No. 22-1200

In the United States Court of Appeals for the Sixth Circuit

JEANNA NORRIS, *ET AL.*,
Plaintiffs-Appellants,

v.

SAMUEL STANLEY, *ET AL.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan

PETITION FOR REHEARING *EN BANC*

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RULE 35(b)(1) STATEMENT

This petition raises the question of whether rational basis review automatically applies to all legal challenges to vaccine mandates. Although a three-judge panel of this Court in *Norris v. Stanley*, 73 F.4th 431 (6th Cir. 2023), determined that it does, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), on which the majority relied, does not stand for such a broad proposition. The panel's misconstruction of *Jacobson*, if allowed to stand, would wrongly insulate from judicial review almost any policy, no matter how intrusive, disproven, or unscientific. Indeed, throughout the Covid-19 era, governmental entities have pushed policies that are not only demonstrably counterproductive in the long run, but which never had any scientific justification in the first place. Allowing the government to use *Jacobson* as a talisman ultimately abdicates judicial responsibility for the protection of individual liberty. Unfortunately, the panel's misinterpretation of *Jacobson* widens the door to future mischief. This Court, sitting *en banc*, should correct the error.

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STATEMENT OF ISSUES MERITING *EN BANC* REVIEW

1. Whether *Jacobson*, decided a century ago during an era of vastly inferior scientific knowledge, permits governmental agencies to impose scientifically baseless vaccine requirements on unwilling employees.

2. Whether rational basis review allows courts to effectively abdicate their responsibility to judicially review cases and controversies.

STATEMENT OF FACTS AND DISPOSITION OF THE CASE

In July of 2021, Michigan State University (MSU) issued a vaccine mandate requiring employees and students, including those working or studying *remotely*, to receive a Covid-19 vaccine.[1] The mandate explicitly refused to consider immunity acquired through prior infection as a substitute for vaccination. Those who declined to get vaccinated were subject to discipline, including termination from employment.

Plaintiffs were employees of MSU when the mandate was announced and had demonstrable naturally acquired immunity to the virus. For this reason, they declined to receive Covid-19 vaccinations, and submitted substantial evidence, including from expert scientists, establishing that natural immunity is equal in quality to, or superior to, that induced through vaccination. As a result of their refusal to receive the vaccine, two of the three eventually were terminated.[2] Plaintiffs brought suit in federal district court

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[1] Certain medical or religious exemptions, not relevant here, could be sought.

[2] The third Plaintiff received an exemption on religious grounds after the lawsuit in this case was filed in the district court.

challenging the mandate on federal constitutional and statutory grounds. The district court granted MSU's motion to dismiss the Complaint, and a panel of this Court, relying principally on *Jacobson*, affirmed. *Norris v. Stanley*, 73 F.4th 431 (6th Cir. 2023).[3]

ARGUMENT

I. THE PANEL'S CONCLUSION THAT *JACOBSON V. MASSACHUSETTS* GIVES GOVERNMENT CARTE BLANCHE TO REQUIRE VACCINES IS ERRONEOUS AND DANGEROUS

A. MSU's Vaccine Requirement Is Subject to Intermediate Scrutiny

Throughout the Covid-19 pandemic, courts have wrongly assumed that *Jacobson* dictates that all vaccine mandates (and other public health measures) warrant rational basis review only. This is erroneous for several reasons. First, *Jacobson* was decided before the Supreme Court adopted various tiers of review. *Norris*, 73 F.4th at 435-36.

Second, Supreme Court jurisprudence recognizes that our history and tradition provide legal protection from unwanted physical intrusion. The idea that a person must be secure in his or her own body long pre-dates the Constitution. *See, e.g.*, John Locke, Second Treatise of Government § 27 (1690) ("[E]very man has a property in his own person: this nobody has any right to but himself.").

At common law, even the touching of one person by another without consent and a legal justification was a battery. *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990); *see also Mills v. Rogers*, 457 U.S. 291, 294 n.4 (1982) ("Under

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[3] On July 27, 2023, the Court granted Appellants' motion to extend the time to file a petition for rehearing *en banc* until August 28, 2023. ECF 42.

the common law of torts, the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician."); *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914) (Cardozo, J.) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.").

Vaccine mandates, no less than any other forced medical procedures, implicate the constitutional right to refuse medical treatment, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), which derives from the "well-established, traditional rights to bodily integrity and freedom from unwanted touching." *Vacco v. Quill*, 521 U.S. 793, 807 (1997). *See also Washington v. Harper*, 494 U.S. 210, 229 (1990) ("[A] forcible injection … into a nonconsenting person's body represents a substantial interference with that person's liberty.").

