UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Professor Russell Stewart,

Plaintiff,

vs.

TIMOTHY WALZ, Governor of the State of Minnesota, in his official capacity, et al.,

Defendants.

Case No. 25-cv-01330 (KMM/LIB)

MEMORANDUM OF LAW IN OPPOSING DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION AND FACTUAL BACKGROUND

In August of 2021, Timothy J. Walz, Governor of the State of Minnesota, through the Minnesota Department of Management and Budget (MMB), issued Policy # 1446 which required all State employees, including Plaintiff, to receive a Covid-19 vaccine or undergo *at least* weekly testing. *See* Compl., ECF 1, ¶¶ 56, 59. Because under Minnesota state law, Governor Walz was powerless to impose any vaccine or testing mandate on the general population,[1] he did the "next best thing," and conditioned state employment upon compliance with Policy # 1446. ECF 1, ¶ 67; *see, e.g.*, Peter Callaghan, *Why Gov. Tim Walz Couldn't Impose a Vaccine Mandate for Minnesota—Even if He Still Had Emergency Powers*, MINNPOST (Oct. 6, 2021), https://tinyurl.com/y2cwdu49 (last viewed June 5, 2025).

Professor Stewart began teaching at Lake Superior College (LSC), a publicly funded member of the Minnesota State Colleges and Universities System, in September of 1992, becoming an unlimited (equivalent of tenured) full-time faculty member in 1995. *See* ECF 1, ¶¶ 48, 71. He taught ethics, logic, introduction to philosophy, political philosophy, philosophy of religion, critical thinking, and environmental ethics courses. *See id.* ¶ 48. Prior to September of 2021, Professor Stewart had not been subjected to any work-related discipline and was held in high regard by peers and students alike. *See id.* ¶ 50. From the onset of the Covid-19 pandemic, Professor Stewart paid close attention to news about the issue and became

[1] The state law in question, titled "Refusal of Treatment," provides that even during a state of emergency, "individuals have a fundamental right to refuse medical treatment, testing, physical or mental examination, vaccination, participation in experimental procedures and protocols, collection of specimens, and preventive treatment programs." Minn. Stat. § 12.39.

increasingly troubled by the changing narrative from government agencies, as well as misguided, authoritarian, and unlawful policy responses. *See id.* ¶ 51.

In mid- to late- August 2021, Professor Stewart received an email from the LSC Administration informing him that he was required, consistent with Policy # 1446, to receive a Covid-19 vaccination by September 8, 2021, or else to undergo at least weekly testing. *See id.* ¶ 72. He was further required to submit a form attesting to his vaccination status and to permit his "data, including [his] information and [his] specimen, [to] be collected, shared, used and retained by [his] agency as detailed in HR/LR Policy # 1446 COVID-19…." *See id.* ¶¶ 72-73. On or around September 10, 2021, Professor Stewart submitted an Attestation Form indicating that he refused to reveal his vaccination status and did not consent to Policy # 1446. *See id.* ¶ 74.

Defendant Linda Kingston, Vice President of Academic and Student Affairs, scheduled a meeting for September 27 to address Professor Stewart's noncompliance with Policy # 1446. *See id.* ¶ 75. In an email, Professor Stewart explained that he objected to Policy # 1446 because the Governor and the MMB lacked the statutory and constitutional authority to impose it, and because it was otherwise unlawful, arbitrary, coercive, and violative of sacrosanct rights to bodily autonomy and privacy. *See id.* ¶ 76.

In addition to Professor Stewart and Dr. Kingston, Director of Human Resources Jestina Vichorek, and union representative Damon Kapke, were present at the September 27th meeting. *See id.* ¶ 77. Ms. Vichorek informed Professor Stewart that he would be placed on unpaid leave and remain on that status until he came into compliance with Policy # 1446. *See id.* ¶ 83. He was barred from teaching his classes. *See id.* ¶ 83. In response to Professor

Stewart's objections that this directive ran afoul of LSC's contractual obligations regarding disciplinary actions, Ms. Vichorek stated that her directive was neither a disciplinary measure nor termination of Professor Stewart's employment. *See id.* ¶ 84. At no point during that meeting, which was recorded, or at any other point during that day or at any preceding time, was Professor Stewart instructed not to contact his students or use his LSC email address. *See id.* ¶ 86. To the contrary, when Professor Stewart explicitly inquired whether he would retain access to his work email, Ms. Vichorek responded that this issue had not yet been decided. *See id.* ¶ 85.

Later that day, Professor Stewart sent his students an email explaining that he had been placed on unpaid leave and excluded from the LSC campus because of his refusal to comply with Policy # 1446. *See id.* ¶ 87. The email, which was attached to the Complaint as Exhibit B, reads in full (excluding greeting and signature):

> I'm writing to inform you that I have been placed on no-pay status and excluded from the LSC campus workplace because I have refused to comply with a recently imposed policy that requires that all employees of the state of Minnesota provide proof that they have been fully vaccinated against COVID-19 or submit to a weekly COVID-19 test.
>
> You can view the policy here: Policy 1446.
>
> I am not opposed to vaccines in general or COVID-19 vaccines in particular. However, I believe that Policy 1446 is unlawful and arbitrary. It is also immoral in that it deploys workplace coercion to undermine the sacrosanct rights of medical autonomy, bodily self-determination, and privacy. The imposition of this policy has demoralized staff and faculty at Lake Superior College has contributed to the damaging polarization that now divides our society.

> Governor Walz and the office of Minnesota Management and Budget (the department charged with development and oversight of the policy) have neither statutory nor Constitutional authority to impose the requirements specified in Policy 1446. Furthermore, the state of Minnesota is not currently under a Peacetime Emergency, so any powers assumed by the Governor under such terms are now null and void. Finally, my employment contract contains no provision authorizing the imposition of the requirements of Policy 1446.
>
> We are supposed to live in a nation and a state governed by the rule of law. Laws must be duly enacted under the provisions of the Federal and State Constitutions, and must not violate individual rights. The arbitrary whims of politicians and bureaucrats cannot form the basis for civil society, yet that is the direction the state of Minnesota has taken under the Governorship of Tim Walz. It is shameful.
>
> This is my 30th year teaching at this institution. It has been a pleasure to serve thousands of students over those many years. I love my work and I wish that I could continue to teach my classes but the administration has forbidden that. I am deeply sorry that it has come to this, but I refuse to be coerced into doing something that violates fundamental rights.
>
> I know you will have many questions. I will not be in a position to answer them. In many ways I am as shocked and puzzled as you are.
>
> I don't know when or if I will be allowed to resume my teaching duties. In the meantime I wish you all the best. I encourage you to pay attention to the world around you and think hard about what you see and hear.

See id. ¶¶ 87-89; *id.* Ex. 2, at 13.

The following day (September 28), Ms. Vichorek sent Professor Stewart an email that, *inter alia*, informed him his access to email was being removed until and unless he came into compliance with Policy # 1446. *See id.* ¶ 90. It was nearly a week later, on October 4, when Ms. Vichorek sent Professor Stewart *another* email accusing him of misconduct not only for

failing to comply with Policy # 1446, but for sending the September 27 email, which she claimed was unprofessional and inappropriate, and constituted inappropriate and unauthorized use of state property. *See id.* ¶ 91. Another disciplinary hearing was scheduled to address both issues (the email and noncompliance with Policy # 1446). Following the meeting (which took place over Zoom), LSC's Vice President Alan Finlayson sent a letter to Professor Stewart which stated that Professor Stewart committed misconduct because he had sent the email to students despite having been instructed not to contact his students regarding his teaching status. *See id.* ¶¶ 96-97. (Of course, no such instruction was given. *See id.* ¶ 96.) Mr. Finlayson claimed that Professor Stewart's September 27 email bore "no relation to the College's academic mission" and caused a "significant disruption of the students' learning environment and interfered with the College's educational mission." *See id.* ¶¶ 98-99. As Professor Stewart continued to refuse to comply with Policy # 1446, he was subject to additional disciplinary hearings and remained on unpaid leave during the remainder of 2021. *See id.* ¶¶ 100-114.

