No. - ____

In the
Supreme Court of the United States

JEANNA NORRIS, *ET AL.*,
Petitioners,

V.

SAMUEL STANLEY, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Sixth Circuit

APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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

ARGUED: Jenin Younes, NEW CIVIL LIBERTIES ALLIANCE, Washington, D.C., for Appellants. Stephanie L. Gutwein, FAEGRE DRINKER BIDDLE & REATH LLP, Indianapolis, Indiana, for Appellees. **ON BRIEF:** Jenin Younes, Gregory Dolin, NEW CIVIL LIBERTIES ALLIANCE, Washington, D.C., for Appellants. Stephanie L. Gutwein, Anne K. Ricchiuto, FAEGRE DRINKER BIDDLE & REATH LLP, Indianapolis, Indiana, for Appellees. Deborah J. Dewart, Hubert, North Carolina, Frederick R. Yarger, WHEELER TRIGG O'DONNELL LLP, Denver, Colorado, for Amici Curiae.

OPINION

July 13, 2023

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

[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.

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

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[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.

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.

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.

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*

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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)

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.*

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[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).

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 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.

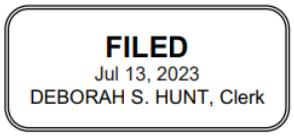
The EUA statute's relevant language—"ensur[ing] that individuals to whom the product is administered are informed . . . of [their] option to accept or refuse" the vaccine—addresses the interaction between the medical provider and the person receiving the vaccine, not the interaction between an employer 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.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 22-1200



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.

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

JUDGMENT

On Appeal from the United States District Court for the Western District Of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEANNA NORRIS, *et al.*, Plaintiffs,	)	
	)	No. 1:21-cv-756
-v-	)	
	)	Honorable Paul
	)	L. Maloney
SAMUEL L. STANLEY, JR., *et al.*, Defendants.	)	

OPINION AND ORDER GRANTING MOTION TO DISMISS

This matter is before the Court on Defendants' motion to dismiss the first amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) (ECF No. 59). The Court has already issued an opinion on the motion: it granted the motion as to Count II (violation of the unconstitutional conditions doctrine and procedural due process) and Count III (violation of the Supremacy Clause). Only Count I (violation of the substantive due process right to refuse unwanted medical care) remains, the dismissal of which is the

subject of this opinion. For the following reasons, the Court will dismiss Count I and terminate this case.

As a preliminary matter, Plaintiffs have an outstanding motion to supplement their response to Defendants' motion to dismiss (ECF No. 68). The motion contains a study from the CDC concerning the efficacy of natural immunity and vaccine immunity. Plaintiffs relied on this study at the hearing on the motion to dismiss,[1] and Defendants did not object. Thus, Defendants do not appear to oppose this study being placed on the record. Moreover, even if Defendants did object, the Court would take judicial notice of the CDC study, which was conducted by a federal agency. *See Overall v. Ascension*, 23 F. Supp. 3d 816, 824-25 (E.D. Mich. 2014) ("The Court may take judicial notice of public documents and government documents because their sources 'cannot reasonably be questioned.'") (citing Fed. R. Evid. 201(b)). The Court will grant Plaintiffs' motion to supplement.

Moving onto Defendants' motion to dismiss, the Court will dismiss the only remaining claim in this matter.[2] This substantive due process claim asserts

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[1] As of the date of this order, the transcript for the motion to dismiss hearing, held on February 11, 2022, is not yet available.
[2] In the opinion and order granting Defendants' motion to dismiss as to Counts II and III, the Court outlined the law regarding Fed. R. Civ. P. 12(b)(6) motions:

A complaint must contain a short and plain statement of the claim showing how the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A defendant bringing a motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).
To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must provide sufficient factual allegations that, if accepted as true, are sufficient to raise a right to relief above the speculative level, *Twombly*, 550 U.S. at 555, and the "claim to relief must be plausible on its face." Id. at 570. "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. For Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). If plaintiffs do not "nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570.

When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. For Bio-Ethical*

that Michigan State University's (MSU) vaccine policy violates Plaintiffs' liberty interests by forcing them to forgo their rights to bodily autonomy and to decline medical treatment (see ECF No. 55 at PageID.1220-29). The Court has held numerous times, in accordance with the case law from several jurisdictions, that rational basis scrutiny applies when assessing whether the MSU vaccine policy is constitutional (*see* ECF Nos. 7, 42, 54, 64). Because the record establishes that there is robust debate surrounding the efficacy of natural immunity versus vaccine immunity, the Court held a hearing to determine whether MSU's vaccine policy does or does not survive rational basis review for failing to include an exemption for people who have acquired natural immunity to COVID from a previous diagnosis.

> *Reform*, 648 F.3d at 369. The Sixth Circuit has noted that courts "may no longer accept conclusory legal allegations that do not include specific facts necessary to establish the cause of action." *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1050 (6th Cir. 2011). However, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations"; rather, "it must assert sufficient facts to provide the defendant with 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Rhodes v. R&L Carriers, Inc.,* 491 F. App'x 579, 582 (6th Cir. 2012) (quoting *Twombly*, 550 U.S. at 555).

(ECF No. 64 at PageID.1428-29).

Despite this vigorous debate, the Court finds that the policy survives rational basis.

Given that rational basis applies, the burden is on Plaintiffs to show that the MSU vaccine mandate is not rationally related to a legitimate government interest. *See Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000). Under rational basis review, "a plaintiff faces a severe burden and must 'negate all possible rational justifications for the distinction.'" *Midkiff v. Adams Cty. Reg'l Water Dist.*, 409 F.3d 758, 770 (6th Cir. 2005) ((quoting *Gean v. Hattaway*, 330 F.3d 758, 771 (6th Cir. 2003)). This is a difficult burden for plaintiffs to overcome because "[u]nder rational basis review, courts 'do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did.'" *Kheriaty v. Regents of Univ. of Cal.*, No. SACV21-1367, 2021 WL 6298332, at *8 (C.D. Cal. Dec. 8, 2021) (quoting *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir. 1994)). In the context of vaccine mandates at universities, "[t]he question before the Court is not 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." *Id.*

Since the implementation of COVID vaccine mandates at colleges and universities across the

United States, courts in numerous jurisdictions have heard challenges to these mandates. Overwhelmingly, courts have denied the plaintiffs' injunctive relief requests and have upheld the generally applicable policies. *See, e.g., Kheriaty v. Regents of Univ. of Cal.*, No. SACV21-01368 JVS (KESx), 2021 WL 4714664 (C.D. Cal. Sept. 29, 2021); *Harris v. Univ. of Mass., Lowell*, -- F. Supp. 3d --, 2021 WL 3848012 (D. Mass. 2021); *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592 (7th Cir. 2021); *Messina v. Coll. of N.J.*, -- F. Supp. 3d --, 2021 WL 4786114 (2021); *Children's Health Def. v. Rutgers State Univ.*, No. 21-15333 (ZNQ) (TJB), 2021 WL 4398743 (D.N.J. Sept. 27, 2021).