In *Harper*, the Court, evaluating a mentally ill prison inmate's claim that forcibly injecting him with psychotropic drugs violated his right to due process of law, applied a more searching level of scrutiny than rational basis. The Court explained that whatever interest the State has in prison safety and security must be balanced against the prisoner's liberty and medical rights, writing that "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others *and the treatment is in the inmate's medical interest*." *Id.* at 227 (emphasis added). This approach is not the functional

equivalent of rational basis review, which subordinates the rights of the individual, asking only whether the government has an interest and can articulate some nexus between that interest and the challenged law.

It is beyond dispute that there is a fundamental liberty interest in consenting to treatment and refusing unwanted medication, as the Supreme Court made clear in *Glucksberg*, 521 U.S. at 721, *Vacco*, 521 U.S. at 807, *Harper*, 494 U.S. at 229, and other cases. The reasoning in these cases, as well as the principles announced by the American Military Tribunal at Nuremberg, are applicable to all medical procedures, including vaccinations. The law requires courts to assess the medical propriety of treatment: government employers cannot simply require (on pain of termination) their employees to take any medication, regardless of consent, medical necessity, and various other circumstances, merely because it can claim—however implausibly—a "public health benefit." Rather, the means chosen to accomplish that interest must be (1) efficacious in achieving the articulated goal, and (2) balanced against individuals' constitutional rights to bodily autonomy. *See Schmerber v. California*, 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value in our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.").

The right to refuse medical treatment is thus "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721. This right has been recognized as universal in *U.S.*

v. Brandt, (Nuremberg Military Tribunal, Case 1). In that case, also known as the Doctors' Trial, American military judges wrote that when evaluating the propriety of a medical procedure, "[t]he voluntary consent of the human subject is absolutely essential." Judgment at 181 (Aug. 19, 1947), *available at* https://legal-tools.org/doc/c18557/pdf (last visited Aug. 24, 2023).

The very concept of liberty is inextricably tied to bodily autonomy, so any government vaccine mandate must be viewed through this lens. Accordingly, it follows that the vaccine mandate at issue here is subject to more searching review than the "rational basis" test, contrary to the panel's approach.

Nothing in *Jacobson* is inconsistent with or contrary to this interpretation of other prevailing case law. Rather, *Jacobson* "balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease." *Cruzan*, 497 U.S. at 278. *See also Guertin v. State*, 912 F.3d 907, 919 (6th Cir. 2019) ("[T]he central tenet of the Supreme Court's vast bodily integrity jurisprudence is balancing an individual's common law right to informed consent with tenable state interests, regardless of the manner in which the government intrudes upon an individual's body.").

In fact, *Jacobson* itself required the government to demonstrate a "substantial relation" between its articulated goal and the law in question and recognized the "inherent right of every freeman to care for his own body and health in such a way as to him seems best[.]" *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 26 (1905).

That is a far more exacting standard than rational basis, which requires only that the government articulate an interest and a rational connection between the challenged law and the *government's* interest. *See generally FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993); *Williamson v. Lee Optical*, 348 U.S. 483 (1955). Put otherwise, rational basis does not entail any assessment of the individual's liberty rights. And a "substantial relation" is a higher bar than a "rational connection." *See In re Cincinnati Radiation Litigation*, 874 F. Supp. 796, 813 (S.D. Ohio 1995) (explaining that, although *Jacobson* upheld compulsory vaccination, it had done so while "acknowledg[ing] that an aspect of fundamental liberty was at stake and that the government's burden was to provide more than minimal justification for its action."). *See also* Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 BUFF. L. REV. 131, 141 (2022) ("At the time [*Jacobson* was decided], there were no tiers of scrutiny, the Supreme Court did not distinguish between fundamental and nonfundamental rights, and the Bill of Rights had not yet been incorporated").[4]

It is also worth noting that Michigan State University itself recognizes the significant constitutional difficulties with blanket immunization requirements. MSU has never required vaccines other than for Covid-19 during the relevant time period, including for its undergraduate students. *See* MSU, *Vaccine/Immunization Policy for Undergraduate Students*, https://tinyurl.com/yc2rc65u (last visited Aug. 24, 2023). MSU

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[4] In this article, Blackman convincingly argues that for over a century, the Supreme Court has badly misconstrued *Jacobson* for a number of reasons. *See* Blackman, *The Irrepressible Myth*, 131-270.

does not require its students or staff to be vaccinated against meningitis—a disease with a mortality rate of around 10-15% of those infected in the United States, and one against which vaccines have been tested for decades. Similarly, MSU does not require influenza vaccination even for its healthcare workers. MSU admits that "[a]bout 50,000 deaths in this country occur from influenza each year, many of which could be prevented by immunization of healthcare workers." FAQs about Influenza Vaccination Requirement for MSU Healthcare Workers, *available at* https://bit.ly/3IipMdz (last visited August 28, 2023). Nevertheless, MSU gives employees an option when it comes to influenza—be vaccinated or "wear an MSU-supplied mask when working in patient care areas."