At the beginning of December 2021, Professor Stewart contracted Covid-19. *See id.* ¶ 115. In January 2022, in the midst of ongoing disciplinary hearings, he inquired of Ms. Vichorek whether there were exemptions for those with naturally acquired immunity, with the obvious implication that he had such immunity. *See id.* ¶¶ 116-117. Ms. Vichorek responded that Policy # 1446, which provided only for religious exemptions, had not been revised. *See id.* ¶ 118.

Ultimately, on March 10, 2022, Professor Stewart's employment with LSC was terminated. *See id.* ¶¶ 134-136.

Professor Stewart filed his Complaint on April 9, 2025, alleging violations of his constitutional rights to free speech, due process, and equal protection stemming from the disciplinary action taken against him for refusing to comply with Policy # 1446 and the email sent to his students. *See* ECF 1.

LEGAL STANDARDS

A complaint survives a Rule 12(b)(6) motion to dismiss if its nonconclusory allegations, accepted as true, make it plausible that the plaintiff is entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 680-81 (2009). The court ordinary does not consider matters outside of the pleadings but may consider exhibits attached to the Complaint because "documents necessarily embraced by the complaint are not matters outside the pleading[s]." *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017). *See also Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003). "[D]ocuments [such as public records] whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading[s]," are "necessarily embraced by the complaint." *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012). *See also Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007). A plaintiff need not provide specific facts in support of his allegations, *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (*per curiam*), but "must include sufficient factual information to provide the 'grounds' on which the claim rests, and to raise a right to relief above a speculative level." *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008). The court is obliged to make "all reasonable inferences in favor of the nonmoving party." *Usenko v. MEMC LLC*, 926 F.3d 468, 472 (8th Cir. 2019). Here, that is Professor Stewart.

ARGUMENT

The Court should deny Defendants' motion to dismiss because the cited caselaw does not support their arguments, and accepting Defendants' arguments would require this Court to resolve factual disputes—contrary to the standards governing motions under Fed. R. Civ. P. 12(b)(6).

I. THE GOVERNOR IS A PROPER DEFENDANT

Defendants argue that the Governor is not a proper party to this lawsuit because he was not Professor Stewart's employer and Policy # 1446 was formalized by the MMB rather than the Governor. *See* Defs.' Mem. in Supp. of Mot. to Dismiss, ECF 14, at 5. Defendants appear to admit that Plaintiff plausibly alleges that MMB formalized Policy # 1446, presumably suggesting that the MMB rather than the Governor is the proper party to this lawsuit. This argument, which notably includes no supporting case citations, misses the mark for a few reasons.

Under the Minnesota State Constitution, the Governor "is commander-in-chief of the military and naval forces and may call them out to execute the laws," and is obligated to "take care that the laws be faithfully executed." MINN. CONST. art V, § 3. The Department of Management and Budget is a state agency, part of the executive branch, and accordingly operates under the authority of the Governor. Minn. Stat. § 15.01 (designating MMB as one of twenty "departments."). The MMB memo laying out Policy # 1446 directs state agencies to require their employees either to get a Covid-19 vaccine or to undergo frequent testing. When announcing issuance of the policy, Governor Walz declared that Minnesota "is leading by example and working to get our public employees vaccinated to protect themselves, their

coworkers, and their communities. With this action, we're joining businesses and colleges across the state who have taken this important step, and I urge other employers to do the same." *Governor Walz Announces Vaccination Requirements for State Agency Employees*, OFF. OF GOVERNOR TIM WALZ & LT. GOVERNOR PEGGY FLANAGAN (Aug. 11, 2021), https://tinyurl.com/3es8m6ca. In statements to the press, Governor Walz's staff invoked his authority as an employer to require state workers to either be vaccinated or get tested frequently. *See* Callaghan, MINNPOST, *supra*. Furthermore, under Minnesota law, the Governor has unfettered authority to remove a commissioner of any of the executive branch agencies, including MMB. *See* Minn. Stat. § 15.06(2) ("A commissioner shall serve at the pleasure of the appointing authority."); *Rico v. State*, 472 N.W.2d 100, 105 (Minn. 1991) (noting governor's "authority to choose the top leaders in the administration—and accordingly also to remove them" because such authority "is essential to effectuate the governor's public policy goals."). A policy promulgated by the MMB necessarily "effectuate[s] the governor's public policy goals," *Rico*, 472 N.W.2d at 105, and the Governor is both politically and legally responsible for such policies.[2] Thus, and contrary to Defendants' protestations, the Complaint's allegations *vis-à-vis* Governor Walz rest on much "more than Plaintiff's assertion that the Governor was responsible for" the challenged policy. *See* ECF 14 at 5-6.

The facts alleged in the Complaint establish that Governor Walz has the constitutional authority to enforce laws (and presumably rules and regulations, including Policy # 1446); that he himself believed he was responsible for issuing Policy # 1446, since he relied on his

[2] It is therefore not surprising that Governor Walz took credit for the challenged policy. Callaghan, MINNPOST, *supra*.

authority as state employer to do so and conveyed that message to the press; and that MMB operated as part of the executive branch, answerable to him. *See Willis Electric Co. v. Polygroup Macau Ltd. (BVI)*, 437 F. Supp. 3d 693, 707 (D. Minn. 2020) (citing *Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 853 (8th Cir. 2010) (explaining that, when determining whether a complaint states a facially plausible claim, the court must accept as true the factual allegations in it and draw all reasonable inferences in the plaintiff's favor)). Had, for example, MMB failed to promulgate COVID-related policies supported by the Governor, Governor Walz had the authority to replace MMB's Commissioner. *See* Minn. Stat. § 15.06(2), (4). Given that he formulated the policy that led to Plaintiff's termination and had authority to enforce it, he is an appropriate defendant in this lawsuit. *See Ex parte Young*, 209 U.S. 123, 157 (1908) ("The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists."); *Papasan v. Allain*, 478 U.S. 265, 282 n.14 (1986) (holding that a state official who, by virtue of state law, is "responsible for 'general supervision' of the administration" of law, is a proper respondent in an action that alleges violation of the Equal Protection Clause by officials under his supervision); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006) (holding that the Governor and Attorney General's broad power to enforce the state constitution and laws made them subject to the *Ex parte Young* exception); *Northland Baptist Church of St. Paul v. Walz*, 530 F.Supp.3d 790, 804 (D. Minn. 2021) (holding that Gov. Walz's ability to direct the Attorney General to enforce his COVID executive orders was enough connection to enforcement at the motion-to-dismiss stage); *Luckey v. Harris*, 860 F.2d 1012, 1016 (11th Cir.

1988) (holding that governor was a proper defendant in lawsuit alleging violations of constitutional rights stemming from deficiencies in Georgia's criminal justice system, because he possessed authority to commence prosecutions and direct Georgia's Attorney General to institute and prosecute actions on the State's behalf).[3]

II. PLAINTIFF'S DUE PROCESS CLAIM WARRANTS HEIGHTENED SCRUTINY

Defendants' primary argument against Plaintiff's due process claim is that it is governed by *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)—a case that in the early days of the 20th century sustained a Massachusetts law requiring smallpox vaccination (on the pain of a small fine) against a constitutional attack. Defendants' argument fails for two principal reasons.