However, very few of these cases have reached the dispositive motion stage. It appears that district courts in only three cases involving COVID vaccine mandates at universities have issued a ruling on a Rule 12 motion: *Harris*, -- F. Supp. 3d --, 2021 WL 3848012; *Kheriaty*, 2021 WL 6298332; and *Wade v. University of Connecticut Board of Trustees*, -- F. Supp. 3d --, 2021 WL 3616035 (D. Conn. 2021).[3]

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[3] *Wade* is distinguishable from this matter. 2021 WL 3616035, at *1. In *Wade*, the District of Connecticut granted the University of Connecticut's motion to dismiss under Rule 12(b)(1). At the time the Court decided the Rule 12(b)(1) motion, two of the plaintiffs had received an exemption from the university's vaccine mandate, and the only other plaintiff never sought an exemption in the first place. The court found that the

During the motion to dismiss hearing on February 11, this Court inquired as to whether the parties were aware of any additional similar cases percolating in other circuits. The parties were not aware of any.

In *Harris*, the District of Massachusetts "allowed" the university's 12(b)(6) motion, and it entered judgment on all counts for the defendants. See *Harris*, 2021 WL 3848012, *8. In April 2021, the University of Massachusetts Lowell and the University of Massachusetts Boston announced that they would implement COVID vaccine mandates for all students who would visit campus unless they received an exemption. *Id*. at *4. Two students commenced the action, alleging violations of their free exercise rights, and violations of procedural and substantive due process. *Id*. at *1. The district court found that plaintiffs failed to state a plausible claim on all counts

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claims of the two plaintiffs who received exemptions "are moot because they are unlikely to face any continuing injury from the vaccination requirement." *Id*. As to the third plaintiff who declined to seek an exemption, "[h]aving failed to avail herself of a simple process that may allow her to avoid the vaccination requirement, she has not suffered an injury that the law recognizes as the basis for a right to complain in federal court." *Id*. Thus, based on mootness and lack of injury, the court concluded that it lacked subject matter jurisdiction, and it dismissed the matter. *Id*. at *9. In the present matter, Defendants' do not raise a standing question in their motion or seek dismissal pursuant to Rule 12(b)(1). Thus, *Wade* is of little value in this case.

because (1) plaintiffs failed to show that the policy burdened their religious rights, (2) plaintiffs were not entitled to process "above and beyond" the publication of the policy, and (3) plaintiffs failed to show that their substantive due process rights were violated because they failed to overcome the deferential rational basis standard. *Id*. at *6-7. The plaintiffs appealed, and the parties are currently briefing their arguments in front of the First Circuit. *See Harris v. Univ. of Mass., Lowell*, No. 21-1770 (1st Cir. 2021).

Kheriaty, which also resolved a challenge to a university COVID vaccine mandate on a Rule 12 motion closely aligns is very applicable to the present matter. *See generally Kheriaty*, 2021 WL 6298332. In July 2021, the University of California enacted a COVID vaccine mandate, which required all students, faculty, and staff, with limited exceptions, to be fully vaccinated before accessing the university's facilities. *Id*. at *1. The plaintiff in this matter was a professor who contracted COVID in July 2020 and has since fully recovered. *Id*. He sought declaratory relief enjoining the university from enforcing the policy against him because he alleged that due to his prior COVID infection, he had superior immunity to COVID compared to vaccinated people. *Id*. The university moved for a judgment on the pleadings, which the district court granted. *Id*. at *9. The plaintiff appealed, and the matter is currently

pending before the Ninth Circuit. See *Kheriaty v. Regents of the Univ. of Cal.*, No. 22-55001 (9th Cir. 2022).

In the Central District of California's order granting the university's motion for judgment on the pleadings, the *Kheriaty* Court recognized that the parties disagreed about the safety and effectiveness of the COVID vaccine, as well as the efficacy of vaccine versus natural immunity. *Id.* at *1. But for the purposes of a motion for judgment on the pleadings, the district court had to accept the factual allegations in the complaint as true. *Id.* In accordance with the expanding case law in numerous jurisdictions, the Court found that Kheriaty failed to show that the university's vaccine policy violated a fundamental right, and thus, it considered the challenge under rational basis review:

> The courts to consider the issue have applied rational basis review because they consistently found that vaccination does not implicate a fundamental right. *See, e.g., Williams v. Brown*, —— F. Supp. 3d ——, 2021 WL 4894264, at *9 (D. Or. Oct. 19, 2021) ("This Court joins [the] growing consensus and concludes that there is no fundamental right under the Constitution to refuse vaccination."). Here, the Vaccine Policy clearly implicates liberty interests

> that are distinct from what other courts have found to be a fundamental right. Kheriaty is not refusing "lifesaving hydration and nutrition." *See Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (inferring that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment"). The state is not seeking to inject him with drugs that have the purpose of "alter[ing] the chemical balance in the patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes." *Washington*, 494 U.S. at 229. Kheriaty does not allege that the Vaccine Policy interferes with "a competent adult exercis[ing] his fundamental liberty interest in medical autonomy by making an end-of-life medical treatment plan." *Magney*, 2018 WL 6460506, at *4. Instead, he is seeking to refuse a vaccine that the University is requiring to protect the broader campus community. Kheriaty cites to no precedent where a court extended the fundamental right to bodily integrity to encompass vaccination. This Court declines to do so as well.

Id. at * 7.