MSU does not impose influenza or meningitis vaccine mandates precisely because it recognizes that requiring such vaccines impinges on individuals' fundamental liberty. Yet, MSU argued, and the panel apparently agreed, that requiring novel, relatively untested vaccines against Covid-19—a disease with about a 1% mortality rate in the United States, *see* Joint Decl., RE 55-1, PageID #1253—does not raise similar liberty and personal autonomy concerns. The panel's error, if allowed to stand, will permit governments of all levels to demand that individuals submit to all sorts of medical procedures of marginal, if any, benefit simply by announcing that the procedures advance the goals of "public health." If liberty can be eviscerated that easily, it is hardly "fundamental."

Further, even if *Jacobson* had applied rational basis level review to the law at issue—it did not—the opinion made clear that the result did not automatically vindicate

every vaccine mandate. *See* 197 U.S. at 28 ("[I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons."). In fact, the Court itself eschewed the broad interpretation of its holding that the panel here insisted upon adopting, confining it to the specific facts of that case when it wrote that it was "decid[ing] *only* that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error." *Id.* at 39 (emphasis added). This Court should not defer to the government upon mere invocation of *Jacobson* as though it was a word of talismanic significance. Instead, as with any other case, it must, like the Supreme Court itself did, confine *Jacobson* to similar facts. Only in doing so will the liberty interests in bodily autonomy be protected.

B. The Court Should Not Blind Itself to Scientific Facts Even When Conducting Deferential Rational Basis Review

Although the panel opined that "[t]he facts of *Jacobson* square well with this case[,]" 73 F.4th at 435, that assertion ignores the vastly different scientific realities of the early 20th versus early 21st century. Instead of ascertaining whether the facts underlying the judgment in *Jacobson* are comparable to the facts of MSU's vaccine requirements, the panel simply concluded that if a vaccination requirement passed

muster in that case, it necessarily passes muster in this one. That decision was error, and such an approach directly threatens Americans' bodily autonomy.

The facts of *Jacobson* are radically different from the present case. First, in *Jacobson*, the required vaccine actually accomplished the government's stated public health aim of *preventing spread* of the disease and possibly even "eradicat[ing]" it. *See* 197 U.S. at 28, 32-34 ("[T]he principle of vaccination as a means to prevent the spread of smallpox has been enforced in many states" and "[i]f vaccination *strongly* tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated.") (emphasis added). Mandatory vaccination in *Jacobson* satisfied the government's stated health aim because the smallpox vaccine was "sterilizing," meaning inoculation with the vaccine precluded reinfection in all but the rarest of cases.

By contrast, "the general consensus is that COVID vaccines are *not* 'sterilizing' and *do not* 'prevent the spread' of the disease." (Bhattacharya Decl., RE 55-1, PageID #1390) (emphasis added); *see also Missouri v. Biden*, 571 F. Supp. 3d 1079, 1094 (E.D. Mo. Nov. 29, 2021), *vacated and remanded on other grounds*, No. 21-3725, 2022 WL 1093036 (8th Cir. Apr. 11, 2022) (noting that "the lack of data regarding vaccination status and transmissibility—in general—is concerning" and quoting the Centers for Medicare and Medicaid Service's own statements acknowledging that "the effectiveness of the vaccine to prevent disease transmission by those vaccinated [is] not currently known" and "the continued efficacy of the vaccine is uncertain").

Second, while it was widely known in the early 20th century (as it is known today) that natural immunity works just as well, if not better, than vaccination, there were basic limitations to ensuring that one *had* natural immunity. For example, antibody testing was unavailable in the early 1900s, and thus there was no good way to ascertain whether an individual had naturally acquired immunity. In contrast, antibody testing is widely available for all sorts of pathogens today, including Covid. Indeed, Covid-19 antibody testing was routine by the time that MSU promulgated its mandate. Hence, *Jacobson* could not have stood for the proposition, prior to the advent of antibody testing, that governments may require persons with natural immunity to receive a vaccination.

Third, *Jacobson* involved vaccination against smallpox, a disease that killed around 30 percent of those infected and posed a significant risk to the young and middle-aged. The high fatality rate factored into the Court's evaluation of the vaccine mandate's constitutionality. Notably, the *Jacobson* Court explicitly considered the deadliness of smallpox as a basis for its determination; it "acknowledged [the] power of a local community to protect itself against an epidemic *threatening the safety of all*." 197 U.S. at 28 (emphasis added). In contrast, the fatality rate for Covid-19 is around 1%, and it poses minimal risks to the young and the middle-aged. Thus, even acknowledging that in some extreme cases (like smallpox), the government's interest in public health may outweigh an individual's interest in bodily autonomy, it does not follow that it does so for *every* infectious disease.