First, because by the time Policy # 1446 was promulgated (not to mention enforced), Minnesota was no longer in a state of emergency, *Jacobson* ceased being the correct reference point for analysis. In the Eighth Circuit, laws or executive orders can be analyzed under the deferential rational basis scrutiny if they were passed and enforced due to an emerging public health emergency that was "rapidly developing, poorly understood, and in need of immediate and decisive action." *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 726-27 (8th Cir. 2022) (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18, 21 (2020)). However, once the emergency has dissipated, judicial review becomes more searching. *Id.* By the second half of

[3] Were this Court to hold that Governor Walz is not a proper party to this suit (though Plaintiff maintains that the facts alleged are sufficient to continue the suit against the Governor), the Court should grant Plaintiff leave to amend the Complaint (or leave to file a motion for leave to amend) to add the MMB and its Commissioner as Defendants. *See* Fed. R. Civ. P. 19(a)(1)(A) (providing for joinder of additional parties to allow for compete relief); Fed. R. Civ. P. 15(a)(2) (providing that leave to amend a pleading should be freely given when justice so requires). Plaintiff opposes any such argument because his claims against any State Defendant sufficiently connected to the enforcement of the policy against him are meritorious, for the reasons stated herein. *See infra* Sections II-V.

2021 and certainly in 2022, governments could not rely on a claimed Covid-19 emergency and *Jacobson* to justify otherwise unlawful deprivations of rights.

Second, even if this Court were to view the Complaint through the lens of *Jacobson*, it should do so by carefully parsing that decision, instead of adopting Defendants' overbroad argument that *Jacobson* endorsed all vaccine mandates for all times. Even a cursory examination of *Jacobson* shows that such broad reading is erroneous, and it is especially problematic in light of subsequent Supreme Court authority. There are several reasons why *Jacobson*, while still binding precedent, does not stand for the proposition that Plaintiff's due process challenge to Policy # 1446 is subject to the lowest level of judicial scrutiny. And while other courts made contrary holdings, *see, e.g.*, *Norris v. Stanley*, 73 F.4th 431 (6th Cir. 2023); *Kheriaty v. Regents of the Univ. of Cal.*, No. 22-55001, 2022 WL 17175070 (9th Cir. 2022), none of the faulty decisions from other circuits are binding on this Court, which should reject their reasoning on the grounds laid out below.

For either of the above reasons, this Court should reject Defendants' unwarranted reliance on *Jacobson*.

A. Under the Precedent of this Circuit, Jacobson Does Not Apply to a Mandate Imposed Long After the Initial Emergency Has Passed

Defendants acknowledge that in this Circuit *Jacobson* does not apply long after an initial emergency has passed but maintain that the circumstances present when Governor Walz implemented Policy # 1446 constituted an "ongoing public health crisis" as the Delta variant of Covid-19 proliferated. *See* ECF 14, at 8. Defendants misunderstand both the nature of Plaintiff's claim and the standards governing their own motion.

First, in his Complaint, Professor Stewart explicitly requested that this Court provide him with injunctive relief requiring his reinstatement to the position he held at LSC prior to his unlawful termination. *See* ECF 1, at 47. The law of this Circuit is clear—*Jacobson* may have been "the best guide for navigating constitutional challenges to emergency public health initiatives," but as "[t]he public health crisis ha[d] since evolved, and time [became] available for more reasoned and less immediate decision-making by public health officials," "the constitutional lens shifted from *Jacobson* deference to the modern tiers of scrutiny." *Heights Apartments,* 30 F.4th at 726-27.

In *Heights Apartments*, the Eighth Circuit addressed the Governor's eviction moratorium, initially imposed in March of 2020—at the very start of the pandemic. Without specifying the precise time period during which *Jacobson* applies, the court held that:

> [S]ome of the damages [the plaintiff] allegedly suffered likely occurred during the public health crisis when *Jacobson* deference would be applicable. Some likely occurred after the immediate public health crisis dissipated, and traditional levels of scrutiny are applicable. It is a factual determination left to the district court on remand to resolve when during the pandemic the constitutional lens shifted from *Jacobson* deference to the modern tiers of scrutiny.

Id. at 727 (citations omitted). The court also explained the rationale for applying *Jacobson* "in the early days of the pandemic":

> Much was unknown at that time—governmental leaders were acting on the best information available and needed to move quickly given the nature of the emergency. At a time when local authorities were confronted with a public health crisis that was rapidly developing, poorly understood, and in need of immediate and decisive action, *Jacobson* seemed to be the best guide for navigating constitutional challenges to emergency public health initiatives. The public health crisis has since evolved, and time is available for more reasoned and less immediate decision-making

> by public health officials. In addition, the Supreme Court has since given guidance that is instructive regarding our standard of review during public health crises.

Id. at 726-27.

Notably, the court issued the *Heights Apartments* decision in April 2022, about a month after Professor Stewart was terminated from his position at LSC. The court never mentioned the Delta variant as a reason to consider the immediate public health crisis ongoing; to the contrary, it clearly considered any emergency to have long passed. As in *Heights Apartments*, by the time Governor Walz announced his office was mandating the Covid-19 vaccine in August of 2021, "time [was] available for more reasoned and less immediate decision-making." *Id.* at 727. Indeed, the legislature had ended the state of emergency in Minnesota by this time (in July 2021), and so no one in government was even claiming the existence of a public health crisis that justified suspending traditional constitutional protections.[4]

In view of this reasoning, Defendants' contention that *Jacobson* resolves Plaintiff's claims is unavailing. Because Policy # 1446 was promulgated after the state of emergency had been lifted, it must be analyzed by reference to traditional levels of judicial scrutiny. And in the absence of what the Eighth Circuit dubbed "*Jacobson* deference," the applicable analysis should take into account the bedrock common law principles of bodily autonomy. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) ("At common law, even the touching of one person by another without consent and without legal justification was a battery."); *Mills v.*

[4] In fact, the Eighth Circuit's reasoning strongly implies that the "public health crisis" was even *shorter* in duration than Governor Walz's assertion of a public health "emergency," which itself still ended months before this case arose. The Eighth Circuit directly cited *Tandon v. Newsom*, 593 U.S. 61 (2021) as standing for the premise that *Jacobson* no longer applied. *Heights Apartments*, 30 F.4th at 727. That case was decided on April 9, 2021, well before Professor Stewart's termination.

Rogers, 457 U.S. 291, 294 n.4 (1982) ("Under the common law of torts, the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician."); *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914) (Cardozo, J.) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."). A limitation on this basic right to bodily autonomy—a right hallowed by this Nation's "history and traditions," *see Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)—must, at a minimum, be subjected to heightened judicial scrutiny.

Policy # 1446 plainly fails that test, because it requires employees to receive undesired medical testing and vaccination on pain of losing their jobs, despite providing *no benefit* to any third party from such intrusions on bodily autonomy. It is also worth noting that the State of Minnesota itself explicitly recognizes its citizens' fundamental liberty interest in refusing vaccination, medication, and testing. *See* Minn. Stat. § 12.39 ("[I]ndividuals have a *fundamental* right to refuse medical treatment, *testing*, physical or mental examination, *vaccination*, participation in experimental procedures and protocols, *collection of specimens*, and preventive treatment programs.") (emphases added). This law (titled "Refusal of Treatment") acknowledges that requiring vaccination—*especially* in the case of a relatively new, minimally tested vaccine for someone who has naturally acquired immunity—and testing and collection of specimens—are not *de minimis* intrusions, despite Defendants' attempts to characterize them as such. It is because of this statute that Governor Walz acknowledged he could not have directly imposed a vaccination/testing mandate on Minnesotans. But the federal constitution

also protects this selfsame right to bodily autonomy, and Governor Walz cannot circumvent his own State's statutory limits by transgressing Professor Stewart's federal constitutional rights. Simply put, Defendants cannot make state employment conditional upon surrendering these constitutionally protected liberty interests in bodily autonomy. *See infra* Part II.C-D.