In applying rational basis review, the district court found that the stated purpose of the university's

vaccine policy was "'to facilitate protection of the health and safety of the University community from' COVID-19." *Id*. at *8. The Court noted that as long as the university could have had a legitimate reason for acting as it did, then the policy would survive rational basis. *Id*. The plaintiff argued that the vaccine policy was not rationally related to the goal of public safety because he alleged that individuals with infection-induced immunity have superior protection to COVID. *Id*. However, this argument was not enough to overcome rational basis review, even accepting the allegations of the complaint as true. *Id*. The Court reasoned:

> The question before the Court is not 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. The face of the Vaccine Policy makes clear that the University considered scientific literature and evidence before deciding to require vaccination. Additionally, the Vaccine Policy cites to government publications suggesting that a positive antibody test is insufficient to establish immunity. Presented with that evidence, it would be reasonable for the University to conclude that a broad vaccine requirement would be necessary even if the allegations in the complaint were true. With

> half a million members of the University community, it would be rational for the University to conclude that it would not be able to effectively ensure that all individuals had immunity to COVID-19 without requiring vaccination.

Id. (internal citations omitted).

The Court finds that *Kheriaty* is directly on point in this litigation. The Central District of California thoroughly analyzed a university vaccine mandate that, just like MSU's vaccine policy, failed to provide an exception for individuals with "natural immunity." Because the University of California's policy relied on scientific literature and evidence, it survived rational basis scrutiny. In establishing its policy in July 2021, MSU also relied on scientific literature and guidance from the CDC, MDHHS, and FDA (see ECF No. 63 at PageID.1413-16; ECF No. 60 at PageID.1351-54 (outlining much of the guidance that MSU relied on in implementing its vaccine mandate)). It was not irrational for MSU to rely on this guidance at the time it implemented the policy. *See Danker v. City of Council Bluffs*, -- F. Supp. 3d --, 2021 WL 5326409, at *11-12 (S.D. Iowa 2021) (explaining that even in situations with "changed circumstances" and changing science, under rational basis review, courts must assess the challenged policy at the time of its implementation, not "years later").

Turning to cases outside of the university context that involve natural immunity, other courts have declined to enjoin COVID vaccine mandates for state and city employees. *See e.g., Troogstad v. City of Chicago*, -- F. Supp. 3d --, 2021 WL 5505542 (N.D. Ill. 2021); *Halgren v. City of Naperville*, -- F. Supp. 3d --, 2021 WL 5998583 (N.D. Ill. 2021). In these cases, various city employees challenged Illinois Governor Pritzker's executive orders that required healthcare workers to get the COVID vaccine or submit to weekly testing. As neither case implicated a fundamental right, the Northern District of Illinois applied rational basis review. *See Troogstad*, 2021 WL 5505542, at *5-7; *Halgren*, 2021 WL 5998583, at *23-33.

After conducting a comparative analysis of natural versus vaccine immunity based on the records in the cases, the Northern District of Illinois determined that the executive orders survived rational basis review. The *Troogstad* Court concluded:

> [E]ven if there were robust scientific debate about whether natural immunity is more effective than vaccine-created immunity in preventing the contraction and transmission of COVID-19 (as Plaintiffs contend), this still would not be enough for Plaintiffs to prevail.

2021 WL 5505542, at *7. And the *Halgren* Court concluded:

> Plaintiffs fail to show that the benefits of vaccination on top of natural immunity (and thus combining both forms of protection via hybrid immunity) exceeds the bounds of rational speculation as a "conceivable basis" for the mandates under the rational review test.

2021 WL 5998583, at *31.

Kheriaty, *Troogstad*, and *Halgren* all conclude that so long as a government regulation is supported by a "reasonably conceivable state of facts," it will survive rational basis review. *Troogstad*, 2021 WL 5505542, at *7. Because "[r]ational basis review does not require that every government policy be perfectly tailored to its goals," MSU's vaccine policy survives rational basis. See *Kheriaty*, 2021 WL 6298332, at *8. Although there is "robust scientific debate" about the efficacy of natural versus vaccine immunity, Plaintiffs have failed to establish that it was irrational for MSU not to provide an exception to its vaccine mandate for individuals who have acquired natural immunity. See also *Biden v. Missouri*, 142 S. Ct. 647, 653-54 (2022) (holding that the Centers for Medicare and Medicaid Services' interim final rule, which imposes a COVID-19 vaccination mandate for staff of healthcare facilities participating in Medicaid and Medicare, was not "arbitrary and capricious" even though it required vaccination of employees with natural immunity).

Plaintiffs have the burden of negating every rational basis that supports the MSU vaccine mandate, and the Court finds that they have failed to do so. CDC guidance is clear: "[V]accination remains the safest and primary strategy to prevent SARS-CoV2 infections, associated complications, and onward transmission" (ECF No. 68 at PageID.1450). In achieving MSU's stated legitimate goal of protecting its students and staff from COVID-19, it was plainly rational, in July 2021 when MSU established the policy, for MSU to rely on CDC guidance and require its students and staff to receive the COVID vaccination.[4]

On the present record, Plaintiffs have failed to meet their burden of showing that the MSU vaccine policy is not rationally related to a legitimate purpose. Consequently, even accepting Plaintiffs' factual allegations as true, Plaintiffs have failed to state a claim upon which relief can be granted.

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[4] The court notes Plaintiff's recent filing of the CDC study regarding natural immunity, released nearly two years after the commencement of the pandemic. Why did it take two years, plaintiffs impliedly ask, in light of the CDC laser focus on vaccines as the principle answer to minimize sickness and "the spread"? A question outside the lane of the judiciary, but one which calls for an answer if the CDC's science is to provide the rational basis for employer actions in the future.

IT IS HEREBY ORDERED that Plaintiffs' motion to supplement (ECF No. 68) is **GRANTED.**

IT IS FURTHER ORDERED that Defendants' motion to dismiss Count I of the amended complaint (ECF No. 59) is **GRANTED.**

Judgment to follow.

IT IS SO ORDERED.

Date: February 22, 2022

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

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEANNA NORRIS, *et al.*, Plaintiffs,	)	
	)	No. 1:21-cv-756
-v-	)	
	)	Honorable Paul L. Maloney
SAMUEL L. STANLEY, JR., *et al.*, Defendants.	)	

JUDGMENT

This Court has resolved all pending claims in this lawsuit. As required by Rule 58 of the Federal Rules of Civil Procedure, **JUDGMENT ENTERS.**

THIS ACTION IS TERMINATED.

IT IS SO ORDERED.