Given the vast gulf between dangers posed by smallpox and those posed by Covid-19, not to mention the other circumstances mentioned above, straining the logic of the former to apply it to the latter is inappropriate and dangerous. If the panel is correct and there is no logical endpoint to *Jacobson*, then no American will ever be shielded from any mandated healthcare intervention so long as the government could "rationally" label it as "useful for the protection of public health."

II. MSU'S VACCINE MANDATE FAILS RATIONAL BASIS REVIEW

Rational basis review must mean something more than "government wins no matter what." Otherwise, there would be no purpose for any analysis at all. While the level of scrutiny may not be particularly searching, "deference is not abdication and 'rational-basis scrutiny' is still scrutiny." *Nordlinger v. Hahn*, 505 U.S. 1, 31 (1992) (Stevens, J., dissenting); *see also Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 857 (4th Cir. 1999), aff'd *sub nom. United States v. Morrison*, 529 U.S. 598 (2000) (rejecting "a deference so absolute as to preclude any independent judicial evaluation of constitutionality whatsoever—a deference indistinguishable from judicial abdication"). Government actions and threats to individual liberty must be scrutinized no less (and likely more so) during a crisis than during periods of tranquility. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 74 (2020) (Kavanaugh, J., concurring) ("[J]udicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised."). Regrettably, the panel failed to apply

any real scrutiny to MSU's regulation and instead abdicated judicial responsibility to the University's bureaucracy. The panel accepted MSU's claim—at the motion to dismiss stage—of a "public health benefit" as a legitimate ground for its mandate, without any inquiry into the strength of the nexus between MSU's end and its chosen means.

The Complaint alleged that, under the posited scientific circumstances regarding the vaccines and Covid-19—*facts that were known to MSU*—there was no legitimate public health rationale for applying MSU's mandate to remote workers and workers with demonstrated natural immunity. First Amended Complaint, RE 55, PageID #1210. For example, MSU continued its mandate long after there was *no dispute* that the vaccines were not sterilizing (*i.e.*, they did not prevent infection or transmission). Merely hoping that, despite overwhelming evidence to the contrary, a policy will accomplish its stated goals, ("*this time* it will be different") is magical thinking that has no rational basis.

The same can be said regarding the "natural immunity" versus "vaccination immunity" debate. MSU's claims regarding the superiority of "vaccine immunity" were always dubious, as CDC's (since reversed) guidance flew in the face of a century-plus of knowledge of immunology. When MSU refused to rescind the mandate after it became manifestly clear that vaccines do no better (and indeed do worse) than "natural immunity," MSU's reasoning moved even further afield from rationality and into the realm of magical thinking. Because it became clear rather quickly—indeed by summer of 2021, when MSU imposed its mandate—that the vaccines provide inferior immunity to that acquired naturally, and certainly when it comes to infecting third parties (which

is what "*public* health" is concerned with), forcing a Covid-recovered person to take a vaccine is not rational. *See* First Amended Complaint, RE 55, PageID ##1202-10.

III. Complete Deference to Agency Guidance Does Not Equate to Rational Basis Review

If under rational basis review, agency recommendations from mere guidance documents are treated as unassailable truths, as the district court treated the CDC's guidance, such that government entities may "rationally" force their employees to follow that mere guidance on pain of losing their jobs, then there is no available path to challenge bad government science, and we may as well dispense with the concept of judicial review of agency action altogether. In such a dystopian scenario, which the panel decision below adopts, the CDC has effectively insulated itself from judicial review by advancing its views merely as guidance rather than as a judicially reviewable final agency action. Meanwhile, institutions across the country, using that very guidance, mandate that the naturally immune get the vaccine—and, like MSU, they then rely on the guidance as a "rational basis" shield when their decision to fire people for refusing the vaccination is challenged. It would be difficult for the government to create a more perfect example of a Catch-22.

Even if reliance on CDC guidance did, *ipso facto*, render MSU policies crafted in reliance upon it rational, the university cannot take advantage of this defense because at least two of the vaccines that MSU accepts as compliant with its mandate (Sinovac and Sinopharm) were never approved nor recommended by the FDA and CDC. MSU's

position—and one that apparently met with the panel's approval—is that MSU can freely pick and choose which scientific studies or experts to rely on to support different and contradictory clauses of the same policy. And because in a world of eight billion people one can always find an "expert" to support virtually any governmental policy, a "review" which simply asks whether a governmental agency can cite some expert's opinion abdicates judicial responsibility to actually *review* governmental policies.