At this point, the Court must credit Plaintiff's allegations that, as a factual matter, at the time Policy # 1446 was promulgated and enforced, the "immediate public health crisis dissipated, and [therefore] traditional levels of scrutiny [rather than *Jacobson* deference] are applicable" to Plaintiff's claims. *See Heights Apartments*, 30 F.4th at 727.[5]

B. Jacobson Did Not, in Fact, Apply Rational Basis Review to Massachusetts' Smallpox Vaccine Mandate

Even were this Court to apply *Jacobson*, it should not use that case as a shibboleth, the mere invocation of which immediately puts all vaccine mandates beyond review. At the very least, the Court should recognize that *Jacobson* was decided before the Supreme Court adopted the tiers of scrutiny with which modern lawyers are familiar. *See Roman Cath. Diocese of Brooklyn*, 592 U.S. at 23 (Gorsuch, J., concurring) (noting that "*Jacobson* pre-dated the modern tiers of scrutiny."). *See also* Josh Blackman, *The Irrepressible Myth of* Jacobson v. Massachusetts, 70 Buff. L. Rev. 131, 141 (2022) ("At the time [*Jacobson* was decided], there were no tiers of scrutiny,

[5] To the extent that there is a factual dispute whether the emergency was or wasn't truly over, such factual disputes are not amenable to resolution at the motion to dismiss stage. *See Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 666 (8th Cir. 2001) ("[N]either the district court, nor we, can conduct a battle of experts on a motion to dismiss. Rather, we must assume the truth of the allegations pleaded with particularity in the complaint. The strong-inference pleading standard does not license us to resolve disputed facts at this stage of the case.")

the Supreme Court did not distinguish between fundamental and nonfundamental rights, and the Bill of Rights had not yet been incorporated.").[6]

Additionally, contrary to the flawed Covid-era decisions of several courts, were one to overlay the modern tiers of scrutiny on *Jacobson*, the conclusion is inescapable that the Court engaged in something more robust than mere rational-basis review. *Jacobson* explicitly required the government to demonstrate a "substantial relation" between its articulated goal and the law in question, 197 U.S. at 31, and recognized the "inherent right of every freeman to care for his own body and health in such way as to him seems best[.]" *Id.* at 26. That is a far more exacting standard than rational basis, which requires only that the government posit some interest and a rational connection between the challenged law and the alleged interest. Put otherwise, a "substantial relation" is a higher bar than a "rational connection." *See generally FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955).

Unlike the rational basis test, which does not entail *any* assessment of the individual's liberty rights, the *Jacobson* Court considered the significant liberty interests at stake, explaining that it was balancing Henning Jacobson's liberty interest in declining the unwanted vaccine against the State's interest in preventing smallpox from spreading. *Jacobson*, 197 U.S. at 37-38. It was only because "the spread of smallpox" "imperiled an entire population," that the State's interest in "stamp[ing] out the disease of smallpox" (via vaccine mandate) outweighed Rev. Jacobson's liberty interests. *Id.* at 30-32. *See also In re Cincinnati Radiation Litig.*, 874 F. Supp.

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

796, 813 & n.12 (S.D. Ohio 1995) (explaining that, although *Jacobson* upheld compulsory vaccination, it had done so while "acknowledg[ing] that an aspect of fundamental liberty was at stake and that the government's burden was to provide more than minimal justification for its action.").

Properly read then, *Jacobson* requires that *at a minimum*, Defendants articulate a "substantial relation" (rather than merely a "rational" one) between the Covid vaccine mandate and "protection of the public health and the public safety." 197 U.S. at 31. That standard is beyond debate, since the Court used this precise language in its decision. Thus, *Jacobson* did not employ the equivalent of rational-basis analysis.

C. Subsequent Supreme Court Case Law Heightened Protections for Bodily Autonomy that Originated in the Common Law

Though the *Jacobson* Court permitted Massachusetts to impose a vaccination requirement on individuals "residing or remaining in any city or town where smallpox is prevalent," *id.* at 37, it also recognized "the inherent right of every freeman to care for his own body and health in such way as to him seems best." *Id.* at 26. This concession is not surprising because this idea long pre-dates the Constitution. *See, e.g.*, John Locke, Second Treatise of Government § 27 (1690) ("[E]very man has a property in his own person: this no body [*sic*] has any right to but himself.").

The *Jacobson* Court was surely cognizant of the fact that "[a]t common law, even the touching of one person by another without consent and without legal justification was a battery." *Cruzan*, 497 U.S. at 269. *Cf. Mills*, 457 U.S. at 299 (acknowledging constitutional right to "unwanted administration" of certain drugs); *Schloendorff*, 211 N.Y. at 129-30 (1914) (comparing forced surgery to assault). Over the subsequent century, the Supreme Court has

reaffirmed this principle on numerous occasions. It is beyond peradventure, then, that Americans possess a constitutionally protected liberty interest in consenting to treatment and refusing unwanted medication. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Vacco v. Quill*, 521 U.S. 793, 807 (1997); *Washington v. Harper*, 494 U.S. 210, 229 (1990); *Mills*, 457 U.S. at 299.

Even assuming *arguendo* (and *dubitante*) that the *Jacobson* Court applied only the equivalent of rational basis scrutiny, subsequent case law recognized that vaccine mandates implicate the fundamental, constitutional right to refuse medical treatment derived from the "well-established, traditional rights to bodily integrity and freedom from unwanted touching." *Vacco*, 521 U.S. at 807. (citing *Cruzan*, 497 U.S. at 278–79). This right is also "implicit in the concept of ordered liberty," *Glucksberg*, 521 U.S. at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969)), and it has been recognized as universal in *United States v. Brandt* (Nuremberg Military Tribunal, Case 1). In that case, also known as the Doctors' Trial, American military judges wrote that when evaluating the propriety of a medical procedure, "[t]he voluntary consent of the human subject is absolutely essential." Judgment at 181 (Aug. 19, 1947), *available at* https://tinyurl.com/3zvjmrdy (last visited July 7, 2025).

The Supreme Court reaffirmed that "[a] forcible injection … into a nonconsenting person's body represents a substantial interference with that person's liberty." *Harper*, 494 U.S. at 229. *See also id.* at 221-22 ("We have no doubt that, in addition to the liberty interest created by the State's Policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the

Fourteenth Amendment.").[7] Plaintiff's interests in avoiding unwanted medical treatment are no less weighty than those of the inmate in *Harper*, but unlike in *Harper*, Defendants had no corresponding and countervailing interest in requiring vaccination because Covid vaccines, at least when it comes to people having natural immunity, do not benefit third parties. *See infra* Part III.

In short, the governing jurisprudence that has evolved over the course of this country's history instructs courts to assess the legal propriety of mandated medical interventions by weighing the public health benefits of such interventions against the individual liberty interests at stake. Government employers cannot simply require (on pain of termination) their employees to take any medication or undergo potentially incessant testing, regardless of consent, medical necessity, or various other circumstances, merely because the Government asserts that the treatment may be beneficial to the employee. Rather, the means chosen to accomplish the government interest must be *both* (1) efficacious in achieving the articulated goal, and (2) balanced against individuals' constitutional rights to bodily autonomy. *See Schmerber v. California*, 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other

[7] Although in that case the Court applied rational basis scrutiny to evaluate a policy that required forced medication in prisons, it did so in the context of an "inmate [who was because of his mental illness] *dangerous to himself or others*." *Id.* at 227 (emphasis added).

conditions."). There is no reason to evaluate the claims of the Plaintiff here under a different standard.

Finally, it should not go unsaid that *Jacobson*, to the extent it cannot be reconciled with subsequent case law (though it easily can be), has not withstood the test of time. Indeed, *Jacobson*'s direct progeny is part of the Supreme Court's notorious "anti-canon." *See* Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 Duke L.J. 243, 303 (1998). The Supreme Court has relied on *Jacobson*'s reasoning exactly once—to justify its decision in *Buck v. Bell*, which infamously upheld the forced sterilization of mentally ill women. 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough."). While that abhorrent ruling alone does not invalidate the logic in *Jacobson*, that we now recognize forced sterilization to cross *Jacobson*'s line into the "cruel and inhuman" certainly should give pause to those advocating for a broad reading of *Jacobson* or, worse yet, to those who imagine *Jacobson* to have resolved for all time mandatory-vaccination legal disputes.

Given *Jacobson*'s unsavory progeny and the Court's subsequent explicit recognition of a robust right to bodily autonomy, *Jacobson* should be cabined to its facts and not extended beyond the Supreme Court's intended application.