Date: February 22, 2022

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

Appendix D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEANNA NORRIS, et al., Plaintiffs,	)	
	)	No. 1:21-cv-756
-v-	)	
	)	Honorable Paul
	)	L. Maloney
SAMUEL L. STANLEY, JR., et al., Defendants.	)	

OPINION AND ORDER GRANTING IN PART AND RESERVING IN PART DEFENDANTS' MOTION TO DISMISS

Pending before the Court is Defendants' motion to dismiss Plaintiffs' first amended complaint (ECF No. 59) pursuant to Fed. R. Civ. P. 12(b)(6). For the following reasons, the Court will grant the motion as to Counts II and III and reserve on the motion as to Count I. Upon further argument, the Court will issue a subsequent order regarding Count I.

I. Facts

In light of the coronavirus pandemic, colleges and universities around the country have implemented COVID-19 vaccine mandates for their staff and students. Michigan State University (MSU), the employer/former employer of the Plaintiffs in this matter, has followed this trend. MSU established its COVID-19 vaccine policy in the fall of 2021. The university's president, Dr. Samuel Stanley, Jr., announced the policy on July 30, 2021 (*see* ECF No. 55-1 at PageID.1327). It requires all faculty, staff, and students to be fully vaccinated against COVID-19 or have an approved religious or medical exemption (*see* ECF No. 60 at PageID.1355).[1]

When MSU originally announced the policy, faculty, staff, and students were required to have received at least one dose of the COVID-19 vaccine by August 31, 2021, or they could be subject to disciplinary action such as termination or suspension (ECF No. 55-1 at PageID.1330). MSU has continued this policy into the Spring 2022 semester.

The Plaintiffs in this matter are three employees/former employees of MSU. They all argue that they should be exempt from MSU's vaccine policy

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[1] *See COVID Directives*, Mich. St. U., https://msu.edu/together-we-will/directives.html (last updated Jan. 7, 2022) for the full policy.

because they have acquired "natural immunity" from COVID-19 due to their previous COVID infections. Plaintiff Jeanna Norris is a supervisory Administrative Associate and Fiscal Officer who contracted and recovered from COVID in November 2020 (ECF No. 55 at PageID.1211, ¶¶ 72, 77). Since commencing this action, Plaintiff Norris has received a religious exemption from the MSU vaccine policy, meaning she is no longer required to receive the COVID-19 vaccine to continue her employment at MSU (ECF No. 62 at PageID.1384). Plaintiff Kraig Ehm is a former video producer who contracted COVID-19 in April 2021 (ECF No. 55 at PageID.1212, ¶¶ 82-83). After failing to comply with MSU's vaccine policy, Plaintiff Ehm was terminated from his position on November 3, 2021 (*Id.* at PageID.1212, ¶ 84). Plaintiff D'Ann Rohrer is an Extension Educator who was diagnosed with COVID-19 in August 2021 (*Id.* at PageID.1212-13, ¶¶ 85-86). Because she has refused to receive the COVID-19 vaccine, Plaintiff Rohrer has been placed on unpaid leave (*Id.* at PageID.1213, ¶ 87).

Plaintiffs brought this lawsuit seeking injunctive relief, declaratory relief, and nominal damages. They argue that the MSU vaccine policy violates their substantive due process rights to liberty and privacy by infringing on their bodily autonomy and right to refuse unwanted medical treatment; that the MSU

vaccine policy creates an unconstitutional condition, which in turn creates a procedural due process violation; and that the MSU vaccine policy violates the Supremacy Clause because the vaccine policy conflicts with the federal Emergency Use Authorization (EUA) statute (*see generally* ECF No. 55). Plaintiffs have already asked this Court for a temporary restraining order and preliminary injunction enjoining the MSU vaccine policy. The Court denied both requests (ECF Nos. 7, 42). Defendants now seek to dismiss the first amended complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(6).

II. Legal Standard

A complaint must contain a short and plain statement of the claim showing how the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A defendant bringing a motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).

To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must provide sufficient factual allegations that, if accepted as true, are sufficient to raise a right to relief above the speculative level, *Twombly*, 550 U.S. at 555, and the "claim to relief must be plausible on its face." *Id.* at 570. "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. For Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). If plaintiffs do not "nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570.

When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. For Bio-Ethical Reform*, 648 F.3d at 369. The Sixth Circuit has noted that courts "may no longer accept conclusory legal allegations that do not include specific facts necessary to establish the cause of action." *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1050 (6th Cir. 2011). However, "a complaint attacked by a

Rule 12(b)(6) motion to dismiss does not need detailed factual allegations"; rather, "it must assert sufficient facts to provide the defendant with 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Rhodes v. R&L Carriers, Inc.*, 491 F. App'x 579, 582 (6th Cir. 2012) (quoting *Twombly*, 550 U.S. at 555).

III. Analysis

A. Count I – Substantive Due Process

As this Court stated in its order denying Plaintiff Norris's[2] motion for a preliminary injunction, the likelihood of success on the merits in this lawsuit "hinges in significant measure on the standard of review that this Court must apply given existing appellate authority" (ECF No. 42 at PageID.821). In this matter, the Court has twice held that rational basis scrutiny applies because the MSU vaccine policy does not implicate any fundamental right under the Constitution (see ECF Nos. 7, 42); *Midkiff v. Adams Cty. Reg'l Water Dist.*, 409 F.3d 758, 770 (6th Cir. 2005) ("If a protected class or fundamental right is involved, [the court] must apply strict scrutiny, but where no suspect class or fundamental right is

[2] At the beginning stages of this litigation, Plaintiff Norris was the only plaintiff in the matter. Plaintiff Ehm Rohrer were later added pursuant to the first amended complaint (ECF No. 55) after the Court had denied Plaintiff Norris's requests for a temporary restraining order and preliminary injunction.

implicated, [the court] must apply rational basis review.").

Although Plaintiffs still zealously assert that strict scrutiny applies, the Court is not persuaded. Plaintiffs urge the Court to distinguish the present matter from *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the landmark case regarding a smallpox vaccine mandate that has since then provided the basis for many other vaccine mandates. Yet, courts in numerous jurisdictions have applied *Jacobson* to the present-day COVID-19 vaccine mandates, and they have found that *Jacobson* requires a rational basis standard of review for such cases. *See, e.g., Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) ("Plaintiffs assert that the rational-basis standard used in *Jacobson* does not offer enough protection for their interests and that courts should not be as deferential to the decisions of public bodies as *Jacobson* was, but a court of appeals must apply the law established by the Supreme Court."); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) (stating that Jacobson "essentially applied a rational basis review"); *Bauer v. Summey*, __ F. Supp. 3d __, 2021 WL 4900922, at *10 (D.S.C. 2021) ("Since *Jacobson*, federal courts have consistently held that vaccine mandates do not implicate a fundamental right and, accordingly, applied rational basis review in

determining the constitutionality of such mandates.") (collecting cases).

