adopting the vaccine mandate at issue here. According to MSU, the purpose of the vaccine mandate is to keep people safe from COVID-19 on MSU's campuses. That is a laudable goal, and one with which we agree. The focus is thus on immunity, which only makes sense. We don't vaccinate for the sake of vaccination, we vaccinate for the purpose of minimizing the incidents and severity of particular diseases. But if there are other mechanisms by which that purpose is achieved, then government-mandated vaccines run afoul of our Constitutional liberties. In short, MSU, while keeping its campuses safe, does not lead down binary of vaccinated versus non-vaccinated; it leads us down the road of immune versus

non-immune. Regardless of the mechanism by which we reach immunity.

With that understanding, we ask this Court to focus on the constitutional questions at hand. Plaintiff's constitutional right to bodily autonomy, and focusing primarily on Jacobson and subsequent cases, we will demonstrate that the constitutional balancing test that you must apply today actually lands in favor of Jeanna Norris. We will also focus on the proper standard of reviewing, which we believe is absolutely strict scrutiny, and we will explain why. We need to look at the scope of defendants' police power to adopt and enforce such a mandate against naturally immune employees. We need to look at the legal constraints on MSU's ability to adopt its vaccine mandate, and the fact that it's a mandate here represents an unconstitutional condition.

I'm going to briefly address preemption and the proper balancing of interest between the parties. And with that framework before the Court, at this point I will turn this over to Ms. Younes to call Dr. Noorchashm.

Thank you, your Honor.

THE COURT: Thank you, counsel.

You may call your witness, counsel.

MS. YOUNES: Thank you. Your Honor, I would like to call Dr. Noorchashm to the stand.

THE COURT: Doctor, please step forward and be sworn.

HOOMAN NOORCHASHM,

was thereupon called as a witness herein, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

COURT CLERK: Please be seated.

THE WITNESS: Thank you.

09:15:00 COURT CLERK: State your full name and spell your last name for the record, please.

THE WITNESS: My first name is Hooman. My last name Noorchashm, spelled N-o-o-r-c-h-a-s-h-m.

DIRECT EXAMINATION

09:15:11 BY MS. YOUNES:

Q. Good morning, Doctor.

A. Good morning.

MS. YOUNES: Your Honor, may I approach the witness please?

09:15:19 THE COURT: Indeed.

BY MS. YOUNES:

Q. Doctor, can you identify the document you were just handed?

A. Yes, this is my curriculum vitae.

09:15:38 Q. Can you please summarize the contents, your educational

background, your residency, and your work experience?

A. Sure. It's all detailed here. I earned my Bachelor's degree from the University of Pennsylvania in 1992 I want on to the University of Pennsylvania Medical School. Under an MSTP training grant the medical scientist training grant from the National Institute of Health issued. I earned my Ph.D. in cellular immunology with a focus on other immunity, B-cell and T-cell biology, and subsequently earned an M.D. degree. I joined -- I did a postdoctoral fellowship in immunology at the University of Pennsylvania, and subsequently joined the faculty in immunology there. Followed by a general surgery residency at the Hospital of the University of Pennsylvania, and subsequently a cardiothoracic surgery fellowship at Harvard's Brigham and Women's Hospital. My area of focus, your Honor, was transplantation immunology and cardiothoracic transplantation. I've been on the faculty of the University of Pennsylvania, Harvard Medical School as well as Thomas Jefferson University, and I'm currently in private general practice.

MS. YOUNES: Your Honor, move to have Dr. Noorchashm qualified as an expert in immunology.

THE COURT: Any objection?

MS. RICCHIUTO: Your Honor, we don't object to the extent that, you know, we agree that the doctor's

credentials are what they are. We certainly have some concerns about the admissibility of the opinions that he's rendered under 702 from the perspective whether or not they are generally accepted. So we would like to preserve that objection, but we certainly don't object to him testifying today.

THE COURT: So noted.

You may proceed, counsel.

BY MS. YOUNES:

Q. Dr. Noorchashm, can you explain what immunology is?

A. Yes. Immunology is a branch of biology wherein we study the dynamics of the immune response to foreign antigens, including bacteria, viruses, as well as transplanted organs. There are two branches of the immune system that are critical for our survival adaptive immune response, which includes B-cells and T-cells and the innate immune system, which deals more with generic pathogenic markers.

Q. Have you published any research on these topics?

A. Yes, I have about 60 peer-reviewed publications to my name.

Q. And what is your opinion of the COVID-19 vaccines?

A. Well, I had the good fortune of being at the University of Pennsylvania when mRNA technology was being developed. This was actually quite an unbelievable feat by the

scientists who developed it. Initially the scientists got a lot of push back because it was such an unusual phenomenon to use mRNA as an antigen. And my opinion of this vaccine is that it's one of the most effective vaccines we have ever made, and every American should be very proud of this accomplishment. To have created these vaccines in under a year is something we should all be very proud of. I also believe that these vaccines are reasonably safe, that the benefits of vaccination in non-immune people far outweigh the risks of vaccine. I think the vaccines are a very important part of our fight against COVID-19.

Now, I would say, your Honor, that one thing we are doing here that is absolutely unprecedented with this vaccine is we are deploying it in the midst of a pandemic, where literally millions of people have contracted the disease. Now, the only other times we have done that has been during the smallpox pandemic as well as the polio pandemic. In both of those cases we were not, very specifically, not vaccinating people who had previously been infected. So back in the early 1900s, we had smallpox, we were not vaccinating people with previous infections for very specific reasons, and that is that those folks, conventional wisdom as well as professional expertise of immunologists, tell us those people are very robustly immune.

Q. Can you explain the concept of naturally acquired immunity?

A. Yes. Naturally acquired immunity is a term of definition. It essentially refers to a natural pathogen such as a virus or a bacteria activating the B-cells and T-cells in an antigen specific way. So when the body encounters a virus, for example, B-cells and T-cells become activated and collaborate with one another to generate what's called IGG antibodies. The IGG antibodies were the main readout for the clinical trials that demonstrated efficacy. So these antibodies are pathognomonic, if you will, or diagnostic of immunity. And both natural immunity as well as vaccine induced those T-cells and B-cells into activation to make antibodies. Now, one of the remarkable things about the COVID-19 vaccine is that the reason why we even have this vaccine, your Honor, is that we knew the public health officials scientists knew that natural infection actually is protective. There are, in fact, viruses such as the human immunodeficiency virus, the HIV virus, where infection is not protective.

The reason why Operation Warp Speed under the direction of Dr. Fauci and another is Dr. Woodcock, understood that a vaccine would be effective against this pandemic is that natural infection was protective itself. And in fact, that's one of the things that a very prominent

virologist, Dr. Paul Offit have penned, as well as Dr. Fauci himself have said. I think I can quote Dr. Fauci as saying that natural infection is the mother of all vaccinations. That's something that Dr. Fauci has publically said in the past. Certainly Dr. Offit is on the record publically stating that the reason why we made these vaccines and we knew they would work or have a chance of working is that the natural infection immunities. So I don't think we can ignore these facts. These are real scientific and medical facts.

MS. YOUNES: Your Honor, may we approach the witness?

THE COURT: Go ahead.

MS. YOUNES: Your Honor, we move to have this --

BY MS. YOUNES:

Q. Doctor, can you tell us what this paper is?

A. Yes. This is an analysis that was actually just ironically enough it was uploaded onto the medRxiv website today. This is an analysis that my colleagues and I did. It's a literature review and brief meta analysis, if you will, and so I refrain from calling it a full meta analysis because it's not, but it's a review of the literature that we have to date, reviewing nine publications that demonstrate the equivalency of clinical susceptibility to subsequent infection between naturally immune people and

fully vaccinated people.

We also review some of the studies looking back to the susceptibility of clinical disease in citing COVID recovery. So this paper is now in the public domain and is attempted to review as extensively as possible all existing literature.

MS. YOUNES: Your Honor, I move to have this admitted into evidence as Exhibit 2. And also Dr. Noorchashm's CV as Exhibit 1.

THE COURT: Do we have the exhibits marked?

MS. HAGEMAN: I will mark that right now, your Honor.

THE COURT: Okay. Let's do the CV as Number 1 and this latest exhibit is Number 2?

Any objection to Exhibit 2?

MS. RICCHIUTO: No, other than the same objection as previously stated.

THE COURT: All right. Exhibit 2 is received.

BY MS. YOUNES:

Q. Doctor, is there any reason to believe that natural immunity is less long lasting than vaccine-induced immunity?

A. Well, Ms. Younes, I think this is an evolving topic obviously. You know, we already know that the vaccines seem to have quite a dramatic wane rate after about eight months, especially in people who are older. As you know, the FDA

recently approved booster shots in folks who are over 65. So there is certainly a wane rate.

I suspect that the natural immunity also will have a wane rate, however, it's probably -- it's very probably some, based on the fundamentals of immunology, that natural immunity will last at least as long as the vaccine, if not longer. The robustness of natural immune response is something that, I think, the vaccine tries to mimic. And even our most effective vaccines are probably not as effective as the natural infection itself. In fact, some of the vaccines in circulation we already know that are accepted in the United States include the J & J vaccine, which is only about 60 percent effective at its best, the Sinovac vaccine, that's the Chinese version of the vaccine, that's also accepted by MSU and other places, that's about 50 percent effective. So I think, you know, there's certainly going to be a wane rate to vaccine immunity, that there is likely to be a wane rate to natural immunity too, but it's far less likely than it is with the vaccine.

MS. YOUNES: Your Honor, may we approach the witness?

THE COURT: Sure.

BY MS. YOUNES:

Q. Doctor, are you familiar with this document?

A. Yes.

Q. Can you tell us what it is?

A. This is Ms. Norris's serology report, which I ordered for her. I believe that's the one I ordered. Yes.

Q. Can you explain the results?

A. Sure. This is an FDA-approved measure. It's basically the same measure that the clinical trials of COVID-19 vaccination used. It's based on an OIZA (phonetic sp.) analysis where we detect the spike antibody to the SARS-CoV-2. It's essentially the exact same parameter that the clinical trials of vaccination use to demonstrate efficacy. And in this case, it demonstrates that Ms. Jeanna Norris has about seven times baseline levels of the spike antibody. In my experience, the value of naturally immune patients serologies, Ms. Norris's range is actually above those people, that's sort of my empiric clinical experience documenting these serologies in naturally immune people.

So I think, in my opinion, this is a demonstration that Ms. Norris is quite robustly immune to the virus. In fact, she has antibodies against the Nucleocapsid antibody as well, and I should say -- I should backtrack and say that when a body mounts a response to the whole virus, the whole virus contains 29 proteins, whereas the vaccine only contains one protein. So what you're mounting your response to -- in response to the whole virus is 29 different proteins, so it's a much more diverse and robust response.

And one of the principles of immunology is that the diversity of the immune response gives you the robustness, whereas in the case of the vaccine, it's only one molecule, which is a spike protein.

So, you know, I would say that this value here indicates that Ms. Jeanna Norris is actually quite robustly protected. In fact, my understanding is in conversation with her, about two weeks ago or so, she was in contact with family members who a day later came down with COVID, and she and her husband both were protected from that. They did not acquire COVID even though their entire family did. I think just functionally that is an expected finding that she has this result. Again, I know it's a anecdote, but I think it's a powerful one.

Q. Doctor, what are your -- what, if anything, is your opinion of the risks and benefits of vaccinating people who have naturally acquired immunity?

A. Well, I think it's important for us to consider what we mean by safety. I think the COVID-19 vaccine is reasonably safe, and that means that the benefits of this vaccine outweigh the potential risks. We all know that, just like any other medical procedure, this vaccine has risks involved. In fact, there are no medicines that have no risks. This vaccine definitely has a risk profile. But clearly the risk of a natural infection -- uncontrolled

natural infection far outweighs the risks of the vaccine.

Now, just because something is reasonably safe doesn't mean it can't do harm. And the way we prevent harm in medicine is by adhering to the principles of medical ethics. The principles of medical ethics are not simply cliches. They are actually there to protect people from irrational use of medical products. And one of those principles is the principle of medical necessity, your Honor.

As a heart surgeon when I was practicing as a heart surgeon if I did a coronary bypass on someone who didn't need it, that would basically be a violation of medical necessity. And if a complication -- even a routine complication as a result of heart surgery occurred while I did that unnecessary procedure, that would classify as harm. So even though I've done something that is safe, even though the complications are within the range of what we would expect from that operation, when the patient experiences the complication, in the setting of not having medical necessity, that classifies as harm. And I think that the risk here of the vaccine is that if we deploy it in people who do not stand to benefit from it compared to others who do, and then a complication does occur, it really doesn't matter what the rate of complication is, it matters that that person got harmed, because you've subjected them to

unnecessary or very marginal benefit.

So I think it's very important to consider what actually means and how you calibrate that against safety. You can do quite a bit of harm with a very safe product.

Q. Doctor, is there any reason to believe that people who have had COVID-19 are at heightened risk of harm compared to somebody who hasn't?

A. Yes. So I think the way I think about this, your Honor, and as I would like to present this to the Court is that I think about the idea of harm as a building with two stories to it; one is this idea of medical necessity which I just articulated, to do something medically unnecessary and a complication does occur, that classifies as harm because you've done something unnecessary.

Now, in the second story of this building is actually specific harm. And yes, I think there's some good evidence that if you take a person who is either recently infected or previously infected and you vaccinate them, you might actually do harm. There's a paper out of Manchester that demonstrated about a two to four times higher incidence of adverse reactions in the case of patients who had been recently infected. There's also a nature paper -- Nature Paper is a highly recognized peer-reviewed journal that demonstrates about a seven percent incidence of hospitalizations for adverse reactions in people who have

been previously infected and subsequently vaccinated. So these are two pieces of science.

Certainly from my own anecdotal experience, I have two patients whose cases actually were quite well publicized by the families themselves, one is Brandy McFadden from Tennessee. Ms. McFadden had a prior infection and she was vaccinated, had a very very intense response to the vaccination and she went paralyzed. Now, the paralysis was temporary, but it has been debilitating while she is still recovering. The other is the case of Everest Romney of Utah. Everest was an all-American basketball player and he was on the basketball circuit when he acquired an asymptomatic or a very mildly symptomatic case and went and got vaccinated and within about a couple of weeks of that, and he developed brain clots, and he's still recovering from that now.

I'm describing their cases with full permission from their families, they were publicized, so that the background is there.

There are also other very prominent cases, 36-year-old J. Barton Williams who is an orthopedic surgeon down in Memphis, he was a Harvard graduate, he had just gotten married, went to his honeymoon, acquired an asymptomatic infection, comes back to work, gets vaccinated, several weeks later dies in the ICU from a hyperinflammatory

disease related to the vaccination.

So, you know, these are anecdotal cases, of course, but I think that they are very important ones because if these individuals were naturally infected and immune and did not stand to benefit from it, even if the complications are within the range of what we would expect numerically, from a frequency respect, they classify as harm because we delivered an unnecessary medical procedure to them.

I also wanted to add, Ms. Younes, there's a case series in the CDC which I included in one of my declarations to the Court, that describes six patients, that's a CDC study, that developed a hyperinflammatory reaction called MIS-C. MIS-C is a hyperinflammatory reaction that goes with COVID as well as the vaccine unknown to be produced at a certain frequency. It's relatively rare. It's probably one in tens of thousands that it happens. But the CDC describes six cases. Of the six cases, three of them were previously infected with COVID. These were people who ended up in the ICU with a hyperinflammatory disease --

COURT REPORTER: Excuse me, in the --

THE WITNESS: In the ICU, in the Intensive Care Unit.

I'm sorry if I'm wearing you out.

But basically this case series was a critical one that came from the CDC, and of the cases that were

described, three of them were associated with previously infected, subsequently vaccinated and had a hyperinflammatory reaction and ended up in the Intensive Care Unit.

So again, even though one might say from a public health perspective, from a risk perspective, these are unavoidable complications associated with this medical procedure. We certainly can't say that this vaccine doesn't have any risks, right, but if it does have an intrinsic risk rate and we subject people unnecessarily or with very marginal benefit to the risk of these complications, I think we have done harm. And I think that's what the issue is here. The issue is that we have 320,000,000 people who are essentially mandated to be vaccinated, and if the rate of complication occurs at a rate of one in ten to hundreds of thousands, which is to the layperson a very rare number, you are talking about a lot of people with a lot of unnecessary medical treatments they are subjected to at a risk of harm.

BY MS. YOUNES:

Q. Doctor, in your professional opinion, what do you think of a policy that forces Ms. Norris to get a vaccine at the threat of losing her job?

A. Well, I think in the case of Ms. Norris, this is an unbelievably draconian practice. Ms. Norris is robustly immune, number one. She's -- There's no reason to believe

that she poses any risk to herself or anyone at MSU. She has robust antibodies, She's functionally proven that. But she's also an employee of this university for eight years, and she's the primary breadwinner for her family. So here is this person essentially ignoring the principles of science and compelling her to get this vaccine that she does not want to get.

Now, the issue is this, is that if, you know, if she had some chance of benefit, if she posed some risk to the community, one could argue that she could potentially choose to get this vaccine. But at the rate that she is protected, in my opinion, and especially compared to the other vaccines that are being accepted, for example, MSU accepts the Sinovac vaccine, which only has a 50 percent efficacy rate, and gives a free pass to everyone who gets a Sinovac. So imagine you have 20 people who got the Sinovac vaccine at MSU, ten of them would not be immune, right. So those guys are getting a free pass while Ms. Norris, who is quite robustly immune, the preponderance of evidence is demonstrating that she's very robustly immune epidemiologically, is being discriminated against by the university at the threat at the loss of her employment. I don't know how to describe that to be honest with you. I mean, I think that we are better than that.

I think that there's actually possibly irreparable

harm if you expose Ms. Norris to what I think is an unnecessary vaccination. So, you know, I would beg the Court to actually consider this very carefully. This is -- The Europeans, in fact, are providing exemptions as a matter of passage. Israel and our European allies are accepting COVID recovery and antibody immunity as evidence of immunity. We are far behind, and we are making a very big mistake in the United States.

MS. YOUNES: Your Honor, I would like to move for admission of Ms. Norris's serological testing results as Exhibit 3.

THE COURT: Any objection to the report?

MS. RICCHIUTO: No, your Honor. This is the first we are seeing it.

THE COURT: I'll receive the exhibit.

To the extent it might be ECF'd at some point in time, we'll make this accessible only to counsel and the Court, because I presume it's got some personal data on there that is not appropriate for public consumption.

MS. YOUNES: Thank you, your Honor.

BY MS. YOUNES:

Q. Just a couple more questions, Doctor.

Have you reviewed Dr. Zervos's declaration dated September 10, 2021?

A. I have.

Q. And what is your opinion of his conclusions?
A. Well, I think Dr. Zervos is adhering to a narrative that our establishment and public health officials are promoting, which is that everyone should get vaccinated. And frankly, you know, I think for the vast majority of Americans who are not immune, it's actually the correct orientation, and I think that folks who are not immune should get vaccinated, and I think that is a reasonable opinion.

I do, however, think that Dr. Zervos in his opinion is using the idea that Ms. Norris has antibodies to make a point that these antibodies are not protective and vaccine antibodies are far more protective, I think there's this sort of internal inconsistency because on the one hand these antibodies are demonstrating the efficacy of the vaccine itself, so we know that these antibodies are important for vaccine immunity. In fact, in clinical trials that I believe Dr. Zervos himself was involved with evaluating, these antibodies are actually the basis for our claims of efficacy. So here on one hand to say that antibodies are very important for efficacy, the vaccine on the other hand we are saying, as Jeanna Norris, is saying that she has antibodies and the antibodies don't mean anything. This is an internal contradiction.

Q. Do you hold these views to a reasonable degree of

medical certainty?
A. Yes, I do.
Q. Thank you.
THE COURT: Pass the witness, Counsel?
MS. YOUNES: Sorry?
MS. HAGEMAN: Yes.
THE COURT: Are you passing the witness?
MS. YOUNES: Yes.
THE COURT: Counsel, you may inquire.
MS. RICCHIUTO: Thank you. Good morning.
THE WITNESS: Good morning.
MS. RICCHIUTO: Good morning, your Honor.

CROSS EXAMINATION

BY MS. RICCHIUTO:
Q. Good morning, Dr. Noorchashm.
I'm going to try to be brief.
A. Sure.
Q. I just want to confirm a few things.
Dr. Noorchashm, you are not an infectious diseases doctor, is that correct?
A. Correct. I'm an immunologist and a surgeon.
Q. And you are not board certified by any board, is that correct?
A. Not currently.
Q. That's not correct?

A. Not currently.
Q. Oh, okay.
Have you ever been qualified as an expert in litigation before?
A. No, I have not.
Q. Have you ever treated a COVID patient?
A. Yes, I have.
Q. Can you tell me about that? Is that --
A. For --
Q. Excuse me. Go ahead.
A. Yes. Sure. You know, so I -- my practice primarily at the moment involves a lot of intervertive care for patients who have complex surgical problems in the outpatient setting. And when the COVID pandemic happened, a tremendous number of people approached me, knowing my background in immunology, you know, I do what I would consider general practice at this point, you know. It's more of a practice where I integrate care for people prior to the COVID pandemic. So there's a lot of trust in the community and so a lot of folks would refer to me.
And so, yes, I have treated COVID patients, including my own family members with those therapies that are considered more mainstream, as well as therapies that are not considered necessarily mainstream, as many of them are still evolving.

I was also involved in a clinical trial with the University of Pennsylvania with Dr. Carl June and his colleagues looking at a preventive drug, it's not as preventive as a treatment for infection, and his results are published already.

So primarily my interaction with COVID patients surrounds their concern about immunity. You know, I do believe that one of the mistakes that we are making in this country is that we are not providing patients with their personal immunity information. I found that when I actually sent serologies off on patients and they find that they have no antibodies, they are very likely to be vaccinated. So I would say that, you know, if I put a hundred patients in front of me and they come to me asking for their serologies, I send off the serology, the same as I sent of Ms. Norris, and if their antibody comes back negative, half of them will get the vaccine. These include friends and neighbors and people in my community, in Buckstown, Pennsylvania, it's the First Congressional District of Pennsylvania. So I do think that we are making a very big mistake at the level of the FDA blocking antibody testing in Americans. This is actually keeping people's personal health information away from them that could help them make rational decisions. On May 19th, the FDA came out with an edict advising physicians not to measure serologies, and this is an error. So I have,

in fact, sent off hundreds at this point, of patients' serologies and have advised them to get vaccinated because they are not.

Q. Have you treated a COVID patient in the hospital or in the intensive care unit?

A. No, but I've taken care of many critically ill patients with pathologies that are very similar to -- and I've actually been involved with the care of people with respiratory failures. I have extensive experience with ECMO and cardiac surgery.

Q. Do you currently have any hospital privileges?

A. I do not.

Q. Okay. My understanding is you're not licensed to practice medicine in Michigan; is that correct?

A. I'm licensed to practice medicine in the states of New Jersey and Pennsylvania.

Q. Okay. Do you have a doctor/patient relationship with Ms. Norris?

A. I do.

Q. Okay. And you believe that that relationship is permitted under Michigan's medical licensing rules?

A. Well, so Ms. Norris sought my consultation during the pandemic, we initially interacted through a tele-health and then in person. So I think that not only my duty as a physician, but also the Good Samaritan laws and rules apply,

and I've provided my input to Ms. Norris on her status. Now, in terms of whether I treated her for anything, I have not treated her for anything, I'm not performing any operations on her or prescribed her any medicines.

Q. Okay. You mentioned the hundreds of patients for which you have been ordering these serology reports, Dr. Noorchashm, are those for the purpose of seeking medical exemptions in lawsuits or with respect to other vaccine mandates?

A. No. No, these are people who have heard my message, which is that, you know, just like you go get a colonoscopy to see if you have colon cancer, you get your PSA measured to make sure you have -- you know, make sure your prostate is okay. You know, this test is literally the gold standard test for evaluation of your immune status. And so the fact that in our country, you know, we put a rover on Mars, the fact that we can't provide an opportunity for every American to figure out what their immunity status is is a dramatic mistake. So what I've been doing, counsel, is I've been providing people with the opportunity to assess their immunity because most Americans are reasonable and want to protect themselves. When they see that they are not protected, they go get vaccinated.

Q. When you submit those hundreds of serology orders for the lab reports to get produced, are you compensated to do

that?
A. Not at all.
Q. All right. Are you being compensated to be here today? I don't think your declaration covers that.
A. Not at all. Only for the cost of travel.
Q. Okay. Thank you.
So no compensation in any way for your consultation with Norris, whether or not it's medical treatment?
A. I accept no compensation for any of my COVID-related work.
Q. You -- I think you just told us that you're aware that the CDC doesn't recommend the antibody tests that you have been writing orders for, correct?
A. That's right. The FDA actually has an advisory against it. However, the FDA has approved these serology tests, and they are available for prescription for prescribers to prescribe with LabCorp and Quest.
Q. If we can, Dr. Noorchashm, and your Honor, I'd just like to refer back to Exhibit 3.
THE COURT: Sure.
MS. RICCHIUTO: That he should still have in front of him.
BY MS. RICCHIUTO:
Q. I just was looking at this text, Dr. Noorchashm, in this first box here, and it says, "It is not yet

determined--" Excuse me. "It is yet undetermined what level of antibody to SARS-CoV-2 spike protein correlates to immunity against developing symptomatic SARS-CoV-2 disease." Do you see that?

A. Yes, I do.

Q. Did I read that correctly?

A. You did.

Q. Thank you.

A. Do you want my opinion on that?

Q. I do not, your Honor -- I do not, Doctor.

I do want to ask you about a couple of things from your declarations. Would it help you if I put them in front of you?

A. Either way. However you want it.

Q. Okay. These are declarations that have been filed in this case. You've filed three, correct?

A. I believe I filed one under the TRO, one subsequently for the preliminary injunction, and then the one for -- in response to Dr. Zervos's rebuttal.

MS. RICCHIUTO: Just for the record, I show those as ECF numbers 4-2 starting at Page ID 43, ECF Number 12, and then I apologize, I don't have the ECF Number from the one that would have been dated yesterday, which is September 21st, but I don't have any questions about that one today.

BY MS. RICCHIUTO:

Q. I just want to ask you briefly, Dr. Noorchashm, about a statement in your first declaration, and I think it's consistent with what you testified to today, which is that -- let me make sure that I get it correct here -- "In my opinion, Ms. Norris's spike antibody level is highly likely to be above the minimum necessary to provide adequate protection against reinfection from the SARS-CoV-2 virus." Does that sentence sound familiar?

A. That sounds like my statement, yes.

Q. Okay. That's from 7G of the first declaration.

A. Yes.

Q. So I just wanted to follow-up with you on that "highly likely" statement, which I think is consistent with what you said in your testimony.

A. Yep.

Q. So you have an opinion that it's highly likely that her antibody -- her antibody level is above the minimum necessary?

A. Yes.

Q. You don't know for sure whether that's the case?

A. Well, I can explain the basis for that statement, if I may.

So, look, clinical decisions and clinical opinions are based on evidence. We base them on evidence. That opinion is based on the fact that the preponderance of

epidemiological evidence at present, as well as our foundational sort of knowledge of immunology, demonstrate that people who are COVID recovered and already immune, are protected equally, if not better, than people who are vaccinated. In fact, you know, with respect to antibody levels, we already know that even the vaccine has a variable effectiveness. The Johnson & Johnson vaccine is about 34 percent ineffective at best. The mRNA vaccines are about 10 to 15 percent ineffective at best. And there is variability in responses both to the vaccine as well as the virus.

Now, certainly the Sinovac has about a 50 percent efficacy rate. And the reason why this is important is that, I think, you know, to conflate this idea that the level of antibody is determinative of protection from subsequent infection is a mistake. I think there is a conflation going on both in literature as well as in Dr. Zervos's testimony that the level of antibodies sort of conflated and confused the actual clinical protection from the disease.

You know, everything I reviewed by myself and my colleagues reviewed in this Exhibit 2, these are the studies that demonstrate equivalency, it's not superiority. I can certainly say with definitive certainty that the efficacy of natural infection versus the efficacy of the Sinovac, for example, is almost certainly going to be superior.

Now, you know, I don't know if I answered your question, Counsel, but I think that we cannot allow ourselves to conflate antibody levels with clinical protection. We have to integrate this with the epidemiological data and our historic knowledge. There are virtually no other transient viruses where natural infection -- where natural infection is not well protected. I mean, again, I quoted the smallpox epidemic or pandemic in the early 1900s. I know that there are some famous cases based on that. And, you know, in those instances clinicians and physicians and immunologists never vaccinated a recovered patient, because the idea was that they were immune. And, in fact, the reason why they developed these vaccines back then was that they knew that the natural infection was protective of subsequent infection. The same is true here. You know, I think in our attempt to save the nation, we are overshooting.

Q. Thank you for that, Dr. Noorchashm. I just wanted to confirm that your opinion was that it was highly likely. We agree about that, right? That's what your declaration says, that it's highly likely that she's above the minimum necessary.

A. Yes. In fact, she's proven herself to be immune by interacting with people who are COVID positive and not acquiring it.

Q. Thank you.

I want to ask you about a couple of other statements. These are from your second declaration. This is ECF Number 12, dated the 16th. And there are a few different places, and again, I'm confident you don't have your paragraphs memorized so it's not meant to be a quiz. There's a few different places, Dr. Noorchashm, where you appear to concede, as I think you also did this morning, that the vaccinations even in the COVID recovered may provide some incremental protective benefit. Do you remember language to that effect? Is that your opinion?

A. Yes.

Q. Okay. So if they may provide some benefit, I think you call it marginal benefit or you say it may be reasonable to offer already immune Americans the opportunity to be vaccinated. In light of that, isn't it true then that if there may be a benefit that there may be a benefit to, for example, reducing spread of COVID or making those individuals less susceptible? Do you agree with that?

A. In general terms I agree with that. You know, look, I think that --

Q. Thank you.

A. May I continue? In general --

THE COURT: Let's allow him to explain his answer.

MS. RICCHIUTO: Sure.

THE COURT: Go ahead, Doctor.

THE WITNESS: I think in general the bar for the decision to compel and force someone to get vaccinated has to be a comparison to immunity level of people we consider fully vaccinated versus COVID recovered. Is it true that there is a marginal benefit to vaccinating the previously vaccinated? Yes. In fact, we already know the FDA last week approved booster shots for people fully vaccinated. The idea being we want to enhance their level of immunity because it wanes. Is that also the case for, you know, COVID recovered people? There is a study out of Kentucky that demonstrates that there's a marginal benefit. Now, when you actually look at the absolute numbers, the number needed to treat COVID recovered persons is about 200 people. So you need to treat 200 COVID recovered people to get one person to be protected as opposed to seven people treated who are COVID naive to get one protection, right. So the benefit is marginal, but I don't think it should be conflated with this idea of the mandate. The bar for the comparison to the mandate, right, is between COVID naive people who are vaccinated and COVID recovered people. And in the setting where an institution like MSU is accepting vaccines like Sinovac that only has a 50 percent efficacy rate or the Johnson & Johnson, I don't think it's justified to use this marginal benefit that the Kentucky study shows

to actually compel someone against their will, at the risk of losing their livelihood to get a vaccine while at MSU there are people floating around with Johnson & Johnson vaccinations and Sinovac who are not immune. That is an irrational, illogical, and unethical way to conduct ourselves in a civil forum.

Q. Dr. Noorchashm, returning to Exhibit Number 3.

A. Yes, ma'am.

Q. My reading of this is that it's dated on -- it's dated August 20th and 21st of this year, is that correct?

A. Yes, it was relatively recent.

Q. Which is consistent with what's in the papers as well. Does that sound right?

A. Yeah.

Q. So you've testified today -- today that you are certain that she is robustly immune; is that correct?

A. Yes.

Q. You've also testified or it's included in your papers that immunity wanes over time, correct?

A. Vaccine immunity wanes much more dramatically it seems than natural immunity, yes.

Q. Natural immunity wanes over time, correct?

A. Natural immunity wanes far slower than vaccine immunity in my experience.

Q. Given that it's been a month since this lab test, Dr.

Noorchashm, I'm just curious how you are able to testify with, I think you said a degree of medical certainly, that she is robustly immune today on September 22nd?
A. Well, the reason -- it's based on past experience.
I'll give you another anecdote. My own son attends the University of Chicago. He got COVID last November. I have serially measured his antibodies, that University actually allowed him for a medical exemption, purely on the grounds of robust immunity. I've serially measured his antibody titers and they have been stable.
Now, I can tell you that in my experience -- again, this is my experience as a clinician -- naturally immune people have far more stable levels of immunity than vaccine immune. Now, the science behind this, your Honor, I can tell you right now that this is, I think, the second or third antibody test Ms. Norris has had, and those levels have been stable. I think she plans to get another antibody test in a month or two, but you know, these antibody levels are going to be stable. That's my testimony.
Q. And we have no evidence of what her antibodies are today on September 22nd, correct?
A. Well, this is relatively recent. I think Dr. Zervos would also agree that if you've gotten an antibody test less than a month before, that's recent.
Q. Is that a no? We don't have a test from today,

correct?
A. Yes, that's correct, not today, not this minute. Unless you guys have a phlebotomist here.
Q. Okay. Just wrapping up here, Dr. Noorchashm. I think my understanding from your declarations is that you have said that you believe that previously infected COVID patients should be vaccinated approximately a year after their infection?
A. I'm sorry, do you have a specific statement that I've made?
Q. Sure. Sure. So, in your first declaration --
A. I don't recall saying that, but --
Q. Okay.
A. But go ahead and read it to me.
Q. Okay. Let's make sure. I could be mistaken, so let's make sure.
Okay. So in your second declaration, this is your September 16th declaration, it's talking about potentially irreversible harm to Ms. Norris if she were to undergo COVID vaccination in light of her prior recent infection within the last year.
A. Yes.
Q. Okay.
A. That is the testimony that I made.
Q. Is there a -- Is it going to be your recommendation to

her then that she be vaccinated in November of this year?
A. That statement was referring to the fact that she has had a recent infection. Recent, I think it's reasonable to say recent is anywhere from six months to a year. You know, in general, I think that with respect to this vaccine, particularly because of its reactogenicity and how, you know, how unusual of a vaccine it is, I think it's wise to actually adjudicate vaccination based on the waning antibody of this. So, I think that, you know, these time lines that we have on our vaccination programs are all sort of vestiges of the past where we were not able to measure antibodies, right. So, look, in medicine as we have evolved, we've made medicine more and more personalized, right. Now, there are certain domains where we do one-size-fits-all still, and that's where harm is, right.

There's been a time in the history of our country where Benjamin Rush blood let everyone, okay, to cure disease. That's a one-size-fits-all type scenario. There are certainly other examples in our history. We have become more and more personalized down to the genetic level.

Now, vaccination is one of those areas where we are not currently basing our vaccine decisions on anything but timelines, right. And, I think, you know, that's generally fine when you don't have a pandemic, but when you have a pandemic where millions of people are actually infected and

they have the bacteria -- or the virus rather in their system, it's a mistake to indiscriminately vaccinate, because we already know and conventional wisdom tells, conventional medical wisdom tells us, that if you have had an infection recently, you should not get vaccinated. In fact, most of us in this room probably go to doctors with infections, if we are supposed to get a vaccine, the docs won't give you the vaccination if you're already sick. There's a reason for that.

And so I think -- I apologize, I don't mean to get long-winded here, but look, you know, I think that, you know, in this courtroom here we are adjudicating a problem that shouldn't be a problem. In fact, this should not be the court's business to adjudicate. This should be up to our scientists and our public health officials to be adjudicating correctly, and they are not, unfortunately.

Now, our European allies, the European Parliament, okay, passed a law for the green pass, which actually accepts COVID recovery and antibody immunity as well as vaccination as, you know, as evidence of a pass. Here we are, we are literally, you know, approaching the civil rights of people like Ms. Jeanna Norris. We are impinging on medical ethics, okay, and we are basically ignoring, you know, the faction of our scientists and physicians who actually understand what natural immunity is, including, by

the way, Dr. Fauci and Dr. Offit themselves. They are on the record saying that vaccination -- or viral infection is the mother of all vaccinations. Dr. Paul Offit is on the record saying that the reason why we made this vaccine is because we knew natural infection was protective, okay. So, I think at some level rationality has to prevail, and if it has to be the court's domain to do so, so be it, that's why we're here.

Q. Thank you for that, Dr. Noorchashm. I want to try to just ask you narrow questions.

A. That's all right. You can feel free to interrupt me or object, that's why we're here.

Q. Your declaration says that most reasonable physicians consider vaccination of already infected persons to be unnecessary?

A. Yes.

Q. Now, I want to ask you a question about that.

A. Yes.

Q. Are you aware, in the context of that statement that most reasonable physicians view this to be unnecessary that no federal public health authority shares your view?

A. Our country is based on the idea of dissent, and I'm not the only one saying this, it's just that folks are worried for their jobs and the politics of their situation and that's why people are not vocal about it. But the idea

here is that we are creating an environment in which the President of the United States has pointed to about 30 percent of the country and opened the door to discrimination. And there are very many professionals who are unwilling to sit on this stand and make this testimony. I can assure you of that, you know. You know, and I think it would be a dramatic mistake to superficially approach this case. This is a very important case.

Q. I want to just be clear about your testimony though, Dr. Noorchashm.

It is, I think I understood from your previous answer to me, it is your testimony that the CDC and the FDA and the Michigan Department of Health and Human Services, they just are all getting it wrong?

A. So --

Q. Correct?

A. I'll answer that question by telling you that there instances in which our institutions and our establishments are fallible and have made mistakes, and I think yes, in our rush to save the nation, that we are practicing indiscriminate medicine and they are incorrect about the policy of vaccinating people who are naturally immune. In fact, you know, half of the western hemisphere is doing the opposite. So, yes, it is true. And I'll also add that I personally had a very terrible family experience with the

FDA. My wife and I were involved in a very large scale public health campaign where for 20 years women were being harmed by an FDA-approved device at a rate of one in 350. This is a very public case -- and I encourage you to look it up. But yes, for 20 years, the FDA and the gynecological establishment was getting it wrong. So, in fact, we have a fallible system. Mistakes are made. It is a human system. To assume that just because the FDA or the CDC says something that it's an edict from God is just a dramatic error. Yes.

Q. I just have two more questions for you, I hope?

A. Sure.

Q. You've referred to Dr. Offit today in your testimony, I think you have a declaration or it might have been briefing by counsel, that refers to some remarks by Dr. Gottlieb. I just want to confirm your understanding, though, that both of those experts are in support of widespread vaccination including for previously immune people. That's what their comments are?

10:02:50

10:03:10

10:03:21

A. So --

Q. Can I possibly -- We are on a really tight schedule, Dr. Noorchashm, can I --

A. Yes. So Dr. Gottlieb, Dr. Offit, Dr. Makri are all on the record saying naturally immune people are robustly immune. I think there is, in response to the Kentucky

study, there is room -- there is room for patients to have a choice to get that added benefit, you know. But I don't think, with respect to these mandates, counsel, I think the bar for that comparison is going to be between Ms. Jeanna Norris's natural immunity versus the least effective vaccine or the Johnson & Johnson vaccine, the Sinovac vaccine, that is being used in others, otherwise, you're opening the door to discrimination. So, yes, these individuals are all in support of vaccination. In fact, in my own declaration it said if Ms. Jeanna Norris wishes to get an added vaccination, that is something she can adjudicate. She should be able to do that, but to mandate her to get it against her will, at the risk of loss of employment, as the primary bread winner is Draconian and terrible.

10:04:11 Q. Is that a medical opinion?

A. That's a medical and civil opinion, ma'am.

Q. Thank you.

Last question, Dr. Noorchashm. Do you have a Twitter account?

10:04:20 A. Yes, ma'am.

Q. Are you a pretty active tweeter, is that fair to say?

A. Yes.

Q. Do you occasionally tweet at public officials, members of the media, celebrities?

10:04:28 A. Not occasionally, frequently, because I think that we

are getting this wrong and it requires public input. So yes, I am very engaged with the public. In fact, I've, you know, I've even directly sent messages to the President himself because I think he is getting it wrong.

10:04:42 MS. RICCHIUTO: Thank you so much.

THE WITNESS: You are welcome.

THE COURT: Redistrict, if any?

MS. YOUNES: Briefly, your Honor, please. Thank you.

10:04:48 REDIRECT EXAMINATION

BY MS. YOUNES:

Q. Doctor, are you aware of a statement that Anthony Fauci made recently saying that he is not denying that all people who get infected and recover have a considerable degree of

10:05:03 immunity?

A. Dr. Fauci is on the record for saying that natural immunity is the mother of all vaccinations. This was back in 2018. And I think as a virologist, Dr. Fauci would agree that the reason why we have these vaccines, counsel, is

10:05:17 because we know that natural immunity actually is quite effective. That's why we know if we mimic the virus, it will work. So, yeah.

MS. YOUNES: Thank you, Doctor.

Thank you, your Honor.

10:05:30 THE COURT: Anything further, counsel?

MS. RICCHIUTO: No, your Honor. Thank you.

THE COURT: All right. Doctor, you may step down with the Court's thanks.

THE WITNESS: Thank you.

10:05:38 (At 10:08 a.m., witness excused.)

MS. HAGEMAN: Thank you, Dr. Noorchashm.

And your Honor, I'm going to go through the legal aspect of the issue today. I hope that everyone can hear me all right.

10:05:48 THE COURT: Well, can we -- Do you have any proofs, counsel, or haven't you made up your mind yet?

MS. RICCHIUTO: I am happy to call our witness now, I think, if Ms. Hageman -- I don't know if that's consistent with your agreement, but we are obviously going to do

10:06:07 whatever you would prefer.

THE COURT: You've agreed to proceed in this fashion. Go ahead.

MS. HAGEMAN: Wonderful. Thank you, your Honor.

THE COURT: I'll take defendants' proofs next.

10:06:16 MS. HAGEMAN: And should I go too fast, please signal to me and I will definitely slow down.

I'm going to first summarize the eight reasons as to why plaintiff's motion for preliminary injunction should be granted, and then I will spend more time as to each of

10:06:29 these issues. But I want to make sure that the Court

understands the highlights or the main points that we want to make.

First, as for the Jacobson decision, your Honor, it actually supports plaintiff's position here, as the Court there fully recognized that there are certain circumstances where a government's vaccine mandate is so arbitrary and unreasonable as to go beyond what is reasonably required for the safety of the public. And I believe that has been confirmed by the testimony by Dr. Noorchashm today. And this happens to just be one of those circumstances.

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To the extent that Jacobson does not support plaintiff's position, I'm going to identify several differences between that particular situation and what we are dealing with here. Jacobson cannot stand for the proposition that vaccine mandates must be evaluated on a rational basis review. I'm going to explain that in further detail as well, but just very succinctly, Jacobson was, in fact, decided before the Supreme Court developed its tiered scrutiny. In fact, Jacobson clearly sets the stage for the Court's later pronouncements on the Constitutional right of personal autonomy from governmental intrusion.

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Third, this case is subject to strict scrutiny. We are dealing with the long recognized Constitutional right of bodily autonomy and protection from governmental intrusion. MSU must prove that it has a compelling government interest

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and that its vaccine mandate is narrowly tailored to achieve that interest. And again, it cannot meet that burden.

Fourth, plaintiff will suffer irreparable harm if she is forced to get the vaccine. And again, I believe that Dr. Noorchashm's testimony today and the declarations he has submitted confirm that point. She has a Constitutional right to bodily autonomy, and the vaccine mandate violates that Constitutional right, meaning it's ipso facto an irreparable harm. MSU's vaccine mandate subjects her to an unnecessary medical treatment with heightened risk of harm of suffering and adverse medical reaction, and she will suffer irreparable injury in the loss of her job and benefits.

Fifth, the Michigan legislature has never delegated its police powers to MSU to adopt the type of sweeping and rigid vaccine mandate at issue here. MSU's reliance on the CDC and the Department of Education recommendations cannot form the basis for such sweeping police power, and neither the CDC nor the Department of Education recommendations preclude MSU from recognizing natural immunity in its vaccine protocol.

Sixth, defendant's vaccine mandate constitutes an unconstitutional condition. MSU is forcing plaintiff to choose between exercising her Constitutional rights and keeping her job.

Seventh, so long as the emergency use authorization situation remains in place, for any of the vaccines, MSU's vaccine mandate is preempted by federal law.

And finally, even if this case is controlled by the rational basis test, the plaintiff wins and defendants lose. Because plaintiff's natural immunities are comparable in terms of meeting MSU's goals of keeping people on campus safe from COVID-19. And then there is no rational basis for refusing to recognize them and provide an exemption to the vaccine mandate.

It is for these reasons, your Honor, that this Court should enter the preliminary injunction to preserve the status quo while this case moves forward.

So again, let's go back to Jacobson. That decision supports plaintiff's position here. And the Court's decision to approve the vaccine mandate in that case was based on different facts and different law. There are those who seem to believe that Jacobson is a blanket statement and open and shut case that allows the government to adopt and enforce a vaccine mandate under all circumstances when public safety is at risk, period, end of discussion. But that is not what Jacobson says, nor is it how it should be interpreted. The Court, in fact, made clear that there are circumstances under which vaccine mandates that go beyond what is reasonably required cannot stand. "It might be that

an acknowledged power of a local community to protect itself against a epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary unreasonable manner or might go so far beyond what was reasonably required for the safety of the public as to authorize or compel the courts to interfere for the protection of such persons." That's on Page 28.

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The Court then finds it necessary to reiterate that same admonition on Page 38 of the decision, making clear that Jacobson was decided on the facts before it, and that the Court was not making a blanket pronouncement that a vaccine mandate would or should be upheld in all circumstances. If there are legitimate reasons to block a vaccine mandate to prevent harm to a particular individual, it is the Court's responsibility to do so. This passage anticipates the development of the bodily integrity cases that came after Jacobson, as well as the Court's eventual adoption heightened scrutiny when dealing with government interference with such bodily autonomy.

Thus, even in Jacobson, the focus was on the immunized versus the not immunized. The Court, in fact, held it would be arbitrary and unreasonable to force someone to take a vaccine who didn't need it, in other words, someone who was already immune. As Dr. Noorchashm testified

today, we weren't talking about a situation where Mr. Jacobson had already had smallpox. If we were, we probably would have had a very different outcome. He had not already had smallpox, and the Court was not confronted with the question that we have before us today.

Jeanna Norris is the very definition of the carve out then that the Supreme Court acknowledged in the Jacobson decision. It's also very important to understand the legal and factual differences between the vaccine mandate at issue in Jacobson versus MSU's directive that we are dealing with here. The Jacobson mandate was properly enacted by the state legislature. It was subject to public scrutiny. It had gone through floor debate. The legislature looked at the competing interests. There were passage of two houses of the legislature, it was signed into law by the governor. It is this process alone that accounts for affording a more rational basis review because such decisions are made by the elected officials accountable to the public.

THE COURT: The legislature doesn't run Michigan State University, do they?

MS. HAGEMAN: No, but --

THE COURT: The Board of Trustees run Michigan State University, correct?

MS. HAGEMAN: Absolutely. But the Board of Trustees only have such police power as has been granted to

them by the Michigan legislature.

THE COURT: What do you make of the Michigan Department of Public Health's position on this issue as it relates to MSU's policy?

10:13:41 MS. HAGEMAN: Well, what I would say, your Honor, is that the police power resides with the state legislature. There is no federal police power.

THE COURT: What about the powers delegated to the Michigan Department of Public Health?

10:13:53 MS. HAGEMAN: The policy in Michigan is that if you are dealing with a vaccination requirement, if someone who is subject to that requirement can demonstrate natural immunity, they can get an exemption, and we see that for high schools and grade school students.

10:14:07 So what I'm getting at, your Honor, is that the policy that is at issue here is based specifically upon federal guidance from the CDC and the Department of Education. MSU, even in some of the argument that I believe you will be presented with today, what they are relying upon

10:14:25 for their vaccine mandate is information that comes from the CDC and the Department of Education. We don't even know where the policy that is at issue here came from, how it was deliberated. We don't see that there was any public participation whatsoever. In fact, it simply appeared on

10:14:42 the website one day. So we are talking about a very

dramatic difference between the Jacobson decision, which was involving a legislative pronouncement, and MSU, which is relying upon federal guidance to come up with the policy. So --

10:14:59 THE COURT: Why isn't that rational?

MS. HAGEMAN: Because it was not adopted through the proper legislative process. And the only --

THE COURT: What do you make of Klaassen?

MS. HAGEMAN: Of Klaassen?

10:15:11 THE COURT: The Seventh Circuit case.

MS. HAGEMAN: I do not believe that Klaassen applies here for several different reasons: Number 1, they went directly at, and it was a blanket attack on the vaccine mandate in its entirety. We are talking about a very

10:15:27 specific subset or issue associated with this particular vaccine mandate. We are not challenging MSU's vaccine mandate. What we are challenging is that MSU refuses to recognize as a medical exemption natural immunity. So there is a completely different factual and legal framework that

10:15:45 we are talking about between Klaassen and this decision.

Another important difference between the two, your Honor, is the fact that in that case there was only, I believe, one person who had natural immunity that was addressed very briefly, but it was not addressed in the

10:15:59 context of what we are talking about. In addition, that was

in the Seventh Circuit, not the Sixth Circuit and not before this Court, and we brought --

THE COURT: I recognize it's not binding on me, but I think it's the only -- it's the only circuit opinion, if I understand it correctly, and come back at me if I'm mistaken, but I think that is the only circuit opinion that is out there in the context of a university. Am I wrong about that?

MS. HAGEMAN: No. And another important aspect of that is it was students, it was not staff or professors that brought that case.

THE COURT: Well, the notion is they don't want the virus to spread on the campus, right?

MS. HAGEMAN: You mean is that the purpose?

THE COURT: Right.

MS. HAGEMAN: We don't disagree that the purpose of MSU's policy is to provide safety for the folks on the MSU campuses, and we don't dispute that that is an appropriate and that is a compelling governmental interest. The point is, however, how do they get there. And the question that we have raised that was not addressed in the Klaassen case is immunity equals immunity equals immunity, so whether it is a compelling government interest or even looking at it from a rational basis standpoint. If immunity from natural immunity is comparable to or better than immunity from a

vaccine, then there is no reason to treat them differently. There is not a compelling or even rational basis for saying we are not going to accept natural immunity if we are going to accept vaccine immunity when they are comparable, and
10:17:32 that is the challenge that we have against Klaassen, because that was not the issue there, but it's also why we disagree with MSU's policy.

We are not challenging that MSU has the ability to try to provide for the safety of the students and the staff
10:17:46 and the faculty at MSU. What we are saying is from the standpoint of the Constitutional issues involved here, the individual autonomy rights and that sort of thing, you cannot try to differentiate between two different kinds of immunity and say we will accept one and we will not accept
10:18:04 the other. And not only will we not accept the other, we are going to force this person to give up their own bodily autonomy, we are going to impose an unconstitutional condition for them to be able to stay as part of the university family, if you will.

10:18:19 So again, I think it's very important to understand that the MSU policy is not based upon the Michigan state police power or Department of Health. They very specifically stated that it is based upon the Department of Education and CDC, neither of which have said that the
10:18:38 university cannot recognize natural immunity as one of

the -- as an immunity. All they have stated is that we recommend vaccinations, Number 1. Number 2, it's a guidance document, it has no force and effect of law whatsoever. And Number 3, there is no police power that comes from CDC, Department of Education down through MSU. MSU only has the legal authority to adopt this policy if that police power comes directly through from the Michigan legislature. And the Michigan legislature --

THE COURT: What case or statute says that?

MS. HAGEMAN: There are quite a few, your Honor. In fact, we cited to them in our -- in our -- Let me find that.

THE COURT: Talking about Michigan cases now?

MS. HAGEMAN: Yes, I am. And we cited to them -- what the cases say is that it must be tethered. What they say is that the exercise of the police power -- Let me find it here.

The Michigan legislature hasn't delegated this police power to them. What it says is that while the legislature can delegate the power to a political subdivision such as MSU, the action taken pursuant thereto must be tethered to the legislative acts. That is G.F. Redmond and Company. This is just one of the cases we have cited to. G.F. Redmond Company vs. Michigan Secretary and Commission, 192 Northwest 688. Otherwise, it's not carrying

out the legislative police power but its own. There is no federal police power as I indicated. The federal recommendations are just that, they are recommendations, they are mere guidance.

10:20:29 What has happened here is that Michigan has cut out -- or MSU has cut out the Michigan legislature entirely in this entire analysis, and said we are going to do what the CDC and Department of Education say, but they also ignore the fact that neither the CDC nor the Department of

10:20:49 Education say that they can't recognize natural immunity as one of the reasons for a medical exemption. So, your Honor, that's another important distinction here is just purely from the police power standpoint, MSU doesn't get to say, we are relying upon the Michigan legislature's police power

10:21:05 when they are not relying upon what the Michigan legislature has said.

And I think another important point here is that we have been dealing with this now for a year and a half. The Michigan legislature has never stepped in and adopted a

10:21:16 vaccine mandate, which is exactly what happened in Jacobson. In Jacobson, it was the legislature that acted, and that's a very important distinction.

There are several other facts that also make Jacobson distinguishable from MSU's case. Again, we believe

10:21:33 Jacobson supports our position, and the clear reading of

that case is that if there is a reason to not -- a reasonable reason not to force a vaccine, the courts are not or should step in to protect the Constitutional liberties of the individual at issue. The Supreme Court's juris prudence related to plaintiff's primary claims was not developed until after Jacobson. And what I mean by that is the bodily autonomy cases that we are familiar with, especially over the last 50 years, were developed after Jacobson was put in place. So I think we have to recognize that Jacobson was important for the situation at hand, but our legal system has evolved, especially on the bodily autonomy type issues, and I think that that's an important distinction.

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Mr. Jacobson was fined $5, he wasn't threatened with losing his job. Smallpox had a mortality rate of 30 percent; Coronavirus is below one percent, even without a vaccine mandate in place. The mortality rate was -- of the smallpox was very important to the legislature, the legislature had the opportunity to act.

The other thing that is important about Jacobson is that it was decided before the Supreme Court developed the tiered scrutiny. So it's not -- you can't simply say that Jacobson applies to a rational basis. And if you did, it would have to be applied because that was adopted by the legislature.

In addition, your Honor, strict scrutiny. There is

just absolutely no question this case should be subject to strict scrutiny. If you look at our brief, our reply brief on Pages 7-8, we cite to several different cases that talk about whether the government has adequately demonstrated a compelling need for the intrusion, a lack of reasonable alternatives, the forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty. Planned Parenthood Ohio Region vs. DeWine, vaccine mandates are a fundamental intrusion into bodily integrity as receiving an injection obviously entails such incursion. So again, what you've got is the development of law in the last 50 years makes it clear that our client, Jeanna Norris, has a Constitutional right to bodily autonomy and MSU's vaccine mandate violates that.

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THE COURT: Do you concede that your client is an at-will employee?

MS. HAGEMAN: Yes, I do. But --

THE COURT: Also concede that she doesn't have a constitutionally protected interest in her job?

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MS. HAGEMAN: I do.

THE COURT: Okay.

MS. HAGEMAN: But I also believe that -- I would also say that she does have a constitutionally protected interest in bodily autonomy. And I also would agree that

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MSU as a governmental entity must respect the Constitutional rights and liberties that she does have. And the irreparable injury here ipso facto is a violation of her Constitutional rights, which was where I was just going with my next points to be made here related to irreparable harm.

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Dr. Noorchashm has testified today that unnecessary medical procedures by definition cause irreparable harm in addition to the Constitutional issue. He further described some of the medical risks associated with taking an unnecessary vaccines and specific side effects that have been traced to COVID-19 vaccines. Considering that the issue is one of bodily autonomy integrity, with MSU's vaccine directly -- vaccine policy directly invading plaintiff's Constitutional rights, there is a real world risk associated with taking an unnecessary medication.

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We have already talked about the police power part of this. I think that it is incredibly important to understand that there is no ability for MSU to unilaterally rely upon a guidance document from CDC and the Department of Education that flies specifically in the face of the Michigan policy -- the Michigan State legislative policy of recognizing natural immunity in vaccine mandate situations.

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Unconstitutional conditions. I briefly want to address this, your Honor. The unconstitutional conditions doctrine forbids burdening the Constitution's enumerated

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rights by coercively withholding benefits. What we are saying is she has a Constitutional right to bodily integrity and autonomy, and they are saying that she is required to breach that or she is -- she is either required to give up her job or breach her Constitutional rights to bodily autonomy. That by its very definition is an unconstitutional condition.

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And two last points: One is on preemption, your Honor. If the defendant will rely upon the fact that one of the Pfizer vaccines has now been approved by the FDA, but the reason that that particular vaccine is not commercially available is because if it were, then all of the other three emergency use authorization vaccines could no longer lawfully be sold under federal law and outcome that the FDA and Pfizer may be trying to avoid because it would significantly reduce the COVID vaccine supply. In other words, the one vaccine that has been approved by the FDA is not readily available, and the other vaccines are still under the EUA. As a result, Michigan State's law, or Michigan State's policy is preempted by federal law under the emergency use authorization.

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And finally, Michigan State University cannot meet the rational basis test because, again, immunity is immunity is immunity is immunity. And in a situation where they have no reasonable basis for discriminating against people who

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have natural immunity and cannot voice one. And again, their policy was not based upon a robust medical analysis of the -- of natural immunity versus vaccine immunity, it was a policy that appeared on the website one day. It's based upon guidance documents, and the very guidance documents that it's based on do not say that it is inappropriate to recognize natural immunity.

So for those reasons, your Honor, I would like to reserve about 15 minutes for rebuttal, unless you have any further questions for me at this time.

THE COURT: I do not.

MS. HAGEMAN: Thank you very much.

THE COURT: Counsel, you may proceed.

MS. RICCHIUTO: Thank you, your Honor.

Michigan State would like to call Dr. Marcus Zervos.

THE COURT: Doctor, please step forward and be sworn.

MARCUS ZERVOS,

was thereupon called as a witness herein, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

COURT CLERK: Please be seated.

State your full name and spell your last name for

the record, please.

THE WITNESS: Marcus Zervos, Z-e-r-v-o-s.

THE COURT: Counsel, you may inquire.

MS. RICCHIUTO: Thank you, your Honor.

10:28:44 May I approach the witness?

THE COURT: You may.

MS. RICCHIUTO: May my colleague approach the witness, I should say.

Would you like us to keep going with the numbering,

10:29:01 your Honor?

THE COURT: You can use letters, counsel.

MS. RICCHIUTO: Okay.

THE COURT: So this would be Exhibit A.

MS. RICCHIUTO: Okay.

10:29:12 DIRECT EXAMINATION

BY MS. RICCHIUTO:

Q. Dr. Servos, do you recognize the document that you've been handed as Defendants A?

A. Yes, I do.

10:29:19 Q. You see the text across the top there, that just shows it's been filed before in this lawsuit. What is this document?

A. This is my curriculum vitae dated 9-7 of this year.

Q. And this true and correct copy of your curriculum

10:29:36 vitae?

A. Yes, it is.
Q. It is lengthy, so I don't want to spend time having you go over it. Is it fair to say that your credentials are summarized in the declaration that you filed in this case?
10:29:49 A. Yes, they are.
Q. And very briefly, maybe just for the Court's benefit, if you could give your current activity as it most specifically relates to COVID-19.
A. I am a division head of Infectious Disease at Henry
10:30:04 Ford Health System. I'm also Assistant Dean of Global Affairs, Wayne State University School of Medicine. In relation specifically to COVID, as the head of Infectious Disease at a large health system, I'm responsible for the care of people with a variety of different infections
10:30:24 including COVID, and directly care for hundreds of patients either myself or supervise their care. I'm also -- was appointed as the advisor to Mayor Duggan for the City of Detroit in response to COVID, and I worked very closely with the Detroit Health Department until now on response to COVID
10:30:45 in the City of Detroit.
Q. How many, if you know, Dr. Zervos, how many peer-reviewed publications do you have?
A. Counting published abstracts, which are also peer-reviewed, and papers, probably over 700.
10:31:01 MS. RICCHIUTO: I would move qualification of

Dr. Zervos as an expert in this matter.

THE COURT: Any objection?

MS. HAGEMAN: No objection, your Honor.

THE COURT: So noted.

10:31:09 MS. RICCHIUTO: Thank you.

BY MS. RICCHIUTO:

Q. Dr. Zervos, I want to make sure again to use the Court's time wisely this morning, and make sure that we are focused on the points that are most important to the

10:31:21 question before us. And so with that, I'm going to dig right in.

Do you have an opinion on whether natural immunity or COVID-19 vaccination provides greater protection against COVID-19?

10:31:35 A. I think that the vaccination provides a better immunity and should be given even if people with a history of a prior infection.

Q. Can you explain the basis and the reasons for that opinion?

10:31:50 A. Right. So the vaccines have gone through a clinical trials process. I participated as a principal investigator at Henry Ford Health System for Moderna and J & J vaccines. I know their process well. And there have been over 100,000 people that have been evaluated in the clinical trials. And

10:32:14 we know from those -- and the way that those studies are

done is they're prospective, they're randomized, they're blinded. We have a control group, so we compare people who get the vaccine versus those that didn't get the vaccine, and we look for effectiveness. And the effectiveness of the vaccine is how many people got infections in one group or another, what are the number of people that were hospitalized, what were the number of people that died were the measures of effectiveness.

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Vaccine safety is also looked at, and it's compared between the people that were vaccinated and the controls. With natural infection, we don't have the same type of information from the trials, we don't have randomized control from trials, looking at what happens over time with natural infection, but we know that people with natural infection can get reinfected. We also know that antibody levels can fall off over time making them at risk of infection and reinfection.

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Q. Can you explain just briefly, Dr. Zervos, there's been reference in the filings to the Court to a Kentucky study and an Israel study. Can you address just briefly, you know, describe those studies and describe the significance of each?

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A. Yes. The Israel study showed that there was -- there were less reinfections, better antibody response in people that had the -- that received -- that had natural

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infections, that they were better protected for reinfection. The limitation of that study is that it's non, it was non peer-reviewed. So the process of peer review means it goes through reviewers, the issues with the paper are not or are looked at and conclusions could be modified. It's retrospective. There is no control group. The biggest issue with it is, it was a short -- it was a short period of time that was evaluated, it was only three months. So within the first three months, somebody with natural infection may not get reinfected, but what happens at six months or eight months was not studied in that paper. So it has, I think, it has enough and various important limitations, and the limitations are significant enough that we can't interpret that as indicating that somebody with natural infection is protected.

Q. Okay. And that was with respect to the--

A. That is the Israel study. The CDC study, which was published in MMWR was, looked at a small number of patients, but it showed that in people that had natural infection, they were a little bit more than two times more likely to get reinfection than people that got vaccinated getting infection.

THE COURT: That's Kentucky?

THE WITNESS: That is the Kentucky study. The Kentucky study that showed, you know, again showed there was

more of a likelihood, at least two times more of a likelihood of getting a reinfection in somebody with natural infection than getting an infection if they were vaccinated. The Israel study showed that people with -- that had natural infection were protected more likely than if they got vaccine, but there were a variety of different limitations of that study that weren't mentioned.

BY MS. RICCHIUTO:

Q. You were in the courtroom for Dr. Noorchashm's testimony, correct?

A. Yes.

Q. He gave some testimony about the smallpox and the polio vaccinations. I was curious if there are differences between the COVID vaccine, for example, the mechanism that that vaccine relies upon, and the vaccines that were available for those medical issues in the past that are significant for purposes of the analysis today?

A. Yes. I mean they are very important differences. We do know that antibodies is important in immune response; we know that cellular immunity is important in immune response, but we also know that -- where I differ from Dr. Noorchashm's opinion is that we know very clearly there are many viruses that people can get a second time. So just because you get a virus and you have antibodies demonstrated doesn't mean that you can't get it a second time.

Similarly, it doesn't mean that even if you're immunized that you can't get infection again. Flu is the perfect example of that. We can demonstrate an antibody response after somebody has the flu, but the -- or if they get flu vaccine, but that antibody is still not enough to protect them from getting the flu the next year. Same thing with other infections. You can show that for strep throat, for example, you can demonstrate that somebody can have antibody to that, but they can still get a reinfection. Somebody can get -- The point being that reason it's different from smallpox is that it is possible with some vaccinations that people can still get infection after that or get reinfected.

Q. Can you explain, Dr. Zervos, limitations of measuring the amount and the efficacy of a previously infected individual's natural immunity to COVID-19? So for example, the serological tests that Dr. Noorchashm talked about today?

A. Immunity is -- There is a combination of factors involved in immunity. It's not just the antibody or whether they have T and B-cells or not, but we don't know what the level of antibody is that's protective for one infection or another. And that was even mentioned in the laboratory report that you shared earlier. And even more than that, we know even less about what T-cells and B-cells mean in immune response. But there is a lot of other things that go into

immunity. How closely somebody is to somebody else who has COVID, you know, what are their risk factors in terms of acquisition of the infection. It might make somebody more susceptible than another, which is why, when we look at prevention of infection, we don't just look at antibody levels. We look at what is the effectiveness of the, for the vaccine studies, what is the effectiveness of the vaccines. So what is the protection that somebody gets? How often do they end up in hospital? How often do they end up with infection? How often do they die? As a result of infection is the measure of efficacy, not one antibody level or another. We still do not know what the level of antibody is that would be protective or not protective and what other factors are involved.

10:39:38 Q. How does that explanation that you gave of kind of natural immunity, how does that differ from what we know about immunity of vaccinated individuals?

A. So what is different from the vaccination is that we have large randomized control trials. We have over 100,000 people that have been in the controlled trials. And it's respective, randomized, blinded studies, we have control groups, so we are able to see how people do compared to -- who get the vaccine compared to controls, and measure them over time. So it's not just the, you know, the first few months or first six months, but now we have at least a

year's worth of data that continues in the clinical trials, and we also have the real world experience to see what the effectiveness of the vaccine is. It's not just do they have the antibody or not, it's also what is the effectiveness of the vaccine over time in terms of preventing infection. And we don't have those type of studies for people with natural infection. Natural infection, the limitations of the studies is they are retrospective, they are short-term, they don't have control groups along with the exposures. We don't have a lot of information that's needed to be able to draw conclusions.

Q. What is your reaction, Dr. Zervos, to counsel's argument, and I think Dr. Noorchashm may have said it too, to this idea that immunity is immunity is immunity?

A. No, that's not correct. We know that there is a lot of different aspects to immunity. We know that antibody is important, we know that cellular immunity is important, but we also know that people have different risks in terms of getting infections, somebody with diabetes or obesity or cancer have different risks than others. We know that behaviors are important. If you're in a crowded room with other people that have COVID, you're more likely to get it or not. It's -- it is -- so what is the level of exposure with some of these risks? So there are a lot of factors that go into the immunity of infected. So we can't just

look at an antibody level and say somebody is protected or not. We have to look at the overall picture of risks and also somebody's vulnerability to infection.

Q. I wrote down this morning that Dr. Noorchashm said that those that are advocating for vaccination of those who have been previously infected are ignoring principles of science. Do you have a response or reaction to that opinion, Dr. Zervos?

A. Yes. So the, you know, the process of making that recommendation is that the -- so the vaccines go through the clinical trials and they go into real world studies with millions -- not millions, hundreds of thousands of people. The FDA approves the vaccine for emergency use or full approval, CDC then meets and through its ACIP, the college of -- or Committee For Immunization Practices meets, and all of these groups have a consensus of experts, and those experts come up with recommendations. It is almost unheard of for us as people that are actually caring for patients and making public health, infectious disease recommendations not to go along with the ACIP recommendations, so every public health authority is -- the major public health authority, the W.H.O. is saying not only should we be vaccinating generally, but we should be vaccinating people with natural infection. And I put Dr. Walinski's (phonetic sp.) statement in my declaration, that the W.H.O. says that

somebody with natural infection should be immunized. Every major society is also saying that it is, so the consensus is very broad. And the reason for it is because we believe that people with natural infection are not prevented from reinfection. Those that did have natural infection may have been or likely were infected with earlier strains and now we have different strains, we have the Delta variant, we have other strains that are upcoming that may not be protected. We know that natural immunity wanes also over time in terms of antibody levels even if you just consider antibody levels to be important. And we know that -- We know from real world experience that the vaccines have remained effective and they remain safe in terms of the safety part, we know that it's safer to get the vaccine than to get the infection.

Q. Thank you for that segue, Dr. Zervos. I was going to ask you with respect to that last statement that you made, that it's safe to get the vaccine than to get infected, does that remain your opinion with respect to individuals like Ms. Norris who have had a previous infection?

A. Yes, because --

Q. Why?

A. Yes, and the reason for that is, you know, you can't take, you know, three people, you know, anecdotally that had some kind of side effect after getting the vaccine and say

this was related to the vaccine. You have to compare it to a control group. Even in the controlled studies we had in the Moderna trial, for example, 30,000 subjects, there were 14 deaths. You say, oh, well, you know, Moderna vaccine causes deaths. You got to look at the placebo, the placebo had 14 deaths also. People die of other reasons, you know, during the, the reason they are in a clinical trial. Same thing after vaccine. They get a vaccine, they have one side effect or another. Is it different from a control group? We don't have that information. So you know, and again, we know that the vaccines have, they do have side effects, they have -- and those are well described. They have pain, they have redness, people get flu-like symptoms. Some people even had more serious symptoms. But the serious things like blood clotting, myocarditis, that type of thing, which are rare, they are more common in people that get infection. And again, in terms of specifically in this situation is that by immunizing people that have previous infection we're not only protecting the person himself, but we are people protecting people around them. And it is very well demonstrated that somebody who is even asymptomatic with the virus can spread it to somebody else. And if that person is vulnerable, they can die from infection.

I see people all the time where somebody is a -- they are even college students, they have some mild or even

asymptomatic infection, there's a family member or somebody around them that gets infection, they are more vulnerable and end up in the hospital and even die from it. So it's not just to protect the -- so what I'm saying that the risk of vaccine is less than infection, it is for the individual, but it's also for the public and people around that person as a whole.

Q. And that example, Dr. Zervos, you were just giving about family members and patients in the hospital, is that experience based on experiences that you have had treating COVID patients in a clinical setting over the last year and a half?

A. Yes. It's both the literature -- I mean it's well described household transmission, transmission in various close settings. The ability of COVID to spread is not disputable. It can spread very easily including from asymptomatic people and including from the Delta virus, which, of course, is why things have changed most recently. It's from the literature, but it's also personal experience. It is -- This last year and a half has been devastating. We have had hospitals filled. We have had deaths. We have had long-term effects. We have people with long-term COVID. One in every three people -- persons that get COVID have long-term symptoms. So it is, you know, that makes it difficult to differentiate, well, somebody's long-term

symptoms, how much of this is reinfection or not, you know, requires specialized testing that is not usually available.

But the point being is that the effect of COVID is devastating, and we really need to get ourselves together and get our population immunized, and which is our best way of controlling the virus.

I commend MSU for what it's doing in the mandates and not just trying to protect the individual person, but also protect the community overall.

10:48:36 Q. And just to wrap up, Dr. Zervos, the position that MSU has taken in its policy with respect to individuals who have had a natural -- a previous natural or previous infection and now maybe have natural immunity or did in the past, that's consistent with every single public health -- 10:48:54 recognized public health authority; is that correct?

A. Every public health authority is -- continues to recommend that somebody with natural infection get immunized, and the reason for that is out of concern for the person themselves for reinfection, but also the concern for 10:49:13 spreading infection to others. That is a generally held public health opinion, opinion among every medical society, public health entity and not only in the United States, but it includes W.H.O. and others.

Q. And the opinions that you've expressed here today, 10:49:31 Dr. Zervos, have you expressed those opinions with a

reasonable degree of certainty?
A. Yes.
MS. RICCHIUTO: Okay. I will pass the witness. I know they are very eager to talk to you, Dr. Zervos, so I'll let them get to it.
THE COURT: Counsel, you may inquire.
MS. HAGEMAN: Thank you, your Honor.
CROSS EXAMINATION
BY MS. HAGEMAN:
10:49:51 Q. Good morning, Dr. Zervos.
A. Good morning.
Q. People with natural -- You have indicated that people with natural infection can be reinfected and their antibodies can wane; is that correct?
10:50:08 A. Yes.
Q. That's also true of vaccinated individuals, isn't it?
A. Yes.
Q. And even if you get vaccinated for COVID-19, you can get it a second time, can't you?
10:50:21 A. If --
Q. Excuse me, even if you get vaccinated for COVID-19, you can still get COVID-19 again, can't you?
A. Yes, you can.
Q. In fact, the proof of the pudding is in the eating, and
10:50:33 we are seeing numerous breakthrough cases of people who have

already been vaccinated who have become reinfected with COVID-19, correct?

A. There are breakthrough cases, which is why we are looking at potentially the need for giving boosters.

10:50:50 Q. Right. So we just we keep vaccinating, in other words; is what you're potentially advocating?

A. Well, we vaccinate as necessary. We give flue shots every year because we know that --

Q. What my point is --

10:51:03 THE COURT: Counsel, let the witness finish and then ask your next question, okay?

MS. HAGEMAN: Excuse me.

THE COURT: Because Ms. Thomas is very good, but she can't take down both at the same time.

10:51:13 MS. HAGEMAN: Thank you, Ms. Thomas.

THE COURT: Go ahead, counsel.

Doctor, were you done with your answer?

THE WITNESS: Yes. Yes, I was.

BY MS. HAGEMAN:

10:51:22 Q. Well, in fact, everything that you've said about natural immunity today and your criticisms and your concerns about people with natural immunity applies to people who have already had the vaccine with COVID-19 as well, don't they?

10:51:34 A. No. No, it doesn't. They are totally different.

Q. We know there is breakthrough cases, correct? With people who have been vaccinated for COVID-19, we know there are breakthrough cases?

A. We know there are breakthrough cases.

10:51:47 Q. And we know that the efficacy of the vaccine wanes over time, correct?

A. It can wane over time.

Q. Yes.

A. In some people, which is the reason we are looking at

10:51:56 giving boosters to some people, not everybody, but to some people.

Q. Okay. So again, because your concern -- you have voiced a concern that with natural immunity, we don't know how long that natural immunity will last, correct?

10:52:12 A. It varies. It varies by individual, and some people with natural infection, they don't develop antibodies at all. Others, it wanes other a few months. Reinfections can occur usually any time after about three months after natural infection is what we have seen so far.

10:52:32 Q. Okay. Well, I want you to answer my question. And that is this: What are your concerns about folks with natural immunities? You don't know how long that natural immunity will last; is that right?

A. Everybody is different, every person is different.

10:52:47 Q. Okay. And with the people who have had the vaccine, we

don't know how long they will be protected from COVID-19 either, do we?

A. We have better information on that vaccine patients and we do know how long they are going to be protected because we have been following people in a clinical trial. The answer to that is yes, we do know how long they are going to be protected with some, you know, some provision. There might be changes in strains, there might be individual variability from one person to the next, you know. We are following people in the trials for years, so what happens, you know, two years from now we don't know.

Q. Well, you can't have been following it in trials for years because this breakout has been approximately a year and a half long, correct?

A. We will be following it for years.

Q. Pardon me?

A. We will be following it for years. The trials, the way the trials are being done is that we are following those patients for five years.

Q. But I'm talking about what our knowledge is right now.

So in other words, Doctor, the situation we are dealing with, because we are dealing with a pandemic and it's only been around for about a year and a half, we don't know how effective or how long the COVID vaccines will be effective just like according to your testimony, we don't

know how long natural immunity will be effective?
A. No, that's not correct. That's not correct. We know that through the clinical trials up to this point, we know how safe and how effective they are. And not only do we know it, but we know it in a perspective randomized blinded fashion compared to controls. So we know how are people doing, how often do they get infections compared to people who don't get the vaccine over the year that we have been studying it so far. So we have that information. We know that over time that, with the vaccine, that people do get infections but, and we know how many people get infections. So that is information.
Q. But what we do know is that if you've had the COVID-19 vaccine, you may get reinfected tomorrow, correct?
A. You might get an infection.
Q. Right?
A. You might get an infection tomorrow. The likelihood of that resulting in a hospitalization or death is very low.
Q. Okay. And we also know that with some of the vaccines that MSU has approved, that they are substantially less effective than others that they have approved or will recognize. So the Sinovac, for example, as compared to the mRNA or the Johnson & Johnson, there are differences in terms of the effectiveness in preventing the vaccine and how long they will prevent the vaccine in all of those vaccines,

isn't there -- or that they will prevent the COVID in all of those vaccines, correct?

A. It's hard to compare one vaccine with another because there aren't head-to-head comparisons. It is -- and there are different strains involved and different periods of time the study was done. The J & J study, for example, was done around the world, it was not just done in the United States. There were different strains involved. All of the vaccines that MSU is recommending are FDA -- either FDA emergency use, FDA approved or W.H.O. endorsed as having safety and effectiveness. Whether there is a difference in efficacy rate in one or another, partly depends on the time the study was done, the strains that were involved, the -- and who is included in the study or not included in the study. It's not possible unless there is a head-to-head comparison to say that, you know, one vaccine is necessarily better than others. If they're all in the emergency use approved or FDA approved or approved by W.H.O., we believe that they have demonstrated enough safety and efficacy to be recommended by MSU. So I agree with their position.

Q. FDA have not approved the Sinovac, they have only approved the mRNA and the Johnson & Johnson, correct?

A. W.H.O. has approved the --

Q. My question was whether FDA has.

A. No, they haven't.

Q. That's right, okay.

Sounds to me like there's a lot of uncertainty in this, which is what we are all kind of experiencing, isn't it?

10:56:59 A. Well, we -- there is an enormous amount of scientific literature and we learn things, you know, new every day, and it is -- so we are learning more about the vaccines every day, but we also learn more about natural infection, we learn about how virus changes. And as part of our reason

10:57:18 for recommending that people with natural infection get immunized is because we are learning more about that every day also.

Q. Yeah, it's Kind of a fluid situation, isn't it?

A. We continue to learn more and more every day.

10:57:30 Q. Right. And you have been critical of the Israeli study. The Israeli study involved 700,000 people, correct?

A. Right.

Q. And it's one of the largest in the entire world that's been completed, correct?

10:57:41 A. It's -- yes, it is one of the largest studies.

Q. And it showed that natural immunity was 27 times more effective than vaccinated immunity at preventing symptomatic infection, correct?

A. That's what they reported. I don't think it showed

10:57:54 that, but that's what they reported.

Q. That's what the report shows.

Your criticism of it is it was not peer-reviewed, correct?

A. That's one of many criticisms.

10:58:03 Q. Several of the studies that you have done have also not yet been peer-reviewed, correct?

A. The majority of what I cited in my declarations were New England Journal, CDC, you know, other MMWR, Lancet, multiple peer-reviewed papers. I did put in a few

10:58:24 references to some of the studies that were cited by others, and then I put in a few -- I did put in a few papers that were not peer-reviewed.

Q. Right. Again --

A. I didn't -- The conclusions that I reached were from

10:58:41 the peer-reviewed literature.

Q. It's been kind of a fluid situation over the last year and a half, hasn't it? We are all learning, aren't we?

MS. RICCHIUTO: Object to form.

THE WITNESS: The science, you know, we do learn

10:58:53 things every day, there is no question about that.

BY MS. HAGEMAN:

Q. Just one last question, Dr. Zervos.

Can you guarantee that Ms. Norris will not suffer any side effects if she's forced to get the vaccine as being

10:59:05 required by MSU?

A. Well, you know, she's not my patient so, you know, I think if there is a patient-doctor relationship, it's, you know, there is a combination of, you know, what are medical illnesses, what are the risk factors, what are the exposures, what is the-- what is the, you know, when was the infection that she had before. But knowing that her -- What I do know about it, all I've seen is just the -- actually I just saw it today before I knew the result, but just the lab reports, and knowing that she had an antibody of whatever it was, 40 or 50 or 60 in August, I don't know whether she has the antibody now or not a month later. Actually, I would anticipate it would be lower. So my recommendation would be that it would be more likely that she's going to suffer a harm from a reinfection, which is just a matter of time, than from getting the vaccine.

Q. Okay. That wasn't my question. Because what we are talking about here is her personal autonomy, and her bodily integrity. And what I'm asking you, and we have talked about the fact that there is also a risk of harm with vaccines or with any medical intervention, isn't there?

A. There is always the possibility of a side effect from getting the vaccine.

Q. You cannot guarantee that if MSU forces Ms. Norris to get the vaccine for COVID-19 having natural immunities, that she will not suffer adverse medical side effects, can you?

A. We know what the side effects are of the vaccine, and it would be possible for her to get a side effect. I can't say whether -- It would be unlikely from what we know about the vaccine.

11:00:46 Q. But you can't guarantee that?

A. She is at risk of getting an adverse effect from the vaccine.

MS. HAGEMAN: Thank you.

THE COURT: Redirect, counsel?

11:00:56 MS. RICCHIUTO: None, your Honor.

THE COURT: All right. Thank you.

Doctor, you may step down with the Court's thanks.

THE WITNESS: Thank you.

(At 11:01 a.m., witness excused.)

11:01:12 THE COURT: Counsel, you may proceed.

MS. RICCHIUTO: Thank you, your Honor.

Your Honor, we have a demonstrative exhibit. Amy -- that we had worked with Amy to get just a slide deck just to guide our discussion.

11:01:24 THE COURT: Tell you what, we have been at this for two hours, so we will take ten minutes.

MS. RICCHIUTO: I promise it's not that bad.

THE COURT: No, no, no. It's okay. Two hours is fine. Everybody needs to stand and stretch.

11:01:36 MS. RICCHIUTO: Thank you.

THE COURT: Okay.

MS. HAGEMAN: Thank you, your Honor.

COURT CLERK: All rise, please.

Court is in recess.

11:01:44 (At 11:01 a.m., recess.)

(At 11:15, a.m., proceedings continued.)

THE COURT: We are back on the record in 21-756. Counsel are present. We are ready for argument from the defendant.

11:15:22 Go ahead. You may proceed, counsel.

MS. RICCHIUTO: Thank you, your Honor.

Ann Ricchiuto for Michigan State, and this is the portion of our argument that's going to be focused on the law.

11:15:33 We have had our witnesses testify to some factual matters, and now I would like to refocus us on the motion we are here today about, which of course, is a motion for a preliminary injunction. We have got this demonstrative just to sort of help us walk through the legal standard. So

11:15:50 obviously we all know well the four factors.

MS. HAGEMAN: Your Honor, if I may make just one quick objection for the record, and that is with this demonstrative, I've never seen it before today. I haven't had an opportunity to go through to ensure that it only

11:16:04 contains information that is already included in their

brief. I assume that you are going to allow her to go ahead and walk through it. I just wanted to make sure that I had my objection noted on the record that I don't know what is in this document.

11:16:18 THE COURT: All right. Thank you. Objection is noted.

MS. RICCHIUTO: Thank you, your Honor.

THE COURT: Is there some reason why you didn't give this to counsel earlier?

11:16:26 MS. RICCHIUTO: I gave it to them this morning when we got here.

THE COURT: What about yesterday or the day before?

MS. RICCHIUTO: We were working on it, your Honor. It's been an extremely expedited timeline obviously for this

11:16:41 case. It wasn't -- I mean I do believe you are not going to see anything in here that you haven't seen or heard before. The true intent of it is to be just a demonstrative to guide the discussion.

THE COURT: For purposes of future considerations,

11:16:58 you have to give opposing counsel a little bit more notice than dropping something like this on them at 8:30 in the morning before a 9:00 clearing, okay?

MS. RICCHIUTO: Yes, understood, your Honor. Thank you.

11:17:08 THE COURT: All right.

MS. RICCHIUTO: So again, we all obviously know well the factors for the injunction standard. I don't need to dwell on that.

In your TRO order in this case, your Honor, you did a preliminary assessment of Ms. Norris's likelihood of success, and we believe you got it just right, and so we want to walk through that analysis in some more detail.

Just to briefly address the new argument about -- the new authority argument, your Honor, that is subject to the sur-reply. I'm still not sure I hundred percent understand this argument. I think what I understand them to be saying is that Michigan State University can't act or any government entity maybe can't act without a specific legislative delegation. We don't understand that to be the law. But at any rate, there is no legislative delegation necessary here because the authority comes directly from the Michigan Constitution. And that's what you see.

THE COURT: Is that the cover of the 1895 Constitution?

MS. RICCHIUTO: It may be.

THE COURT: I think there's been at least two since.

MS. RICCHIUTO: We will update that. Thank you.

THE COURT: I mean I think you got 1908 and you got 1963.

MS. RICCHIUTO: Is this --

THE COURT: I mean it's a great cover. I like the cover, but there have been two state Constitutions since.

Go ahead, counsel.

11:18:31 MS. RICCHIUTO: Well, our point on this, your Honor, simply is that Michigan State certainly has the authority to provide for the safety of the people on its campuses, it originally derives from the Constitution. There is the Michigan Supreme Court cases that are cited in 11:18:45 our papers essentially saying it's co-extensive with the legislature.

It's also really important to point out here that Michigan State -- I think you made this point, too, in one of your questions -- is not legislating for the entire State 11:18:57 of Michigan, right? So Michigan State is in charge of saying what can happen, can and can't happen on its campuses. It does that through its ordinances. And this is really no different, this is exactly something that's in their purview to address.

11:19:12 So I just wanted to make sure to address those points. Again, these are arguments that are in our papers about the fact that they certainly do have the authority to make rules and policies just like they have, you know, for ever and ever about what it is that happens on their 11:19:29 campuses. And there is not anything different about this

being a vaccination requirement that undermines that authority.

So moving on just from that initial point. The majority of their argument today that we have heard, your Honor, goes to strict scrutiny. And they have already told you in their papers that they think that your TRO order, excuse me -- you may also have to give me the slow down sign -- got it wrong by applying rational basis. This is a Jacobson case, though, your Honor. Yes, it's before rational basis had been articulated as such, but every court has relied on Jacobson including the Sixth Circuit recently with respect to other COVID cases. The Supreme Court dozens of times essentially applies the equivalent of rational basis standard based on Jacobson. And your TRO order confirmed that Jacobson applies to a challenge just like this where a vaccination is unwanted and unnecessary. That's exactly what Jacobson said. In fact, I really find the discussion in that case really striking because it exactly could be happening today. You know, Jacobson is arguing I don't want this, I don't think it's going to help me, I don't think I need it. So those were all arguments that the Supreme Court considered back in the era of Jacobson, obviously different vaccination and different time. But this is what the standard is. Real substantial relation, and if it has a real and substantial relationship

to a legitimate government interest that is rational basis, then this policy has to survive.

The Seventh Circuit -- this is also just from your TRO order, this is the Klaassen case, your Honor. They, as you pointed out, they did recently hold. And my understanding is the same as yours, Judge, that in terms of a circuit opinion, they are the only one that's done a university vaccine mandate and maybe any vaccine mandate. I know that there are other District Court cases that are dealing with a variety of challenges. We cited in our papers, I think, the University of Massachusetts case, a variety of challenges that are making their way through the District Court, but I'm fairly confident that the Seventh Circuit decision is the most comprehensive in terms of reviewing a District Court treatment. And those -- if I can just have the next slide -- those confirm that rational basis applies because no fundamental right is at issue. And they have to have a fundamental right to get into strict scrutiny. The vast majority of the arguments that they have made today are strict scrutiny type arguments and this is simply just not a strict scrutiny case.

THE COURT: Let me ask a question regarding Klaassen. Counsel in her argument indicated Klaassen was a students' case, not necessarily -- and did not include staff of the university. What is your response to that

distinction?

MS. RICCHIUTO: As a factual matter, that is correct. It was a case brought by eight students, most of whom actually had exemptions. But the significance of a challenge to whether or not this is a depravation of the right to bodily integrity or interference with that, that argument is the same. So that the bodies were bodies of students rather than bodies of staff is not a distinction that should make a difference for purposes of the legal analysis. And in fact, in Klaassen, the students took the position essentially that the staff should be more likely to need a mandate because they are older and at higher risk, you know, and we students are kind of more robust from an immunity perspective. To the extent that the staff/student distinction was taken into account in that case, it actually was observed that such a requirement like this might be even more appropriate and more necessary for the staff level. In terms of legal significance of the bodily integrity being the body of a student or body of staff, we don't think there is legal significance there. The students were adults, so this isn't a childhood vaccination case obviously. So from that perspective, we think the logic and the analysis of the -- particularly the analysis on the substantive due process legal question about whether there is a fundamental right to bodily integrity and whether that's possibly invaded by a

requirement like this, we think that translates over to this case.

THE COURT: Are there any circuit opinions from the Sixth Circuit -- well, not opinions. Are there any cases pending in front our circuit right now, meaning the Sixth Circuit, recognizing you're from the Seventh Circuit, but are there any -- to your knowledge, are there any cases pending in the circuit in which an appeal has been taken either way from a district judge in the Sixth Circuit?

MS. RICCHIUTO: On the question of --

THE COURT: On the question before the Court here.

MS. RICCHIUTO: The antibody question?

THE COURT: Right.

MS. RICCHIUTO: No, I'm not aware of any, your Honor.

THE COURT: Okay. Thank you.

I didn't think there were, but I was --

MS. RICCHIUTO: I'm not aware of any. I would hope we would have found them, but I'm certainly not. So from our perspective, I think is the same as yours, which this is the Court, and certainly the District Court in Klaassen, you know, that opinion is substantial and he undertook a very robust analysis of precisely this bodily integrity, you know, is there a fundamental right stemming from it and is there any kind of right that's invaded by a requirement like

this that is Constitutional that would not satisfy rational basis, and he concluded no. So I would, you know, commend that analysis to your attention. Although -- Understanding you'll do your own, but he did kind of, you know, a more
11:25:23 robust than average, look at the law on that.

So here's what we know about bodily autonomy. They have no fundamental right to refuse a vaccination. There's no court that's ever found that. And as a practical matter, there is also no depravation of the right to choose in this
11:25:39 case, and we will talk more about that, but it is something that's important. The bodily integrity cases that are relied on are, you know, obviously Miss Klaassen was incapacitated, so she really literally didn't have a right to choose. Prisoners, people awaiting trial, these are
11:25:55 people who literally the state was going to inject something into their body without their consent. That is not what we have here. Our situation is different, and the Klaassen court recognized it, which is that she does have a choice. So I want to talk about that more in a little bit, but I
11:26:14 just want to make kind of plant the seed that that is another distinction.

So for rational basis, as we know, what we need is a legitimate interest, and we certainly have at least that. The Supreme Court has found, the Sixth Circuit, I believe,
11:26:34 has found, you know, controlling COVID is a compelling state

interest, it's absolutely legitimate, so we should -- I don't even know that we disagree necessarily about that.

It is compelling nationally, it's certainly compelling in Michigan. And here is some statistics here that are also found in the declarations just about the status of COVID in Michigan specifically, that underscores the fact that Michigan has at least a legitimate and probably a compelling interest in controlling this on its campus.

11:26:51 11:27:06 11:27:25 11:27:45 11:28:03

So having established that requisite interest, Michigan State must establish that the requirement is reasonably related. And here, I think, is where we have a little bit of misunderstanding or different way of thinking about the law than the plaintiff's, your Honor. It is not the standard that Michigan State has to bring to you, you know, every thought that it thought before it enacted this policy. We have provided an expert to help understand the science. He is going to do a better job at it than I am going to do, but it's a deferential standard that has -- it has to be a plausible justification that we have offered, or even that you've come up with. Plaintiff's have to negate every conceivable basis that might support the policy. And it just has to be based on rational speculation. We believe that we have shown far more than that, that we exceed that standard by a fair bit, but it is really important to

remember what the standard is here, and that this issue about, you know, the timing of when we considered which studies or what is or isn't specifically outlined in our policy document, you know, that's on the internet for our students to consume. None of that is relevant to a rational basis analysis. Rational basis analysis is, is there a legitimate interest and is there a reasonable relationship, and we believe that we absolutely have that in spades.

As has been alluded to today, the CDC has given specific guidance to higher ed, which obviously includes Michigan State. It's been through the CDC, the U.S. Department of Education, and as a preliminary matter they have recommended, listen, college campuses are big places, with lots of people mingling, vaccination is something that's really important to consider. So that is sort of the starting point for Michigan State's reasonableness.

And then when we get to the specific question before us today, should people -- Does that conventional wisdom include and extend to people who have previously had COVID. And as Dr. Zervos testified, and I think Dr. Noorchashm conceded, every single public health authority who has weighed in on this has said yes, Michigan Department of Health and Human Services has said yes. CDC has said yes. FDA has said yes. And there is in our papers, your Honor, a study that also reflects the CDC did actually

consider efficacy in previously infected individuals. So it's not a matter of, you know, they haven't thought of this or they haven't studied it. Obviously things are continuing to evolve, but this is a question that the CDC has looked at and affirmatively concluded yes, here is what we are doing. And that is a basis for the policy. All of those things cumulatively are the basis for the policy.

So this is the CDC. Here are the other authorities that have, that recommend this. But again, Michigan State is simply acting consistent with the guidance. They are not saying that they are enforcing this guidance or, you know, potentially, I guess, that they couldn't make a different choice, but if the question before you, Judge, is Michigan State's decision reasonable to come down on the side of yes, previously infected people should be vaccinated.

THE COURT: Well, now wait a minute. What you just said is that there is no -- no indication that you are going to enforce the policy. Did I hear you correctly?

MS. RICCHIUTO: No, your Honor.

THE COURT: Okay. I thought there was some --

MS. RICCHIUTO: Oh, okay. I understand what my comment went to. I was referring to --

THE COURT: Because is there anything in front of me if you are not going to enforce the policy?

MS. RICCHIUTO: We are going to enforce the policy.

Let me try to clarify my very confusing statement.

THE COURT: Perhaps you misspoke.

MS. RICCHIUTO: I was trying to be --

THE COURT: You know, my head went ding, ding, ding, ding, so go ahead.

MS. RICCHIUTO: Yes. Understood.

I was referring to an argument that plaintiffs have made which is that somehow Michigan State is taking the position that it is bound by these authorities or that it is the enforcer of the federal authorities. That's not the position we are taking. We have made our own policy decision that we are entitled to make, it is reasonable because it happens to be consistent with all of these, and we will enforce it consistent with the policy that is written. Does that help?

THE COURT: That succinctly states it. Go ahead.

MS. RICCHIUTO: Okay. Thank you. I apologize for that confusion. Thank you for stopping me.

I think what it comes down to, your Honor, is it's as simple as what we heard from Dr. Noorchashm, which is, it's his view that all of these entities have just made a mistake, you know, they are getting it wrong, and that his view that is different is a mistake. Luckily for you, you don't have to necessarily ultimately decide that, so long as Michigan State's view is that it's reasonable. We think we

have adequately shown that it's not a mistake, that the federal guidance is consistent with the science, is consistent with what Michigan State's doing and what its expert has testified that it's doing. But you know, very respectfully, your Honor, one expert disagreeing with that is not unconstitutional. They are asking you to hold that it is unconstitutional for a state university to follow state and federal public health guidance in the middle of a pandemic. That is a very substantial ask, and we think there is no reason to do that under the standard that's before us.

I want to touch briefly just on this question of antibody -- the antibody testing. I think Dr. Noorchashm agreed with us, and it says it right on Exhibit 3 that these, the tests -- the serological tests that he is relying on to measure antibodies are not -- yes, they are recognized tests. You can order them, they are real. Again, we have a difference of opinion between Dr. Noorchashm and the public health authorities about what the significance of those results mean, and so I think it's important to understand that. It's not as if plaintiffs have thought of something that the federal government or that the state department hasn't considered. They are obviously aware those tests are out there. They are also very aware of their limitations. And so the guidance is don't really on those tests for

basically exactly this reason, to say, I've got all of the immunity I need, you know, I don't need to be vaccinated.

THE COURT: But isn't the serological test another data point to consider?

11:34:08 MS. RICCHIUTO: Yes, it certainly is. And it is one data point from among many, many data points that all of these public health authorities have considered. And what they have concluded is, and I don't think I heard him testify, there is not a magic number. I don't believe, your 11:34:27 Honor, that says, you know, if your a five, right, you're immune for the rest of your life. Ms. -- Harriet asked our expert about could we guarantee that nothing would happen, you know, to her client. I think there is no level at which Dr. Noorchashm would be able to guarantee to her that she's 11:34:45 above the level and she definitely wouldn't get COVID or she definitely won't be hospitalized or die from COVID. So that is the limitation on these studies is there is not -- yes, they will give you a number; yes, it is a data point to consider, you know, if there is zero there's and not zero, 11:35:02 but where you are on the spectrum, there is no guidelines about what is high enough, how you can contextualize that number in the context of the other risk factors that Dr. Zervos talked about.

And so for those reasons, the recommendation is 11:35:17 that you can't just take a test, say that it's positive and

say that you're free forever. You know, we all can get the flu multiple times even if we've gotten the flu shot. Think about the flu shot. You can get the flu shot, you can have some immunity to it and you can have the flu more than one time. Despite that, the guidance is still get your flu shot every year. So in a way, this is not different, and I agree with you that it is a data point. It is not a data point that public health authorities are recommending, relying on to make decisions about who should and should not be vaccinated.

THE COURT: Apparently public health officials, if I understood the testimony, they are saying don't get the antibodies test, right? Or the serological test? If I understood the testimony, they are sending out the message don't do it. Help me with that, if you can.

MS. RICCHIUTO: I think what they are saying -- if I just read this title which comes straight from this website, it says not currently recommended to assess immunity after vaccination. So I don't know that they are saying never get this test. If it's some kind of meaningful, something that your doctor prescribes to you, I don't want to suggest there could never be a reason to prescribe that test. But what the guidance is, is don't get this test, and then use it to say I am immune, I can go out, you know, in a big crowd of people with no mask and no

precautions and I'm never going to get COVID. That is what they don't want to have happen, because the data does not support there is some number at which you're safe and home free and immune and immune forever.

11:36:59 THE COURT: But apparently it acts, if I understood the testimony correctly, apparently acts as a motivator for people to get the vaccine because they are showing no immunity, and that is in part persuasive to them to go out and get the shot or get the jab. They call it a jab in

11:37:20 Brittain. Anyway, go ahead.

MS. RICCHIUTO: No. And I heard that testimony from Dr. Noorchashm, too, and that, you know, as a nonpublic health expert that struck me as potentially a good reason to have these tests, right, to have them in existence. That's

11:37:32 a far cry from using them to say I have no immunity, I would like to become immune is very different proposition than using them to say I have got some number, that feels like enough to me. You know, there is no number that any public health guidance has given to say this is the number you need

11:37:49 and this is how long you'll stay at that number. So that's what I would say about that.

This is just another summary, your Honor. Obviously from our perspective, there is well more than sufficient evidence in the record to support the

11:38:06 reasonableness of Michigan State's approach. Immunity

postvaccination is uncertain. There is evidence that vaccination increases it. Again, even if you've been previously infected, and the evidence is there is not substantial harm to previously infected people.

11:38:23 You know, the significance of their argument that people who have previously had COVID-19 being vaccinated or is going to result in harm, the significance of that argument, your Honor, is that all of these authorities are taking the position that they are just affirmatively

11:38:43 recommending something that is going to harm, you know, some huge majority of the American population. We haven't seen that bear out in real world studies, and frankly, your Honor, it's just not plausible that that is the position that our public health experts would be taking. If they

11:38:59 knew it was going to have, you know, substantial harm to people who have previously had COVID, there would be guidance against it. For example, there is guidance against if you get COVID and you have that antibody treatment, you know, that some prominent people, sometimes we hear they get

11:39:17 their hands on the antibodies and they get it. There is guidance from the CDC or FDA saying don't get a vaccination right after that, wait 30 or 60 days because you just ingested those antibodies. So that's an example where they have looked at it, they have made a different judgment.

11:39:33 They being the public health experts. They have made a

different judgment to say in that situation where we are affirmatively infusing someone with antibodies, we think there is a pause on when immunization should happen. Critically, it's not a pause forever, it's 30 or 60 days. It's on the internet. And it doesn't extend to, you know -- they don't say, oh, and based on that conclusion, we also recommend no vaccinations for people who have been previously infected. So this is not an issue that was missed. There is no evidence this is an issue that no one has thought about, instead this is an issue on which the people who we charge with giving us guidance on this have considered it and they have made recommendations. And again, at this point you have a state who is policy making under rational basis standard and is it reasonable for them to follow that guidance.

Okay, skip that.

And so I guess the last thing I would say on that, again, is that our evidence on that is obviously all of the publically available public health guidance, we also have evidence that came in via a well-qualified expert that unquestionably meets all the admissibility standards under Federal Rules of Evidence 702. So you have evidence in the record, your Honor, that the position that Michigan State is taking is the position that is generally accepted in the scientific community.

So when you have a legitimate government interest and a policy that's reasonably related to it, as you well know, you are entitled and encouraged to defer to the policy makers, your Honor. We -- the Supreme Court has found that, the Sixth Circuit has found that during the pandemic that when, you know, even if you want to consider this as a decision making proposition, this is exactly the type of thing that is to be left to the policy makers.

So just one other point on another reason, you know, we have got obviously this great weight of authority, but it's also true that Michigan State as somebody who is administering a policy on behalf of a very, very broad community and a lot of people, they get to take into consideration other factors as well. I'm not suggesting those factors could outweigh the science if the science tipped the other way, but it is also true that the policy that I understand plaintiffs to be advocating for would require periodic antibody testing, tracking of that by the university, you know, hey, it's been, you know, three months since your infection, which you have to report to us. Report to us your infection. We are going to order you to get tested at a certain point, and then we, Michigan State, are going to pick the line of where we think you are, where you don't have enough immunity anymore that you have to get vaccinated. If this case is any lesson, your Honor, I think

we would be right back here. I think a policy maker would choose a point at which they would say you don't have enough immunity, now we're ready for you to be vaccinated and presumably someone would say no, I think that I do. So not only would their kind of proposed solution or the impact of their argument be really difficult to administer, I also don't think it would cure the legal concerns that they say that they have about bodily autonomy and making people do things. You would have to require periodic serological testing and you would have to have somebody on Michigan State's behalf reading that and saying, you know, here is where we think the line is. So I make that point just to say that administrative convenience is yet another reason that Michigan State's decision here is very reasonable. It's consistent with all of the federal public health guidance and it is straightforward and workable to administer as an institution of higher education.

Okay. Their next argument is that this -- that there's been an unconstitutional condition created by what is essentially this choice that Ms. Norris has to either become vaccinated or become employed somewhere else, or withstand the discipline process that would follow from a refusal to be vaccinated consistent with the policy.

The unconstitutional conditions argument is really just another way of arguing that it's unconstitutional.

What the Koontz case says, that's a case that we both cited, is that to have an unconstitutional condition, you have to have coercion and you have to have an enumerated right being relinquished. They say no coercion is required. I don't believe that they have exactly a citation for that. I believe the standard is clear that coercion is required. And as the District Court in Klaassen who grappled with this exact same question, said a hard choice isn't coercion. Again, this is different from the woman who's lying in the hospital bed incapacitated and the government is deciding whether she's going to be forced nutrition. This is an adult who will or won't go to a medical provider and receive a vaccine that is required as a condition of her employment -- employment, you know, as to which she has no property interest in the first instance. The presence of that choice is important and is significant and it means that not only, again, it there no enumerated right at stake, that there's been no coercion. So there can be no unconstitutional condition under the authority as it currently stands. There is also no procedural due process violation, as counsel conceded, obviously. She's got no right to her job. To the extent there is some kind of other -- this other bodily interests or medical decision interests they are relying on. There is no process required because there is no individualized determinations being made here. This is

11:44:28
11:44:48
11:45:08
11:45:34
11:45:52

something that applies to everybody. It's a general nature. It's saying if you work here and you don't meet one of the exemptions, you must be vaccinated. The cases that they cite about this irrebuttable presumption context, those are
11:46:12 essentially loyalty oath cases, where first of all, they are First Amendment cases, so there's strict scrutiny at issue so entirely different level of scrutiny. But also what those cases are saying is, if we allow this loyalty oath rule to stand, we are worried that someone might, you know,
11:46:30 sort of freeze their own speech or bridge their own speech for worry that they lose a benefit, your know, whether it's a tax break or retirement benefit or whatever the case is, the examples in the cases are. This is different. This isn't where she's going to be guiding her conduct and trying
11:46:48 to stay on the line of a fundamental right.

First of all, it's not a First Amendment case and it applies to everybody equally. If you are not vaccinated and you don't meet an exemption, you are required to be vaccinated and that applies to everybody equally, and that
11:47:06 is enough to conclude there is no process due for purposes of procedural due process. So there is no likelihood of success on that claim.

On this preemption issue, I think what I understand them to be saying is this point about, yes, we agree that
11:47:28 the Pfizer vaccination has been approved, but we are worried

that we won't be able to get, you know, the one that's got that name on it as opposed to the other name we have shown in our briefs, your Honor, the language from the FDA and from Pfizer that say they are the same. So they are the same. If she goes and gets, if she leaves here and goes and gets a Pfizer vaccination, it will have the formulation of the FDA approved vaccination. They didn't make a different version of it or add something special to it to get that approval. It's the same vaccination, it's got different packaging now because it's got a different level of approval, but the vaccination is the same. So there is no preemption claim anyway because this EUA statute is not something that applies directly to MSU as a policy maker in this case, but this issue really should be a nonissue, particularly in light of the approval.

THE COURT: What do you make of the fact that you're accepting the Sinovac vaccination, which has not been approved by the FDA or the CDC or any other federal agency?

MS. RICCHIUTO: My understanding of the approval of that vaccination is a couple of things. Number 1, I don't believe that it's accepted for people in the United States because you can't get it here.

THE COURT: The university is accepting it as proof of vaccination, though, right?

MS. RICCHIUTO: Yes, for folks that have that

vaccination available to them.

THE COURT: Then how does that effect the analysis, in your opinion, if at all?

MS. RICCHIUTO: No, thank you, your Honor.

11:49:12 So first of all, I think that the way that the 50 percent -- I don't know -- I know that Dr. Noorchashm has said that it's 50 percent efficacious. I don't know whether that's right or wrong.

THE COURT: I know. But throughout your argument 11:49:25 you have been pointing to the FDA and CDC as supportive of the university's position, but it would appear as if you're accepting the, what I'll refer to the Sinovaccine, that that doesn't have the imprimatur of any state or federal agency, correct?

11:49:46 MS. RICCHIUTO: Not in our country. It has the imprimatur of the World Health Organization.

THE COURT: Oh, that's persuasive.

MS. RICCHIUTO: It's W.H.O. approved, just hasn't been approved in our country as of yet, which is why --

11:49:58 THE COURT: All right. But then, okay, so you're accepting a vaccination which the federal agencies involved have not accepted. And my question to you is: Is that consistent with the rest of your argument pointing to the federal agencies in saying, hey, these people say what we 11:50:22 are doing is perfect, and therefore, the Court shouldn't

interfere, but yet there appears to be at least some indication that you're accepting somebody else's opinion?

MS. RICCHIUTO: I understand the question, your Honor.

11:50:39 I've got a few responses to it. First of all, the someone else in this situation that we are -- we would be deemed to be accepting, I think, under your formulation is the World Health Organization, so it's not me or my son, it is a reputable organization.

11:50:54 Number 2, I don't know --

THE COURT: Do you have any testimony to that effect?

MS. RICCHIUTO: That --

THE COURT: I'm just showing some skepticism on the 11:51:05 W.H.O., which is not necessarily in the record. Go ahead.

MS. RICCHIUTO: Okay. Well, your Honor, I'm not clear. I don't believe it's in the record whether those vaccinations have been submitted for use in the United States and rejected, or whether they have just only been 11:51:21 submitted in other countries. So I don't know that it's necessarily fair to conclude that the FDA has said, for example, that this vaccination is not okay. We just know that they haven't passed on it one way or another. Michigan State has foreign students that, when they are residing 11:51:37 their home country, they need to get the vaccination that's

available to them. So the flip side, I think, of the argument that's being made is that because in China, for example, if that's where the Sinovac comes from, because China doesn't have vaccination that's quite effective as the
11:51:56 vaccination we have in the U.S., those Chinese students should not have to get their vaccination at all. That is the logical conclusion to this argument. And I think Michigan State would say, that's not a policy choice that we want to make. We want students to get the vaccination that
11:52:10 is available to them where they are.

With respect to that, again, with respect to that 50 percent statistic, let's accept for the sake of argument that that's correct. My understanding is that does not mean that five out of ten people have no reaction or no
11:52:28 immunities are produced whatsoever. My understanding of what that 50 percent means is that, in terms of the scale of, you know, the scale of efficacy right, some of these ones in the United States are slightly better at maybe providing fuller coverage, maybe tamping down symptoms
11:52:51 better, it doesn't mean that five of every ten Chinese students at Michigan State -- again, this is hypothetical -- just are walking around with no immunity at all. I don't believe that is the right way to interpret that 50 percent statistic. So in order for -- in order for one to conclude
11:53:09 that this acceptance of the Sinovac again for foreign

students, that that's what they have got available to them, undermines the entirety of the policy would require Michigan State then to say for all foreign students, the policy is waived. They don't have to get it because their shots --

11:53:27 THE COURT: Isn't the appropriate comparison, the 50 percent effectiveness of the Sinovaccine vis-a-vis the effectiveness of natural immunity from having the virus in the first place and recovering?

MS. RICCHIUTO: I think if there were such a

11:53:48 number, that's a comparison you could make. I think what Dr. Zervos's declarations have established is that there is not a percentage that you can assign to be apples to apples with natural immunity and, for example, Sinovac. That's why natural immunity is so limited in terms of what we can rely

11:54:08 on and use it for. So if we had that apples to apples number that had been sort of generated on a, you know, with scientific certainty, then I would take your point, your Honor. I simply don't believe that's a number that's available.

11:54:23 THE COURT: Well, recognizing that this is obviously a dynamic environment in which the science is capturing more data over time and more studies are being done, does there come a point when, let's assume for the sake of analysis that the natural immunity brought about by

11:54:47 having the disease is more effective than one of the

vaccines, then what happens?

MS. RICCHIUTO: I think that would present different circumstances, your Honor. I think if the guidance were that natural -- again, the weight of public health authority were that natural immunity is, as Dr. Noorchashm says, equal to or better than. If it were instead of, all the public health authority as opposed to Dr. Noorchashm and the tables were turned and it were all the public health authority versus Michigan State, then I think your guardrail there, your Honor, is rational basis. Could there come a point where a policy ceases to be reasonable because it's out of alignment with the basis of the policy? There could come a point that that could happen in theory with any policy and public health judgment. We are not at that point today, and we are not at that point at the time that Michigan State implemented this policy, which was exactly in line with all of the best information that was available to them.

So we have gone through no likelihood of success on any of their claims. Again, that's consistent with your TRO order. There is also a completely independent reason that you can deny this preliminary injunction, your Honor, and that's lack of irreparable harm. You already found, again in your TRO order, that money damages for job loss are not irreparable. I don't want to be flip at all about the

significance of the loss of employment or, you know, whether or not that would work a hardship on the Norris family. That's not what we are suggesting. But what the law says is that that is not the basis to get an injunction. Is that -- if you may have some interference with your employment. So just from a clear legal perspective, that's not irreparable harm.

There is also some evidence in the record that Ms. Norris and her family are anxious about this. Again, you know, MSU empathizes with them about that. We aren't being dismissive of that anxiety. What the law says again though is that's not a basis for irreparable harm for purposes of a preliminary injunction, which is what we are here about today.

In terms of the balance of harms, I think the Sixth Circuit has kind of summed this up already. Where you have, you know, this is COVID, people are making big decisions to try to keep their folks safe, if they are a government entity, they are supposed to be making them within the guardrails of rational basis. And when they have done that, then the great weight is that the public interests is served by continuing to adhere to those -- continuing to adhere to those policy decisions.

The other thing I should have said on irreparable harm, your Honor, is I think some of their cases have asked

you to essentially assume it, presume irreparable harm because she has stated a Constitutional claim. That definitely happens in some circumstances, but I believe in every circumstance, it is coupled with a likelihood of success on the merits. I'm certainly not -- certainly none of the cases that they cited found no likelihood of success on the merits, but presumed harm anyway that justified an injunction. A couple of their cases found no likelihood of success, no harm, no injunction, and a couple observed that presuming harm might be appropriate in certain situations, but in both of those cases, there was a likelihood of success on the merits. So it's not -- mean, consider the standard, your Honor, if every time a plaintiff pled a Constitutional claim, they all of a sudden got waived through the irreparable harm standard. There has to be more than that. So the presumption might be appropriate in certain circumstances, it's not appropriate here to the extent that that's what they are asking for on that factor.