D. Jacobson's Reasoning Renders It Inapplicable to Mandates for Medical Procedures That Primarily Benefit the Recipient

Last year, a panel of the Ninth Circuit Court of Appeals rendered a decision that applied the appropriate analysis to the question of the constitutionality of a vaccine mandate implemented by the Los Angeles Unified School District (LAUSD). *See Health Freedom Def.*

Fund v. Carvalho, 104 F.4th 715 (9th Cir. 2024), *reh'g en banc granted by* 127 F.4th 750 (9th Cir. 2025).[8] As the panel correctly noted, *Jacobson*'s rationale was the protection of public health. Noting that *Jacobson* said nothing about "'forced medical treatment' for the recipient's benefit," the panel held that *Jacobson* does not "extend[] beyond its public health rationale—government's power to mandate prophylactic measures aimed at preventing the recipient from spreading disease to others." 104 F.4th at 725.

Indeed, *Jacobson* itself made clear that the result in that case did not automatically vindicate every vaccine mandate. *See* 197 U.S. at 28 ("[I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons."). The Court explicitly eschewed the broad interpretation of its holding, confining it to the specific facts of that case when it wrote that it was "decid[ing] *only* that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error." *Id.* at 39 (emphasis added).

A close reading of *Jacobson* makes evident that the holding was limited to vaccines that *prevent transmission* of a particularly deadly contagious disease. The smallpox vaccine is just such

[8] By rule, the grant of a rehearing automatically vacates the panel's opinion except to the extent it is adopted by the *en banc* court. *See* Advisory Note 2 to 9th Cir. R. 40-3. The *en banc* Court heard arguments in March of 2025 and the matter remains pending before that Court.

a type of a vaccine (referred to as a "sterilizing vaccine") because it stops transmission of the disease to third parties. Hence, *Jacobson* should not be read to allow government to require health measures that benefit only the recipient himself or herself. *See id.* at 35 ("[T]he legislature has the right to pass laws which, according to the common belief of the people, are adapted to *prevent the spread of contagious diseases*.") (emphasis added); *id.* (noting that "vaccination [is] a means of *protecting a community* against smallpox.") (emphasis added); *id.* at 31-32 ("vaccination [is] a means to *prevent the spread* of smallpox.") (emphasis added). In contrast, none of the Covid-19 vaccines are sterilizing vaccines, because none of them stop transmission to third parties—evidence that was available to public health authorities at the time that Policy # 1446 was promulgated.

This Court should adhere to the limiting principle that the government may mandate medical interventions only where submission to the mandate provides a significant, cognizable, and scientifically supported benefit to third parties. In the case of vaccines, that means that the government must show that the disease in question is particularly dangerous *and* that the vaccine is effective in preventing transmission to other members of the community. Only upon such a showing can the government mandate vaccinations.[9] Whatever may be said of Covid's dangerousness, it is beyond dispute that Covid vaccines do not prevent transmission and thus provide no benefits to third parties, because they do not protect them from contracting the disease. Likewise, requiring frequent testing of the

[9] Without delving deeply into the current debate about childhood vaccinations (such as measles, mumps, and rubella), it is enough to say that mandates with respect to those vaccines can be justified by the fact that those vaccines *are* sterilizing and work to protect *third parties*. In contrast, vaccines that serve to protect only the recipient (*e.g.*, HPV) are not mandated.

unvaccinated (especially those with naturally acquired immunity) is irrational because, given the fact that Covid vaccines are not sterilizing, the unvaccinated cohort does not pose a higher risk of spreading the virus than the vaccinated one.

Furthermore, not only are Covid-19 vaccines non-sterilizing, but they have side effects, which may be serious and even deadly. For example, recent studies have demonstrated that the Covid-19 vaccines appear to increase other infections, Covid-19 reinfection rates, appendicitis, abnormal menses, and myopericarditis (inflammation of the heart tissue and/or lining of the heart), and reduce white blood cell and platelet counts.[10] That does not mean the risks of the vaccine are not outweighed by the benefits for many or even most people. But it *does* corroborate the Plaintiff's position that *Jacobson* cannot be read to automatically greenlight any mandate of a medical treatment labeled a vaccine. *See Health Freedom Def. Fund*, 104 F.4th at 724-25. Indeed, according to *Jacobson*'s own reasoning, courts should take particular care to examine vaccine mandates when the vaccine's administration might well be injurious to the subject. *See* 197 U.S. at 38-39.[11]

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[10] *See, e.g.*, Hui Lee Wong, *et al.*, *Surveillance of COVID-19 vaccine safety among elderly persons aged 65 years and older*, SCIENCEDIRECT (Jan. 9, 2023), https://tinyurl.com/4amr84ns (last visited July 7, 2025); Guy Witberg, *et al.*, *Myocarditis after Covid-19 Vaccination in a Large Health Care Organization*, NEJM (Oct. 6, 2021), https://tinyurl.com/bdehusp5 (last visited July 7, 2025); Naoki Hoshino, *et al.*, *An autopsy case report of fulminant myocarditis: Following mRNA COVID-19 vaccination*, PUBMED (July 4, 2022), https://tinyurl.com/azv8r4tt (last visited July 7, 2025).

[11] Nor should this Court be deterred from distinguishing *Jacobson* by the faulty jurisprudence that arose out the Covid-19 era, when the efficacy and risks of the Covid-19 vaccines were not well-known to the public, including courts (although they were either known or should have been known to governmental bodies that mandated them).

III. GOVERNOR WALZ'S VACCINE AND TESTING MANDATE DOES NOT SURVIVE RATIONAL BASIS REVIEW, LET ALONE A MORE STRINGENT LEVEL OF ANALYSIS

Although rational basis review is not the appropriate standard by which to evaluate Professor Stewart's substantive due process claim, it is an appropriate measuring stick for his equal protection claim, since he is not a member of a suspect class. *See Hughes v. City of Cedar Rapids*, 840 F.3d 987, 996 (8th Cir. 2016) ("When no fundamental right or suspect class is at issue, a challenged law must pass the rational basis test.")[12]; *United States v. Skrmetti*, 145 S.Ct. 1816, 1850 (2025) (Barrett, J., concurring) ("Beyond the[] categories [of race and sex], the set [of 'suspect classes'] has remained virtually closed."). Nevertheless, Plaintiff should *still* prevail, because the mandate does not satisfy even this more permissive standard.

Under the rational-basis test, "the State need only show that the differential treatment is rationally related to a legitimate state interest." *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 970 (8th Cir. 2015). At the same time, "[r]ational basis review is not toothless[,]" *Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City*, 742 F.3d 807, 810 (8th Cir. 2013) (quoting *Mathews v. Lucas,* 427 U.S. 495, 510 (1976)), and courts "insist on knowing the relation between the classification adopted and the object to be attained," *Romer v. Evans,* 517 U.S. 620, 632 (1996); *see also Birchansky v. Clabaugh*, 421 F.Supp.3d 658, 681 (S.D. Iowa 2018) (holding that plaintiffs had alleged facts that, if true, established that state regulatory framework did not

[12] To be clear, Plaintiff's position is that there *is* a fundamental right to bodily integrity and impingements on that right are subject to heightened scrutiny. However, to the extent that the Court disagrees with that position, it should still analyze whether treating Professor Stewart (who had naturally-acquired immunity to COVID) differently from individuals who had vaccine-acquired immunity to COVID is rational.

appear rationally related to a legitimate state interest). Requiring this information "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

Here, Minnesota had no legitimate interest in forcing state employees to receive a vaccine—with the coercive alternative of having to undergo frequent testing—that does not stop transmission, because the vaccine offers no benefit to anyone other than the recipient.[13] Minnesota's policy is even less rational when applied to Plaintiff, who—as alleged in the Complaint—had naturally acquired immunity, *superior* to that of his vaccinated but not naturally immune counterparts. *See* Compl., ECF 1, ¶¶ 31-35. The Complaint also alleges that the vaccines do not stop transmission—and it is now evident that public health authorities either knew or should have known this—and can cause adverse effects. *Id.* ¶¶ 38-41. Those effects can be severe and can include death. *See id.* ¶¶ 42-43. Further, individuals with naturally acquired immunity, as compared to those who have never recovered from Covid-19, face an elevated risk of such events. *See id.* ¶¶ 44-46.