Based on the binding Jacobson precedent and consistent case law regarding COVID-19 vaccine mandates, the Court again holds that rational basis scrutiny applies to this matter, which involves a generally applicable vaccine mandate that does not implicate fundamental rights protected under the Constitution.

However, in evaluating Plaintiff Norris's requests for a temporary restraining order and preliminary injunction, although the Court found that Plaintiff Norris was unlikely to succeed on the merits of her substantive due process claim after applying rational basis review, the Court is not inclined to dismiss this claim on a motion to dismiss. Plaintiffs' substantive due process claim asserts that MSU's vaccine policy violates Plaintiffs' liberty interests by forcing them to forgo their rights to bodily autonomy and to decline medical treatment. Because there is robust debate surrounding the efficacy of natural immunity versus vaccine immunity, the Court would prefer to hear further argument on whether MSU's vaccine policy does or does not survive rational basis review for failing to include an exemption for people who have acquired "natural immunity" to COVID from a previous infection. The Court will decide whether Count I survives Defendants' motion to dismiss

subsequent to additional oral argument before this Court.

B. Count II – Unconstitutional Conditions & Procedural Due Process

Plaintiffs also assert that the MSU vaccine policy violates the unconstitutional conditions doctrine because it coerces Plaintiffs into waiving a constitutional right (*see* ECF No. 55 at PageID.1229-34). Although Plaintiffs argue that they need not allege a violation of an enumerated right—that is, they argue that a violation of any constitutional right is sufficient to assert an unconstitutional conditions claim—the Court still finds this argument unpersuasive. Consequently, it cannot survive Defendants' motion to dismiss.

"Under the unconstitutional conditions doctrine, the government may not deny a benefit to a person on a basis that infringes a constitutionally protected right, even if the person has no entitlement to that benefit." *Thompson v. City of Oakwood*, 307 F. Supp. 3d 761, 778 (S.D. Ohio 2018) (citing *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 59 (2006)). This doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). For example, a California rule that required

anyone who sought to take advantage of a property tax exemption to sign a declaration stating that he or she would not advocate for the forcible overthrow of the federal government was a violation of the unconstitutional conditions doctrine. *See Speiser v. Randall*, 357 U.S. 513 (1958). Forcing individuals to waive their right to freedom of speech in this scenario to receive a tax exemption was a clear unconstitutional condition. *See id.* at 518. And although this doctrine is typically associated with enumerated rights, it may apply to coercion by the government involving any constitutional right. *See Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (holding that an Arizona statute that required an individual to reside in a county for at least one year as a condition for receiving nonemergency hospitalization or medical care at the county's expense was an unconstitutional condition that impeded on the right to interstate travel).

While the parties dispute whether this doctrine only applies to enumerated rights or whether it applies to any constitutional right, this dispute is immaterial. Based on *Maricopa County*, the Court finds that the unconstitutional conditions doctrine can indeed apply to governmental coercion encouraging the waiver of a non-enumerated right. However, what the parties have failed to observe is that there is no governmental *benefit* at issue in the

present matter. *See Thompson*, 307 F. Supp. 3d at 778 ("Under the unconstitutional conditions doctrine, the government may not deny a *benefit* to a person on a basis that infringes a constitutionally protected right, even if the person has no entitlement to that *benefit*.") (emphasis added). The MSU vaccine policy does not coerce Plaintiffs into waiving their constitutional rights to bodily autonomy and to decline medical treatment in order to receive a governmental benefit such as a tax exemption, medical treatment, or some sort of governmental funding. Instead, the "benefit" at issue here is Plaintiffs' employment at MSU, to which they are not constitutionally entitled (*see* ECF No. 7 at PageID.348) ("[D]ue to [Plaintiff Norris's] at-will employment status, she does not have a constitutionally protected property interest in her employment position."). Because of the lack of a governmental benefit at issue in this matter, the Court finds that Plaintiffs have failed to plead sufficient facts to allege a violation of the unconstitutional conditions doctrine to survive Defendants' motion to dismiss.

Also under Count II, Plaintiffs vaguely assert a violation of their procedural due process rights (*see* ECF No. 55 at PageID.1231-32, ¶¶ 166-71). Plaintiffs argue that there is a "concurrent" procedural due process violation along with an unconstitutional condition because MSU's vaccine policy "flip[s] the

burden of proof and require[s] Plaintiffs . . . to prove that it is safe for them to perform their respective jobs while unvaccinated" (*Id.* at PageID.1232, ¶ 171).

"In order to establish a procedural due process claim, a plaintiff must show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest." *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006). Defendants argue that Plaintiffs' procedural due process claim must be dismissed because Plaintiffs have failed to state a prima facie case for such a claim (ECF No. 60 at PageID.1363). Defendants assert that Plaintiffs have failed to show that a life, liberty, or property interest is at issue. Although Plaintiffs plead that they "possess a liberty interest in their bodily integrity, a property interest in their careers, and a statutory interest in informed consent" (ECF No. 55 at PageID.1229, ¶ 160), Defendants argue that these are legal conclusions that need not be accepted as true on a motion to dismiss.

Plaintiffs' procedural due process argument fails for numerous reasons. First, Plaintiffs failed to respond to this argument in their response to Defendants' motion to dismiss. "Where a party fails to respond to an argument in a motion to dismiss 'the

Court assumes he concedes this point and abandons the claim.'" *ARJN #3 v. Cooper*, 517 F. Supp. 3d 732, 750 (M.D. Tenn. 2021) (citing *Doe v. Bredesen*, 507 F.3d 998, 1007-08 (6th Cir. 2007)). Therefore, by failing to respond to Defendants' arguments regarding Plaintiffs' procedural due process claim, Plaintiffs have effectively abandoned this claim, and the Court will grant Defendants' motion to dismiss as to this claim.