CONCLUSION

The panel's decision misconstrued *Jacobson* in two fundamental ways. First, it wrongly concluded that *Jacobson* shielded from any meaningful review claims that government employers possess nearly unlimited authority to require their employees to submit to almost any medical intervention so long as there exists a threat of a contagious disease. That overly broad reading of *Jacobson* is dangerous, and it ignores major factual differences between the world as it existed in 1905 and as it exists now, as well as the scientific knowledge available then versus now. The *en banc* Court should make clear that mere appeal to *Jacobson* cannot trample on fundamental interests in liberty and bodily autonomy, and that a State employer must be held to an exacting standard whenever it seeks to limit these rights, which are grounded in our history and tradition.

Furthermore, even assuming that *Jacobson* requires mere rational basis review and does not demand a "*substantial* relationship" between a healthcare requirement and public health goal, the panel committed error when it embraced "a deference so absolute as to preclude any independent judicial evaluation of constitutionality

whatsoever—a deference indistinguishable from judicial abdication." *Brzonkala*, 169 F.3d at 857. This Court should grant *en banc* review to make clear that "'rational-basis scrutiny' is still scrutiny." *Nordlinger*, 505 U.S. at 31 (Stevens, J., dissenting), and that deference to agency guidance that has not gone through notice and comment rulemaking cannot substitute for judicial review.

For all of the foregoing reasons the Court should rehear this case *en banc*.

August 28, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 35(b)(2) because it contains 3,731 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/ Gregory Dolin

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2023, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF filing system and that service upon counsel for the parties will be accomplished using the CM/ECF system.

/s/ Gregory Dolin

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0150p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JEANNA NORRIS; KRAIG EHM; D'ANN ROHRER,
Plaintiffs-Appellants,

v.

SAMUEL L. STANLEY, JR., in his official capacity as President of Michigan State University, et al.,
Defendants-Appellees.

No. 22-1200

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:21-cv-00756—Paul Lewis Maloney, District Judge.

Argued: December 7, 2022

Decided and Filed: July 13, 2023

Before: KETHLEDGE, WHITE, and BUSH, Circuit Judges.

COUNSEL

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OPINION

JOHN K. BUSH, Circuit Judge. During the COVID-19 pandemic, Michigan State University (MSU) required its employees to receive a vaccine against the disease. Plaintiffs, who are MSU employees, objected. They claimed their naturally acquired immunity to COVID-19 should exempt them from the vaccine policy. That reasoning did not persuade MSU, which imposed disciplinary action against them for not getting vaccinated. The complaint below alleged that MSU violated plaintiffs' constitutional rights and that the university's vaccine mandate was preempted by federal law. The district court granted the university's motion to dismiss. We agree with the district court that, as alleged, the university's vaccine policy neither violated plaintiffs' constitutional rights nor was preempted by federal law. We therefore AFFIRM.

I.

In July 2021, MSU announced a set of "COVID directives" for the 2021 fall semester. Those directives expanded on August 5, 2021, when MSU posted to its website a mandatory vaccine policy. The new requirement called for all faculty and staff to be either fully vaccinated or receive at least one of a two-dose series of vaccines by August 31, 2021. The vaccine policy applied to all employees, even those who worked remotely. Any vaccine approved by the Food and Drug Administration (FDA) or World Health Organization (WHO) satisfied the vaccine policy, including WHO-approved vaccines that had not received FDA approval.

MSU's vaccine policy provided for religious and medical exemptions, which were restricted in nature and application, according to plaintiffs. Medical exemptions were limited to "CDC-recognized contraindications and for individuals with disabilities under the ADA." R.55-1, Exhibit H, PageID 1331. Of note, the policy did not provide a medical exemption based on natural immunity, i.e., immunity acquired from a COVID-19 infection. Anyone who did not receive a vaccine in compliance with the policy or receive an exemption, medical or religious, was subject to potential disciplinary action, which included potential termination of employment.

When MSU announced these directives, the three named plaintiffs, Jeanna Norris, Kraig Ehm, and D'ann Rohrer, all worked for the university.[1] Norris tested positive for COVID-19 on November 21, 2020 and received a positive antibody test on August 17, 2021. Ehm was diagnosed with COVID-19 in April 2021 and received a positive antibody test on August 21, 2021. Rohrer was diagnosed with COVID-19 in August 2021 and received a serological test on October 4, 2021, which demonstrated her natural immunity. Based on their natural immunity, plaintiffs argue that it was medically unnecessary for them to be vaccinated.