The government (including a state actor such as LSC) is not entitled, absent any rational reason, to insert itself into employees' personal health decisions, especially ones that affect employees' very bodies.[14] To hold otherwise would endow the State with limitless power over

[13] Indeed, the vaccine may not even offer any benefit to a recipient who has had a prior bout of Covid-19. *See* ECF 1, ¶ 203.

[14] One can imagine a case where a state employer imposes a health or fitness requirement which is directly relevant to the employee's duties, *e.g.*, physical fitness standards for campus police officers. *See, e.g.*, *EEOC v. Pennsylvania*, 768 F.2d 514, 518 (3d Cir. 1985) (noting that Pennsylvania State Police could not impose an arbitrary retirement age, but could "monitor the health and physical prowess" of its officers). This, however, is not such a case as there is no claim that Covid-19 vaccination is in any way related to Plaintiff's job duties.

the lives of citizens. If the individual's physical health is subject to a government's mandates and regulations, there would be no barrier to government-mandated daily exercise regimen or consumption of broccoli. *Cf. NFIB v. Sebelius*, 567 U.S. 519, 660 (2012) (Scalia, Thomas, Kennedy, & Alito, JJ., dissenting) ("[T]he failure of some to eat broccoli may be found to deprive them of a newly discovered cancer-fighting chemical which only that food contains, producing health-care costs that are a burden on the rest of us …."). After all, obesity is one of the most significant risk factors for a severe Covid-19 infection, but no serious person has suggested mandating BMI below a certain level; to even consider such a concept is ludicrous. *Id.* at 553-54 (opinion of Roberts, C.J.); *see also* Roni Caryn Rabin, *The Coronavirus Attacks Fat Tissue, Scientists Find*, N.Y. Times (Dec. 8, 2021).

These facts vitiate the claim that there is *any* rational basis for Minnesota's vaccine mandate. Forcing a Covid-recovered person to take a vaccine that provides no benefit either individually or to third parties, while carrying some risk of adverse effects, however slight, is not rational. Nor is it rational to require that person to undergo frequent testing, when a colleague who is no less likely to spread the virus—*i.e.*, one who has been vaccinated only—is exempt from such a requirement. Defendants claim that "[b]ecause the degree of one's protection from Covid-19 differs across people with 'natural immunity' and vaccine-based immunity, the Court cannot plausibly conclude that these groups are similarly situated." *See* Defs.' Br., ECF 14, at 15. This argument does not make sense. True enough, individuals' immunities differ, but they differ *within the relevant subgroups*. In other words, an individual with vaccination-acquired immunity may differ from another individual with vaccination-acquired immunity, and an individual with infection-acquired immunity may differ from another

individual with infection-acquired immunity. And they can all differ (because people have different biological makeups) from each other. But there is *no* evidence that *as a group* people with vaccination-acquired immunity to Covid-19 differ from people with infection-acquired immunity. Indeed, to the extent that such evidence exists, it suggests that people with infection-acquired immunity have a more robust immunity than those with vaccination-acquired immunity. *See* ECF 1, ¶¶ 36, 148, 165, 167, 195. And to the extent there is a factual or scientific dispute with respect to natural immunity and the vaccine's ability to prevent transmission, at this stage the Court is obliged to accept Plaintiff's allegations as true. *See Health Freedom Def. Fund*, 104 F.4th at 725 ("At this stage, we must accept Plaintiffs' allegations that the vaccine does not prevent the spread of Covid-19 as true.").

The fact that Minnesota recognizes that its citizens should not be subject to unwanted vaccination, testing, or specimen collection, *see* Minn. Stat. § 12.39, further vitiates the argument that this policy was grounded in a "rational basis." It is well-settled that violation of state law by government officials cannot be "rational." *Cf. Dumont v. Comm'r of Tax'n*, 154 N.W.2d 196, 199 (Minn. 1967) ("[I]f the legislature has acted in a specific area, the administrative agency may not adopt a rule in conflict with the statute.").

Defendants argue that "the complaint itself supplies at least one conceivable basis of support for the Policy. Reputable public-health institutions advised that 'the best way to prevent infection and the spread of Covid-19 was through vaccination.'" Defs.' Br., ECF 14 at 19 (quoting ECF 1, ¶ 60). But Plaintiff also alleged that those public health agencies based their recommendations on a proposition that they either knew or should have known to be false: that the available Covid-19 vaccines stop transmission. *See* Compl., ECF 1, ¶¶ 36-40.

Indeed, before Policy # 1446 took effect, the CDC itself, in July of 2021, had acknowledged that the vaccinated are just as likely to spread the Covid-19 virus as the unvaccinated. *Id.* ¶ 39. It cannot be "rational" for government actors to enact health-related mandates that do not even comport with the data available at the time.[15] Nor should Minnesota be permitted to find refuge in CDC guidance when convenient, while at the same time ignoring the information from the very same agency that acknowledges the limits of that guidance. It is government officials, not a cherry-picked portion of the CDC's analysis, who are subject to the Constitution's limitations when they impinge the people's liberty.

Thus, Defendants have not shown that application of the Policy to Professor Stewart satisfies rational-basis scrutiny. There is no rational basis for having required his vaccination for Covid-19. And if it does not satisfy that level of scrutiny, then it certainly does not satisfy any heightened scrutiny. Put differently, if the Court agrees that heightened scrutiny applies to Professor Stewart's Due Process claim, it is impossible for the State to prevail at this juncture, where the Complaint alleges that there is no legitimate interest to advance through application of the Policy to Professor Stewart. Perhaps the State could later proffer evidence to support its greater burden of proof (we doubt that), but it cannot do so here on this record. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence

[15] Furthermore, Defendants conflate two separate considerations. While it may well be that in the abstract, "the best way to prevent infection and the spread of Covid-19 was through vaccination," it is irrational and contrary to century-plus teachings of immunology, to believe that vaccination provides any sort of superior protection as compared to protection one acquires post-infection. *See* ECF 1, ¶¶ 32-33. For the same reason it is irrational to require testing of individuals with naturally-acquired immunity but not vaccine-acquired immunity.

needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

For the foregoing reasons, Professor Stewart has adequately pleaded the violation of Due Process and the Court should deny the motion to dismiss.

IV. LSC TERMINATING PROFESSOR STEWART CONSTITUTED UNLAWFUL RETALIATION IN VIOLATION OF HIS FIRST AMENDMENT RIGHTS

Professor Stewart has also stated a valid First Amendment claim. The Supreme Court has made clear that public employees do not surrender all of their First Amendment rights by virtue of their employment. *See Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). "Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id.* Accordingly, a public employee who was terminated for his speech can bring an unlawful retaliation claim in certain circumstances.

To establish a First Amendment retaliation claim under § 1983, a plaintiff must show: (1) that he was engaged in activity protected by the First Amendment; (2) a government official took adverse employment action against him; and (3) his protected speech was a substantial or motivating factor in the government officials' decision to take adverse employment action. *Davenport v. Univ. of Ark. Bd. of Trustees*, 553 F.3d 1110, 1113 (8th Cir. 2009). Defendants do not contest prong (2)—that they took adverse action against Plaintiff—so the dispute here revolves around prongs (1) and (3). *See Bryson v. Regis Corp.*, 498 F.3d 561, 571 (6th Cir. 2007) (termination of a plaintiff's employment constitutes an adverse action.). *See also Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that government employer could not refuse to renew contract based upon teacher's exercise of protected First Amendment speech, criticizing certain decisions made by the administration).