Second, even if the Court evaluated the merits of Plaintiffs' procedural due process claim, it would still fail to survive Defendants' motion to dismiss. Plaintiffs cannot establish that the MSU vaccine policy forces them to forgo any constitutional right. And even if the Court found that the vaccine policy deprives Plaintiffs of their liberty interest in their bodily autonomy, they cannot show that they were deprived of adequate process.[3] Where a generally

[3] Plaintiffs also assert that they have a property interest in their careers. The Court has held multiple times that Plaintiffs possess no such constitutional interest in their employment at MSU (*see* ECF No. 7 at PageID.347; ECF No. 42 at PageID.822-23). Plaintiffs also assert that they have a "statutory interest" in informed consent. In the following section, the Court will explain why MSU's vaccine policy does not violate the EUA statute's informed consent requirement. Thus, neither of these alleged "interests" provide the requisite constitutional protection that a meritorious procedural due process claim requires. These interests will not help Plaintiffs' procedural due process claim survive Defendants' motion to dismiss.

applicable state rule applies to a large number of individuals, the Due Process Clause does not require that each person have an opportunity to be heard regarding the rule's adoption. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("When a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption."). Not only have Plaintiffs failed to allege exactly what "process" they have been denied, but they are likely not entitled to the type of process—i.e., a hearing—that they prefer.

Because Plaintiffs' have effectively abandoned their procedural due process violation claim and because they have failed to allege sufficient facts to support such a claim, the Court will grant Defendants' motion to dismiss this claim.

C. Count III – Supremacy Clause

Third, Defendants move to dismiss Count III of the first amended complaint. Plaintiffs argue that the federal EUA statute, 21 U.S.C. § 360bbb-3, mandates voluntary and informed consent because it requires individuals receiving an EUA-authorized vaccine to have the "option to accept or refuse administration of the product." *See id.* § 360bbb-3(e)(1)(A)(ii)(III). Plaintiffs further argue that the MSU vaccine policy "actually conflicts" with the EUA statute because it does not give employees the option to refuse

administration of the COVID-19 vaccine, which they argue leads to the conclusion that the policy is preempted pursuant to the Supremacy Clause (ECF No. 55 at PageID.1235).

The Court has already rejected the merits of this argument (*see* ECF No. 42 at PageID.825, n.2). The MSU vaccine policy does not preclude Plaintiffs from receiving informed consent regarding the COVID-19 vaccine, nor does it preclude Plaintiffs from refusing the vaccine. Plaintiffs may refuse administration of the vaccine, but pursuant to the MSU vaccine policy, they may also be terminated from MSU if they do so. The Court reiterates its reasoning from the order denying Plaintiffs' motion for a preliminary injunction: "[T]he vaccine is a condition of employment, which Plaintiff does not have a constitutionally protected interest in" (*Id.*). MSU's vaccine policy does not conflict with the EUA statute; this argument is without merit. The Court finds that Plaintiffs have failed to plead sufficient facts to allege a violation of the EUA, and in turn, a violation of the Supremacy Clause due to preemption.

Moreover, Defendants also moved to dismiss this argument because the EUA statute does not provide a private right of action (*see* ECF No. 60 at PageID.1365); 21 U.S.C. § 337(a) ("[A]ll . . . proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name

of the United States."). While Plaintiffs concede that the EUA does not provide a private right of action, they argue that they may seek injunctive relief to "cease the violation of their rights to informed consent" under the EUA (ECF No. 62 at PageID.1402). Even if the Court accepted this argument, it does not support sufficient facts to allege preemption. Consequently, Count III of Plaintiffs' first amended complaint must also be dismissed for this reason.

D. Plaintiffs' "Remaining Claims"

Finally, Defendants move to dismiss Plaintiffs' "remaining claims," arising out of the 1947 Nuremberg Code, Helsinki Declaration, and HHS Policy for Protection of Human Research Subjects (*see* ECF No. 60 at PageID.1368). In their response to the motion to dismiss, Plaintiffs noted that they cited these various international treaties to establish that the MSU vaccine policy "violates various principles of human rights law and are not in accord with constitutional or international norms," not because they are bringing claims under these treaties (ECF No. 62 at PageID.1406). The Court accepts this assertion. Because Plaintiffs are not seeking relief under these treaties, the Court need not "dismiss" these claims.

IV. Conclusion

The Court finds that Counts II and III of Plaintiffs' first amended complaint fail to withstand Defendants' motion to dismiss, and that the dismissal of Count I will be decided upon further argument. Accordingly,

IT IS HEREBY ORDERED that Defendants' motion to dismiss (ECF No. 59) is **GRANTED** as to Counts II and III and **RESERVED** as to Count I. Counts II and III are dismissed with prejudice.

IT IS FURTHER ORDERED that a notice of hearing on Count I of the motion to dismiss shall issue contemporaneously with this order.

IT IS SO ORDERED.

Date: January 21, 2022

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

Appendix E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

OPINION DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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

I.

A trial court may issue a preliminary injunction under Federal Rule of Civil Procedure 65. A district court has discretion to grant or deny preliminary

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

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

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

II.

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

The likelihood of success on the merits of Plaintiff's claim hinges in significant measure on the standard of review that this Court must apply given existing appellate authority. "If a protected class or fundamental right is involved, [the court] must apply strict scrutiny, but where no suspect class or fundamental right is implicated, [the court] must apply rational basis review." *Midkiff v. Adams Cty. Reg'l Water Dist.*, 409 F.3d 758, 770 (6th Cir. 2005). Because this Court finds that no fundamental right is implicated in the present matter, the Court must apply a rational basis standard.

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

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

rights to privacy and bodily autonomy, but if she chooses not to be vaccinated, she does not have the right to work at MSU at the same time (*see* ECF No. 7 at PageID.347-48) (discussing that Plaintiff, as an at-will employee, does not have a constitutionally protected property interest in her job). The MSU vaccine policy does not violate any of Plaintiff's fundamental rights.

