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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

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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,

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MARCUS ZERVOS:

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E X H I B I T S

Rec'd.

Plaintiff's Exhibit Number 1
(Dr. Hooman Noorchashm Curriculum Vitae)

Plaintiff's Exhibit Number 2 (Research Paper authored by Dr. Hooman Noorchashm and colleagues)	14
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Defendants' Exhibit A
(Dr. Marcus Zervos Curriculum Vitae)

1 Kalamazoo, Michigan

2 September 22, 2021

3 at approximately 9:08 a.m.

4 PROCEEDINGS

09:08:39

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

09:08:58

9 The record should reflect that the plaintiff is
10 represented by Attorneys Younes and Hageman. The defendants
11 are represented by Attorneys Ricchiuto and Gutwein.

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

14 MS. HAGEMAN: Yes, your Honor.

09:09:14

15 THE COURT: Good morning.

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

18 THE COURT: I'm fine.

09:09:20

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

21 THE COURT: Beautiful day in west Michigan.

22 MS. HAGEMAN: It's wonderful to be back in western
23 Michigan. I used to practice here in the early 1990s with
24 the law firm of Smith, Haughey, Rice, and Roegge out of
09:09:33 25 Grand Rapids. And so it's good to be back in Michigan and

1 in front of you today.

2 Before we begin, your Honor, I would like to
3 quickly memorialize and seek approval from the Court of the
4 arrangement that defense counsel and I have entered into in
09:09:44 5 terms of how we plan to proceed today, just so that
6 everybody has a road map of what we are going to do.

7 The parties have agreed that each side will have
8 one and a half hours to present our arguments. I am going
9 to provide a few introductory remarks teeing up our first
09:10:00 10 witness, our only witness, which will be the preeminent
11 immunology doctor, Dr. Hooman Noorchashm, to testify on just
12 a couple of medical issues. Our examination will be counted
13 against our time and defendants' cross examination of
14 Dr. Noorchashm, if any, will be counted against their time.

09:10:17 15 I will then present plaintiff's legal argument
16 preserving approximately 15 minutes of our time for rebuttal
17 to defendants' argument, and then the defendants will
18 present their case. And again, to the extent that they call
19 any witnesses, that will be counted against their time and
09:10:33 20 our cross examination would be counted against ours. And
21 then I would like to provide a brief rebuttal to defendants'
22 arguments after that.

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

09:10:46 25 THE COURT: Okay. Counsel for the defendants

1 agreed?

2 MS. RICCHIUTO: Yes, your Honor.

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

4 MS. HAGEMAN: Wonderful. There is just a few

09:10:54 5 remarks I would like to make to frame up the information
6 that we will be providing today. First of all, I would like
7 to start by introducing plaintiff, Jeanna Norris, who is
8 here in the courtroom with us. And I also want to introduce
9 my colleague, Jenin Younes. Dr. Hooman Noorchashm is also
09:11:11 10 with us today.

11 Second, I'd just like to talk about a few of the
12 legal constructs that we will be addressing. The
13 preliminary injunction issue has been briefed extensively,
14 and because we have limited time today, we will not have
09:11:24 15 time to address every single claim or argument that we have
16 raised or that we have brought in opposition to some of the
17 arguments brought through by the defendants. We stand on
18 our briefs and we do not waive any of the arguments that we
19 have made.

09:11:37 20 Your Honor, and to frame this case, it is important
21 that I think that we lay down a few markers. First of all,
22 the overall -- the overarching issue in this lawsuit is
23 whether the government, MSU in this case, Michigan State
24 University, has the legal authority to force those
09:11:55 25 individuals who are already immune from COVID-19 to be

1 vaccinated against it. That is the overall case that we
2 have brought against MSU. But the issue before the Court
3 today is more narrowly tailored, and it's whether a
4 preliminary injunction should be issued to protect the
09:12:13 5 status quo and plaintiff's constitutional right to bodily
6 integrity and autonomy while this case is pending before
7 this Court. This case, and especially this motion, are thus
8 not about whether the COVID vaccines are good or bad. We,
9 in fact, agree that the development and roll out of the
09:12:29 10 vaccines have been a resounding success. We are not arguing
11 otherwise.

12 With that framework in mind, it is important to
13 emphasize and reiterate defendants' stated goal for adopting
14 the vaccine mandate at issue here. According to MSU, the
09:12:45 15 purpose of the vaccine mandate is to keep people safe from
16 COVID-19 on MSU's campuses. That is a laudable goal, and
17 one with which we agree. The focus is thus on immunity,
18 which only makes sense. We don't vaccinate for the sake of
19 vaccination, we vaccinate for the purpose of minimizing the
09:13:03 20 incidents and severity of particular diseases. But if there
21 are other mechanisms by which that purpose is achieved, then
22 government-mandated vaccines run afoul of our Constitutional
23 liberties. In short, MSU, while keeping its campuses safe,
24 does not lead down binary of vaccinated versus
09:13:23 25 non-vaccinated; it leads us down the road of immune versus

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

3 With that understanding, we ask this Court to focus
4 on the constitutional questions at hand. Plaintiff's
09:13:37 5 constitutional right to bodily autonomy, and focusing
6 primarily on Jacobson and subsequent cases, we will
7 demonstrate that the constitutional balancing test that you
8 must apply today actually lands in favor of Jeanna Norris.
9 We will also focus on the proper standard of reviewing,
09:13:57 10 which we believe is absolutely strict scrutiny, and we will
11 explain why. We need to look at the scope of defendants'
12 police power to adopt and enforce such a mandate against
13 naturally immune employees. We need to look at the legal
14 constraints on MSU's ability to adopt its vaccine mandate,
09:14:15 15 and the fact that it's a mandate here represents an
16 unconstitutional condition.

17 I'm going to briefly address preemption and the
18 proper balancing of interest between the parties. And with
19 that framework before the Court, at this point I will turn
09:14:27 20 this over to Ms. Younes to call Dr. Noorchashm.

21 Thank you, your Honor.

22 THE COURT: Thank you, counsel.

23 You may call your witness, counsel.

24 MS. YOUNES: Thank you. Your Honor, I would like
09:14:39 25 to call Dr. Noorchashm to the stand.

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

3 HOOMAN NOORCHASHM,
4 was thereupon called as a witness herein, and after having
09:14:44 5 been first duly sworn to tell the truth, the whole truth and
6 nothing but the truth, was examined and testified as
7 follows:

8 COURT CLERK: Please be seated.

9 THE WITNESS: Thank you.

09:15:00 10 COURT CLERK: State your full name and spell your
11 last name for the record, please.

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

14 DIRECT EXAMINATION

09:15:11 15 BY MS. YOUNES:

16 Q. Good morning, Doctor.

17 A. Good morning.

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

09:15:19 20 THE COURT: Indeed.

21 BY MS. YOUNES:

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

24 A. Yes, this is my curriculum vitae.

09:15:38 25 Q. Can you please summarize the contents, your educational

1 background, your residency, and your work experience?

2 A. Sure. It's all detailed here. I earned my Bachelor's
3 degree from the University of Pennsylvania in 1992 I went on
4 to the University of Pennsylvania Medical School. Under an
09:15:54 5 MSTP training grant the medical scientist training grant
6 from the National Institute of Health issued. I earned my
7 Ph.D. in cellular immunology with a focus on other immunity,
8 B-cell and T-cell biology, and subsequently earned an M.D.
9 degree. I joined -- I did a postdoctoral fellowship in
09:16:14 10 immunology at the University of Pennsylvania, and
11 subsequently joined the faculty in immunology there.
12 Followed by a general surgery residency at the Hospital of
13 the University of Pennsylvania, and subsequently a
14 cardiothoracic surgery fellowship at Harvard's Brigham and
09:16:32 15 Women's Hospital. My area of focus, your Honor, was
16 transplantation immunology and cardiothoracic
17 transplantation. I've been on the faculty of the University
18 of Pennsylvania, Harvard Medical School as well as Thomas
19 Jefferson University, and I'm currently in private general
09:16:45 20 practice.

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

23 THE COURT: Any objection?

24 MS. RICCHIUTO: Your Honor, we don't object to the
09:16:54 25 extent that, you know, we agree that the doctor's

1 credentials are what they are. We certainly have some
2 concerns about the admissibility of the opinions that he's
3 rendered under 702 from the perspective whether or not they
4 are generally accepted. So we would like to preserve that
09:17:10 5 objection, but we certainly don't object to him testifying
6 today.

7 THE COURT: So noted.

8 You may proceed, counsel.

9 BY MS. YOUNES:

09:17:17 10 Q. Dr. Noorchashm, can you explain what immunology is?

11 A. Yes. Immunology is a branch of biology wherein we
12 study the dynamics of the immune response to foreign
13 antigens, including bacteria, viruses, as well as
14 transplanted organs. There are two branches of the immune
09:17:40 15 system that are critical for our survival adaptive immune
16 response, which includes B-cells and T-cells and the innate
17 immune system, which deals more with generic pathogenic
18 markers.

19 Q. Have you published any research on these topics?

09:17:55 20 A. Yes, I have about 60 peer-reviewed publications to my
21 name.

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

23 A. Well, I had the good fortune of being at the University
24 of Pennsylvania when mRNA technology was being developed.

09:18:12 25 This was actually quite an unbelievable feat by the

1 scientists who developed it. Initially the scientists got a
2 lot of push back because it was such an unusual phenomenon
3 to use mRNA as an antigen. And my opinion of this vaccine
4 is that it's one of the most effective vaccines we have ever
09:18:35 5 made, and every American should be very proud of this
6 accomplishment. To have created these vaccines in under a
7 year is something we should all be very proud of. I also
8 believe that these vaccines are reasonably safe, that the
9 benefits of vaccination in non-immune people far outweigh
09:18:50 10 the risks of vaccine. I think the vaccines are a very
11 important part of our fight against COVID-19.

12 Now, I would say, your Honor, that one thing we are
13 doing here that is absolutely unprecedented with this
14 vaccine is we are deploying it in the midst of a pandemic,
09:19:07 15 where literally millions of people have contracted the
16 disease. Now, the only other times we have done that has
17 been during the smallpox pandemic as well as the polio
18 pandemic. In both of those cases we were not, very
19 specifically, not vaccinating people who had previously been
09:19:23 20 infected. So back in the early 1900s, we had smallpox, we
21 were not vaccinating people with previous infections for
22 very specific reasons, and that is that those folks,
23 conventional wisdom as well as professional expertise of
24 immunologists, tell us those people are very robustly
09:19:40 25 immune.

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

3 A. Yes. Naturally acquired immunity is a term of
4 definition. It essentially refers to a natural pathogen
09:19:51 5 such as a virus or a bacteria activating the B-cells and
6 T-cells in an antigen specific way. So when the body
7 encounters a virus, for example, B-cells and T-cells become
8 activated and collaborate with one another to generate
9 what's called IGG antibodies. The IGG antibodies were the
09:20:11 10 main readout for the clinical trials that demonstrated
11 efficacy. So these antibodies are pathognomonic, if you
12 will, or diagnostic of immunity. And both natural immunity
13 as well as vaccine induced those T-cells and B-cells into
14 activation to make antibodies. Now, one of the remarkable
09:20:30 15 things about the COVID-19 vaccine is that the reason why we
16 even have this vaccine, your Honor, is that we knew the
17 public health officials scientists knew that natural
18 infection actually is protective. There are, in fact,
19 viruses such as the human immunodeficiency virus, the HIV
09:20:47 20 virus, where infection is not protective.

21 The reason why Operation Warp Speed under the
22 direction of Dr. Fauci and another is Dr. Woodcock,
23 understood that a vaccine would be effective against this
24 pandemic is that natural infection was protective itself.
09:21:02 25 And in fact, that's one of the things that a very prominent

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

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

13 THE COURT: Go ahead.

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

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

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

1 fully vaccinated people.

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

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

10 THE COURT: Do we have the exhibits marked?

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

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

15 Any objection to Exhibit 2?

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

18 THE COURT: All right. Exhibit 2 is received.

19 BY MS. YOUNES:

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

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

1 recently approved booster shots in folks who are over 65.

2 So there is certainly a wane rate.

3 I suspect that the natural immunity also will have
4 a wane rate, however, it's probably -- it's very probably
5 some, based on the fundamentals of immunology, that natural
6 immunity will last at least as long as the vaccine, if not
7 longer. The robustness of natural immune response is
8 something that, I think, the vaccine tries to mimic. And
9 even our most effective vaccines are probably not as
10 effective as the natural infection itself. In fact, some of
11 the vaccines in circulation we already know that are
12 accepted in the United States include the J & J vaccine,
13 which is only about 60 percent effective at its best, the
14 Sinovac vaccine, that's the Chinese version of the vaccine,
15 that's also accepted by MSU and other places, that's about
16 50 percent effective. So I think, you know, there's
17 certainly going to be a wane rate to vaccine immunity, that
18 there is likely to be a wane rate to natural immunity too,
19 but it's far less likely than it is with the vaccine.

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

22 THE COURT: Sure.

23 BY MS. YOUNES:

24 Q. Doctor, are you familiar with this document?

25 A. Yes.

1 Q. Can you tell us what it is?

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

4 Q. Can you explain the results?

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

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

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

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

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

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

1 natural infection far outweighs the risks of the vaccine.

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

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

1 unnecessary or very marginal benefit.

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

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

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

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

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

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

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

20 There are also other very prominent cases,
21 36-year-old J. Barton Williams who is an orthopedic surgeon
22 down in Memphis, he was a Harvard graduate, he had just
23 gotten married, went to his honeymoon, acquired an
24 asymptomatic infection, comes back to work, gets vaccinated,
25 several weeks later dies in the ICU from a hyperinflammatory

1 disease related to the vaccination.

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

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

20 COURT REPORTER: Excuse me, in the --

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

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

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

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

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

19 BY MS. YOUNES:

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

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

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

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

25 I think that there's actually possibly irreparable

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

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

12 THE COURT: Any objection to the report?

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

15 THE COURT: I'll receive the exhibit.

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

20 MS. YOUNES: Thank you, your Honor.

21 BY MS. YOUNES:

22 Q. Just a couple more questions, Doctor.

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

25 A. I have.

1 Q. And what is your opinion of his conclusions?

2 A. Well, I think Dr. Zervos is adhering to a narrative
3 that our establishment and public health officials are
4 promoting, which is that everyone should get vaccinated.
5 And frankly, you know, I think for the vast majority of
6 Americans who are not immune, it's actually the correct
7 orientation, and I think that folks who are not immune
8 should get vaccinated, and I think that is a reasonable
9 opinion.

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

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

1 medical certainty?

2 A. Yes, I do.

3 Q. Thank you.

4 THE COURT: Pass the witness, Counsel?

5 MS. YOUNES: Sorry?

6 MS. HAGEMAN: Yes.

7 THE COURT: Are you passing the witness?

8 MS. YOUNES: Yes.

9 THE COURT: Counsel, you may inquire.

10 MS. RICCHIUTO: Thank you. Good morning.

11 THE WITNESS: Good morning.

12 MS. RICCHIUTO: Good morning, your Honor.

13 CROSS EXAMINATION

14 BY MS. RICCHIUTO:

15 Q. Good morning, Dr. Noorchashm.

16 I'm going to try to be brief.

17 A. Sure.

18 Q. I just want to confirm a few things.

19 Dr. Noorchashm, you are not an infectious diseases
20 doctor, is that correct?

21 A. Correct. I'm an immunologist and a surgeon.

22 Q. And you are not board certified by any board, is that
23 correct?

24 A. Not currently.

25 Q. That's not correct?

1 A. Not currently.

2 Q. Oh, okay.

3 Have you ever been qualified as an expert in
4 litigation before?

5 A. No, I have not.

6 Q. Have you ever treated a COVID patient?

7 A. Yes, I have.

8 Q. Can you tell me about that? Is that --

9 A. For --

10 Q. Excuse me. Go ahead.

11 A. Yes. Sure. You know, so I -- my practice primarily at
12 the moment involves a lot of intervertebral care for patients
13 who have complex surgical problems in the outpatient
14 setting. And when the COVID pandemic happened, a tremendous
15 number of people approached me, knowing my background in
16 immunology, you know, I do what I would consider general
17 practice at this point, you know. It's more of a practice
18 where I integrate care for people prior to the COVID
19 pandemic. So there's a lot of trust in the community and so
20 a lot of folks would refer to me.

21 And so, yes, I have treated COVID patients,
22 including my own family members with those therapies that
23 are considered more mainstream, as well as therapies that
24 are not considered necessarily mainstream, as many of them
25 are still evolving.

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

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

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

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

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

11 Q. Do you currently have any hospital privileges?

12 A. I do not.

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

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

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

19 A. I do.

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

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

1 and I've provided my input to Ms. Norris on her status.

2 Now, in terms of whether I treated her for anything, I have
3 not treated her for anything, I'm not performing any
4 operations on her or prescribed her any medicines.

5 Q. Okay. You mentioned the hundreds of patients for which
6 you have been ordering these serology reports, Dr.

7 Noorchashm, are those for the purpose of seeking medical
8 exemptions in lawsuits or with respect to other vaccine
9 mandates?

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

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

1 that?

2 A. Not at all.

3 Q. All right. Are you being compensated to be here today?

4 I don't think your declaration covers that.

5 A. Not at all. Only for the cost of travel.

6 Q. Okay. Thank you.

7 So no compensation in any way for your consultation
8 with Norris, whether or not it's medical treatment?

9 A. I accept no compensation for any of my COVID-related
10 work.

11 Q. You -- I think you just told us that you're aware that
12 the CDC doesn't recommend the antibody tests that you have
13 been writing orders for, correct?

14 A. That's right. The FDA actually has an advisory against
15 it. However, the FDA has approved these serology tests, and
16 they are available for prescription for prescribers to
17 prescribe with LabCorp and Quest.

18 Q. If we can, Dr. Noorchashm, and your Honor, I'd just
19 like to refer back to Exhibit 3.

20 THE COURT: Sure.

21 MS. RICCHIUTO: That he should still have in front
22 of him.

23 BY MS. RICCHIUTO:

24 Q. I just was looking at this text, Dr. Noorchashm, in
25 this first box here, and it says, "It is not yet

1 determined--" Excuse me. "It is yet undetermined what
2 level of antibody to SARS-CoV-2 spike protein correlates to
3 immunity against developing symptomatic SARS-CoV-2 disease."

4 Do you see that?

5 A. Yes, I do.

6 Q. Did I read that correctly?

7 A. You did.

8 Q. Thank you.

9 A. Do you want my opinion on that?

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

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

14 A. Either way. However you want it.

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

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

20 MS. RICCHIUTO: Just for the record, I show those
21 as ECF numbers 4-2 starting at Page ID 43, ECF Number 12,
22 and then I apologize, I don't have the ECF Number from the
23 one that would have been dated yesterday, which is September
24 21st, but I don't have any questions about that one today.

25 BY MS. RICCHIUTO:

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

8 Does that sentence sound familiar?

9 A. That sounds like my statement, yes.

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

11 A. Yes.

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

15 A. Yep.

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

19 A. Yes.

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

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

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

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

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

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

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

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

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

1 Q. Thank you.

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

12 A. Yes.

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

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

22 Q. Thank you.

23 A. May I continue? In general --

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

25 MS. RICCHIUTO: Sure.

1 THE COURT: Go ahead, Doctor.

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

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

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

8 A. Yes, ma'am.

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

11 A. Yes, it was relatively recent.

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

14 A. Yeah.

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

17 A. Yes.

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

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

22 Q. Natural immunity wanes over time, correct?

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

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

1 Noorchashm, I'm just curious how you are able to testify
2 with, I think you said a degree of medical certainly, that
3 she is robustly immune today on September 22nd?

4 A. Well, the reason -- it's based on past experience.

5 I'll give you another anecdote. My own son attends
6 the University of Chicago. He got COVID last November. I
7 have serially measured his antibodies, that University
8 actually allowed him for a medical exemption, purely on the
9 grounds of robust immunity. I've serially measured his
10 antibody titers and they have been stable.

11 Now, I can tell you that in my experience -- again,
12 this is my experience as a clinician -- naturally immune
13 people have far more stable levels of immunity than vaccine
14 immune. Now, the science behind this, your Honor, I can
15 tell you right now that this is, I think, the second or
16 third antibody test Ms. Norris has had, and those levels
17 have been stable. I think she plans to get another antibody
18 test in a month or two, but you know, these antibody levels
19 are going to be stable. That's my testimony.

20 Q. And we have no evidence of what her antibodies are
21 today on September 22nd, correct?

22 A. Well, this is relatively recent. I think Dr. Zervos
23 would also agree that if you've gotten an antibody test less
24 than a month before, that's recent.

25 Q. Is that a no? We don't have a test from today,

1 correct?

2 A. Yes, that's correct, not today, not this minute.
3 Unless you guys have a phlebotomist here.

4 Q. Okay. Just wrapping up here, Dr. Noorchashm. I think
5 my understanding from your declarations is that you have
6 said that you believe that previously infected COVID
7 patients should be vaccinated approximately a year after
8 their infection?

9 A. I'm sorry, do you have a specific statement that I've
10 made?

11 Q. Sure. Sure. So, in your first declaration --

12 A. I don't recall saying that, but --

13 Q. Okay.

14 A. But go ahead and read it to me.

15 Q. Okay. Let's make sure. I could be mistaken, so let's
16 make sure.

17 Okay. So in your second declaration, this is your
18 September 16th declaration, it's talking about potentially
19 irreversible harm to Ms. Norris if she were to undergo COVID
20 vaccination in light of her prior recent infection within
21 the last year.

22 A. Yes.

23 Q. Okay.

24 A. That is the testimony that I made.

25 Q. Is there a -- Is it going to be your recommendation to

1 her then that she be vaccinated in November of this year?

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

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

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

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

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

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

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

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

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

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

16 A. Yes.

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

18 A. Yes.

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

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

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

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

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

15 A. So --

16 Q. Correct?

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

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

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

12 A. Sure.

13 Q. You've referred to Dr. Offit today in your testimony, I
14 think you have a declaration or it might have been briefing
10:02:50 15 by counsel, that refers to some remarks by Dr. Gottlieb. I
16 just want to confirm your understanding, though, that both
17 of those experts are in support of widespread vaccination
18 including for previously immune people. That's what their
19 comments are?

10:03:10 20 A. So --

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

23 A. Yes. So Dr. Gottlieb, Dr. Offit, Dr. Makri are all on
24 the record saying naturally immune people are robustly
10:03:21 25 immune. I think there is, in response to the Kentucky

1 study, there is room -- there is room for patients to have a
2 choice to get that added benefit, you know. But I don't
3 think, with respect to these mandates, counsel, I think the
4 bar for that comparison is going to be between Ms. Jeanna
10:03:39 5 Norris's natural immunity versus the least effective vaccine
6 or the Johnson & Johnson vaccine, the Sinovac vaccine, that
7 is being used in others, otherwise, you're opening the door
8 to discrimination. So, yes, these individuals are all in
9 support of vaccination. In fact, in my own declaration it
10:03:56 10 said if Ms. Jeanna Norris wishes to get an added
11 vaccination, that is something she can adjudicate. She
12 should be able to do that, but to mandate her to get it
13 against her will, at the risk of loss of employment, as the
14 primary bread winner is Draconian and terrible.

10:04:11 15 Q. Is that a medical opinion?

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

17 Q. Thank you.

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

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

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

22 A. Yes.

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

10:04:28 25 A. Not occasionally, frequently, because I think that we

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

10:04:42 5 MS. RICCHIUTO: Thank you so much.

6 THE WITNESS: You are welcome.

7 THE COURT: Redistrict, if any?

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

10:04:48 10 REDIRECT EXAMINATION

11 BY MS. YOUNES:

12 Q. Doctor, are you aware of a statement that Anthony Fauci
13 made recently saying that he is not denying that all people
14 who get infected and recover have a considerable degree of
10:05:03 15 immunity?

16 A. Dr. Fauci is on the record for saying that natural
17 immunity is the mother of all vaccinations. This was back
18 in 2018. And I think as a virologist, Dr. Fauci would agree
19 that the reason why we have these vaccines, counsel, is
10:05:17 20 because we know that natural immunity actually is quite
21 effective. That's why we know if we mimic the virus, it
22 will work. So, yeah.

23 MS. YOUNES: Thank you, Doctor.

24 Thank you, your Honor.

10:05:30 25 THE COURT: Anything further, counsel?

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

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

4 THE WITNESS: Thank you.

10:05:38 5 (At 10:08 a.m., witness excused.)

6 MS. HAGEMAN: Thank you, Dr. Noorchashm.

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

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

12 MS. RICCHIUTO: I am happy to call our witness now,
13 I think, if Ms. Hageman -- I don't know if that's consistent
14 with your agreement, but we are obviously going to do
10:06:07 15 whatever you would prefer.

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

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

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

10:06:16 20 MS. HAGEMAN: And should I go too fast, please
21 signal to me and I will definitely slow down.

22 I'm going to first summarize the eight reasons as
23 to why plaintiff's motion for preliminary injunction should
24 be granted, and then I will spend more time as to each of
10:06:29 25 these issues. But I want to make sure that the Court

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

3 First, as for the Jacobson decision, your Honor, it
4 actually supports plaintiff's position here, as the Court
10:06:43 5 there fully recognized that there are certain circumstances
6 where a government's vaccine mandate is so arbitrary and
7 unreasonable as to go beyond what is reasonably required for
8 the safety of the public. And I believe that has been
9 confirmed by the testimony by Dr. Noorchashm today. And
10:07:00 10 this happens to just be one of those circumstances.

11 To the extent that Jacobson does not support
12 plaintiff's position, I'm going to identify several
13 differences between that particular situation and what we
14 are dealing with here. Jacobson cannot stand for the
10:07:17 15 proposition that vaccine mandates must be evaluated on a
16 rational basis review. I'm going to explain that in further
17 detail as well, but just very succinctly, Jacobson was, in
18 fact, decided before the Supreme Court developed its tiered
19 scrutiny. In fact, Jacobson clearly sets the stage for the
10:07:36 20 Court's later pronouncements on the Constitutional right of
21 personal autonomy from governmental intrusion.

22 Third, this case is subject to strict scrutiny. We
23 are dealing with the long recognized Constitutional right of
24 bodily autonomy and protection from governmental intrusion.
10:07:53 25 MSU must prove that it has a compelling government interest

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

3 Fourth, plaintiff will suffer irreparable harm if
4 she is forced to get the vaccine. And again, I believe that
10:08:09 5 Dr. Noorchashm's testimony today and the declarations he has
6 submitted confirm that point. She has a Constitutional
7 right to bodily autonomy, and the vaccine mandate violates
8 that Constitutional right, meaning it's ipso facto an
9 irreparable harm. MSU's vaccine mandate subjects her to an
10:08:31 10 unnecessary medical treatment with heightened risk of harm
11 of suffering and adverse medical reaction, and she will
12 suffer irreparable injury in the loss of her job and
13 benefits.

14 Fifth, the Michigan legislature has never delegated
10:08:46 15 its police powers to MSU to adopt the type of sweeping and
16 rigid vaccine mandate at issue here. MSU's reliance on the
17 CDC and the Department of Education recommendations cannot
18 form the basis for such sweeping police power, and neither
19 the CDC nor the Department of Education recommendations
10:09:04 20 preclude MSU from recognizing natural immunity in its
21 vaccine protocol.

22 Sixth, defendant's vaccine mandate constitutes an
23 unconstitutional condition. MSU is forcing plaintiff to
24 choose between exercising her Constitutional rights and
10:09:21 25 keeping her job.

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

4 And finally, even if this case is controlled by the
10:09:37 5 rational basis test, the plaintiff wins and defendants lose.
6 Because plaintiff's natural immunities are comparable in
7 terms of meeting MSU's goals of keeping people on campus
8 safe from COVID-19. And then there is no rational basis for
9 refusing to recognize them and provide an exemption to the
10:09:56 10 vaccine mandate.

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

14 So again, let's go back to Jacobson. That decision
10:10:08 15 supports plaintiff's position here. And the Court's
16 decision to approve the vaccine mandate in that case was
17 based on different facts and different law. There are those
18 who seem to believe that Jacobson is a blanket statement and
19 open and shut case that allows the government to adopt and
10:10:23 20 enforce a vaccine mandate under all circumstances when
21 public safety is at risk, period, end of discussion. But
22 that is not what Jacobson says, nor is it how it should be
23 interpreted. The Court, in fact, made clear that there are
24 circumstances under which vaccine mandates that go beyond
10:10:42 25 what is reasonably required cannot stand. "It might be that

1 an acknowledged power of a local community to protect itself
2 against a epidemic threatening the safety of all might be
3 exercised in particular circumstances and in reference to
4 particular persons in such an arbitrary unreasonable manner
10:11:04 5 or might go so far beyond what was reasonably required for
6 the safety of the public as to authorize or compel the
7 courts to interfere for the protection of such persons."

8 That's on Page 28.

9 The Court then finds it necessary to reiterate that
10:11:19 10 same admonition on Page 38 of the decision, making clear
11 that Jacobson was decided on the facts before it, and that
12 the Court was not making a blanket pronouncement that a
13 vaccine mandate would or should be upheld in all
14 circumstances. If there are legitimate reasons to block a
10:11:36 15 vaccine mandate to prevent harm to a particular individual,
16 it is the Court's responsibility to do so. This passage
17 anticipates the development of the bodily integrity cases
18 that came after Jacobson, as well as the Court's eventual
19 adoption heightened scrutiny when dealing with government
10:11:54 20 interference with such bodily autonomy.

21 Thus, even in Jacobson, the focus was on the
22 immunized versus the not immunized. The Court, in fact,
23 held it would be arbitrary and unreasonable to force someone
24 to take a vaccine who didn't need it, in other words,
10:12:08 25 someone who was already immune. As Dr. Noorchashm testified

1 today, we weren't talking about a situation where Mr.
2 Jacobson had already had smallpox. If we were, we probably
3 would have had a very different outcome. He had not already
4 had smallpox, and the Court was not confronted with the
10:12:26 5 question that we have before us today.

6 Jeanna Norris is the very definition of the carve
7 out then that the Supreme Court acknowledged in the Jacobson
8 decision. It's also very important to understand the legal
9 and factual differences between the vaccine mandate at issue
10:12:42 10 in Jacobson versus MSU's directive that we are dealing with
11 here. The Jacobson mandate was properly enacted by the
12 state legislature. It was subject to public scrutiny. It
13 had gone through floor debate. The legislature looked at
14 the competing interests. There were passage of two houses
10:13:00 15 of the legislature, it was signed into law by the governor.
16 It is this process alone that accounts for affording a more
17 rational basis review because such decisions are made by the
18 elected officials accountable to the public.

19 THE COURT: The legislature doesn't run Michigan
10:13:16 20 State University, do they?

21 MS. HAGEMAN: No, but --

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

24 MS. HAGEMAN: Absolutely. But the Board of
10:13:26 25 Trustees only have such police power as has been granted to

1 them by the Michigan legislature.

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

10:13:41 5 MS. HAGEMAN: Well, what I would say, your Honor,
6 is that the police power resides with the state legislature.
7 There is no federal police power.

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

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

10:14:07 15 So what I'm getting at, your Honor, is that the
16 policy that is at issue here is based specifically upon
17 federal guidance from the CDC and the Department of
18 Education. MSU, even in some of the argument that I believe
19 you will be presented with today, what they are relying upon
10:14:25 20 for their vaccine mandate is information that comes from the
21 CDC and the Department of Education. We don't even know
22 where the policy that is at issue here came from, how it was
23 deliberated. We don't see that there was any public
24 participation whatsoever. In fact, it simply appeared on
10:14:42 25 the website one day. So we are talking about a very

1 dramatic difference between the Jacobson decision, which was
2 involving a legislative pronouncement, and MSU, which is
3 relying upon federal guidance to come up with the policy.

4 So --

10:14:59 5 THE COURT: Why isn't that rational?

6 MS. HAGEMAN: Because it was not adopted through
7 the proper legislative process. And the only --

8 THE COURT: What do you make of Klaassen?

9 MS. HAGEMAN: Of Klaassen?

10:15:11 10 THE COURT: The Seventh Circuit case.

11 MS. HAGEMAN: I do not believe that Klaassen
12 applies here for several different reasons: Number 1, they
13 went directly at, and it was a blanket attack on the vaccine
14 mandate in its entirety. We are talking about a very
10:15:27 15 specific subset or issue associated with this particular
16 vaccine mandate. We are not challenging MSU's vaccine
17 mandate. What we are challenging is that MSU refuses to
18 recognize as a medical exemption natural immunity. So there
19 is a completely different factual and legal framework that
10:15:45 20 we are talking about between Klaassen and this decision.

21 Another important difference between the two, your
22 Honor, is the fact that in that case there was only, I
23 believe, one person who had natural immunity that was
24 addressed very briefly, but it was not addressed in the
10:15:59 25 context of what we are talking about. In addition, that was

1 in the Seventh Circuit, not the Sixth Circuit and not before
2 this Court, and we brought --

3 THE COURT: I recognize it's not binding on me, but
4 I think it's the only -- it's the only circuit opinion, if I
10:16:13 5 understand it correctly, and come back at me if I'm
6 mistaken, but I think that is the only circuit opinion that
7 is out there in the context of a university. Am I wrong
8 about that?

9 MS. HAGEMAN: No. And another important aspect of
10:16:29 10 that is it was students, it was not staff or professors that
11 brought that case.

12 THE COURT: Well, the notion is they don't want the
13 virus to spread on the campus, right?

14 MS. HAGEMAN: You mean is that the purpose?

10:16:41 15 THE COURT: Right.

16 MS. HAGEMAN: We don't disagree that the purpose of
17 MSU's policy is to provide safety for the folks on the MSU
18 campuses, and we don't dispute that that is an appropriate
19 and that is a compelling governmental interest. The point
10:16:54 20 is, however, how do they get there. And the question that
21 we have raised that was not addressed in the Klaassen case
22 is immunity equals immunity equals immunity, so whether it
23 is a compelling government interest or even looking at it
24 from a rational basis standpoint. If immunity from natural
10:17:14 25 immunity is comparable to or better than immunity from a

1 vaccine, then there is no reason to treat them differently.
2 There is not a compelling or even rational basis for saying
3 we are not going to accept natural immunity if we are going
4 to accept vaccine immunity when they are comparable, and
10:17:32 5 that is the challenge that we have against Klaassen, because
6 that was not the issue there, but it's also why we disagree
7 with MSU's policy.

8 We are not challenging that MSU has the ability to
9 try to provide for the safety of the students and the staff
10:17:46 10 and the faculty at MSU. What we are saying is from the
11 standpoint of the Constitutional issues involved here, the
12 individual autonomy rights and that sort of thing, you
13 cannot try to differentiate between two different kinds of
14 immunity and say we will accept one and we will not accept
10:18:04 15 the other. And not only will we not accept the other, we
16 are going to force this person to give up their own bodily
17 autonomy, we are going to impose an unconstitutional
18 condition for them to be able to stay as part of the
19 university family, if you will.

10:18:19 20 So again, I think it's very important to understand
21 that the MSU policy is not based upon the Michigan state
22 police power or Department of Health. They very
23 specifically stated that it is based upon the Department of
24 Education and CDC, neither of which have said that the
10:18:38 25 university cannot recognize natural immunity as one of

1 the -- as an immunity. All they have stated is that we
2 recommend vaccinations, Number 1. Number 2, it's a guidance
3 document, it has no force and effect of law whatsoever. And
4 Number 3, there is no police power that comes from CDC,
10:19:00 5 Department of Education down through MSU. MSU only has the
6 legal authority to adopt this policy if that police power
7 comes directly through from the Michigan legislature. And
8 the Michigan legislature --

9 THE COURT: What case or statute says that?

10:19:15 10 MS. HAGEMAN: There are quite a few, your Honor.
11 In fact, we cited to them in our -- in our -- Let me find
12 that.

13 THE COURT: Talking about Michigan cases now?

14 MS. HAGEMAN: Yes, I am. And we cited to them --
10:19:35 15 what the cases say is that it must be tethered. What they
16 say is that the exercise of the police power -- Let me find
17 it here.

18 The Michigan legislature hasn't delegated this
19 police power to them. What it says is that while the
10:19:55 20 legislature can delegate the power to a political
21 subdivision such as MSU, the action taken pursuant thereto
22 must be tethered to the legislative acts. That is G.F.
23 Redmond and Company. This is just one of the cases we have
24 cited to. G.F. Redmond Company vs. Michigan Secretary and
10:20:12 25 Commission, 192 Northwest 688. Otherwise, it's not carrying

1 out the legislative police power but its own. There is no
2 federal police power as I indicated. The federal
3 recommendations are just that, they are recommendations,
4 they are mere guidance.

10:20:29 5 What has happened here is that Michigan has cut out
6 -- or MSU has cut out the Michigan legislature entirely in
7 this entire analysis, and said we are going to do what the
8 CDC and Department of Education say, but they also ignore
9 the fact that neither the CDC nor the Department of
10:20:49 10 Education say that they can't recognize natural immunity as
11 one of the reasons for a medical exemption. So, your Honor,
12 that's another important distinction here is just purely
13 from the police power standpoint, MSU doesn't get to say, we
14 are relying upon the Michigan legislature's police power
10:21:05 15 when they are not relying upon what the Michigan legislature
16 has said.

17 And I think another important point here is that we
18 have been dealing with this now for a year and a half. The
19 Michigan legislature has never stepped in and adopted a
10:21:16 20 vaccine mandate, which is exactly what happened in Jacobson.
21 In Jacobson, it was the legislature that acted, and that's a
22 very important distinction.

23 There are several other facts that also make
24 Jacobson distinguishable from MSU's case. Again, we believe
10:21:33 25 Jacobson supports our position, and the clear reading of

1 that case is that if there is a reason to not -- a
2 reasonable reason not to force a vaccine, the courts are not
3 or should step in to protect the Constitutional liberties of
4 the individual at issue. The Supreme Court's juris prudence
10:21:52 5 related to plaintiff's primary claims was not developed
6 until after Jacobson. And what I mean by that is the bodily
7 autonomy cases that we are familiar with, especially over
8 the last 50 years, were developed after Jacobson was put in
9 place. So I think we have to recognize that Jacobson was
10:22:09 10 important for the situation at hand, but our legal system
11 has evolved, especially on the bodily autonomy type issues,
12 and I think that that's an important distinction.

13 Mr. Jacobson was fined \$5, he wasn't threatened
14 with losing his job. Smallpox had a mortality rate of 30
10:22:27 15 percent; Coronavirus is below one percent, even without a
16 vaccine mandate in place. The mortality rate was -- of the
17 smallpox was very important to the legislature, the
18 legislature had the opportunity to act.

19 The other thing that is important about Jacobson is
10:22:45 20 that it was decided before the Supreme Court developed the
21 tiered scrutiny. So it's not -- you can't simply say that
22 Jacobson applies to a rational basis. And if you did, it
23 would have to be applied because that was adopted by the
24 legislature.

10:23:01 25 In addition, your Honor, strict scrutiny. There is

1 just absolutely no question this case should be subject to
2 strict scrutiny. If you look at our brief, our reply brief
3 on Pages 7-8, we cite to several different cases that talk
4 about whether the government has adequately demonstrated a
10:23:20 5 compelling need for the intrusion, a lack of reasonable
6 alternatives, the forcible injection of medication into a
7 nonconsenting person's body represents a substantial
8 interference with that person's liberty. Planned Parenthood
9 Ohio Region vs. DeWine, vaccine mandates are a fundamental
10:23:38 10 intrusion into bodily integrity as receiving an injection
11 obviously entails such incursion. So again, what you've got
12 is the development of law in the last 50 years makes it
13 clear that our client, Jeanna Norris, has a Constitutional
14 right to bodily autonomy and MSU's vaccine mandate violates
10:23:58 15 that.

16 THE COURT: Do you concede that your client is an
17 at-will employee?

18 MS. HAGEMAN: Yes, I do. But --

19 THE COURT: Also concede that she doesn't have a
10:24:06 20 constitutionally protected interest in her job?

21 MS. HAGEMAN: I do.

22 THE COURT: Okay.

23 MS. HAGEMAN: But I also believe that -- I would
24 also say that she does have a constitutionally protected
10:24:15 25 interest in bodily autonomy. And I also would agree that

1 MSU as a governmental entity must respect the Constitutional
2 rights and liberties that she does have. And the
3 irreparable injury here ipso facto is a violation of her
4 Constitutional rights, which was where I was just going with
10:24:33 5 my next points to be made here related to irreparable harm.

6 Dr. Noorchashm has testified today that unnecessary
7 medical procedures by definition cause irreparable harm in
8 addition to the Constitutional issue. He further described
9 some of the medical risks associated with taking an
10:24:51 10 unnecessary vaccines and specific side effects that have
11 been traced to COVID-19 vaccines. Considering that the
12 issue is one of bodily autonomy integrity, with MSU's
13 vaccine directly -- vaccine policy directly invading
14 plaintiff's Constitutional rights, there is a real world
10:25:08 15 risk associated with taking an unnecessary medication.

16 We have already talked about the police power part
17 of this. I think that it is incredibly important to
18 understand that there is no ability for MSU to unilaterally
19 rely upon a guidance document from CDC and the Department of
10:25:27 20 Education that flies specifically in the face of the
21 Michigan policy -- the Michigan State legislative policy of
22 recognizing natural immunity in vaccine mandate situations.

23 Unconstitutional conditions. I briefly want to
24 address this, your Honor. The unconstitutional conditions
10:25:46 25 doctrine forbids burdening the Constitution's enumerated

1 rights by coercively withholding benefits. What we are
2 saying is she has a Constitutional right to bodily integrity
3 and autonomy, and they are saying that she is required to
4 breach that or she is -- she is either required to give up
10:26:04 5 her job or breach her Constitutional rights to bodily
6 autonomy. That by its very definition is an
7 unconstitutional condition.

8 And two last points: One is on preemption, your
9 Honor. If the defendant will rely upon the fact that one of
10:26:23 10 the Pfizer vaccines has now been approved by the FDA, but
11 the reason that that particular vaccine is not commercially
12 available is because if it were, then all of the other three
13 emergency use authorization vaccines could no longer
14 lawfully be sold under federal law and outcome that the FDA
10:26:42 15 and Pfizer may be trying to avoid because it would
16 significantly reduce the COVID vaccine supply. In other
17 words, the one vaccine that has been approved by the FDA is
18 not readily available, and the other vaccines are still
19 under the EUA. As a result, Michigan State's law, or
10:26:59 20 Michigan State's policy is preempted by federal law under
21 the emergency use authorization.

22 And finally, Michigan State University cannot meet
23 the rational basis test because, again, immunity is immunity
24 is immunity is immunity. And in a situation where they have
10:27:16 25 no reasonable basis for discriminating against people who

1 have natural immunity and cannot voice one. And again,
2 their policy was not based upon a robust medical analysis of
3 the -- of natural immunity versus vaccine immunity, it was a
4 policy that appeared on the website one day. It's based
10:27:38 5 upon guidance documents, and the very guidance documents
6 that it's based on do not say that it is inappropriate to
7 recognize natural immunity.

8 So for those reasons, your Honor, I would like to
9 reserve about 15 minutes for rebuttal, unless you have any
10:27:52 10 further questions for me at this time.

11 THE COURT: I do not.

12 MS. HAGEMAN: Thank you very much.

13 THE COURT: Counsel, you may proceed.

14 MS. RICCHIUTO: Thank you, your Honor.

10:28:04 15 Michigan State would like to call Dr. Marcus
16 Zervos.

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

19 MARCUS ZERVOS,

10:28:11 20 was thereupon called as a witness herein, and after having
21 been first duly sworn to tell the truth, the whole truth and
22 nothing but the truth, was examined and testified as
23 follows:

24 COURT CLERK: Please be seated.

10:28:31 25 State your full name and spell your last name for

1 the record, please.

2 THE WITNESS: Marcus Zervos, Z-e-r-v-o-s.

3 THE COURT: Counsel, you may inquire.

4 MS. RICCHIUTO: Thank you, your Honor.

10:28:44 5 May I approach the witness?

6 THE COURT: You may.

7 MS. RICCHIUTO: May my colleague approach the
8 witness, I should say.

9 Would you like us to keep going with the numbering,
10:29:01 10 your Honor?

11 THE COURT: You can use letters, counsel.

12 MS. RICCHIUTO: Okay.

13 THE COURT: So this would be Exhibit A.

14 MS. RICCHIUTO: Okay.

10:29:12 15 DIRECT EXAMINATION

16 BY MS. RICCHIUTO:

17 Q. Dr. Servos, do you recognize the document that you've
18 been handed as Defendants A?

19 A. Yes, I do.

10:29:19 20 Q. You see the text across the top there, that just shows
21 it's been filed before in this lawsuit. What is this
22 document?

23 A. This is my curriculum vitae dated 9-7 of this year.

24 Q. And this true and correct copy of your curriculum
10:29:36 25 vitae?

1 A. Yes, it is.

2 Q. It is lengthy, so I don't want to spend time having you
3 go over it. Is it fair to say that your credentials are
4 summarized in the declaration that you filed in this case?

10:29:49 5 A. Yes, they are.

6 Q. And very briefly, maybe just for the Court's benefit,
7 if you could give your current activity as it most
8 specifically relates to COVID-19.

9 A. I am a division head of Infectious Disease at Henry
10:30:04 10 Ford Health System. I'm also Assistant Dean of Global
11 Affairs, Wayne State University School of Medicine. In
12 relation specifically to COVID, as the head of Infectious
13 Disease at a large health system, I'm responsible for the
14 care of people with a variety of different infections
10:30:24 15 including COVID, and directly care for hundreds of patients
16 either myself or supervise their care. I'm also -- was
17 appointed as the advisor to Mayor Duggan for the City of
18 Detroit in response to COVID, and I worked very closely with
19 the Detroit Health Department until now on response to COVID
10:30:45 20 in the City of Detroit.

21 Q. How many, if you know, Dr. Zervos, how many
22 peer-reviewed publications do you have?

23 A. Counting published abstracts, which are also
24 peer-reviewed, and papers, probably over 700.

10:31:01 25 MS. RICCHIUTO: I would move qualification of

1 Dr. Zervos as an expert in this matter.

2 THE COURT: Any objection?

3 MS. HAGEMAN: No objection, your Honor.

4 THE COURT: So noted.

10:31:09 5 MS. RICCHIUTO: Thank you.

6 BY MS. RICCHIUTO:

7 Q. Dr. Zervos, I want to make sure again to use the
8 Court's time wisely this morning, and make sure that we are
9 focused on the points that are most important to the
10:31:21 10 question before us. And so with that, I'm going to dig
11 right in.

12 Do you have an opinion on whether natural immunity
13 or COVID-19 vaccination provides greater protection against
14 COVID-19?

10:31:35 15 A. I think that the vaccination provides a better immunity
16 and should be given even if people with a history of a prior
17 infection.

18 Q. Can you explain the basis and the reasons for that
19 opinion?

10:31:50 20 A. Right. So the vaccines have gone through a clinical
21 trials process. I participated as a principal investigator
22 at Henry Ford Health System for Moderna and J & J vaccines.
23 I know their process well. And there have been over 100,000
24 people that have been evaluated in the clinical trials. And
10:32:14 25 we know from those -- and the way that those studies are

1 done is they're prospective, they're randomized, they're
2 blinded. We have a control group, so we compare people who
3 get the vaccine versus those that didn't get the vaccine,
4 and we look for effectiveness. And the effectiveness of the
10:32:31 5 vaccine is how many people got infections in one group or
6 another, what are the number of people that were
7 hospitalized, what were the number of people that died were
8 the measures of effectiveness.

9 Vaccine safety is also looked at, and it's compared
10:32:50 10 between the people that were vaccinated and the controls.
11 With natural infection, we don't have the same type of
12 information from the trials, we don't have randomized
13 control from trials, looking at what happens over time with
14 natural infection, but we know that people with natural
10:33:11 15 infection can get reinfected. We also know that antibody
16 levels can fall off over time making them at risk of
17 infection and reinfection.

18 Q. Can you explain just briefly, Dr. Zervos, there's been
19 reference in the filings to the Court to a Kentucky study
10:33:35 20 and an Israel study. Can you address just briefly, you
21 know, describe those studies and describe the significance
22 of each?

23 A. Yes. The Israel study showed that there was -- there
24 were less reinfections, better antibody response in people
10:33:52 25 that had the -- that received -- that had natural

1 infections, that they were better protected for reinfection.
2 The limitation of that study is that it's non, it was non
3 peer-reviewed. So the process of peer review means it goes
4 through reviewers, the issues with the paper are not or are
10:34:13 5 looked at and conclusions could be modified. It's
6 retrospective. There is no control group. The biggest
7 issue with it is, it was a short -- it was a short period of
8 time that was evaluated, it was only three months. So
9 within the first three months, somebody with natural
10:34:31 10 infection may not get reinfected, but what happens at six
11 months or eight months was not studied in that paper. So it
12 has, I think, it has enough and various important
13 limitations, and the limitations are significant enough that
14 we can't interpret that as indicating that somebody with
10:34:55 15 natural infection is protected.

16 Q. Okay. And that was with respect to the--

17 A. That is the Israel study. The CDC study, which was
18 published in MMWR was, looked at a small number of patients,
19 but it showed that in people that had natural infection,
10:35:14 20 they were a little bit more than two times more likely to
21 get reinfection than people that got vaccinated getting
22 infection.

23 THE COURT: That's Kentucky?

24 THE WITNESS: That is the Kentucky study. The
10:35:32 25 Kentucky study that showed, you know, again showed there was

1 more of a likelihood, at least two times more of a
2 likelihood of getting a reinfection in somebody with natural
3 infection than getting an infection if they were vaccinated.
4 The Israel study showed that people with -- that had natural
10:35:56 5 infection were protected more likely than if they got
6 vaccine, but there were a variety of different limitations
7 of that study that weren't mentioned.

8 BY MS. RICCHIUTO:

9 Q. You were in the courtroom for Dr. Noorchashm's
10:36:09 10 testimony, correct?

11 A. Yes.

12 Q. He gave some testimony about the smallpox and the polio
13 vaccinations. I was curious if there are differences
14 between the COVID vaccine, for example, the mechanism that
10:36:23 15 that vaccine relies upon, and the vaccines that were
16 available for those medical issues in the past that are
17 significant for purposes of the analysis today?

18 A. Yes. I mean they are very important differences. We
19 do know that antibodies is important in immune response; we
10:36:43 20 know that cellular immunity is important in immune response,
21 but we also know that -- where I differ from
22 Dr. Noorchashm's opinion is that we know very clearly there
23 are many viruses that people can get a second time. So just
24 because you get a virus and you have antibodies demonstrated
10:37:00 25 doesn't mean that you can't get it a second time.

1 Similarly, it doesn't mean that even if you're immunized
2 that you can't get infection again. Flu is the perfect
3 example of that. We can demonstrate an antibody response
4 after somebody has the flu, but the -- or if they get flu
10:37:21 5 vaccine, but that antibody is still not enough to protect
6 them from getting the flu the next year. Same thing with
7 other infections. You can show that for strep throat, for
8 example, you can demonstrate that somebody can have antibody
9 to that, but they can still get a reinfection. Somebody can
10:37:39 10 get -- The point being that reason it's different from
11 smallpox is that it is possible with some vaccinations that
12 people can still get infection after that or get reinfected.

13 Q. Can you explain, Dr. Zervos, limitations of measuring
14 the amount and the efficacy of a previously infected
10:38:05 15 individual's natural immunity to COVID-19? So for example,
16 the serological tests that Dr. Noorchashm talked about
17 today?

18 A. Immunity is -- There is a combination of factors
19 involved in immunity. It's not just the antibody or whether
10:38:22 20 they have T and B-cells or not, but we don't know what the
21 level of antibody is that's protective for one infection or
22 another. And that was even mentioned in the laboratory
23 report that you shared earlier. And even more than that, we
24 know even less about what T-cells and B-cells mean in immune
10:38:42 25 response. But there is a lot of other things that go into

1 immunity. How closely somebody is to somebody else who has
2 COVID, you know, what are their risk factors in terms of
3 acquisition of the infection. It might make somebody more
4 susceptible than another, which is why, when we look at
10:39:04 5 prevention of infection, we don't just look at antibody
6 levels. We look at what is the effectiveness of the, for
7 the vaccine studies, what is the effectiveness of the
8 vaccines. So what is the protection that somebody gets?
9 How often do they end up in hospital? How often do they end
10:39:21 10 up with infection? How often do they die? As a result of
11 infection is the measure of efficacy, not one antibody level
12 or another. We still do not know what the level of antibody
13 is that would be protective or not protective and what other
14 factors are involved.

10:39:38 15 Q. How does that explanation that you gave of kind of
16 natural immunity, how does that differ from what we know
17 about immunity of vaccinated individuals?

18 A. So what is different from the vaccination is that we
19 have large randomized control trials. We have over 100,000
10:39:59 20 people that have been in the controlled trials. And it's
21 respective, randomized, blinded studies, we have control
22 groups, so we are able to see how people do compared to --
23 who get the vaccine compared to controls, and measure them
24 over time. So it's not just the, you know, the first few
10:40:16 25 months or first six months, but now we have at least a

1 year's worth of data that continues in the clinical trials,
2 and we also have the real world experience to see what the
3 effectiveness of the vaccine is. It's not just do they have
4 the antibody or not, it's also what is the effectiveness of
10:40:33 5 the vaccine over time in terms of preventing infection. And
6 we don't have those type of studies for people with natural
7 infection. Natural infection, the limitations of the
8 studies is they are retrospective, they are short-term, they
9 don't have control groups along with the exposures. We
10:40:50 10 don't have a lot of information that's needed to be able to
11 draw conclusions.

12 Q. What is your reaction, Dr. Zervos, to counsel's
13 argument, and I think Dr. Noorchashm may have said it too,
14 to this idea that immunity is immunity is immunity?

10:41:10 15 A. No, that's not correct. We know that there is a lot of
16 different aspects to immunity. We know that antibody is
17 important, we know that cellular immunity is important, but
18 we also know that people have different risks in terms of
19 getting infections, somebody with diabetes or obesity or
10:41:32 20 cancer have different risks than others. We know that
21 behaviors are important. If you're in a crowded room with
22 other people that have COVID, you're more likely to get it
23 or not. It's -- it is -- so what is the level of exposure
24 with some of these risks? So there are a lot of factors
10:41:48 25 that go into the immunity of infected. So we can't just

1 look at an antibody level and say somebody is protected or
2 not. We have to look at the overall picture of risks and
3 also somebody's vulnerability to infection.

4 Q. I wrote down this morning that Dr. Noorchashm said that
10:42:09 5 those that are advocating for vaccination of those who have
6 been previously infected are ignoring principles of science.
7 Do you have a response or reaction to that opinion,
8 Dr. Zervos?

9 A. Yes. So the, you know, the process of making that
10:42:25 10 recommendation is that the -- so the vaccines go through the
11 clinical trials and they go into real world studies with
12 millions -- not millions, hundreds of thousands of people.
13 The FDA approves the vaccine for emergency use or full
14 approval, CDC then meets and through its ACIP, the college
10:42:48 15 of -- or Committee For Immunization Practices meets, and all
16 of these groups have a consensus of experts, and those
17 experts come up with recommendations. It is almost unheard
18 of for us as people that are actually caring for patients
19 and making public health, infectious disease recommendations
10:43:08 20 not to go along with the ACIP recommendations, so every
21 public health authority is -- the major public health
22 authority, the W.H.O. is saying not only should we be
23 vaccinating generally, but we should be vaccinating people
24 with natural infection. And I put Dr. Walinski's (phonetic
10:43:28 25 sp.) statement in my declaration, that the W.H.O. says that

1 somebody with natural infection should be immunized. Every
2 major society is also saying that it is, so the consensus is
3 very broad. And the reason for it is because we believe
4 that people with natural infection are not prevented from
10:43:51 5 reinfection. Those that did have natural infection may have
6 been or likely were infected with earlier strains and now we
7 have different strains, we have the Delta variant, we have
8 other strains that are upcoming that may not be protected.
9 We know that natural immunity wanes also over time in terms
10:44:10 10 of antibody levels even if you just consider antibody levels
11 to be important. And we know that -- We know from real
12 world experience that the vaccines have remained effective
13 and they remain safe in terms of the safety part, we know
14 that it's safer to get the vaccine than to get the
10:44:31 15 infection.

16 Q. Thank you for that segue, Dr. Zervos. I was going to
17 ask you with respect to that last statement that you made,
18 that it's safe to get the vaccine than to get infected, does
19 that remain your opinion with respect to individuals like
10:44:45 20 Ms. Norris who have had a previous infection?

21 A. Yes, because --

22 Q. Why?

23 A. Yes, and the reason for that is, you know, you can't
24 take, you know, three people, you know, anecdotally that had
10:44:58 25 some kind of side effect after getting the vaccine and say

1 this was related to the vaccine. You have to compare it to
2 a control group. Even in the controlled studies we had in
3 the Moderna trial, for example, 30,000 subjects, there were
4 14 deaths. You say, oh, well, you know, Moderna vaccine
10:45:15 5 causes deaths. You got to look at the placebo, the placebo
6 had 14 deaths also. People die of other reasons, you know,
7 during the, the reason they are in a clinical trial. Same
8 thing after vaccine. They get a vaccine, they have one side
9 effect or another. Is it different from a control group?

10:45:32 10 We don't have that information. So you know, and again, we
11 know that the vaccines have, they do have side effects, they
12 have -- and those are well described. They have pain, they
13 have redness, people get flu-like symptoms. Some people
14 even had more serious symptoms. But the serious things like
10:45:52 15 blood clotting, myocarditis, that type of thing, which are
16 rare, they are more common in people that get infection.
17 And again, in terms of specifically in this situation is
18 that by immunizing people that have previous infection we're
19 not only protecting the person himself, but we are people
10:46:12 20 protecting people around them. And it is very well
21 demonstrated that somebody who is even asymptomatic with the
22 virus can spread it to somebody else. And if that person is
23 vulnerable, they can die from infection.

24 I see people all the time where somebody is a --
10:46:34 25 they are even college students, they have some mild or even

1 asymptomatic infection, there's a family member or somebody
2 around them that gets infection, they are more vulnerable
3 and end up in the hospital and even die from it. So it's
4 not just to protect the -- so what I'm saying that the risk
10:46:51 5 of vaccine is less than infection, it is for the individual,
6 but it's also for the public and people around that person
7 as a whole.

8 Q. And that example, Dr. Zervos, you were just giving
9 about family members and patients in the hospital, is that
10:47:08 10 experience based on experiences that you have had treating
11 COVID patients in a clinical setting over the last year and
12 a half?

13 A. Yes. It's both the literature -- I mean it's well
14 described household transmission, transmission in various
10:47:23 15 close settings. The ability of COVID to spread is not
16 disputable. It can spread very easily including from
17 asymptomatic people and including from the Delta virus,
18 which, of course, is why things have changed most recently.
19 It's from the literature, but it's also personal experience.
10:47:39 20 It is -- This last year and a half has been devastating.
21 We have had hospitals filled. We have had deaths. We have
22 had long-term effects. We have people with long-term COVID.
23 One in every three people -- persons that get COVID have
24 long-term symptoms. So it is, you know, that makes it
10:47:58 25 difficult to differentiate, well, somebody's long-term

1 symptoms, how much of this is reinfection or not, you know,
2 requires specialized testing that is not usually available.

3 But the point being is that the effect of COVID is
4 devastating, and we really need to get ourselves together
10:48:18 5 and get our population immunized, and which is our best way
6 of controlling the virus.

7 I commend MSU for what it's doing in the mandates
8 and not just trying to protect the individual person, but
9 also protect the community overall.

10:48:36 10 Q. And just to wrap up, Dr. Zervos, the position that MSU
11 has taken in its policy with respect to individuals who have
12 had a natural -- a previous natural or previous infection
13 and now maybe have natural immunity or did in the past,
14 that's consistent with every single public health --
10:48:54 15 recognized public health authority; is that correct?

16 A. Every public health authority is -- continues to
17 recommend that somebody with natural infection get
18 immunized, and the reason for that is out of concern for the
19 person themselves for reinfection, but also the concern for
10:49:13 20 spreading infection to others. That is a generally held
21 public health opinion, opinion among every medical society,
22 public health entity and not only in the United States, but
23 it includes W.H.O. and others.

24 Q. And the opinions that you've expressed here today,
10:49:31 25 Dr. Zervos, have you expressed those opinions with a

1 reasonable degree of certainty?

2 A. Yes.

3 MS. RICCHIUTO: Okay. I will pass the witness. I
4 know they are very eager to talk to you, Dr. Zervos, so I'll
10:49:42 5 let them get to it.

6 THE COURT: Counsel, you may inquire.

7 MS. HAGEMAN: Thank you, your Honor.

8 CROSS EXAMINATION

9 BY MS. HAGEMAN:

10:49:51 10 Q. Good morning, Dr. Zervos.

11 A. Good morning.

12 Q. People with natural -- You have indicated that people
13 with natural infection can be reinfected and their
14 antibodies can wane; is that correct?

10:50:08 15 A. Yes.

16 Q. That's also true of vaccinated individuals, isn't it?

17 A. Yes.

18 Q. And even if you get vaccinated for COVID-19, you can
19 get it a second time, can't you?

10:50:21 20 A. If --

21 Q. Excuse me, even if you get vaccinated for COVID-19, you
22 can still get COVID-19 again, can't you?

23 A. Yes, you can.

24 Q. In fact, the proof of the pudding is in the eating, and
10:50:33 25 we are seeing numerous breakthrough cases of people who have

1 already been vaccinated who have become reinfected with
2 COVID-19, correct?

3 A. There are breakthrough cases, which is why we are
4 looking at potentially the need for giving boosters.

10:50:50 5 Q. Right. So we just we keep vaccinating, in other words;
6 is what you're potentially advocating?

7 A. Well, we vaccinate as necessary. We give flue shots
8 every year because we know that --

9 Q. What my point is --

10:51:03 10 THE COURT: Counsel, let the witness finish and
11 then ask your next question, okay?

12 MS. HAGEMAN: Excuse me.

13 THE COURT: Because Ms. Thomas is very good, but
14 she can't take down both at the same time.

10:51:13 15 MS. HAGEMAN: Thank you, Ms. Thomas.

16 THE COURT: Go ahead, counsel.

17 Doctor, were you done with your answer?

18 THE WITNESS: Yes. Yes, I was.

19 BY MS. HAGEMAN:

10:51:22 20 Q. Well, in fact, everything that you've said about
21 natural immunity today and your criticisms and your concerns
22 about people with natural immunity applies to people who
23 have already had the vaccine with COVID-19 as well, don't
24 they?

10:51:34 25 A. No. No, it doesn't. They are totally different.

1 Q. We know there is breakthrough cases, correct? With
2 people who have been vaccinated for COVID-19, we know there
3 are breakthrough cases?

4 A. We know there are breakthrough cases.

10:51:47 5 Q. And we know that the efficacy of the vaccine wanes over
6 time, correct?

7 A. It can wane over time.

8 Q. Yes.

9 A. In some people, which is the reason we are looking at
10:51:56 10 giving boosters to some people, not everybody, but to some
11 people.

12 Q. Okay. So again, because your concern -- you have
13 voiced a concern that with natural immunity, we don't know
14 how long that natural immunity will last, correct?

10:52:12 15 A. It varies. It varies by individual, and some people
16 with natural infection, they don't develop antibodies at
17 all. Others, it wanes other a few months. Reinfections can
18 occur usually any time after about three months after
19 natural infection is what we have seen so far.

10:52:32 20 Q. Okay. Well, I want you to answer my question. And
21 that is this: What are your concerns about folks with
22 natural immunities? You don't know how long that natural
23 immunity will last; is that right?

24 A. Everybody is different, every person is different.

10:52:47 25 Q. Okay. And with the people who have had the vaccine, we

1 don't know how long they will be protected from COVID-19
2 either, do we?

3 A. We have better information on that vaccine patients and
4 we do know how long they are going to be protected because
10:53:03 5 we have been following people in a clinical trial. The
6 answer to that is yes, we do know how long they are going to
7 be protected with some, you know, some provision. There
8 might be changes in strains, there might be individual
9 variability from one person to the next, you know. We are
10:53:17 10 following people in the trials for years, so what happens,
11 you know, two years from now we don't know.

12 Q. Well, you can't have been following it in trials for
13 years because this breakout has been approximately a year
14 and a half long, correct?

10:53:30 15 A. We will be following it for years.

16 Q. Pardon me?

17 A. We will be following it for years. The trials, the way
18 the trials are being done is that we are following those
19 patients for five years.

10:53:40 20 Q. But I'm talking about what our knowledge is right now.

21 So in other words, Doctor, the situation we are
22 dealing with, because we are dealing with a pandemic and
23 it's only been around for about a year and a half, we don't
24 know how effective or how long the COVID vaccines will be
10:53:56 25 effective just like according to your testimony, we don't

1 know how long natural immunity will be effective?

2 A. No, that's not correct. That's not correct. We know

3 that through the clinical trials up to this point, we know

4 how safe and how effective they are. And not only do we

10:54:11 5 know it, but we know it in a perspective randomized blinded

6 fashion compared to controls. So we know how are people

7 doing, how often do they get infections compared to people

8 who don't get the vaccine over the year that we have been

9 studying it so far. So we have that information. We know

10:54:31 10 that over time that, with the vaccine, that people do get

11 infections but, and we know how many people get infections.

12 So that is information.

13 Q. But what we do know is that if you've had the COVID-19

14 vaccine, you may get reinfected tomorrow, correct?

10:54:47 15 A. You might get an infection.

16 Q. Right?

17 A. You might get an infection tomorrow. The likelihood of

18 that resulting in a hospitalization or death is very low.

19 Q. Okay. And we also know that with some of the vaccines

10:55:00 20 that MSU has approved, that they are substantially less

21 effective than others that they have approved or will

22 recognize. So the Sinovac, for example, as compared to the

23 mRNA or the Johnson & Johnson, there are differences in

24 terms of the effectiveness in preventing the vaccine and how

10:55:21 25 long they will prevent the vaccine in all of those vaccines,

1 isn't there -- or that they will prevent the COVID in all of
2 those vaccines, correct?

3 A. It's hard to compare one vaccine with another because
4 there aren't head-to-head comparisons. It is -- and there
10:55:36 5 are different strains involved and different periods of time
6 the study was done. The J & J study, for example, was done
7 around the world, it was not just done in the United States.
8 There were different strains involved. All of the vaccines
9 that MSU is recommending are FDA -- either FDA emergency
10:55:55 10 use, FDA approved or W.H.O. endorsed as having safety and
11 effectiveness. Whether there is a difference in efficacy
12 rate in one or another, partly depends on the time the study
13 was done, the strains that were involved, the -- and who is
14 included in the study or not included in the study. It's
10:56:18 15 not possible unless there is a head-to-head comparison to
16 say that, you know, one vaccine is necessarily better than
17 others. If they're all in the emergency use approved or FDA
18 approved or approved by W.H.O., we believe that they have
19 demonstrated enough safety and efficacy to be recommended by
10:56:38 20 MSU. So I agree with their position.

21 Q. FDA have not approved the Sinovac, they have only
22 approved the mRNA and the Johnson & Johnson, correct?

23 A. W.H.O. has approved the --

24 Q. My question was whether FDA has.

10:56:51 25 A. No, they haven't.

1 Q. That's right, okay.

2 Sounds to me like there's a lot of uncertainty in
3 this, which is what we are all kind of experiencing, isn't
4 it?

10:56:59 5 A. Well, we -- there is an enormous amount of scientific
6 literature and we learn things, you know, new every day, and
7 it is -- so we are learning more about the vaccines every
8 day, but we also learn more about natural infection, we
9 learn about how virus changes. And as part of our reason
10:57:18 10 for recommending that people with natural infection get
11 immunized is because we are learning more about that every
12 day also.

13 Q. Yeah, it's kind of a fluid situation, isn't it?

14 A. We continue to learn more and more every day.

10:57:30 15 Q. Right. And you have been critical of the Israeli
16 study. The Israeli study involved 700,000 people, correct?

17 A. Right.

18 Q. And it's one of the largest in the entire world that's
19 been completed, correct?

10:57:41 20 A. It's -- yes, it is one of the largest studies.

21 Q. And it showed that natural immunity was 27 times more
22 effective than vaccinated immunity at preventing symptomatic
23 infection, correct?

24 A. That's what they reported. I don't think it showed
10:57:54 25 that, but that's what they reported.

1 Q. That's what the report shows.

2 Your criticism of it is it was not peer-reviewed,
3 correct?

4 A. That's one of many criticisms.

10:58:03 5 Q. Several of the studies that you have done have also not
6 yet been peer-reviewed, correct?

7 A. The majority of what I cited in my declarations were
8 New England Journal, CDC, you know, other MMWR, Lancet,
9 multiple peer-reviewed papers. I did put in a few
10:58:24 10 references to some of the studies that were cited by others,
11 and then I put in a few -- I did put in a few papers that
12 were not peer-reviewed.

13 Q. Right. Again --

14 A. I didn't -- The conclusions that I reached were from
10:58:41 15 the peer-reviewed literature.

16 Q. It's been kind of a fluid situation over the last year
17 and a half, hasn't it? We are all learning, aren't we?

18 MS. RICCHIUTO: Object to form.

19 THE WITNESS: The science, you know, we do learn
10:58:53 20 things every day, there is no question about that.

21 BY MS. HAGEMAN:

22 Q. Just one last question, Dr. Zervos.

23 Can you guarantee that Ms. Norris will not suffer
24 any side effects if she's forced to get the vaccine as being
10:59:05 25 required by MSU?

1 A. Well, you know, she's not my patient so, you know, I
2 think if there is a patient-doctor relationship, it's, you
3 know, there is a combination of, you know, what are medical
4 illnesses, what are the risk factors, what are the
10:59:21 5 exposures, what is the-- what is the, you know, when was the
6 infection that she had before. But knowing that her --
7 What I do know about it, all I've seen is just the --
8 actually I just saw it today before I knew the result, but
9 just the lab reports, and knowing that she had an antibody
10:59:39 10 of whatever it was, 40 or 50 or 60 in August, I don't know
11 whether she has the antibody now or not a month later.
12 Actually, I would anticipate it would be lower. So my
13 recommendation would be that it would be more likely that
14 she's going to suffer a harm from a reinfection, which is
10:59:58 15 just a matter of time, than from getting the vaccine.

16 Q. Okay. That wasn't my question. Because what we are
17 talking about here is her personal autonomy, and her bodily
18 integrity. And what I'm asking you, and we have talked
19 about the fact that there is also a risk of harm with
11:00:15 20 vaccines or with any medical intervention, isn't there?

21 A. There is always the possibility of a side effect from
22 getting the vaccine.

23 Q. You cannot guarantee that if MSU forces Ms. Norris to
24 get the vaccine for COVID-19 having natural immunities, that
11:00:32 25 she will not suffer adverse medical side effects, can you?

1 A. We know what the side effects are of the vaccine, and
2 it would be possible for her to get a side effect. I can't
3 say whether -- It would be unlikely from what we know about
4 the vaccine.

11:00:46 5 Q. But you can't guarantee that?

6 A. She is at risk of getting an adverse effect from the
7 vaccine.

8 MS. HAGEMAN: Thank you.

9 THE COURT: Redirect, counsel?

11:00:56 10 MS. RICCHIUTO: None, your Honor.

11 THE COURT: All right. Thank you.

12 Doctor, you may step down with the Court's thanks.

13 THE WITNESS: Thank you.

14 (At 11:01 a.m., witness excused.)

11:01:12 15 THE COURT: Counsel, you may proceed.

16 MS. RICCHIUTO: Thank you, your Honor.

17 Your Honor, we have a demonstrative exhibit. Amy
18 -- that we had worked with Amy to get just a slide deck just
19 to guide our discussion.

11:01:24 20 THE COURT: Tell you what, we have been at this for
21 two hours, so we will take ten minutes.

22 MS. RICCHIUTO: I promise it's not that bad.

23 THE COURT: No, no, no. It's okay. Two hours is
24 fine. Everybody needs to stand and stretch.

11:01:36 25 MS. RICCHIUTO: Thank you.

1 THE COURT: Okay.

2 MS. HAGEMAN: Thank you, your Honor.

3 COURT CLERK: All rise, please.

4 Court is in recess.

11:01:44 5 (At 11:01 a.m., recess.)

6 (At 11:15, a.m., proceedings continued.)

7 THE COURT: We are back on the record in 21-756.

8 Counsel are present. We are ready for argument from the
9 defendant.

11:15:22 10 Go ahead. You may proceed, counsel.

11 MS. RICCHIUTO: Thank you, your Honor.

12 Ann Ricchiuto for Michigan State, and this is the
13 portion of our argument that's going to be focused on the
14 law.

11:15:33 15 We have had our witnesses testify to some factual
16 matters, and now I would like to refocus us on the motion we
17 are here today about, which of course, is a motion for a
18 preliminary injunction. We have got this demonstrative just
19 to sort of help us walk through the legal standard. So
11:15:50 20 obviously we all know well the four factors.

21 MS. HAGEMAN: Your Honor, if I may make just one
22 quick objection for the record, and that is with this
23 demonstrative, I've never seen it before today. I haven't
24 had an opportunity to go through to ensure that it only
11:16:04 25 contains information that is already included in their

1 brief. I assume that you are going to allow her to go ahead
2 and walk through it. I just wanted to make sure that I had
3 my objection noted on the record that I don't know what is
4 in this document.

11:16:18 5 THE COURT: All right. Thank you. Objection is
6 noted.

7 MS. RICCHIUTO: Thank you, your Honor.

8 THE COURT: Is there some reason why you didn't
9 give this to counsel earlier?

11:16:26 10 MS. RICCHIUTO: I gave it to them this morning when
11 we got here.

12 THE COURT: What about yesterday or the day before?

13 MS. RICCHIUTO: We were working on it, your Honor.

14 It's been an extremely expedited timeline obviously for this
11:16:41 15 case. It wasn't -- I mean I do believe you are not going to
16 see anything in here that you haven't seen or heard before.
17 The true intent of it is to be just a demonstrative to guide
18 the discussion.

19 THE COURT: For purposes of future considerations,
11:16:58 20 you have to give opposing counsel a little bit more notice
21 than dropping something like this on them at 8:30 in the
22 morning before a 9:00 clearing, okay?

23 MS. RICCHIUTO: Yes, understood, your Honor. Thank
24 you.

11:17:08 25 THE COURT: All right.

1 MS. RICCHIUTO: So again, we all obviously know
2 well the factors for the injunction standard. I don't need
3 to dwell on that.

4 In your TRO order in this case, your Honor, you did
11:17:20 5 a preliminary assessment of Ms. Norris's likelihood of
6 success, and we believe you got it just right, and so we
7 want to walk through that analysis in some more detail.

8 Just to briefly address the new argument about --
9 the new authority argument, your Honor, that is subject to
11:17:38 10 the sur-reply. I'm still not sure I hundred percent
11 understand this argument. I think what I understand them to
12 be saying is that Michigan State University can't act or any
13 government entity maybe can't act without a specific
14 legislative delegation. We don't understand that to be the
11:17:56 15 law. But at any rate, there is no legislative delegation
16 necessary here because the authority comes directly from the
17 Michigan Constitution. And that's what you see.

18 THE COURT: Is that the cover of the 1895
19 Constitution?

11:18:11 20 MS. RICCHIUTO: It may be.

21 THE COURT: I think there's been at least two
22 since.

23 MS. RICCHIUTO: We will update that. Thank you.

24 THE COURT: I mean I think you got 1908 and you got
11:18:20 25 1963.

1 MS. RICCHIUTO: Is this --

2 THE COURT: I mean it's a great cover. I like the
3 cover, but there have been two state Constitutions since.

4 Go ahead, counsel.

11:18:31 5 MS. RICCHIUTO: Well, our point on this, your
6 Honor, simply is that Michigan State certainly has the
7 authority to provide for the safety of the people on its
8 campuses, it originally derives from the Constitution.
9 There is the Michigan Supreme Court cases that are cited in
11:18:45 10 our papers essentially saying it's co-extensive with the
11 legislature.

12 It's also really important to point out here that
13 Michigan State -- I think you made this point, too, in one
14 of your questions -- is not legislating for the entire State
11:18:57 15 of Michigan, right? So Michigan State is in charge of
16 saying what can happen, can and can't happen on its
17 campuses. It does that through its ordinances. And this is
18 really no different, this is exactly something that's in
19 their purview to address.

11:19:12 20 So I just wanted to make sure to address those
21 points. Again, these are arguments that are in our papers
22 about the fact that they certainly do have the authority to
23 make rules and policies just like they have, you know, for
24 ever and ever about what it is that happens on their
11:19:29 25 campuses. And there is not anything different about this

1 being a vaccination requirement that undermines that
2 authority.

3 So moving on just from that initial point. The
4 majority of their argument today that we have heard, your
11:19:44 5 Honor, goes to strict scrutiny. And they have already told
6 you in their papers that they think that your TRO order,
7 excuse me -- you may also have to give me the slow down
8 sign -- got it wrong by applying rational basis. This is a
9 Jacobson case, though, your Honor. Yes, it's before
11:20:02 10 rational basis had been articulated as such, but every court
11 has relied on Jacobson including the Sixth Circuit recently
12 with respect to other COVID cases. The Supreme Court dozens
13 of times essentially applies the equivalent of rational
14 basis standard based on Jacobson. And your TRO order
11:20:22 15 confirmed that Jacobson applies to a challenge just like
16 this where a vaccination is unwanted and unnecessary.
17 That's exactly what Jacobson said. In fact, I really find
18 the discussion in that case really striking because it
19 exactly could be happening today. You know, Jacobson is
11:20:38 20 arguing I don't want this, I don't think it's going to help
21 me, I don't think I need it. So those were all arguments
22 that the Supreme Court considered back in the era of
23 Jacobson, obviously different vaccination and different
24 time. But this is what the standard is. Real substantial
11:20:54 25 relation, and if it has a real and substantial relationship

1 to a legitimate government interest that is rational basis,
2 then this policy has to survive.

3 The Seventh Circuit -- this is also just from your
4 TRO order, this is the Klaassen case, your Honor. They, as
11:21:15 5 you pointed out, they did recently hold. And my
6 understanding is the same as yours, Judge, that in terms of
7 a circuit opinion, they are the only one that's done a
8 university vaccine mandate and maybe any vaccine mandate. I
9 know that there are other District Court cases that are
11:21:32 10 dealing with a variety of challenges. We cited in our
11 papers, I think, the University of Massachusetts case, a
12 variety of challenges that are making their way through the
13 District Court, but I'm fairly confident that the Seventh
14 Circuit decision is the most comprehensive in terms of
11:21:48 15 reviewing a District Court treatment. And those -- if I can
16 just have the next slide -- those confirm that rational
17 basis applies because no fundamental right is at issue. And
18 they have to have a fundamental right to get into strict
19 scrutiny. The vast majority of the arguments that they have
11:22:06 20 made today are strict scrutiny type arguments and this is
21 simply just not a strict scrutiny case.

22 THE COURT: Let me ask a question regarding
23 Klaassen. Counsel in her argument indicated Klaassen was a
24 students' case, not necessarily -- and did not include staff
11:22:24 25 of the university. What is your response to that

1 distinction?

2 MS. RICCHIUTO: As a factual matter, that is
3 correct. It was a case brought by eight students, most of
4 whom actually had exemptions. But the significance of a
11:22:39 5 challenge to whether or not this is a deprivation of the
6 right to bodily integrity or interference with that, that
7 argument is the same. So that the bodies were bodies of
8 students rather than bodies of staff is not a distinction
9 that should make a difference for purposes of the legal
11:22:57 10 analysis. And in fact, in Klaassen, the students took the
11 position essentially that the staff should be more likely to
12 need a mandate because they are older and at higher risk,
13 you know, and we students are kind of more robust from an
14 immunity perspective. To the extent that the staff/student
11:23:15 15 distinction was taken into account in that case, it actually
16 was observed that such a requirement like this might be even
17 more appropriate and more necessary for the staff level. In
18 terms of legal significance of the bodily integrity being
19 the body of a student or body of staff, we don't think there
11:23:34 20 is legal significance there. The students were adults, so
21 this isn't a childhood vaccination case obviously. So from
22 that perspective, we think the logic and the analysis of the
23 -- particularly the analysis on the substantive due process
24 legal question about whether there is a fundamental right to
11:23:52 25 bodily integrity and whether that's possibly invaded by a

1 requirement like this, we think that translates over to this
2 case.

3 THE COURT: Are there any circuit opinions from the
4 Sixth Circuit -- well, not opinions. Are there any cases
11:24:07 5 pending in front our circuit right now, meaning the Sixth
6 Circuit, recognizing you're from the Seventh Circuit, but
7 are there any -- to your knowledge, are there any cases
8 pending in the circuit in which an appeal has been taken
9 either way from a district judge in the Sixth Circuit?

11:24:30 10 MS. RICCHIUTO: On the question of --

11 THE COURT: On the question before the Court here.

12 MS. RICCHIUTO: The antibody question?

13 THE COURT: Right.

14 MS. RICCHIUTO: No, I'm not aware of any, your
11:24:38 15 Honor.

16 THE COURT: Okay. Thank you.

17 I didn't think there were, but I was --

18 MS. RICCHIUTO: I'm not aware of any. I would hope
19 we would have found them, but I'm certainly not. So from
11:24:46 20 our perspective, I think is the same as yours, which this is
21 the Court, and certainly the District Court in Klaassen, you
22 know, that opinion is substantial and he undertook a very
23 robust analysis of precisely this bodily integrity, you
24 know, is there a fundamental right stemming from it and is
11:25:04 25 there any kind of right that's invaded by a requirement like

1 this that is Constitutional that would not satisfy rational
2 basis, and he concluded no. So I would, you know, commend
3 that analysis to your attention. Although -- Understanding
4 you'll do your own, but he did kind of, you know, a more
11:25:23 5 robust than average, look at the law on that.

6 So here's what we know about bodily autonomy. They
7 have no fundamental right to refuse a vaccination. There's
8 no court that's ever found that. And as a practical matter,
9 there is also no deprivations of the right to choose in this
11:25:39 10 case, and we will talk more about that, but it is something
11 that's important. The bodily integrity cases that are
12 relied on are, you know, obviously Miss Klaassen was
13 incapacitated, so she really literally didn't have a right
14 to choose. Prisoners, people awaiting trial, these are
11:25:55 15 people who literally the state was going to inject something
16 into their body without their consent. That is not what we
17 have here. Our situation is different, and the Klaassen
18 court recognized it, which is that she does have a choice.
19 So I want to talk about that more in a little bit, but I
11:26:14 20 just want to make kind of plant the seed that that is
21 another distinction.

22 So for rational basis, as we know, what we need is
23 a legitimate interest, and we certainly have at least that.
24 The Supreme Court has found, the Sixth Circuit, I believe,
11:26:34 25 has found, you know, controlling COVID is a compelling state

1 interest, it's absolutely legitimate, so we should -- I
2 don't even know that we disagree necessarily about that.

3 It is compelling nationally, it's certainly
4 compelling in Michigan. And here is some statistics here
11:26:51 5 that are also found in the declarations just about the
6 status of COVID in Michigan specifically, that underscores
7 the fact that Michigan has at least a legitimate and
8 probably a compelling interest in controlling this on its
9 campus.

11:27:06 10 So having established that requisite interest,
11 Michigan State must establish that the requirement is
12 reasonably related. And here, I think, is where we have a
13 little bit of misunderstanding or different way of thinking
14 about the law than the plaintiff's, your Honor. It is not
11:27:25 15 the standard that Michigan State has to bring to you, you
16 know, every thought that it thought before it enacted this
17 policy. We have provided an expert to help understand the
18 science. He is going to do a better job at it than I am
19 going to do, but it's a deferential standard that has -- it
11:27:45 20 has to be a plausible justification that we have offered, or
21 even that you've come up with. Plaintiff's have to negate
22 every conceivable basis that might support the policy. And
23 it just has to be based on rational speculation. We believe
24 that we have shown far more than that, that we exceed that
11:28:03 25 standard by a fair bit, but it is really important to

1 remember what the standard is here, and that this issue
2 about, you know, the timing of when we considered which
3 studies or what is or isn't specifically outlined in our
4 policy document, you know, that's on the internet for our
11:28:23 5 students to consume. None of that is relevant to a rational
6 basis analysis. Rational basis analysis is, is there a
7 legitimate interest and is there a reasonable relationship,
8 and we believe that we absolutely have that in spades.

9 As has been alluded to today, the CDC has given
11:28:45 10 specific guidance to higher ed, which obviously includes
11 Michigan State. It's been through the CDC, the U.S.
12 Department of Education, and as a preliminary matter they
13 have recommended, listen, college campuses are big places,
14 with lots of people mingling, vaccination is something
11:29:04 15 that's really important to consider. So that is sort of the
16 starting point for Michigan State's reasonableness.

17 And then when we get to the specific question
18 before us today, should people -- Does that conventional
19 wisdom include and extend to people who have previously had
11:29:22 20 COVID. And as Dr. Zervos testified, and I think Dr.
21 Noorchashm conceded, every single public health authority
22 who has weighed in on this has said yes, Michigan Department
23 of Health and Human Services has said yes. CDC has said
24 yes. FDA has said yes. And there is in our papers, your
11:29:42 25 Honor, a study that also reflects the CDC did actually

1 consider efficacy in previously infected individuals. So
2 it's not a matter of, you know, they haven't thought of this
3 or they haven't studied it. Obviously things are continuing
4 to evolve, but this is a question that the CDC has looked at
11:30:01 5 and affirmatively concluded yes, here is what we are doing.
6 And that is a basis for the policy. All of those things
7 cumulatively are the basis for the policy.

8 So this is the CDC. Here are the other authorities
9 that have, that recommend this. But again, Michigan State
11:30:20 10 is simply acting consistent with the guidance. They are not
11 saying that they are enforcing this guidance or, you know,
12 potentially, I guess, that they couldn't make a different
13 choice, but if the question before you, Judge, is Michigan
14 State's decision reasonable to come down on the side of yes,
11:30:39 15 previously infected people should be vaccinated.

16 THE COURT: Well, now wait a minute. What you just
17 said is that there is no -- no indication that you are going
18 to enforce the policy. Did I hear you correctly?

19 MS. RICCHIUTO: No, your Honor.

11:30:55 20 THE COURT: Okay. I thought there was some --

21 MS. RICCHIUTO: Oh, okay. I understand what my
22 comment went to. I was referring to --

23 THE COURT: Because is there anything in front of
24 me if you are not going to enforce the policy?

11:31:08 25 MS. RICCHIUTO: We are going to enforce the policy.

1 Let me try to clarify my very confusing statement.

2 THE COURT: Perhaps you misspoke.

3 MS. RICCHIUTO: I was trying to be --

4 THE COURT: You know, my head went ding, ding,
11:31:18 5 ding, ding, so go ahead.

6 MS. RICCHIUTO: Yes. Understood.

7 I was referring to an argument that plaintiffs have
8 made which is that somehow Michigan State is taking the
9 position that it is bound by these authorities or that it is
11:31:35 10 the enforcer of the federal authorities. That's not the
11 position we are taking. We have made our own policy
12 decision that we are entitled to make, it is reasonable
13 because it happens to be consistent with all of these, and
14 we will enforce it consistent with the policy that is
11:31:50 15 written. Does that help?

16 THE COURT: That succinctly states it. Go ahead.

17 MS. RICCHIUTO: Okay. Thank you. I apologize for
18 that confusion. Thank you for stopping me.

19 I think what it comes down to, your Honor, is it's
11:32:04 20 as simple as what we heard from Dr. Noorchashm, which is,
21 it's his view that all of these entities have just made a
22 mistake, you know, they are getting it wrong, and that his
23 view that is different is a mistake. Luckily for you, you
24 don't have to necessarily ultimately decide that, so long as
11:32:23 25 Michigan State's view is that it's reasonable. We think we

1 have adequately shown that it's not a mistake, that the
2 federal guidance is consistent with the science, is
3 consistent with what Michigan State's doing and what its
4 expert has testified that it's doing. But you know, very
11:32:39 5 respectfully, your Honor, one expert disagreeing with that
6 is not unconstitutional. They are asking you to hold that
7 it is unconstitutional for a state university to follow
8 state and federal public health guidance in the middle of a
9 pandemic. That is a very substantial ask, and we think
11:32:59 10 there is no reason to do that under the standard that's
11 before us.

12 I want to touch briefly just on this question of
13 antibody -- the antibody testing. I think Dr. Noorchashm
14 agreed with us, and it says it right on Exhibit 3 that
11:33:15 15 these, the tests -- the serological tests that he is relying
16 on to measure antibodies are not -- yes, they are recognized
17 tests. You can order them, they are real. Again, we have a
18 difference of opinion between Dr. Noorchashm and the public
19 health authorities about what the significance of those
11:33:36 20 results mean, and so I think it's important to understand
21 that. It's not as if plaintiffs have thought of something
22 that the federal government or that the state department
23 hasn't considered. They are obviously aware those tests are
24 out there. They are also very aware of their limitations.
11:33:51 25 And so the guidance is don't really on those tests for

1 basically exactly this reason, to say, I've got all of the
2 immunity I need, you know, I don't need to be vaccinated.

3 THE COURT: But isn't the serological test another
4 data point to consider?

11:34:08 5 MS. RICCHIUTO: Yes, it certainly is. And it is
6 one data point from among many, many data points that all of
7 these public health authorities have considered. And what
8 they have concluded is, and I don't think I heard him
9 testify, there is not a magic number. I don't believe, your
11:34:27 10 Honor, that says, you know, if your a five, right, you're
11 immune for the rest of your life. Ms. -- Harriet asked our
12 expert about could we guarantee that nothing would happen,
13 you know, to her client. I think there is no level at which
14 Dr. Noorchashm would be able to guarantee to her that she's
11:34:45 15 above the level and she definitely wouldn't get COVID or she
16 definitely won't be hospitalized or die from COVID. So that
17 is the limitation on these studies is there is not -- yes,
18 they will give you a number; yes, it is a data point to
19 consider, you know, if there is zero there's and not zero,
11:35:02 20 but where you are on the spectrum, there is no guidelines
21 about what is high enough, how you can contextualize that
22 number in the context of the other risk factors that
23 Dr. Zervos talked about.

24 And so for those reasons, the recommendation is
11:35:17 25 that you can't just take a test, say that it's positive and

1 say that you're free forever. You know, we all can get the
2 flu multiple times even if we've gotten the flu shot. Think
3 about the flu shot. You can get the flu shot, you can have
4 some immunity to it and you can have the flu more than one
11:35:34 5 time. Despite that, the guidance is still get your flu shot
6 every year. So in a way, this is not different, and I agree
7 with you that it is a data point. It is not a data point
8 that public health authorities are recommending, relying on
9 to make decisions about who should and should not be
11:35:52 10 vaccinated.

11 THE COURT: Apparently public health officials, if
12 I understood the testimony, they are saying don't get the
13 antibodies test, right? Or the serological test? If I
14 understood the testimony, they are sending out the message
11:36:10 15 don't do it. Help me with that, if you can.

16 MS. RICCHIUTO: I think what they are saying -- if
17 I just read this title which comes straight from this
18 website, it says not currently recommended to assess
19 immunity after vaccination. So I don't know that they are
11:36:27 20 saying never get this test. If it's some kind of
21 meaningful, something that your doctor prescribes to you, I
22 don't want to suggest there could never be a reason to
23 prescribe that test. But what the guidance is, is don't get
24 this test, and then use it to say I am immune, I can go out,
11:36:43 25 you know, in a big crowd of people with no mask and no

1 precautions and I'm never going to get COVID. That is what
2 they don't want to have happen, because the data does not
3 support there is some number at which you're safe and home
4 free and immune and immune forever.

11:36:59 5 THE COURT: But apparently it acts, if I understood
6 the testimony correctly, apparently acts as a motivator for
7 people to get the vaccine because they are showing no
8 immunity, and that is in part persuasive to them to go out
9 and get the shot or get the jab. They call it a jab in
11:37:20 10 Brittain. Anyway, go ahead.

11 MS. RICCHIUTO: No. And I heard that testimony
12 from Dr. Noorchashm, too, and that, you know, as a nonpublic
13 health expert that struck me as potentially a good reason to
14 have these tests, right, to have them in existence. That's
11:37:32 15 a far cry from using them to say I have no immunity, I would
16 like to become immune is very different proposition than
17 using them to say I have got some number, that feels like
18 enough to me. You know, there is no number that any public
19 health guidance has given to say this is the number you need
11:37:49 20 and this is how long you'll stay at that number. So that's
21 what I would say about that.

22 This is just another summary, your Honor.
23 Obviously from our perspective, there is well more than
24 sufficient evidence in the record to support the
11:38:06 25 reasonableness of Michigan State's approach. Immunity

1 postvaccination is uncertain. There is evidence that
2 vaccination increases it. Again, even if you've been
3 previously infected, and the evidence is there is not
4 substantial harm to previously infected people.

11:38:23 5 You know, the significance of their argument that
6 people who have previously had COVID-19 being vaccinated or
7 is going to result in harm, the significance of that
8 argument, your Honor, is that all of these authorities are
9 taking the position that they are just affirmatively
11:38:43 10 recommending something that is going to harm, you know, some
11 huge majority of the American population. We haven't seen
12 that bear out in real world studies, and frankly, your
13 Honor, it's just not plausible that that is the position
14 that our public health experts would be taking. If they
11:38:59 15 knew it was going to have, you know, substantial harm to
16 people who have previously had COVID, there would be
17 guidance against it. For example, there is guidance against
18 if you get COVID and you have that antibody treatment, you
19 know, that some prominent people, sometimes we hear they get
11:39:17 20 their hands on the antibodies and they get it. There is
21 guidance from the CDC or FDA saying don't get a vaccination
22 right after that, wait 30 or 60 days because you just
23 ingested those antibodies. So that's an example where they
24 have looked at it, they have made a different judgment.
11:39:33 25 They being the public health experts. They have made a

1 different judgment to say in that situation where we are
2 affirmatively infusing someone with antibodies, we think
3 there is a pause on when immunization should happen.

4 Critically, it's not a pause forever, it's 30 or 60 days.

11:39:52 5 It's on the internet. And it doesn't extend to, you know --
6 they don't say, oh, and based on that conclusion, we also
7 recommend no vaccinations for people who have been
8 previously infected. So this is not an issue that was
9 missed. There is no evidence this is an issue that no one
11:40:08 10 has thought about, instead this is an issue on which the
11 people who we charge with giving us guidance on this have
12 considered it and they have made recommendations. And
13 again, at this point you have a state who is policy making
14 under rational basis standard and is it reasonable for them
11:40:24 15 to follow that guidance.

16 Okay, skip that.

17 And so I guess the last thing I would say on that,
18 again, is that our evidence on that is obviously all of the
19 publically available public health guidance, we also have
11:40:46 20 evidence that came in via a well-qualified expert that
21 unquestionably meets all the admissibility standards under
22 Federal Rules of Evidence 702. So you have evidence in the
23 record, your Honor, that the position that Michigan State is
24 taking is the position that is generally accepted in the
11:41:02 25 scientific community.

1 So when you have a legitimate government interest
2 and a policy that's reasonably related to it, as you well
3 know, you are entitled and encouraged to defer to the policy
4 makers, your Honor. We -- the Supreme Court has found that,
11:41:18 5 the Sixth Circuit has found that during the pandemic that
6 when, you know, even if you want to consider this as a
7 decision making proposition, this is exactly the type of
8 thing that is to be left to the policy makers.

9 So just one other point on another reason, you
11:41:41 10 know, we have got obviously this great weight of authority,
11 but it's also true that Michigan State as somebody who is
12 administering a policy on behalf of a very, very broad
13 community and a lot of people, they get to take into
14 consideration other factors as well. I'm not suggesting
11:41:55 15 those factors could outweigh the science if the science
16 tipped the other way, but it is also true that the policy
17 that I understand plaintiffs to be advocating for would
18 require periodic antibody testing, tracking of that by the
19 university, you know, hey, it's been, you know, three months
11:42:14 20 since your infection, which you have to report to us.

21 Report to us your infection. We are going to order you to
22 get tested at a certain point, and then we, Michigan State,
23 are going to pick the line of where we think you are, where
24 you don't have enough immunity anymore that you have to get
11:42:29 25 vaccinated. If this case is any lesson, your Honor, I think

1 we would be right back here. I think a policy maker would
2 choose a point at which they would say you don't have enough
3 immunity, now we're ready for you to be vaccinated and
4 presumably someone would say no, I think that I do. So not
11:42:45 5 only would their kind of proposed solution or the impact of
6 their argument be really difficult to administer, I also
7 don't think it would cure the legal concerns that they say
8 that they have about bodily autonomy and making people do
9 things. You would have to require periodic serological
11:43:04 10 testing and you would have to have somebody on Michigan
11 State's behalf reading that and saying, you know, here is
12 where we think the line is. So I make that point just to
13 say that administrative convenience is yet another reason
14 that Michigan State's decision here is very reasonable.
11:43:20 15 It's consistent with all of the federal public health
16 guidance and it is straightforward and workable to
17 administer as an institution of higher education.

18 Okay. Their next argument is that this -- that
19 there's been an unconstitutional condition created by what
11:43:45 20 is essentially this choice that Ms. Norris has to either
21 become vaccinated or become employed somewhere else, or
22 withstand the discipline process that would follow from a
23 refusal to be vaccinated consistent with the policy.

24 The unconstitutional conditions argument is really
11:44:09 25 just another way of arguing that it's unconstitutional.

1 What the Koontz case says, that's a case that we both cited,
2 is that to have an unconstitutional condition, you have to
3 have coercion and you have to have an enumerated right being
4 relinquished. They say no coercion is required. I don't
11:44:28 5 believe that they have exactly a citation for that. I
6 believe the standard is clear that coercion is required.
7 And as the District Court in Klaassen who grappled with this
8 exact same question, said a hard choice isn't coercion.
9 Again, this is different from the woman who's lying in the
11:44:48 10 hospital bed incapacitated and the government is deciding
11 whether she's going to be forced nutrition. This is an
12 adult who will or won't go to a medical provider and receive
13 a vaccine that is required as a condition of her employment
14 -- employment, you know, as to which she has no property
11:45:08 15 interest in the first instance. The presence of that choice
16 is important and is significant and it means that not only,
17 again, it there no enumerated right at stake, that there's
18 been no coercion. So there can be no unconstitutional
19 condition under the authority as it currently stands. There
11:45:34 20 is also no procedural due process violation, as counsel
21 conceded, obviously. She's got no right to her job. To the
22 extent there is some kind of other -- this other bodily
23 interests or medical decision interests they are relying on.
24 There is no process required because there is no
11:45:52 25 individualized determinations being made here. This is

1 something that applies to everybody. It's a general nature.
2 It's saying if you work here and you don't meet one of the
3 exemptions, you must be vaccinated. The cases that they
4 cite about this irrebuttable presumption context, those are
11:46:12 5 essentially loyalty oath cases, where first of all, they are
6 First Amendment cases, so there's strict scrutiny at issue
7 so entirely different level of scrutiny. But also what
8 those cases are saying is, if we allow this loyalty oath
9 rule to stand, we are worried that someone might, you know,
11:46:30 10 sort of freeze their own speech or bridge their own speech
11 for worry that they lose a benefit, your know, whether it's
12 a tax break or retirement benefit or whatever the case is,
13 the examples in the cases are. This is different. This
14 isn't where she's going to be guiding her conduct and trying
11:46:48 15 to stay on the line of a fundamental right.

16 First of all, it's not a First Amendment case and
17 it applies to everybody equally. If you are not vaccinated
18 and you don't meet an exemption, you are required to be
19 vaccinated and that applies to everybody equally, and that
11:47:06 20 is enough to conclude there is no process due for purposes
21 of procedural due process. So there is no likelihood of
22 success on that claim.

23 On this preemption issue, I think what I understand
24 them to be saying is this point about, yes, we agree that
11:47:28 25 the Pfizer vaccination has been approved, but we are worried

1 that we won't be able to get, you know, the one that's got
2 that name on it as opposed to the other name we have shown
3 in our briefs, your Honor, the language from the FDA and
4 from Pfizer that say they are the same. So they are the
11:47:49 5 same. If she goes and gets, if she leaves here and goes and
6 gets a Pfizer vaccination, it will have the formulation of
7 the FDA approved vaccination. They didn't make a different
8 version of it or add something special to it to get that
9 approval. It's the same vaccination, it's got different
11:48:08 10 packaging now because it's got a different level of
11 approval, but the vaccination is the same. So there is no
12 preemption claim anyway because this EUA statute is not
13 something that applies directly to MSU as a policy maker in
14 this case, but this issue really should be a nonissue,
11:48:27 15 particularly in light of the approval.

16 THE COURT: What do you make of the fact that
17 you're accepting the Sinovac vaccination, which has not been
18 approved by the FDA or the CDC or any other federal agency?

19 MS. RICCHIUTO: My understanding of the approval of
11:48:49 20 that vaccination is a couple of things. Number 1, I don't
21 believe that it's accepted for people in the United States
22 because you can't get it here.

23 THE COURT: The university is accepting it as proof
24 of vaccination, though, right?

11:49:01 25 MS. RICCHIUTO: Yes, for folks that have that

1 vaccination available to them.

2 THE COURT: Then how does that effect the analysis,
3 in your opinion, if at all?

4 MS. RICCHIUTO: No, thank you, your Honor.

11:49:12 5 So first of all, I think that the way that the 50
6 percent -- I don't know -- I know that Dr. Noorchashm has
7 said that it's 50 percent efficacious. I don't know whether
8 that's right or wrong.

9 THE COURT: I know. But throughout your argument
11:49:25 10 you have been pointing to the FDA and CDC as supportive of
11 the university's position, but it would appear as if you're
12 accepting the, what I'll refer to the Sinovaccine, that that
13 doesn't have the imprimatur of any state or federal agency,
14 correct?

11:49:46 15 MS. RICCHIUTO: Not in our country. It has the
16 imprimatur of the World Health Organization.

17 THE COURT: Oh, that's persuasive.

18 MS. RICCHIUTO: It's W.H.O. approved, just hasn't
19 been approved in our country as of yet, which is why --

11:49:58 20 THE COURT: All right. But then, okay, so you're
21 accepting a vaccination which the federal agencies involved
22 have not accepted. And my question to you is: Is that
23 consistent with the rest of your argument pointing to the
24 federal agencies in saying, hey, these people say what we
11:50:22 25 are doing is perfect, and therefore, the Court shouldn't

1 interfere, but yet there appears to be at least some
2 indication that you're accepting somebody else's opinion?

3 MS. RICCHIUTO: I understand the question, your
4 Honor.

11:50:39 5 I've got a few responses to it. First of all, the
6 someone else in this situation that we are -- we would be
7 deemed to be accepting, I think, under your formulation is
8 the World Health Organization, so it's not me or my son, it
9 is a reputable organization.

11:50:54 10 Number 2, I don't know --

11 THE COURT: Do you have any testimony to that
12 effect?

13 MS. RICCHIUTO: That --

14 THE COURT: I'm just showing some skepticism on the
11:51:05 15 W.H.O., which is not necessarily in the record. Go ahead.

16 MS. RICCHIUTO: Okay. Well, your Honor, I'm not
17 clear. I don't believe it's in the record whether those
18 vaccinations have been submitted for use in the United
19 States and rejected, or whether they have just only been
11:51:21 20 submitted in other countries. So I don't know that it's
21 necessarily fair to conclude that the FDA has said, for
22 example, that this vaccination is not okay. We just know
23 that they haven't passed on it one way or another. Michigan
24 State has foreign students that, when they are residing
11:51:37 25 their home country, they need to get the vaccination that's

1 available to them. So the flip side, I think, of the
2 argument that's being made is that because in China, for
3 example, if that's where the Sinovac comes from, because
4 China doesn't have vaccination that's quite effective as the
11:51:56 5 vaccination we have in the U.S., those Chinese students
6 should not have to get their vaccination at all. That is
7 the logical conclusion to this argument. And I think
8 Michigan State would say, that's not a policy choice that we
9 want to make. We want students to get the vaccination that
11:52:10 10 is available to them where they are.

11 With respect to that, again, with respect to that
12 50 percent statistic, let's accept for the sake of argument
13 that that's correct. My understanding is that does not mean
14 that five out of ten people have no reaction or no
11:52:28 15 immunities are produced whatsoever. My understanding of
16 what that 50 percent means is that, in terms of the scale
17 of, you know, the scale of efficacy right, some of these
18 ones in the United States are slightly better at maybe
19 providing fuller coverage, maybe tamping down symptoms
11:52:51 20 better, it doesn't mean that five of every ten Chinese
21 students at Michigan State -- again, this is hypothetical --
22 just are walking around with no immunity at all. I don't
23 believe that is the right way to interpret that 50 percent
24 statistic. So in order for -- in order for one to conclude
11:53:09 25 that this acceptance of the Sinovac again for foreign

1 students, that that's what they have got available to them,
2 undermines the entirety of the policy would require Michigan
3 State then to say for all foreign students, the policy is
4 waived. They don't have to get it because their shots --

11:53:27 5 THE COURT: Isn't the appropriate comparison, the
6 50 percent effectiveness of the Sinovaccine vis-a-vis the
7 effectiveness of natural immunity from having the virus in
8 the first place and recovering?

9 MS. RICCHIUTO: I think if there were such a
11:53:48 10 number, that's a comparison you could make. I think what
11 Dr. Zervos's declarations have established is that there is
12 not a percentage that you can assign to be apples to apples
13 with natural immunity and, for example, Sinovac. That's why
14 natural immunity is so limited in terms of what we can rely
11:54:08 15 on and use it for. So if we had that apples to apples
16 number that had been sort of generated on a, you know, with
17 scientific certainty, then I would take your point, your
18 Honor. I simply don't believe that's a number that's
19 available.

11:54:23 20 THE COURT: Well, recognizing that this is
21 obviously a dynamic environment in which the science is
22 capturing more data over time and more studies are being
23 done, does there come a point when, let's assume for the
24 sake of analysis that the natural immunity brought about by
11:54:47 25 having the disease is more effective than one of the

1 vaccines, then what happens?

2 MS. RICCHIUTO: I think that would present
3 different circumstances, your Honor. I think if the
4 guidance were that natural -- again, the weight of public
11:55:02 5 health authority were that natural immunity is, as
6 Dr. Noorchashm says, equal to or better than. If it were
7 instead of, all the public health authority as opposed to
8 Dr. Noorchashm and the tables were turned and it were all
9 the public health authority versus Michigan State, then I
11:55:21 10 think your guardrail there, your Honor, is rational basis.
11 Could there come a point where a policy ceases to be
12 reasonable because it's out of alignment with the basis of
13 the policy? There could come a point that that could happen
14 in theory with any policy and public health judgment. We
11:55:38 15 are not at that point today, and we are not at that point at
16 the time that Michigan State implemented this policy, which
17 was exactly in line with all of the best information that
18 was available to them.

19 So we have gone through no likelihood of success on
11:55:59 20 any of their claims. Again, that's consistent with your TRO
21 order. There is also a completely independent reason that
22 you can deny this preliminary injunction, your Honor, and
23 that's lack of irreparable harm. You already found, again
24 in your TRO order, that money damages for job loss are not
11:56:15 25 irreparable. I don't want to be flip at all about the

1 significance of the loss of employment or, you know, whether
2 or not that would work a hardship on the Norris family.
3 That's not what we are suggesting. But what the law says is
4 that that is not the basis to get an injunction. Is that --
11:56:32 5 if you may have some interference with your employment. So
6 just from a clear legal perspective, that's not irreparable
7 harm.

8 There is also some evidence in the record that
9 Ms. Norris and her family are anxious about this. Again,
11:56:47 10 you know, MSU empathizes with them about that. We aren't
11 being dismissive of that anxiety. What the law says again
12 though is that's not a basis for irreparable harm for
13 purposes of a preliminary injunction, which is what we are
14 here about today.

11:57:02 15 In terms of the balance of harms, I think the Sixth
16 Circuit has kind of summed this up already. Where you have,
17 you know, this is COVID, people are making big decisions to
18 try to keep their folks safe, if they are a government
19 entity, they are supposed to be making them within the
11:57:25 20 guardrails of rational basis. And when they have done that,
21 then the great weight is that the public interests is served
22 by continuing to adhere to those -- continuing to adhere to
23 those policy decisions.

24 The other thing I should have said on irreparable
11:57:41 25 harm, your Honor, is I think some of their cases have asked

1 you to essentially assume it, presume irreparable harm
2 because she has stated a Constitutional claim. That
3 definitely happens in some circumstances, but I believe in
4 every circumstance, it is coupled with a likelihood of
11:57:57 5 success on the merits. I'm certainly not -- certainly none
6 of the cases that they cited found no likelihood of success
7 on the merits, but presumed harm anyway that justified an
8 injunction. A couple of their cases found no likelihood of
9 success, no harm, no injunction, and a couple observed that
11:58:17 10 presuming harm might be appropriate in certain situations,
11 but in both of those cases, there was a likelihood of
12 success on the merits. So it's not -- mean, consider the
13 standard, your Honor, if every time a plaintiff pled a
14 Constitutional claim, they all of a sudden got waived
11:58:34 15 through the irreparable harm standard. There has to be more
16 than that. So the presumption might be appropriate in
17 certain circumstances, it's not appropriate here to the
18 extent that that's what they are asking for on that factor.

19 So with that, I will respectfully request that you
11:58:53 20 deny the motion for preliminary injunction, unless you have
21 additional questions for me.

22 THE COURT: I do. There is some indication in the
23 record that the plaintiff has been working remotely. I
24 believe I'm accurate in that regard; is that true?

11:59:08 25 MS. RICCHIUTO: Yes.

1 THE COURT: Has the university set a policy about
2 how long they are going to allow employees to work remotely?

3 MS. RICCHIUTO: So we have a declaration in the
4 record on this from Ms. Norris's supervisor, your Honor.

11:59:22 5 THE COURT: Refresh my memory.

6 MS. RICCHIUTO: There are some people in her
7 department, if you will, that may not be the right word, but
8 some of her colleagues are coming in voluntarily. She's not
9 prohibited from coming to campus, for example. And their
11:59:35 10 goal is to return people to work. She wasn't a remote
11 employee before the pandemic, she's not intended to be a
12 remote employee after the pandemic. She went home in March
13 of 2020, like the rest of us, and worked from there, but the
14 evidence is that Michigan State has the authority to call
11:59:50 15 her back and, in fact, intends to do that, and that other of
16 her colleagues are working in person.

17 THE COURT: Is this case ripe before you call her
18 back? Because if I appreciate your argument, and assuming
19 that rational basis is the standard, obviously you're
12:00:12 20 worried about the safety of the campus and the safety of the
21 work force, the Court appreciates that, but as long as the
22 plaintiff is working remotely, is this case ripe?

23 MS. RICCHIUTO: Well, your Honor, I think the
24 burden would be on the plaintiff to establish that she was
12:00:32 25 never going to come to campus ever again for any reason, and

1 that there would have to be evidence that Michigan State
2 wasn't going to allow her to do that.

3 THE COURT: Theoretically the Mu variant I'm just
4 throwing that out because I heard about it in the press, I
12:00:45 5 recognize, I don't think there's been any reference to it in
6 the record. But if the Mu variant causes universities
7 across the State of Michigan to continue to allow their
8 employees to work remotely, then the compelling government
9 interest vis-a-vis this particular plaintiff is still
10 attendant to the case or not?

11 MS. RICCHIUTO: Michigan State -- I believe
12 Michigan State has an interest in having this policy
13 enforced and in having this policy deemed --

14 THE COURT: But if Ms. Norris is staying at home
12:01:21 15 and working and never going to East Lansing, does that
16 change the calculus?

17 MS. RICCHIUTO: Well, what of the circumstance,
18 your Honor, where this, you know, where the case is found
19 not ripe and then the next day she either voluntarily comes
12:01:37 20 on campus because she decides she wants to, or she's asked
21 to, that would be our concern about that.

22 THE COURT: I don't doubt that the university has
23 the authority to order the plaintiff to show up at work. I
24 don't doubt that for one nanosecond. But until they do
12:02:01 25 that, what is the compelling government interest to force

1 her to get the vaccine when she is working from home?

2 MS. RICCHIUTO: I think Michigan State's interest

3 is in having its policy remain intact. So to the extent

4 that you construe an order from today to apply only to

12:02:23 5 Ms. Norris, for example, and not to apply to all -- not to

6 say that anyone who has been previously vaccinated -- or

7 excuse me, previously infected, it's unreasonable for

8 Michigan State to allow them to get the vaccine. Michigan

9 State would have an interest right now today in not having

12:02:44 10 that ruling be issued, because it would impact more than

11 just Ms. Norris and it would potentially impact people who

12 are on campus every day and are previously vaccinated. If

13 the question is, if the injunction would apply not -- I

14 think the way that they have asked, which is everybody who

12:03:02 15 has ever been infected with COVID-19 should not have to be

16 vaccinated. I think Michigan State has an interest right

17 now today in having that policy upheld. If the question is,

18 should there be an injunction on one single person who is

19 not coming to campus, then I agree with you that could be

12:03:19 20 different, but Michigan State would be very concerned about

21 any kind of ruling that would erode its ability to enforce

22 its policy with respect to other previously infected people.

23 I believe that, you know, people would come and say, but

24 I've been infected, I've been infected, and the effect of

12:03:37 25 that order would be to undermine that policy even if the

1 intent were to only say Ms. Norris has to bring this case
2 again when Michigan State asks her to return.

3 THE COURT: All right. Thank you.

4 MS. RICCHIUTO: Thank you.

12:03:53 5 MS. HAGEMAN: Your Honor, I understand that we do
6 have a stop.

7 THE COURT: Don't worry about it.

8 MS. HAGEMAN: Okay. Thank you.

9 THE COURT: We have blown the time deadlines.

12:04:05 10 Given the Court's questions and the importance of the
11 testimony put on, so don't worry about it. Go ahead.

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

13 As to the ripeness matter, I'll go to that first.

14 And that is we are going to seek class certification for
12:04:21 15 this case as it moves forward, Number 1. And MSU, in fact,
16 is applying the policy against Ms. Norris right now despite
17 the fact that she has not been called back to campus. So
18 she's been receiving notices that she's required to do
19 certain things according to the policy, including uploading
12:04:38 20 personal medical information and that sort of thing. So
21 MSU, in fact, is enforcing the policy against her right now
22 and others who are similarly situated.

23 So --

24 THE COURT: So there are other aspects of the
12:04:52 25 policy that they are asking your client to comply with?

1 MS. HAGEMAN: Yes, they are.

2 THE COURT: Other than getting the shot?

3 MS. HAGEMAN: She has to respond and upload
4 information to the portals that they have, and which really
12:05:07 5 goes to one of the issues of whether this is
6 administratively or administrable and administrative
7 convenience.

8 They are already asking individuals to provide
9 their information. That's how they get the information as
12:05:24 10 to whether someone is vaccinated or not. MSU is already
11 tracking their employees in terms of whether they are
12 vaccinated or not. They are already getting that kind of
13 personal information, and I'm going to come back to that
14 again here in a minute specific to the argument that was
12:05:41 15 made by defense counsel.

16 There are a couple of points that I think are very
17 important to make, and I stated this during my own argument,
18 and that is that we agree there is a compelling interest in
19 controlling COVID. But we disagree that there is a
12:05:56 20 compelling interest to force a vaccine on someone who has
21 natural immunities and doesn't need that vaccine.

22 I also think that we really have to understand and
23 dissect Jacobson for what it says in terms of why the Court
24 reached the decision that it did. And I've already quoted
12:06:16 25 for you on Page 28 that the Court specifically held that,

1 "In the event that the power -- an acknowledged power of a
2 local community to protect itself against an epidemic
3 threatening the safety of all might be exercised in
4 particular circumstances in reference to particular persons
12:06:38 5 in such an arbitrary unreasonable manner or might go so far
6 beyond what is reasonably required for the safety of the
7 public as to authorize or compel the courts to interfere for
8 the protection of such persons." Why that is important is
9 the exact issue that we are dealing with right here.

12:06:56 10 The Jacobson decision would have come out
11 differently if the state legislature had ordered that
12 everybody who had already had smallpox was required to get
13 vaccinated. That isn't what was at issue in that case, and
14 that's an important distinction, because when you go to
12:07:12 15 Page 36 of that decision, it talks about all of the things
16 that the defendant wanted to prove. And what the Court said
17 is the defendant offered to prove that vaccination quite
18 often caused serious and permanent injury, that it resulted
19 in death, that it didn't know if it would affect him that
12:07:30 20 way, and it lists all of these various things, but it said
21 these offers in effect invited the Court and jury to go over
22 the whole ground -- gone over by the legislature when it
23 enacted the statute in question. So the defense would have
24 you believe that how this policy came into effect is totally
12:07:50 25 and completely irrelevant, yet they are relaying on the

1 Jacobson decision for the vast majority of the arguments
2 that they have made. Jacobson says we can vaccinate, we can
3 vaccinate. But the Court in Jacobson upheld the vaccination
4 because there was a process that came before the legislative
12:08:11 5 pronouncement as to what that policy was going to be. We
6 don't know what the policy is here. We don't know that they
7 have taken into consideration all of these other important
8 points. And why that becomes so significant right now, your
9 Honor, is because of the point that you made near the very
12:08:31 10 end of their discussion when you were talking about the
11 Sinovac vaccine. You absolutely nailed it on the head,
12 which is whoa, whoa, whoa, whoa, you keep talking about the
13 general consensus among all of the public health authorities
14 in the United States is that these are good vaccines and
12:08:51 15 that everybody should take them and shouldn't have to worry
16 about it, and that everything is going to be hunky-dory.
17 And then they admit well, but we have got a bunch of foreign
18 national students that are going to be coming in and they
19 have taken a vaccine that may not have any effectiveness
12:09:06 20 whatsoever in terms of the COVID-19.

21 THE COURT: Well, the testimony I have in the
22 record is it's 50 percent effective, right?

23 MS. HAGEMAN: Well, that's --

24 THE COURT: That was your own witness.

12:09:16 25 MS. HAGEMAN: That was our own, but what is very

1 interesting about that is that the defense counsel then went
2 on to say well, we don't really even know what that means.
3 Does it mean that 50 percent of the students are walking
4 around with any immunities? We don't know. We don't know
12:09:29 5 what the 50 percent efficacy means. So the very
6 representative of the university is telling you today that
7 MSU doesn't know whether Sinovac provides better protection
8 than natural immunity, because they haven't looked at it.
9 We have a situation where the expert testimony that has come
12:09:47 10 in today is that our client has robust immunities.
11 Throughout history in terms of viral infections, we have
12 recognized that previous infections provide immunities. And
13 then we have got an admission saying, you know, we really
14 don't know. And what they say is even if Sinovac isn't very
12:10:06 15 effective, we got to let these students in, we can't require
16 them to get a different kind of vaccine than what was
17 available to them. She stated, this doesn't undermine the
18 entire policy, but it does undermine the policy that doesn't
19 recognize natural immunity. It absolutely undermines the
12:10:25 20 policy that is applied to my client when they are saying
21 that the purpose of this is to keep their campus safe. They
22 are admitting by accepting vaccines that are not approved in
23 the United States, that have not been approved by FDA or the
24 CDC or emergency use authorization. They are saying we will
12:10:49 25 make exceptions, we will accept something that doesn't come

1 down from on high from the guidance of CDC or from the FDA
2 or the Department of Education. What they are saying is
3 under certain circumstances, your Honor, we are going to
4 have to accept something else. All we are saying is in this
12:11:06 5 circumstances they ought to accept that something else as
6 well. All we are saying here is that when we are dealing
7 with natural immunity and we have the information that we
8 do, it is entirely unreasonable, even under a rational basis
9 analysis, to say under no circumstance are we going to
12:11:23 10 consider natural immunity in terms of our vaccine policy,
11 and that's all we are saying. Again, the vaccine policy is
12 in place. The question is the natural immunities.

13 Some of the other points that are very important to
14 understand is we keep talking about these guidance
12:11:38 15 documents, we keep talking about the public policy
16 pronouncements made by these public health authorities.
17 Those public health authorities have no police power. They
18 have no ability to force MSU to adopt a vaccine mandate.
19 They have no ability to say that MSU is not allowed to
12:11:58 20 recognize natural immunities, but you know who does? The
21 Michigan legislature.

22 THE COURT: Well, let's talk about that for a
23 minute, because the state constitutional provision would
24 appear to vest in the authority of the Board of Trustees of
12:12:12 25 the university to operate the school separate and apart from

1 the legislature. So I'm, in light of the Constitutional
2 provision in the state Constitution, I'm having a little bit
3 of difficulty understanding your argument in that regard.

4 MS. HAGEMAN: According to Article 8, Section 5 of
12:12:32 5 the Michigan Constitution, it provides that in relevant part
6 that each board shall have general supervision of the
7 institution and the control and direction of all
8 expenditures from the institution's funds. And I believe
9 that might be what you're referring to. But this is
12:12:47 10 entirely consistent with our argument that MSU has police
11 power only over educational and fiscal matters. So sure,
12 choosing its own president, making those kinds of decisions
13 do not allow it to rule over the health decisions of MSU
14 employees. They are completely different things. So as an
12:13:10 15 institution, they may have the authority to even adopt the
16 vaccine policy for example. That's --

17 THE COURT: I think you better go on to another
18 argument. You are not convincing me in light of the state
19 Constitutional provision --

12:13:22 20 MS. HAGEMAN: Then I'm going to go to one case that
21 I would recommend that you read, and that is Federated
22 Publications from -- actually, the case is Branham vs. Board
23 of Regents at the University of Michigan, 145 N.W.2d, 860,
24 it's a 1966 decision, and it specifically states that, "The
12:13:45 25 University of Michigan is an independent branch of the

1 government of the State of Michigan, but it is not an
2 island. Within the confines of the operation and allocation
3 of funds of the university, it is supreme. Without those
4 confines, however, there is no reason to allow the regents
12:14:01 5 to use their independence to thwart the clearly established
6 public policy of the people of Michigan. The public policy
7 of the people of Michigan as it pronounced by their
8 legislature is that natural immunity is recognized when
9 there are vaccine mandates." So that is one of the issues
12:14:19 10 that I think is very important to look at, and that is the
11 basis of our police power argument.

12 There is question -- and there's been question
13 raised by defense counsel about the serological tests. And
14 questioning the verbiage included on that serological test.
12:14:38 15 The irony of this, your Honor, is that it's the serological
16 tests is how we know whether the vaccines work. That is how
17 they determine whether the vaccine has been effective. So
18 we can't just say those serological tests, set them aside,
19 they don't really matter, they have all of this disclaimer
12:14:58 20 language. That's how we know whether the vaccines work,
21 that's why the test is done.

22 One of the other points that has been made is that,
23 you know, you have to get a different flu shot every year.
24 They are not mandated. Sometimes recommended that you get a
12:15:13 25 flu shot every year, but we don't have CDC and we don't have

1 universities and we don't have all of these folks saying
2 everybody is mandated to get a flu vaccine every year.

3 Just a few other points, your Honor, and then I
4 will rest our case and request that a preliminary injunction
12:15:30 5 be issued.

6 There is also a comment -- comments made about a
7 parade of horrors about what they will have to do to track
8 natural immunity. But if the point is immunity, and we have
9 testimony from their own expert witness, and we know it, the
12:15:48 10 vaccines wane over time in effectiveness. We know that. We
11 know that there are substantial breakthrough cases. We know
12 that a substantial percentage of the cases that we are
13 seeing today related to Coronavirus are among people who
14 have already been vaccinated. We know it is not an absolute
12:16:07 15 silver bullet that is going to protect everybody. So if you
16 are going to say that someone who has natural immunity is
17 going to be required to be tested, and that's just simply
18 not something we can do as a university, why would you limit
19 it to only the people who have natural immunity when we know
12:16:23 20 as a matter of fact that people who get the vaccine can
21 likewise spread it to other people. It's included in the
22 documents that they have filed. They know that. So again,
23 it's a parade of horrors and it's a description about the
24 difficulty of administering this that really undermines the
12:16:40 25 very argument that they are making, which we have to have a

1 one size fits all approach because that is the only way we
2 can keep everybody safe. But we know that's not true. In
3 fact, when I asked their doctor at the very end of his
4 examination, I asked him the question, "Can you guarantee
12:16:54 5 that my client will not suffer an adverse consequence of
6 getting one of the vaccines?" And what was his response?
7 What would you expect any rational doctor to say? He said,
8 well, she needs to have consultation with her doctor and she
9 needs to think about what's in the best interests of her,
12:17:10 10 and she needs to look at her own medical conditions, and she
11 needs to decide whether that vaccine is going to be right
12 for her. That was the right answer. Because he can't
13 guarantee that there will not be an adverse consequence with
14 my client or anybody else who has natural immunities, and
12:17:26 15 that's exactly why it is reasonable for the university who
16 is going to adopt a vaccine mandate to say, for those of you
17 who may have natural immunities, we are going to allow you
18 to prove to us that you are also safe for being on campus,
19 which brings me back to the last thing that I'm going to
12:17:45 20 talk about, and I believe we have absolutely met the
21 standard for preliminary injunction. There is a substantial
22 likelihood of success on the merits in this case, your
23 Honor, we talked to you about it today. Things have been
24 evolving over time. We have got Dr. Fauci admitting,
12:17:57 25 Dr. Gottlieb admitting we need to be taking natural immunity

1 into consideration when we debate and have this discussion.
2 And we can stand up in front of Court -- the Court, and we
3 are going to get a definitive answer here, but the reality
4 is that a week from now or two weeks from now or three weeks
12:18:13 5 from now there may be something else that comes out that
6 leads -- that puts us in a completely different situation
7 and what we should have --

8 THE COURT: Well, and presumably the policy makers
9 at the university would adjust policy at that point, right?

12:18:27 10 MS. HAGEMAN: Except I didn't hear that today.
11 What I heard is that they absolutely have every interest in
12 making sure that this policy goes into effect and there are
13 no exceptions made.

14 THE COURT: Well, that's as of September 22nd.

12:18:39 15 MS. HAGEMAN: Right, but the attorney was very
16 adamant they do not want to make any exceptions for my
17 client, the plaintiff, who is working remotely, because they
18 want this policy to go into effect intact.

19 Another thing is that it's necessary to prevent
12:18:53 20 irreparable injury. There is no question that deprivation
21 of a Constitutional right as well as the risks associated
22 with the unnecessary medical intervention pose an
23 unreasonable risk, and it is -- it will, it does constitute
24 irreparable injury. The threatened injury to our
12:19:12 25 individuals outweighs the harm the preliminary injunction

1 would cause to MSU. MSU is already making medical and
2 religious exemptions. They are already making medical and
3 religious exemption. So if I come in and say I have a blood
4 clotting issue or myocarditis issue, they are going to have
12:19:30 5 to assess that, they are going to have to assess whether
6 they are going to accept that as an exemption. All this is
7 another category of exemption when somebody can come in and
8 say I have sufficient natural immunities, I believe I should
9 be exempt. And they can assess it just like they do the
12:19:44 10 others. And the preliminary injunction would not be averse
11 to the public interest. Again, the public interest here has
12 to be in protecting the civil liberties of our client, and
13 acknowledging that natural immunities are as robust, if not
14 better, than some of the vaccines. And again, if it's about
12:20:01 15 safety, we have met that, we have shown through our
16 testimony, as well as the argument we have made, that the
17 our situation and the situation of others similarly
18 situated, the balance weighs in favor of our clients and
19 granting the preliminary injunction.

12:20:19 20 This has been a rough year, your Honor, it's been a
21 rough year for everybody, but I think that Justice Gorsuch
22 said it best when said we simply cannot throw the
23 Constitution out the window, and I'm paraphrasing. He's
24 probably a lot more eloquent than I am. But we cannot throw
12:20:33 25 the Constitution out the window because we are dealing with

1 a pandemic. In fact, as you know, as I know, as everybody
2 in this room knows, the Constitution and the liberties and
3 the protection that it provides become even more important
4 in an emergency situation or a difficult situation like what
12:20:51 5 we are dealing with now.

6 These Constitutional rights need to be protected,
7 the status quo needs to be protected as we move forward with
8 this case to ensure that we are not creating the kind of
9 irreparable harm to our client that will be caused if she's
12:21:06 10 forced to get a vaccine against her will and despite the
11 fact that she has natural immunities.

12 Thank you, your Honor.

13 THE COURT: Thank you, counsel.

14 Anything further from MSU?

12:21:19 15 MS. RICCHIUTO: No, your Honor. I think Harriet
16 gets the last word as the movant, so I will honor that.

17 THE COURT: All right. That's fine. Thank you.
18 I'll get an opinion out as soon as I can. Thank you.

19 MS. HAGEMAN: Thank you, your Honor.

12:21:30 20 MS. RICCHIUTO: Thank you.

21 COURT CLERK: All rise, please.

22 (At 12:21 p.m., proceedings concluded.)
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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
U.S. District Court Reporter
410 West Michigan
Kalamazoo, Michigan 49007