With respect to the first disputed question: a plaintiff engages in protected speech in this context when he speaks on a matter of public concern. *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968). In *Pickering*, the plaintiff, a public-school teacher, was terminated from his position after sending a letter to a local newspaper that criticized the Board of Education and district superintendent's handling of proposals to raise new revenue for the school district. *Id.* at 564. The Court held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment," and accordingly this firing was unlawful. *Id.* at 564. The case at hand is not much different. Professor Stewart sent, via email, a letter to his students criticizing LSC Administration's implementation of Policy # 1446, as well as the policy itself. He was disciplined, and ultimately terminated for, *inter alia*, this very email which spoke on an issue of public concern.

Speech may be characterized as involving matters of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane v. Franks*, 573 U.S. 228, 241 (2014) (quoting *Snyder v. Phelps,* 562 U.S. 443, 453 (2011) (cleaned up)). The inquiry turns on the "content, form, and context" of the speech. *Connick v. Myers*, 461 U.S. 138, 145 (1983). Under *Pickering* and its progeny, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419. *See also Bailey v. Dep't of Elementary and Secondary Educ.*, 451 F.3d 514, 518 (8th Cir. 2006). "If the Government's interest is 'significantly greater' than [the plaintiff's] interest in contributing to public debate,

then [the plaintiff's] speech is not protected." *De Ritis v. McGarrigle*, 861 F.3d 444, 456-57 (3d Cir. 2017) (quoting *Pickering*, 391 U.S. at 573). Here, Defendants can advance *no* legitimate interest to stifle Professor Stewart's speech. Professor Stewart did not call for any disobedience to Policy # 1446 nor any other policy; he did not disclose any confidential information; he did not cause any disruption to the school's email system or other operations, or the like. Defendants can point to nothing in Professor Stewart's email that undermined their ability to "operate efficiently and effectively."[16]

The fact that the subject matter in question concerns the Plaintiff's employment "is nondispositive. The First Amendment protects some expressions related to the speaker's job." *Garcetti*, 547 U.S. at 421. *See Lane*, 573 U.S. at 240 ("The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."). *See also Dougherty v. Sch. Dist. of Philadelphia*, 772 F.3d 979, 989 (3d Cir. 2014) (rejecting government's contention that speech is not protected when it "owes its existence to a public employee's professional responsibilities."). The "critical question" in determining whether a public employee spoke as a citizen is whether the "speech at issue is itself ordinarily within the scope of an employee's duties." *Lane*, 573 U.S. at 240. If it is, then the employer may regulate it; otherwise, "the First Amendment provides protection against discipline." *Garcetti*, 547 U.S. at 421.

[16] To the extent that there are factual disputes about this question, these disputes are not amenable to resolution on a motion to dismiss. *See Fla. State Bd. of Admin.*, 270 F.3d at 666; *accord Gustilo v. Hennepin Healthcare Sys.*, 122 F.4th 1012, 1019 (8th Cir. 2024) ("Any underlying factual disputes concerning whether the plaintiff's speech is protected, however, should be submitted to the jury through special interrogatories or special verdict forms.").

Defendants rely upon the misguided argument that, because the speech in question was in an email form to an internal audience, the Court should find that it did not address a matter of public concern and therefore is not entitled to First Amendment protections. *See* Defs.' Br., ECF 14, at 23. But privately expressed complaints and opinions are not beyond First Amendment protection. *See Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413-16 (1979). *See also Sousa v. Roque*, 578 F.3d 164, 174 (2d Cir.2009) ("An employee who complains solely about his own dissatisfaction with the conditions of his employment is speaking upon matters only of personal interest … it does not follow that a person motivated by a personal grievance cannot be speaking on a matter of public concern.") (quotation omitted). *See also Kelly v. Huntington Union Free Sch. Dist.*, 675 F.Supp.2d 283 (E.D.N.Y. 2009) (holding that varied speech by public employees, including statements to students about improper changes to a program for gifted and talented students and statements to administration about a colleague's misconduct, may constitute protected speech about matters of public concern, and denying motion to dismiss).

Indeed, Defendants try—unavailingly—to distinguish *Mayfield v. Mo. House of Representatives*, 122 F.4th 1046 (8th Cir. 2024). In *Mayfield*, a clerk in the Missouri House of Representatives emailed the Speaker of the House and President Pro Tem of the Missouri Senate advocating for the use of face masks in the state capital building. *Id.* at 1050. Three days later, he was fired. *Id.* After a jury found in favor of the plaintiff, the Eighth Circuit affirmed, finding that the email was a matter of public concern, as it focused on protecting the public from the Covid-19 pandemic. *Id.*

Defendants argue, by cherry-picking certain statements from the email in question, that Plaintiff's speech is unlike Mayfield's because Professor Stewart tied his impending absence due to his refusal to comply with Policy # 1446 to his philosophical, legal, and ethical criticisms of it, whereas Mayfield did not express concerns specific to *his or his family's* health. *See* Defs.' Br., ECF 14, at 22-23.

But the Court must look at Professor Stewart's email in its entirety. While Professor Stewart was prompted to send the email due to the disciplinary action he faced, the primary reason for the correspondence was to explain to his concerns with the ethical, legal, and medical ramifications of Policy # 1446 broadly, and why he thought the State was wrong to require employees to get vaccinated or endure frequent testing. *See Garcetti*, 547 U.S. at 421 ("The [speech] concerned the subject matter of [plaintiff's] employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job[.]") (quoting *Pickering*, 391 U.S. at 573). For example, he expressed his belief that the policy is "immoral in that it deploys workplace coercion to undermine the sacrosanct rights of medical autonomy, bodily self-determination, and privacy. The imposition of this policy has demoralized staff and faculty … [and] has contributed to the damaging polarization that now divides our society." He further objected to the unlawful nature of the policy:

> We are supposed to live in a nation and a state governed by the rule of law. Laws must be duly enacted under the provisions of the Federal and State Constitutions, and must not violate individual rights. The arbitrary whims of politicians and bureaucrats cannot form the basis for civil society, yet that is the direction the state of Minnesota has taken under the Governorship of Tim Walz. It is shameful.

ECF 1-1.

The matter of public interest addressed in Professor Stewart's email is also evident by his providing the audience the link to the State's policy, his discussion of general vaccine policies, and his explication of the limits of the government's constitutional and statutory authority. Professor Stewart was not writing to decry his own circumstances, but advising his audience to think critically about policies and events affecting them. He specifically said: "I encourage you to pay attention to the world around you and think hard about what you see and hear." *Id.* In light of the actual language of Professor Stewart's email, Defendants' claim that "Plaintiff's email was prompted by his disagreement with impending disciplinary proceedings, not any desire to address a public audience," Defs.' Br., ECF 14, at 25, is clearly wrong.

Moreover, under the *Pickering* balancing test, there is no good reason that this speech should be denied First Amendment protection. Defendants' claim that Professor Stewart's email was disruptive to the workplace, *see id.* at 26, is absurd. Sending a single email to adult college students to voice dissent from a state-wide policy being implemented at the college level is not "disruptive." Professor Stewart did not say anything rude, offensive, shocking, or make a personal attack. He did not encourage students to engage in any kind of disruptive activity, unless thinking for oneself is considered disruptive. In short, there was absolutely nothing "disruptive" about this email. Moreover, to the extent the State's argument is that Professor Stewart's speech on matters of public concern itself—on which people may inherently disagree—is disruptive or reasonably could disrupt LSC's mission, there is no such evidence at this stage. *See, e.g.*, *Gustilo*, 122 F.4th at 1019. And more to the point, even if there were evidence of disagreement and upset with Professor Stewart's speech, that alone would not

be competent evidence of disruption. *See, e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").