Plaintiff attempted to distinguish her case from *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) but was unsuccessful. She argues that her case is different because *Jacobson* never considered natural immunity, and because the policy in *Jacobson* was subject to bicameralism and presentment to the Massachusetts legislature, while the MSU policy was not. First, the asserted factual differences between *Jacobson* and Plaintiff's case are not relevant. Over the last year and a half, courts have looked to *Jacobson* to infer that a rational basis standard applies to generally applicable vaccine mandates; the facts of the case are obviously not going to be identical to every COVID vaccine case that has been or is currently being litigated. *See, e.g., Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) ("Plaintiffs assert that the rational-basis standard used in Jacobson does not offer enough protection for their interests and that courts should not be as deferential to the decisions of public bodies as *Jacobson* was, but

a court of appeals must apply the law established by the Supreme Court."); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) (stating that *Jacobson* essentially applied a rational basis standard); *Harris v. Univ. of Mass., Lowell*, No. 21-cv-11244-DJC, 2021 WL 3848012 (D. Mass. Aug. 27, 2021) (applying rational basis to the university's "generally applicable public health measure[]"). This Court must apply the law from the Supreme Court: *Jacobson* essentially applied rational basis review and found that the vaccine mandate was rational in "protect[ing] the public health and public safety." 197 U.S. at 25-26. The Court cannot ignore this binding precedent.

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

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

[1] *See, e.g.*, *New CDC Study: Vaccination Offers Higher Protection Than Previous COVID-19 Infection*, CDC (Aug. 6, 2021, 1:00

failed to show that the MSU vaccine mandate does not meet rational basis. She is unlikely to succeed on the merits of her claim.[2]

PM), https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html. The Court also notes the letter from U.S. Senator Roger Marshall of Kansas, himself an M.D., and co-signed by fellow Doctors Caucus members of the House and Senate, urging the CDC to recognize COVID-19 natural immunity in future guidance policies. The letter references studies identifying the efficacy of natural immunity.

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

Finally, the Court notes a recent case out of the Central District of California: *Kheriaty v. Regents of the University of California*, No. 8:21-cv-01367 (C.D. Cal. Sept. 29, 2021). The facts of this case are very similar to the present case. In *Kheriaty*, a professor at the University of California claimed to be naturally immune to COVID-19 due to a COVID infection he suffered in 2020, just as Ms. Norris. *Id.* at 1. He sought an injunction preventing the University from enforcing its vaccine mandate against him because he alleged his prior infection gave him superior immunity to COVID than vaccinated individuals. *Id.* In denying Mr. Kheriaty's injunctive relief, the district court applied a rational basis standard under *Jacobson* and found that despite competing studies and evidence on natural immunity, it was not irrational for the University to implement a vaccine mandate. *Id.* at 8. The University relied on CDC guidance and clinical trials that supported the effectiveness of the COVID vaccine, which is enough to meet rational basis. *Id.* at 3. Specifically regarding competing evidence on natural immunity versus vaccine immunity, the court stated, "merely drawing different conclusions based on consideration of scientific evidence does not render the Vaccine Policy arbitrary and irrational." *Id.* at 10. Although the

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not have a constitutionally protected interest in. There is no preemption issue here.

Court recognizes that *Kheriaty* is merely persuasive authority, it strengthens the Court's position that a rational basis standard applies to the present matter and that a university policy choice in its vaccine mandate is not irrational.

B. Factor II: Irreparable Harm

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

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

C. Factors III & IV: The Equities

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

D. Balancing the Factors

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

Accordingly,

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

Date: October 8, 2021

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

Appendix F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEANNA NORRIS, Plaintiff,	)	
	)	No. 1:21-cv-756
-v-	)	
	)	HON. PAUL
	)	L. MALONEY
SAMUEL L. STANLEY, JR., ET AL., Defendants.	)	

ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER

This matter is before the Court on Plaintiff's motion for a temporary restraining order (ECF No. 3). Plaintiff's lawsuit challenges the constitutionality of the COVID-19 vaccine mandate for all Michigan State University ("MSU") employees, created and enforced by Samuel L. Stanley, Jr., President of MSU; Dianne Byrum, Chair of the Board of Trustees of MSU; Dan Kelly, Vice Chair of the Board of Trustees; Renee Jefferson, Pat O'Keefe, Brianna T. Schott, Kelly Tebay, and Rema Vessar, Members of the Board of

Trustees; and John and Jane Does 1-10 (collectively, "Defendants").

The decision to grant or deny a temporary restraining order falls within the discretion of a district court. *See Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) ("The district court's decision to grant a temporary restraining order, when appealable, is reviewed by this court for abuse of discretion."). Under Rule 65, a court may issue a temporary restraining order, without notice to the adverse party, only if two conditions are met. Fed. R. Civ. P. 65(b)(1). First, the moving party must establish specific facts through an affidavit or a verified complaint showing that an immediate and irreparable injury will result to the moving party before the adverse party can be heard in opposition to the motion. Fed. R. Civ. P. 65(b)(1)(A). Second, the counsel for the moving party must certify in writing any efforts made to give notice and the reasons why notice should not be required. Fed. R. Civ. P. 65(b)(1)(B). In addition, the court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party*, 543 F.3d at 361

(quoting *Northeast Ohio Coalition for Homeless and Service Employees Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)). The four factors are not prerequisites that must be met, but are interrelated concerns that must be balanced together. *See Northeast Ohio Coalition*, 467 F.3d at 1009.

The Court finds that Plaintiff has not met her burden.

Factor 1: Substantial Likelihood of Success on the Merits

Under the first factor, Plaintiff has not demonstrated a strong likelihood of success on the merits of her claim. The Plaintiff alleges a substantial likelihood of success on the merits on three grounds. First, she alleges that MSU's COVID-19 vaccine mandate violates her Ninth and Fourteenth Amendments right to privacy by forcing her to receive an unwanted and unnecessary vaccine. However, there is directly contradictory Supreme Court precedent. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court upheld a Massachusetts law that allowed cities to require residents to be vaccinated against smallpox based on the state's valid exercise of its police power to protect the health and safety of its citizens. *See id.* at 38. The Supreme Court further established a rational basis standard of review for vaccination mandates. *See generally id.*

Moreover, in a persuasive case recently decided in the U.S. District Court for the Northern District of Indiana, the district court denied the plaintiffs'—students at Indiana University—motion for preliminary injunction to prevent the university from enforcing its vaccine mandate for students. *See Klaassen v. Trs. of Indiana*, No. 1:21-CV-238 DRL, 2021 WL 3073926 (N.D. Ind., July 18, 2021). The district court conceded that although students retain the right to refuse unwanted medical treatment, the Fourteenth Amendment permits Indiana University to require its students to be vaccinated to protect the public health of its students, faculty, and staff. *See id.* at *46. And on appeal, the Seventh Circuit reiterated that under Jacobson, vaccination mandates are subject to a rational basis standard of review. *See Klaassen v. Trs. of Indiana*, No. 21-2326, 2021 WL 3281209, at *1 (7th Cir., Aug. 2, 2021). This Court finds the *Klaassen* opinion to be persuasive authority, as there is no binding Sixth Circuit precedent to consult.