They therefore did not comply with the vaccine policy. Thus, Ehm was terminated on November 3, 2021, and Rohrer was placed on unpaid leave. But Norris did not face disciplinary action because she received a religious exemption from the vaccine requirement on November 19, 2021.[2]

Following the negative employment actions against Ehm and Rohrer, plaintiffs filed their amended complaint on November 5, 2021. The complaint seeks declaratory and injunctive relief for a class of MSU's employees who have naturally acquired immunity. They claim violations of their constitutional rights to bodily autonomy and to decline medical treatment. The complaint alleges that: (1) MSU cannot establish a compelling governmental interest in overriding the claimed constitutional rights of plaintiffs by forcing them to be vaccinated or potentially face termination; (2) the vaccine policy constitutes an unconstitutional condition on continued employment by the state; and (3) the vaccine policy contradicts the federal Emergency Use Authorization (EUA) statute, 21 U.S.C. § 360bbb-3, which preempts any state action requiring an employee receive a vaccine.

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[1]Between the initiation of this appeal and the issuance of this opinion, MSU voluntarily rescinded its vaccine policy. But that does not moot this appeal because plaintiffs sought nominal damages for the alleged violations of their constitutional rights. R. 55, PageID 1246. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796, 801–02 (2021). Nor is there any indication that MSU has undone any of the negative employment actions faced by Ehm or Rohrer, so the harm plaintiffs faced has not been removed. *See Sullivan v. Benningfield*, 920 F.3d 401, 410–11 (6th Cir. 2019); *see also Cam I, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 460 F.3d 717, 720 (6th Cir. 2006). And for its part, MSU maintains that the case is not moot.

[2]As a result of the exemption, Norris lacks injury in fact to confer Article III standing. *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 861 (6th Cir. 2020). Ehm and Rohrer, in contrast, have such standing because of the disciplinary consequences they faced.

To support these claims, and particularly the first claim, plaintiffs provided declarations by experts that the significance and efficacy of natural immunity are either similar or superior to receiving a vaccine. Plaintiffs also relied on a CDC study discussing the similarity of efficacy between natural immunity and vaccine immunity, and, with no objection from defendants, the district court considered this information.

Defendants moved to dismiss all claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). Based on the briefing, the district court granted the motion to dismiss on counts two and three, then after conducting a hearing, dismissed count one as well.

For count one—the substantive due process claim—the district court applied rational basis review to uphold MSU's vaccine requirement. The district court explained that it was not to consider "whether the Vaccine Policy is the best vehicle for achieving the stated goals, but merely whether the University could have had a legitimate reason for acting as it did." *Norris v. Stanley*, No. 1:21-cv-756, 2022 WL 557306, at *4 (W.D. Mich. Feb. 22, 2022) (quoting *Kheriaty v. Regents of Univ. of Cal.*, No. SACV21-1367, 2021 WL 6298332, at *8 (C.D. Cal. Dec. 8, 2021)).

As for count two—the claim of an unconstitutional condition on employment—the district court determined that plaintiffs were not coerced "into waiving their constitutional rights to bodily autonomy and to decline medical treatment in order to receive a governmental benefit." *Norris v. Stanley*, No. 1:21-cv-756, 2022 WL 247507, at *4 (W.D. Mich. Jan. 21, 2022). Because the district court found that employment at MSU was not a governmental benefit in the context of an unconstitutional condition, it dismissed this claim.

Finally, regarding count three—the Supremacy Clause claim—the district court rejected the argument that the EUA statute preempted state action. The district court explained that MSU's vaccine policy "does not preclude Plaintiffs from receiving informed consent regarding the COVID-19 vaccine, nor does it preclude Plaintiffs from refusing the vaccine," so there was no conflict between that policy and the EUA statute. *Id.* at *5.

Plaintiffs timely appealed the judgment of dismissal.

II.

We review de novo a district court's order granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 793 (6th Cir. 2016). In doing so, we must "construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations as true, and examine whether the complaint contains 'sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."''" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 672, 678 (2009)). But we "need not accept as true legal conclusions or unwarranted factual inferences." *Gregory v. Shelby Cnty.*, 220 F.3d 433, 446 (6th Cir. 2000).

A.

Plaintiffs' substantive due process claim fails because MSU's vaccine policy satisfies rational basis scrutiny, which the district court correctly held governs this claim. We base our standard of review on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). That case involved a Massachusetts statute, passed in response to smallpox, that empowered local boards of health to adopt mandatory vaccine requirements. *Id.* at 12. The city of Cambridge did so by requiring all residents to receive the smallpox vaccination by a certain date, and those who failed to comply with the statute were fined $5 or jailed until they paid the fine. *Id.* at 13–14. The Supreme Court upheld this vaccine mandate. *See id.* at 25.

The facts of *Jacobson* square well with this case. MSU has been empowered through Michigan's Constitution to have "authority over 'the absolute management of the University,'" which shows Michigan vested its police power in MSU.[3] *Federated Publ'ns, Inc. v. Bd. of Trs. of Mich. State Univ.*, 594 N.W.2d 491, 497 (Mich. 1999) (quoting *State Bd. of Agric. v. State Admin. Bd.*, 197 N.W. 160, 160 (Mich. 1924)). With that power, MSU promulgated COVID-19 directives that included a vaccine policy, enforceable through disciplinary action.

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[3]In the district court, plaintiffs failed to challenge MSU's authority to enact the vaccine policy, so they have abandoned that argument, despite their attempt to raise this issue on appeal. *Dice Corp. v. Bold Techs.*, 556 F. App'x 378, 384 (6th Cir. 2014).

Jacobson does not use the language of "rational basis" because, at the time of that decision, the tiers of scrutiny were yet to be defined and labeled by the Supreme Court. But the opinion explains that the Court only considered whether the policy enactment had a "real or substantial relation to its object." *Jacobson*, 197 U.S. at 31. Both Chief Justice Roberts and Justice Gorsuch have recently suggested that the "real or substantial relation" language analogizes to rational basis scrutiny today. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring); *see S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Mem.) (Roberts, C.J., concurring). Even more, the Supreme Court explained in *New York Rapid Transit Corp. v. City of New York*[4] that a "distinction in legislation is not arbitrary" under the Fourteenth Amendment "if any state of facts reasonably can be conceived that would sustain it." 303 U.S. 573, 578 (1938) (quoting *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916)). In that case, the Supreme Court affirmed a motion to dismiss because states receive significant discretion when making policy decisions that invoke considerations similar to the modern rational basis review. *See id.* at 587.

With rational basis scrutiny, we apply a strong presumption of validity when evaluating if the state's action furthers a legitimate state interest. *Ashki v. I.N.S.*, 233 F.3d 913, 920 (6th Cir. 2000). Public health and safety easily fall within the state's legitimate interests. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67 ("Stemming the spread of COVID-19 is unquestionably a compelling interest . . . ."); *see S. Bay United*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). When analyzing the policy under rational basis review, the "reasoning in fact underl[ying] the [government's] decision" is "constitutionally irrelevant" because the court "will be satisfied with the government's rational speculation linking the regulation to a legitimate purpose, even [if] unsupported by evidence or empirical data." *Am. Exp. Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011) (internal quotation marks omitted) (quoting *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002)). So while plaintiffs argue that the research they cite shows that vaccinating naturally immune individuals carries little to no benefit, that argument is not enough to strike down the vaccine requirement under rational basis review in the face of a

[4]Notably, that case was decided one month before *United States v. Carolene Products Co.*, where the Supreme Court coined the rational basis review we use today. 304 U.S. 144, 152–54 (1938).

rational basis for MSU's policy. The policy put in place by the state need not be narrowly tailored nor further a compelling governmental interest as it would need to survive strict scrutiny. Instead, to pass rational basis review, it is sufficient that MSU could rationally believe that requiring the vaccine for naturally immune individuals would further combat COVID-19 on its campus.

Plaintiffs make many of the same claims about the vaccine requirement as did the plaintiff in *Jacobson*: delegating police power to administrative bodies on issues of public health is improper, liberty interests in bodily integrity and autonomy are violated, and the policy is arbitrary. *Jacobson*, 197 U.S. at 25–26, 28. The scientific consensus around the smallpox vaccine was contested in that case just as plaintiffs challenge the science underlying natural immunity compared with vaccine immunity here. *Id.* at 30. The Supreme Court was not convinced by these arguments in 1905 and, absent any indication from the Court that *Jacobson* is to be overruled or limited, we are bound to apply that decision to reject plaintiffs' arguments here.

We also note that the government actor here—MSU—was plaintiffs' employer. The government receives "far broader powers [as the plaintiffs' employer] than does the government as a sovereign" creating policies for all citizens. *Waters v. Churchill*, 511 U.S. 661, 671 (1994). Governments acting as employers have broader power and discretion because "government offices could not function if every employment decision became a constitutional matter." *Connick v. Myers*, 461 U.S. 138, 143 (1983). Since public health is a legitimate interest and plaintiffs were MSU employees, the presumption of the vaccine policy's validity is strengthened even further.

Plaintiffs bear the heavy burden of showing that no possible rational justification for the policy exists. *Midkiff v. Adams Cnty. Reg'l Water Dist.*, 409 F.3d 758, 770 (6th Cir. 2005). They fail to meet this burden. In their brief, plaintiffs acknowledge that MSU has a legitimate interest in protecting public health but characterize MSU's actions as an attempt "to exert control over individuals' personal health decisions." Appellants' Brief at 38. This effort to skirt MSU's legitimate interest is unconvincing.

Plaintiffs point to several cases to argue for intermediate scrutiny, but they fail to mention a single case in any federal jurisdiction when a court denied or rejected the application of *Jacobson*'s rational basis standard to a COVID-19 vaccine mandate. Instead, plaintiffs invoke cases that meaningfully differ from mandatory vaccine requirements and involve other facts, ranging from forced administration of antipsychotic drugs to prisoners, *Washington v. Harper*, 494 U.S. 210 (1990), to refusing unwanted lifesaving medical treatment, *Washington v. Glucksberg*, 521 U.S. 702 (1997), and other far afield contexts. Appellants' Brief at 26–29. These cases are not a persuasive reason to distinguish *Jacobson* and other, more recently decided, cases that upheld state-imposed vaccine mandates. *See Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593–94 (7th Cir. 2021) (Easterbrook, J.).

Further, plaintiffs do not adequately explain how receiving a vaccine violates a *fundamental* right, which would invoke a higher level of scrutiny. Absent such plausibly alleged explanations, the complaint warrants dismissal under rational basis review. *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 464 (1988) (in affirming a dismissal on the merits, the Court explained that the statute challenged in that case "discriminate[d] against no suspect class and interfere[d] with no fundamental right").

MSU's policy furthers a legitimate governmental interest of protecting public health. Thus, the policy passes rational basis review.

B.

Given that MSU's policy satisfies rational basis review, no employee's rights are violated, and thus the policy is not an unconstitutional condition on plaintiffs' employment. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 913 (6th Cir. 2019) (en banc). As the Court explained in *Jacobson*, "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be . . . wholly freed from restraint." 197 U.S. at 26. And MSU may condition plaintiffs' employment in a constitutional manner. For example, the Supreme Court affirmed the dismissal of a complaint against Missouri's age restriction for state judges. *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). The Court reasoned that the state must "assert only a rational basis for its age

classification" because age is not a suspect classification, so that age condition on employment was constitutional. *Id.*

Plaintiffs cite several unconstitutional-condition cases to challenge the district court's conclusion that their claim fails because they show no entitlement to a government benefit. But every case plaintiffs invoke involved a First Amendment right. Appellants' Brief at 40–42. And we need not reach this issue because, as explained, plaintiffs do not plausibly allege any constitutional violation resulting from the vaccine mandate.

III.

We now reach plaintiffs' argument that MSU's policy is preempted by federal law regulating the distribution and use of pharmaceuticals.

Typically, only FDA-approved pharmaceuticals can be marketed and prescribed in the United States, 21 U.S.C. § 355(a), but emergency use authorization (EUA) is a notable exception. *McCray v. Biden*, No. CV 21-2882, 2021 WL 5823801, at *2 (D.D.C. Dec. 7, 2021). An EUA allows for public distribution of a pharmaceutical that has not received a final FDA approval. 21 U.S.C. § 360bbb-3. The EUA statute instructs that, "to the extent practicable given the applicable circumstances," the Secretary of Health and Human Services (HHS) "shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization . . . as the Secretary finds necessary or appropriate to protect the public health." *Id.* § 360bbb-3(e)(1)(A). These conditions are to include:

> Appropriate conditions designed to ensure that individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

Id. § 360bbb-3(e)(1)(A)(ii)(III).

Plaintiffs assert in their complaint that MSU's policy is preempted because it conflicts with the EUA statute. In their appellate briefing, plaintiffs argue this federal statute either preempts MSU's policy or renders it irrational because it contradicts federal law. Appellants' Brief at 50. We find these arguments unpersuasive.

The EUA statute's relevant language—"ensur[ing] that individuals to whom the product is administered are informed . . . of [their] option to accept or refuse" the vaccine—addresses the interaction between the medical provider and the person receiving the vaccine, not the interaction between an employer and an employee receiving a vaccine. 21 U.S.C. § 360bbb-3(e)(1)(A)(ii); *see id.* § 360bbb-3(a)(1)(A) (requiring conditions "for a person who carries out any activity for which authorization is issued"); *Klaassen v. Trs. of Ind. Univ.*, 549 F. Supp. 3d 836, 870 (N.D. Ind. 2021). The statute is meant to ensure patients' consent to the pharmaceutical they are receiving, but this does not mean that MSU cannot require vaccination as a term of employment. Nor do Plaintiffs suggest that HHS has established any conditions forbidding employment-based vaccination requirements. The language of the statute also does not undo the fact that MSU's policy is furthering a legitimate governmental interest, so plaintiffs' claim that the policy must be irrational because of this statute are unfounded.

IV.

For the foregoing reasons, we AFFIRM the district court's dismissal of all claims.