So with that, I will respectfully request that you deny the motion for preliminary injunction, unless you have additional questions for me.

THE COURT: I do. There is some indication in the record that the plaintiff has been working remotely. I believe I'm accurate in that regard; is that true?

MS. RICCHIUTO: Yes.

THE COURT: Has the university set a policy about how long they are going to allow employees to work remotely?

MS. RICCHIUTO: So we have a declaration in the record on this from Ms. Norris's supervisor, your Honor.

11:59:22 THE COURT: Refresh my memory.

MS. RICCHIUTO: There are some people in her department, if you will, that may not be the right word, but some of her colleagues are coming in voluntarily. She's not prohibited from coming to campus, for example. And their

11:59:35 goal is to return people to work. She wasn't a remote employee before the pandemic, she's not intended to be a remote employee after the pandemic. She went home in March of 2020, like the rest of us, and worked from there, but the evidence is that Michigan State has the authority to call

11:59:50 her back and, in fact, intends to do that, and that other of her colleagues are working in person.

THE COURT: Is this case ripe before you call her back? Because if I appreciate your argument, and assuming that rational basis is the standard, obviously you're

12:00:12 worried about the safety of the campus and the safety of the work force, the Court appreciates that, but as long as the plaintiff is working remotely, is this case ripe?

MS. RICCHIUTO: Well, your Honor, I think the burden would be on the plaintiff to establish that she was

12:00:32 never going to come to campus ever again for any reason, and

that there would have to be evidence that Michigan State wasn't going to allow her to do that.

THE COURT: Theoretically the Mu variant I'm just throwing that out because I heard about it in the press, I recognize, I don't think there's been any reference to it in the record. But if the Mu variant causes universities across the State of Michigan to continue to allow their employees to work remotely, then the compelling government interest vis-a-vis this particular plaintiff is still attendant to the case or not?

MS. RICCHIUTO: Michigan State -- I believe Michigan State has an interest in having this policy enforced and in having this policy deemed --

THE COURT: But if Ms. Norris is staying at home and working and never going to East Lansing, does that change the calculus?

MS. RICCHIUTO: Well, what of the circumstance, your Honor, where this, you know, where the case is found not ripe and then the next day she either voluntarily comes on campus because she decides she wants to, or she's asked to, that would be our concern about that.

THE COURT: I don't doubt that the university has the authority to order the plaintiff to show up at work. I don't doubt that for one nanosecond. But until they do that, what is the compelling government interest to force

her to get the vaccine when she is working from home?

MS. RICCHIUTO: I think Michigan State's interest is in having its policy remain intact. So to the extent that you construe an order from today to apply only to Ms. Norris, for example, and not to apply to all -- not to say that anyone who has been previously vaccinated -- or excuse me, previously infected, it's unreasonable for Michigan State to allow them to get the vaccine. Michigan State would have an interest right now today in not having that ruling be issued, because it would impact more than just Ms. Norris and it would potentially impact people who are on campus every day and are previously vaccinated. If the question is, if the injunction would apply not -- I think the way that they have asked, which is everybody who has ever been infected with COVID-19 should not have to be vaccinated. I think Michigan State has an interest right now today in having that policy upheld. If the question is, should there be an injunction on one single person who is not coming to campus, then I agree with you that could be different, but Michigan State would be very concerned about any kind of ruling that would erode its ability to enforce its policy with respect to other previously infected people. I believe that, you know, people would come and say, but I've been infected, I've been infected, and the effect of that order would be to undermine that policy even if the

intent were to only say Ms. Norris has to bring this case again when Michigan State asks her to return.

THE COURT: All right. Thank you.

MS. RICCHIUTO: Thank you.

12:03:53 MS. HAGEMAN: Your Honor, I understand that we do have a stop.

THE COURT: Don't worry about it.

MS. HAGEMAN: Okay. Thank you.

THE COURT: We have blown the time deadlines.

12:04:05 Given the Court's questions and the importance of the testimony put on, so don't worry about it. Go ahead.

MS. HAGEMAN: Thank you. Thank you, your Honor.

As to the ripeness matter, I'll go to that first. And that is we are going to seek class certification for

12:04:21 this case as it moves forward, Number 1. And MSU, in fact, is applying the policy against Ms. Norris right now despite the fact that she has not been called back to campus. So she's been receiving notices that she's required to do certain things according to the policy, including uploading

12:04:38 personal medical information and that sort of thing. So MSU, in fact, is enforcing the policy against her right now and others who are similarly situated.

So --

THE COURT: So there are other aspects of the

12:04:52 policy that they are asking your client to comply with?

MS. HAGEMAN: Yes, they are.

THE COURT: Other than getting the shot?

MS. HAGEMAN: She has to respond and upload information to the portals that they have, and which really goes to one of the issues of whether this is administratively or administrable and administrative convenience.

They are already asking individuals to provide their information. That's how they get the information as to whether someone is vaccinated or not. MSU is already tracking their employees in terms of whether they are vaccinated or not. They are already getting that kind of personal information, and I'm going to come back to that again here in a minute specific to the argument that was made by defense counsel.

There are a couple of points that I think are very important to make, and I stated this during my own argument, and that is that we agree there is a compelling interest in controlling COVID. But we disagree that there is a compelling interest to force a vaccine on someone who has natural immunities and doesn't need that vaccine.

I also think that we really have to understand and dissect Jacobson for what it says in terms of why the Court reached the decision that it did. And I've already quoted for you on Page 28 that the Court specifically held that,

"In the event that the power -- an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances in reference to particular persons in such an arbitrary unreasonable manner or might go so far beyond what is reasonably required for the safety of the public as to authorize or compel the courts to interfere for the protection of such persons." Why that is important is the exact issue that we are dealing with right here.

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The Jacobson decision would have come out differently if the state legislature had ordered that everybody who had already had smallpox was required to get vaccinated. That isn't what was at issue in that case, and that's an important distinction, because when you go to Page 36 of that decision, it talks about all of the things that the defendant wanted to prove. And what the Court said is the defendant offered to prove that vaccination quite often caused serious and permanent injury, that it resulted in death, that it didn't know if it would affect him that way, and it lists all of these various things, but it said these offers in effect invited the Court and jury to go over the whole ground -- gone over by the legislature when it enacted the statute in question. So the defense would have you believe that how this policy came into effect is totally and completely irrelevant, yet they are relaying on the

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Jacobson decision for the vast majority of the arguments that they have made. Jacobson says we can vaccinate, we can vaccinate. But the Court in Jacobson upheld the vaccination because there was a process that came before the legislative pronouncement as to what that policy was going to be. We don't know what the policy is here. We don't know that they have taken into consideration all of these other important points. And why that becomes so significant right now, your Honor, is because of the point that you made near the very end of their discussion when you were talking about the Sinovac vaccine. You absolutely nailed it on the head, which is whoa, whoa, whoa, whoa, you keep talking about the general consensus among all of the public health authorities in the United States is that these are good vaccines and that everybody should take them and shouldn't have to worry about it, and that everything is going to be hunky-dory. And then they admit well, but we have got a bunch of foreign national students that are going to be coming in and they have taken a vaccine that may not have any effectiveness whatsoever in terms of the COVID-19.

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THE COURT: Well, the testimony I have in the record is it's 50 percent effective, right?

MS. HAGEMAN: Well, that's --

THE COURT: That was your own witness.

MS. HAGEMAN: That was our own, but what is very

interesting about that is that the defense counsel then went on to say well, we don't really even know what that means. Does it mean that 50 percent of the students are walking around with any immunities? We don't know. We don't know what the 50 percent efficacy means. So the very representative of the university is telling you today that MSU doesn't know whether Sinovac provides better protection than natural immunity, because they haven't looked at it. We have a situation where the expert testimony that has come in today is that our client has robust immunities. Throughout history in terms of viral infections, we have recognized that previous infections provide immunities. And then we have got an admission saying, you know, we really don't know. And what they say is even if Sinovac isn't very effective, we got to let these students in, we can't require them to get a different kind of vaccine than what was available to them. She stated, this doesn't undermine the entire policy, but it does undermine the policy that doesn't recognize natural immunity. It absolutely undermines the policy that is applied to my client when they are saying that the purpose of this is to keep their campus safe. They are admitting by accepting vaccines that are not approved in the United States, that have not been approved by FDA or the CDC or emergency use authorization. They are saying we will make exceptions, we will accept something that doesn't come

down from on high from the guidance of CDC or from the FDA or the Department of Education. What they are saying is under certain circumstances, your Honor, we are going to have to accept something else. All we are saying is in this circumstances they ought to accept that something else as well. All we are saying here is that when we are dealing with natural immunity and we have the information that we do, it is entirely unreasonable, even under a rational basis analysis, to say under no circumstance are we going to consider natural immunity in terms of our vaccine policy, and that's all we are saying. Again, the vaccine policy is in place. The question is the natural immunities.

Some of the other points that are very important to understand is we keep talking about these guidance documents, we keep talking about the public policy pronouncements made by these public health authorities. Those public health authorities have no police power. They have no ability to force MSU to adopt a vaccine mandate. They have no ability to say that MSU is not allowed to recognize natural immunities, but you know who does? The Michigan legislature.

THE COURT: Well, let's talk about that for a minute, because the state constitutional provision would appear to vest in the authority of the Board of Trustees of the university to operate the school separate and apart from

the legislature. So I'm, in light of the Constitutional provision in the state Constitution, I'm having a little bit of difficulty understanding your argument in that regard.

MS. HAGEMAN: According to Article 8, Section 5 of the Michigan Constitution, it provides that in relevant part that each board shall have general supervision of the institution and the control and direction of all expenditures from the institution's funds. And I believe that might be what you're referring to. But this is entirely consistent with our argument that MSU has police power only over educational and fiscal matters. So sure, choosing its own president, making those kinds of decisions do not allow it to rule over the health decisions of MSU employees. They are completely different things. So as an institution, they may have the authority to even adopt the vaccine policy for example. That's --

THE COURT: I think you better go on to another argument. You are not convincing me in light of the state Constitutional provision --

MS. HAGEMAN: Then I'm going to go to one case that I would recommend that you read, and that is Federated Publications from -- actually, the case is Branham vs. Board of Regents at the University of Michigan, 145 N.W.2d, 860, it's a 1966 decision, and it specifically states that, "The University of Michigan is an independent branch of the

government of the State of Michigan, but it is not an island. Within the confines of the operation and allocation of funds of the university, it is supreme. Without those confines, however, there is no reason to allow the regents 12:14:01 to use their independence to thwart the clearly established public policy of the people of Michigan. The public policy of the people of Michigan as it pronounced by their legislature is that natural immunity is recognized when there are vaccine mandates." So that is one of the issues 12:14:19 that I think is very important to look at, and that is the basis of our police power argument.

There is question -- and there's been question raised by defense counsel about the serological tests. And questioning the verbiage included on that serological test. 12:14:38 The irony of this, your Honor, is that it's the serological tests is how we know whether the vaccines work. That is how they determine whether the vaccine has been effective. So we can't just say those serological tests, set them aside, they don't really matter, they have all of this disclaimer 12:14:58 language. That's how we know whether the vaccines work, that's why the test is done.

One of the other points that has been made is that, you know, you have to get a different flu shot every year. They are not mandated. Sometimes recommended that you get a 12:15:13 flu shot every year, but we don't have CDC and we don't have

universities and we don't have all of these folks saying everybody is mandated to get a flu vaccine every year.

Just a few other points, your Honor, and then I will rest our case and request that a preliminary injunction be issued.

There is also a comment -- comments made about a parade of horribles about what they will have to do to track natural immunity. But if the point is immunity, and we have testimony from their own expert witness, and we know it, the vaccines wane over time in effectiveness. We know that. We know that there are substantial breakthrough cases. We know that a substantial percentage of the cases that we are seeing today related to Coronavirus are among people who have already been vaccinated. We know it is not an absolute silver bullet that is going to protect everybody. So if you are going to say that someone who has natural immunity is going to be required to be tested, and that's just simply not something we can do as a university, why would you limit it to only the people who have natural immunity when we know as a matter of fact that people who get the vaccine can likewise spread it to other people. It's included in the documents that they have filed. They know that. So again, it's a parade of horribles and it's a description about the difficulty of administering this that really undermines the very argument that they are making, which we have to have a

one size fits all approach because that is the only way we can keep everybody safe. But we know that's not true. In fact, when I asked their doctor at the very end of his examination, I asked him the question, "Can you guarantee that my client will not suffer an adverse consequence of getting one of the vaccines?" And what was his response? What would you expect any rational doctor to say? He said, well, she needs to have consultation with her doctor and she needs to think about what's in the best interests of her, and she needs to look at her own medical conditions, and she needs to decide whether that vaccine is going to be right for her. That was the right answer. Because he can't guarantee that there will not be an adverse consequence with my client or anybody else who has natural immunities, and that's exactly why it is reasonable for the university who is going to adopt a vaccine mandate to say, for those of you who may have natural immunities, we are going to allow you to prove to us that you are also safe for being on campus, which brings me back to the last thing that I'm going to talk about, and I believe we have absolutely met the standard for preliminary injunction. There is a substantial likelihood of success on the merits in this case, your Honor, we talked to you about it today. Things have been evolving over time. We have got Dr. Fauci admitting, Dr. Gottlieb admitting we need to be taking natural immunity

into consideration when we debate and have this discussion. And we can stand up in front of Court -- the Court, and we are going to get a definitive answer here, but the reality is that a week from now or two weeks from now or three weeks from now there may be something else that comes out that leads -- that puts us in a completely different situation and what we should have --

THE COURT: Well, and presumably the policy makers at the university would adjust policy at that point, right?

MS. HAGEMAN: Except I didn't hear that today. What I heard is that they absolutely have every interest in making sure that this policy goes into effect and there are no exceptions made.

THE COURT: Well, that's as of September 22nd.

MS. HAGEMAN: Right, but the attorney was very adamant they do not want to make any exceptions for my client, the plaintiff, who is working remotely, because they want this policy to go into effect intact.

Another thing is that it's necessary to prevent irreparable injury. There is no question that depravation of a Constitutional right as well as the risks associated with the unnecessary medical intervention pose an unreasonable risk, and it is -- it will, it does constitute irreparable injury. The threatened injury to our individuals outweighs the harm the preliminary injunction

would cause to MSU. MSU is already making medical and religious exemptions. They are already making medical and religious exemption. So if I come in and say I have a blood clotting issue or myocarditis issue, they are going to have to assess that, they are going to have to assess whether they are going to accept that as an exemption. All this is another category of exemption when somebody can come in and say I have sufficient natural immunities, I believe I should be exempt. And they can assess it just like they do the others. And the preliminary injunction would not be averse to the public interest. Again, the public interest here has to be in protecting the civil liberties of our client, and acknowledging that natural immunities are as robust, if not better, than some of the vaccines. And again, if it's about safety, we have met that, we have shown through our testimony, as well as the argument we have made, that the our situation and the situation of others similarly situated, the balance weighs in favor of our clients and granting the preliminary injunction.

This has been a rough year, your Honor, it's been a rough year for everybody, but I think that Justice Gorsuch said it best when said we simply cannot throw the Constitution out the window, and I'm paraphrasing. He's probably a lot more eloquent than I am. But we cannot throw the Constitution out the window because we are dealing with

a pandemic. In fact, as you know, as I know, as everybody in this room knows, the Constitution and the liberties and the protection that it provides become even more important in an emergency situation or a difficult situation like what we are dealing with now.

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These Constitutional rights need to be protected, the status quo needs to be protected as we move forward with this case to ensure that we are not creating the kind of irreparable harm to our client that will be caused if she's forced to get a vaccine against her will and despite the fact that she has natural immunities.

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Thank you, your Honor.

THE COURT: Thank you, counsel.

Anything further from MSU?

MS. RICCHIUTO: No, your Honor. I think Harriet gets the last word as the movant, so I will honor that.

12:21:19

THE COURT: All right. That's fine. Thank you. I'll get an opinion out as soon as I can. Thank you.

MS. HAGEMAN: Thank you, your Honor.

MS. RICCHIUTO: Thank you.

12:21:30

COURT CLERK: All rise, please.

(At 12:21 p.m., proceedings concluded.)

C E R T I F I C A T E

I, Kathleen S. Thomas, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/

Kathleen S. Thomas, CSR-1300, RPR
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