Plaintiff's second argument that she has a substantial likelihood of success on the merits rests on the Due Process Clause of the Fourteenth Amendment in that no state may "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, sec. 1. Although Plaintiff does not directly assert that she is a for-

cause employee, she does argue that she has a property interest in her employment and benefits at MSU and thus cannot be denied this position without due process of the law—i.e., for refusing to receive the COVID-19 vaccine and being terminated as a result. In Michigan, it is presumed that Plaintiff is an at-will employee. *See Lytle v. Malady*, 579 N.W.2d 906, 910 (Mich. 1998) ("Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party."). Therefore, due to Plaintiff's at-will employment status, she does not have a constitutionally protected property interest in her employment position and this claim is without merit. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972).

Third and finally, Plaintiff argues that she demonstrated a substantial likelihood of success on the merits because MSU's vaccine mandate fails to give her the option to refuse the vaccine under the federal Emergency Use Authorization ("EUA") statute. *See* 21 U.S.C. § 360bbb-3. Under the EUA, the FDA can issue the emergency use of a vaccine that has not yet received FDA approval, licensing, or been cleared for commercial distribution due to a potential emergency. *See id*. § 360bbb-3(a)(2). However, the EUA further requires that in such a scenario, one of the conditions of the authorization of an unapproved product is to allow the individual to whom the product

is administered to be given "the option to accept or refuse administration of the product." *Id*. § 360bbb-3(e)(1)(A)(ii)(III). Here, Plaintiff alleges that she has not been given the option to refuse administration of the COVID-19 vaccine. However, on August 23, 2021, the FDA approved the Pfizer Comirnaty COVID19 Vaccine. *See FDA Approves First COVID-19 Vaccine*, FDA (Aug. 23, 2021), https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine. Consequently, should Plaintiff be offered the FDA-approved Pfizer Comirnaty vaccine, her argument under the EUA statute would be moot, as she would not be entitled the option to refuse the vaccine. Thus, Plaintiff has failed to demonstrate a substantial likelihood of success on the merits on EUA grounds as well.

Taking all of these arguments into consideration, because Plaintiff does not have a constitutionally protected property interest in her employment position at MSU and is not being denied any constitutional rights under the Fourteenth Amendment, nor is employment a fundamental right under the United States Constitution, this matter will receive rational basis scrutiny. See League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 128 (6th Cir. 2020) (explaining that Governor Whitmer's COVID executive orders merely required a "rational speculation" standard that only

offered conceivable support). And for Plaintiff to win under this standard of review, Plaintiff must show that MSU's vaccine mandate is not rationally related to a legitimate governmental interest, i.e., the health and safety of the public. Plaintiff is unlikely to win under rational basis review. Therefore, at this stage, Plaintiff has not shown a substantial likelihood of success on the merits.

Factor 2: Showing of Irreparable Injury

Further, under the second factor, Plaintiff has failed to show irreparable harm that will befall her before Defendants have an opportunity to respond to be granted a temporary restraining order. *See* Fed. R. Civ. P. 65(b)(1)(A).

In Plaintiff's eyes, she has two options: receive the COVID-19 vaccine and give up her constitutionally protected rights to bodily autonomy and privacy, or refuse to receive the COVID-19 vaccine and risk termination of her job, a constitutionally protected property interest. As such, Plaintiff argues that in either option, her constitutional rights will be infringed upon, causing her an irreparable harm. But Plaintiff misconstrues what an irreparable harm is. An irreparable harm is an extraordinary harm—one that cannot be fully compensated by money damages. *See Winter v. NRDC*, 555 U.S. 7, 22 (2008). If Plaintiff can be properly compensated by monetary damages,

she cannot show that she is facing an irreparable harm necessary to receive a temporary restraining order.

As Plaintiff will not receive the COVID-19 vaccine by August 31, 2021, she could consequently be terminated by MSU for failing to receive the vaccine. And if this Court determines during litigation that Plaintiff was wrongfully terminated, Plaintiff would indeed have proper monetary compensation: her lost wages and benefits she did not receive during her period of wrongful termination. These lost wages and benefits can be calculated to an exact amount and are not speculative enough to warrant a temporary restraining order. Therefore, Plaintiff has failed to show that she faces an irreparable injury in the event that MSU terminates Plaintiff's employment.

Accordingly, because Plaintiff failed to show that she is substantially likely to succeed on the merits of this case and that she will face an irreparable injury not compensable by monetary damages, this Court need not address the public interest factor in Plaintiff's requested temporary restraining order. Plaintiff's motion for a temporary restraining order must be denied. Therefore,

IT IS HEREBY ORDERED that Plaintiff must serve a copy of her complaint (ECF No. 1), a copy of her motion for a temporary restraining order (ECF

No. 3), and a copy of this Order on Defendants as soon as reasonably possible and no later than Friday, September 3, 2021, by 5:00 pm. Plaintiff must also serve the Defendants with a proof of service and file a proof of service with this Court as soon as reasonably possible.

IT IS FURTHER ORDERED that Defendants must file a response to the motion for a preliminary injunction no later than Friday, September 10, 2021, by 5:00 pm, and Plaintiff may file a reply brief by Wednesday, September 15, 2021, by 5:00 pm.

IT IS FURTHER ORDERED that the Parties shall appear for a hearing on the preliminary injunction on Wednesday, September 22, 2021, at 9:00 am at the Federal Building, 410 W. Michigan Ave., Kalamazoo, MI 49007.

IT IS SO ORDERED

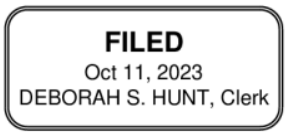
Date: August 31, 2021

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

Appendix G

No. 22-1200

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



JEANNA NORRIS; KRAIG EHM;) D'ANN ROHRER,	)	
Plaintiffs-Appellants,	)	
v.	)	
	)	O R D E R
SAMUEL L. STANLEY, JR., IN HIS OFFICIAL CAPACITY) AS PRESIDENT OF MICHIGAN STATE UNIVERSITY, ET AL.,	)	
Defendants-Appellees.	)	

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

The court received a petition for rehearing en banc. The original panel has reviewed the petition for

rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk