# No. 21-2326

**In the United States Court of Appeals for the Seventh Circuit**

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**Ryan Klaassen**, **Jaime Carini**, **Daniel J. Baumgartner**, **Ashlee Morris**, **Seth Crowder**, **Macey Policka**, **Margaret Roth**, and **Natalie Sperazza**,
*Plaintiffs-Appellants*

*v.*

The Trustees of Indiana University,
*Defendant-Appellee*

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On Appeal from the U.S. District Court for the Northern District of Indiana, Case No. 1:21-cv-00238-DRL-SLC, Honorable Damon R. Leichty, District Judge

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## Reply in Support of Emergency Motion of Appellants Klaassen *et al.* for an Injunction Pending Appeal Relief

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# Argument

## I. Students are Likely to Prevail on the Merits.

Students are likely to prevail on their claim that IU's Mandate violates Students' 14th Amendment due process rights of bodily integrity and autonomy and of medical treatment choice, since IU cannot prove that the Mandate survives intermediate or strict scrutiny.

### A. IU Claims Plenary Power to Require Whatever IU Determines is the Most Effective Means for Student's Health and Safety.

IU audaciously relies on an extreme reading of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) to claim plenary power over IU students, to protect the public against disease (Resp., 2, ECF 11), by having nearly *cart blanche* to impose whatever is "currently the most effective way" to prevent a disease (*id*. at 3). This plenary power never ends, as IU contends both that "its application does not depend on the existence of a pandemic" (PI Resp., 19), and, in any event, "[s]temming the tide of COVID-19 'is unquestionably a compelling [governmental] interest,'" (Resp., 2 (citation omitted)), regardless of "the current circumstances of the COVID pandemic[]" (*id*. at 16).

Some language in *Jacobson*, taken out of context, might support such an extreme interpretation. The *Jacobson* Court upheld a state-authorized vaccine requirement imposed on Cambridge residents in response to a smallpox outbreak,

unless they fit an exemption, or pay a $5 fine. Jacobson challenged that the authorizing statute "was in derogation of the rights secured by the 14th Amendment . . . ." 197 U.S. at 12, 14. *Jacobson* held, however, that any individual liberty interest involved may be overridden in such circumstances by "laws for the common good." *Id.* at 26-27. The Court found no error in the trial court's refusal to hear evidence which cast doubt on the efficacy and safety of the vaccine, because "the legislature must be assumed to have known the opposing theories," and "[i]t is *no part of the function* of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease." *Id.* at 30 (emphasis added).

This extreme deference to decision-makers and no-evidence/"no . . . function" role of the courts is the plenary authority that IU seeks and what it claims that *Jacobson* requires. This extreme view of *Jacobson* led directly to the infamous decision in *Buck v. Bell*, 274 U.S. 200 (1927), upholding the involuntary sterilization of those with mental retardation. The *Buck* Court cited *Jacobson*: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson*, 197 U. S. 11. Three generations of imbeciles are enough." 274 U.S. at 207. Not satisfied with their extreme interpretation of *Jacobson*, IU also maintains that *Buck v. Bell* remains good law (PI Resp., 17), demonstrating the scope of the plenary power they claim.

IU claims, and the district court conferred, the same plenary power over their student's medical treatment decisions that is excised by a prison over its inmates. *See* Op. 49; *Washington v. Harper*, 494 U.S. 210 (1990). In *Harper*, while the Court recognized a prisoner "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause," "the extent of the prisoner's right . . . must be defined in the context of the inmate's confinement," "where the proper standard is . . . whether the regulation is 'reasonably related to legitimate penological interests.' This is true even when the constitutional right . . . is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." *Id.* at 222 (citations omitted). This is the rational basis review the district court employed and results in the plenary power that IU seeks.

This interpretation is not the reasonable one. While unremarkably holding that "it is within a state's police power to establish regulations implementing mandatory vaccine laws and vest local officials with enforcement authority[,]" Resp., 14 (citation omitted), *Jacobson* recognized that such police powers could be *exercised* to violate the federal constitutional or statutory law, "in . . . an arbitrary, unreasonable manner," or in a way to go "beyond what [i]s reasonably required for the safety of the public." *Id.* at 28. This left judicial review of the *exercise* of those police powers to subsequent courts.

If violations of constitutional rights occur in exercise of those powers, as here, then, under *Jacobson*, the government needs to show the exercise passes constitutional muster. IU cannot do so here when the proper heightened constitutional scrutiny is applied.

**B. IU's Mandate Infringes on Substantial Constitutional Rights, Requiring Heightened Scrutiny.**

IU opens its Response with an erroneous statement: "Over a century ago, in *Jacobson*, the Supreme Court upheld a law that required the smallpox vaccine against *a substantive due process challenge*." Resp., 2 (emphasis added). "Substantive due process" was not recognized in legal text books until the 1930s and did not appear in U.S. Supreme Court cases until the 1950's, *see generally*, G. Edward White, *The Constitution and the New Deal* 259 (2000); *Republic National Gas v. Oklahoma*, 334 U.S. 62, 90 (1948) (J. Rutledge, dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 277 (1952) (J. Reed, concurring). Incorporation of the Bill of Rights, upon which substantive due process against the States is based, did not begin until 1925. *See Gitlow v. New York*, 268 U.S. 652 (1925). So *Jacobson* did not employ substantive due process analysis, which modern constitutional jurisprudence requires. *See generally Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 897 (W.D. Pa. 2020).

Significant, even compelling, rights of bodily integrity and autonomy and

medical treatment choice that are infringed here, requiring heightened, even strict scrutiny, that have been recognized since *Jacobson*. *See* Mot. 7-11. Most important are the government mandate cases where a medical treatment decision is overridden by the government. These cases involve: forced "stomach pumping" to obtain evidence of narcotics, *Rochin v. California*, 342 U.S. 165 (1952); involuntary commitment to a mental hospital for treatment, *Humphrey v. Cody*, 405 U.S. 504 (1972); *Addington v. Texas*, 441 U.S. 418 (1979); *Vitek v. Jones*, 445 U.S. 480 (1980); medical treatment decisions by incompetent patients, *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990); forced pre-trial administration of antipsychotic drugs, *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Sell v. United States*, 539 U.S. 166, 186 (2003). Each of these cases involve the significant right to refuse medical treatment and the Court required heightened scrutiny to overcome. The district court recognized IU's Mandate could infringe on Students' rights, under the unconstitutional condition doctrine, Op., 48, but incorrectly applied rational basis review.

### C. Under Heightened Scrutiny, the Burden Shifts to IU to Justify its Mandate Under Strict Scrutiny.

Two levels of heightened scrutiny exist—intermediate scrutiny and strict scrutiny. Under intermediate scrutiny, the Court applies a "rigorous standard of review" that requires "the State [to] demonstrate[] a sufficiently important interest

and employ[] means closely drawn to avoid unnecessary abridgments of" the right. *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 197 (2014). Under strict scrutiny, the government has the burden of proof to establish the law is necessary to advance a compelling governmental interest by narrowly tailored and least restrictive means. *Sherbert v. Verner*, 374 U.S. 398 (1963). Both levels impose on IU the burden of proof which, critically, the district court did not require.

*Sell* is the latest and most comprehensive case establishing a strict scrutiny framework for government medical treatment mandates. Mot., 10-11. IU wrongly dismisses *Sell* in a footnote. Resp., 12 n.2.

Describing the *Sell* test as a strict scrutiny test is fair since it contains all of the essential elements of strict scrutiny, i.e. a protected constitutional right, a sufficiently important state interest to overcome the right, narrow tailoring and less restrictive means, and the requirement that the government must prove it all. Mot., 10-11. The *Sell* test is not used within "the penal framework"—Sell was in a mental hospital awaiting trial, not a convicted felon in prison, like *Harper.* That is why *Sell* applied heightened scrutiny, not *Harper*'s rational basis. Surely a medical treatment choice by law-abiding adults, like Students, is entitled to at least the same respect as a medical treatment decision by a person with severe mental illness awaiting trial.

*Sell*'s strict scrutiny test for medical treatment decisions has been applied beyond the narrow confines of involuntary administration of drugs to a mentally ill defendant facing criminal charges in order to render that defendant competent to stand trial. *Contra* Resp., 12, n.2. But that's where IU wants to cabin it. This Circuit has suggested as much in *Russell v. Richards*, where in the context of involuntary administration of delousing shampoo to inmates, this Court assumed that delousing shampoo was "a medication," but found that it was a less intrusive externally applied medication that posed little risk of harm. 384 F.3d 444, 450 (7th Cir. 2004). As a result, this Court held that context didn't require *Sell*'s protections. *Id.* Other Circuits have applied the *Sell* test in other contexts.[1]

Thus *Sell* provides the framework for the strict scrutiny analysis of IU's Mandate and requires IU prove that its Mandate meets strict scrutiny. The district court did not employ *Sell*—this is clear legal error.

**D. IU Failed to Prove that its Mandate Satisfies Strict Scrutiny.**

**1. The District Court Employed the Wrong Legal Standard in Finding Facts.**

IU argues that IU's Mandate passes strict scrutiny, citing to the district

[1] *See, e.g., United States v. Baldovinos*, 434 F.3d 233, 239-241 (4th Cir. 2006) (applying *Sell*'s analysis to forced administration of antipsychotic drugs to render defendant competent to be sentenced); *Witt v. Department of the Air Force*, 527 F.3d 806, 817-821 (9th Cir. 2008) (applying *Sell*'s heightened scrutiny analysis to discharge of Air Force nurse for homosexual relationship).

court's findings. Resp., 16-17. But the district court never considered whether IU's Mandate passed strict scrutiny. Instead, the district court evaluated all facts under the umbrella of whether IU's Mandate is rationally related to their goal. Op. 57.

From the district court's discussion of the state of the pandemic, to CDC and State recommendations, to IU's Mandate, etc., all facts were considered through the lens of whether IU's Mandate satisfied rational basis. The district court did not consider any fact under the correct legal standard nor did it consider any facts relevant to determine whether IU could satisfy its burden of proof.

Accordingly, the basis for the district court's fact finding was clear error and cannot support strict scrutiny.

**2. Currently, IU's Interest in Public Health and Safety Is Not Compelling Enough to Justify IU's Mandate.**

**a. For IU's Interest in Public Health and Safety to be Compelling It Must Prevent Hospitalizations and Death from a Disease, not Just Infections.**

It's been assumed that stopping the spread of COVID was a compelling interest that justified draconian government restrictions. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (J. Gorsuch, concurring). But that assumption has been based in another critical assumption—that the spread of COVID will lead to increased hospitalizations and death. After all, we don't allow the government to mandate extraordinary measures to prevent the common cold or

flu, but only serious diseases that result in significant injury and death.

As the mortality rate of a disease increases, so does the government justification for restrictive measures. For instance, *Jacobson*'s smallpox had a case fatality rate (CFR) approaching 30%, across all age groups.[2] We now have data showing COVID's CFR is relatively low 1.8%.[3]

IU states the vaccine is necessary to "stem[] the spread of COVID-19" and gives IU "the best protection" in the fight against it. Resp., 15, 17. IU's approach is to reach virtually zero COVID cases—this is irrational and would mean its plenary power lasts forever.

**b. IU's Interest in Public Health and Safety is no longer Compelling Enough to Justify IU's Mandate at this Stage of the Pandemic As Applied to this Age Group.**

When stratified for the college-age group, COVID's CFR plummets to 0.01%.[4] Even with the Delta variant causing current increases in cases, even among vaccinated individuals, CFR remains extraordinarily low. The latest data from Israel (which has a high vaccination rate) and the UK shows that COVID

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[2] PD Ellner, PubMed, *Smallpox: gone but not forgotten*, https://pubmed.ncbi.nlm.nih.gov/9795781/.

[3] *See* Johns Hopkins, *MORTALITY ANALYSES* https://coronavirus.jhu.edu/data/mortality.

[4] *See*, CDC, *COVID-19 Weekly Cases and Deaths per 100,000 Population by Age, Race/Ethnicity, and Sex* https://covid.cdc.gov/covid-data-tracker/#demographicsovertime.

vaccine effectiveness against Delta coronavirus infection and symptomatic ("mild") disease has decreased from about 95% to 40%, whereas effectiveness against hospitalization and severe disease remains at 80% to 90%.[5]

Given the lack of serious danger COVID poses to college-age students, the relatively low hospitalization and death rates, even with the Delta variant, IU's Mandate is not justified at this stage as applied to this age group.

**c. IU's Mandate is underinclusive and doesn't legitimately advance its claimed interest.**

"A law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotation and alteration marks omitted). In other words, "underinclusiveness diminish[es] the credibility of the government's rationale for restricting speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 52–53 (1994). IU's new exemptions make IU's Mandate woefully underinclusive, defeating IU's stated objective.

IU has recently expanded its exemptions. First, IU's medical exemption "in practice," applies to "those who have a medical condition that their doctor believes

[5] *See* Swiss Policy Research, *Covid Vaccines: The Good, The Bad, The Ugly* https://swprs.org/covid-vaccines-the-good-the-bad-the-ugly/.

nonetheless contraindicates the vaccine[]" (Resp., 3), substantially increasing who can avoid the Mandate. Second, IU added an ethical exemption. Resp., 4. While IU does not define this exemption, it appears to mirror the religious exemption, which IU "automatically grants upon request." Resp., 3.

IU's radically expanded exemptions have virtually guaranteed anyone can get an exemption—its Mandate is now woefully underinclusive and belies its claimed interest in the Mandate. Accordingly, IU no longer has a compelling interest sufficient to justify its Mandate and the exemptions render it underinclusive. IU's Mandate, therefore, fails strict scrutiny.

**II. Students Have Suffered Irreparable Harm.**

Defendant claims that "[t]he district court twice determined that plaintiffs failed to establish . . . irreparable harm[.]" Resp., 23. However, this was because the district court erroneously held that there was no constitutional harm. Students, however, have established a constitutional harm and, in that event, the district court correctly held that "[t]o the extent that the students establish a constitutional harm, the law presumes irreparable harm[ ]" (Op., 91 (citations omitted)), and with a constitutional injury, "the court could see that there is no adequate remedy at law[,]" (Op., 93).

As a result, Students have shown irreparable harm.

**III. The Balance of Equities and the Public Interest Weigh in Students' Favor.**

IU argues that the balance of harms tips in their favor. Resp., 20. But IU ignores Students' significant constitutional injury, which the Students have established, and that others are free to get vaccinated, or wear masks and social distance, if they so choose, to protect themselves, even without IU's Mandate.

Further, the district court correctly held that "if the students had shown a likelihood that the university was unreasonably infringing on their constitutional rights, enjoining that violation would be in the public interest." Op. 96.

Considering all factors under the correct legal standard, the balance of harms and the public interest tip in Students' favor.

## Conclusion

The Court should grant Students' Motion.

July 30, 2021

Respectfully submitted,

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July 30, 2021

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