Defendants attempt to rely on *Anzaldua v. Northeast Ambulance and Fire Protection District*, 793 F.3d 822 (8th Cir. 2015), in which the plaintiff, a paramedic and firefighter, sent emails to a newspaper complaining about the Fire District and the Chief of the District in particular. The court was "skeptical" that the email was primarily motivated by public concern, given that the plaintiff had sent the email just days after being suspended and singled out the District Chief for criticism, with whom the plaintiff already had a strained relationship. *Id.* at 833-34. However, the case at bar is fundamentally different from *Anzaldua*. First, Plaintiff did not complain about members of the LSC Administration, and thus did not create the kind of workplace disruption that resulted from Anzaldua's email, in which he criticized the alleged misconduct of specific superiors. Rather, Professor Stewart was taking the opportunity presented by his suspension to address his students on a matter of crucial public importance which was debated (and continues to be debated) nationwide. Unlike in *Anzaldua*, where the terminated employee explicitly stated that exposing "dirt" on his superiors would make his termination "worthwhile," there was no indication that Professor Stewart was seeking revenge on LSC.

Second, the Eighth Circuit explained that "a fire department, as a public safety organization, 'has a more significant interest than the typical government employer in regulating the speech activities of its employees in order to promote efficiency, foster loyalty

and obedience to superior officers, maintain morale, and instill public confidence in its ability.'" *Anzaldua*, 793 F.3d at 834 (quoting *Shands v. City of Kennett*, 993 F.2d 1337. 1344 (8th Cir. 1993)). In contrast, a community college is not a "public safety" organization and therefore has no heightened interest in regulating the speech of its employees. To the contrary, as an institution of higher learning dedicated to the pursuit of truth, LSC should err on the side of *encouraging* dissent and critical thinking.

Defendants next argue that in any event, Plaintiff has not shown that the email to his students was the "but for" cause of his termination, citing *Sanimax USA, LLC v. City of S. St. Paul*, 95 F.4th 551, 564 (8th Cir. 2024). But *Sanimax* is not the correct case under which to analyze Plaintiff's First Amendment claim. In *Sanimax*, the plaintiff did not claim that he was terminated from a public position in retaliation for First Amendment protected activity—he claimed that the city enacted ordinances to punish him. That is a different sort of claim. Second, *Sanimax* was decided at the summary-judgment phase, when the relevant facts were no longer in dispute. At the motion-to-dismiss stage, the plaintiff must show only that the First Amendment protected speech was a "substantial" or "motivating" factor in the decision to terminate him from employment. *See Davenport*, 553 F.3d at 1113.

Since LSC cited the email to the students as one of the reasons for firing him, the facts as alleged in the Complaint demonstrate that the sending of the email constituted a "substantial" or "motivating" factor in his termination. If it had not, the Administration would not have cited it. And while it appeared to be one of five reasons for terminating Professor Stewart, all four of the other reasons related to noncompliance with Policy # 1446. In other words, there were only two substantive reasons for termination—failure to comply with Policy

1446 and the sending of the email. This fact weighs in favor of considering it a "substantial" and "motivating" factor.

And once the plaintiff has shown that the exercise of protected speech was a "substantial" or "motivating" factor for his termination from public employment, the burden shifts to the defendant *after the pleadings stage* to show that he would have been fired anyway. It seems unlikely that Defendants will be able to carry this burden, but in any event it is a question of fact for resolution at a later stage, after discovery. *See Davison v. City of Minneapolis*, 490 F.3d 648, 655 (8th Cir. 2007) (citing *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977)).

Finally, LSC Defendants claim that even if Plaintiff's First Amendment retaliation claim is viable, it can only be sustained against President Rogers since she was responsible for Plaintiff's termination. *See* Defs.' Br., ECF 14 at 21. This contention is misguided. All LSC Defendants were part of the disciplinary process. Ms. Vichorek, Director of Human Resources, led the disciplinary hearings, at which Dr. Kingston, Vice President of Academic and Student Affairs, was also present and informed Professor Stewart he would be placed on no-pay status. *See* Compl., ECF 1, ¶¶ 75, 84. Ms. Vichorek and Dr. Kingston sent the emails informing Professor Stewart that he was being disciplined for misconduct, ordering him to cooperate, provide materials, and not discuss the matter with other employees or students. *Id.* ¶¶ 75, 90-91, 132. Vice President Al Finalyson sent certified letters to Professor Stewart about the results of the investigation and imposing suspensions without pay. *See id.* ¶¶ 95-102, 106, 129, 131. Ms. Vichorek delivered the denial of Professor Stewart's religious exemption request, and while the email wasn't entirely clear as to whose decision it was, it sounded as though it was hers. *See id.* ¶ 128. *See Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 724 (9th Cir.

2012) (determining that, in a First Amendment retaliation case, "because the Board members govern the School District, and have supervisory authority to stop the adverse actions against the *Riley* plaintiffs, they may incur liability due to their knowledge and acquiescence in a constitutional violation."); *id.* ("in addition to suing the director of facility services, who had actually applied the policy to the newspaper, the plaintiff also sued the president and vice president of the university who had not been directly involved in enforcement of the policy, but had been informed about the application of the policy and done nothing to stop it. We held that …. [they] could be liable under Section 1983") (citing *OSU Student All. v. Ray*, 699 F.3d 1053, 1075 (9th Cir. 2012)); *Maras v. Curators of the Univ. of Mo.*, 983 F.3d 1023 (8th Cir. 2020) (allowing a plaintiff to maintain a lawsuit alleging discrimination in denial of tenure against all individuals who were involved in the process and not just the University President who made the final decision); *Okruhlik v. Univ. of Ark.*, 255 F.3d 615 (8th Cir. 2001) (denying motion to dismiss where plaintiffs sued multiple university officials for discrimination).

Defendants' reliance on *Norgren v. Minnesota Department of Health and Human Services*, 96 F.4th 1048, 1057 (8th Cir. 2024), *see* Defs.' Br., ECF 14 at 21, does not help them advance their cause. In *Norgren*, the plaintiff "pled no facts supporting his allegation that she personally engaged in promotion [of] discrimination …. [and] pled no facts indicating she created or implemented a DHS-wide policy of denying promotions to employees who objected to the trainings." *Id.* That is a stark contrast from the Defendants in question here, who played active roles in suspending Professor Stewart, putting him on no-pay status, and then claiming (without any support) that he violated a non-existent policy prohibiting employees from sending emails to students such as the one he sent.

Professor Stewart has adequately pleaded a valid First Amendment claim and Defendants' Rule 12(b)(6) motion should be denied.

V. PROFESSOR STEWART'S ALLEGATIONS ARE SUFFICIENT TO MAINTAIN HIS "UNCONSTITUTIONAL CONDITIONS" CLAIM

Defendants' sole argument in support of their motion to dismiss Professor Stewart's unconstitutional conditions claim is that "Policy [# 1446] did not violate any of Plaintiff's constitutional rights" and therefore the challenged policy could not have "functioned as an unconstitutional condition." Defs.' Br., ECF 14 at 28. Defendants do not dispute that compliance with Policy # 1446 was indeed a condition of employment.

Professor Stewart agrees with Defendants insofar as they argue that the unconstitutional conditions claim rises and falls with the underlying challenge to Policy # 1446. However, because, for reasons stated in Parts II-III, *ante*, that policy was unconstitutional, Defendants' argument must necessarily fail.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to LR 7.1(f), I certify that the foregoing Memorandum of Law in Opposition to Defendants' Motion to Dismiss complies with the word limitations set forth in these rules for memoranda of law. This brief contains 11,892 words, which contains all text these rules require to be counted, including headings, footnotes, and quotations. This document was prepared with and word count calculated by Microsoft Word Version 2506. Furthermore, pursuant to LR 7.1(h), I hereby certify that the foregoing document was prepared with Garamond font size 13, which is a proportionally spaced font.

/s/ Gregory Dolin

CERTIFICATE OF SERVICE

Pursuant to this Court's CM/ECF Procedures, I hereby certify that on July 7, 2025, I filed the foregoing document with this Court's CM/ECF system. Since counsel of record for all parties are registered participants in this Court's Electronic Filing System, service of the foregoing document will be accomplished via the Notice of Electronic Filing generated by this system.

/s/ Gregory Dolin