No. 23-

IN THE

# Supreme Court of the United States

CHILDREN'S HEALTH DEFENSE, ADRIANA PINTO, PETER CORDI, RAELYNNE MILLER, KAYLA MATEO, JAKE BOTHE, ANTHONY LAMANCUSA, JESSICA MOORE, RYAN SANDOR, GIANNA CORALLO, RYAN FARRELL, SEBASTIAN BLASI, MAGGIE HORN AND LINDSAY MANCINI,

*Petitioners,*

*v.*

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, BOARD OF GOVERNORS, RUTGERS SCHOOL OF BIOMEDICAL AND HEALTH SCIENCES, CHANCELLOR BRIAN L. STROM AND PRESIDENT JONATHAN HALLOWAY,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Is there a fundamental right under the Fourteenth Amendment's Due Process or Equal Protection Clauses to exercise informed consent *freely* and refuse unwanted medical treatment with an *experimental* vaccine that is not effective at preventing transmission of disease, is not safe and can cause serious injury or death? What standard of review is appropriate under *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), or this Court's subsequent jurisprudence, when this liberty is at stake?

2. Did Rutgers University lack expressly delegated authority to mandate *experimental* vaccines during an outbreak that were not effective, or safe, upon its students – even students attending classes remotely – while excluding professors or employees from the mandate?

3. Did Rutgers University's mandate conflict with Section 564 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360bbb-3, which requires "that individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product . . . "?

4. Were the courts below bound to accept as true the following facts, among others, plead by Petitioners?

    a. COVID-19 vaccines are *experimental* injections;

    b. COVID-19 vaccines were never tested for and are not effective at preventing infection or transmission of disease;

c. COVID-19 is not a *vaccine-preventable* disease;

d. COVID-19 vaccines have caused serious injury and death to thousands of people; and

e. Rutgers was conflicted from imposing any COVID-19 vaccine mandate due to financial ties with vaccine manufacturers, its involvement in clinical trials for COVID-19 vaccines, and its stake in the approval and widespread dissemination and use of COVID-19 vaccines arising from its own research to develop a novel COVID-19 vaccine.

## PARTIES TO THE PROCEEDINGS

Petitioners (Plaintiffs-Appellants below) are Children's Health Defense ("CHD") and Adriana Pinto with Peter Cordi; Raelynne Miller; Kayla Mateo; Jake Bothe; Anthony Lamancusa; Jessica Moore; Ryan Sandor; Gianna Corallo; Ryan Farrell; Sebastian Blasi; Maggie Horn; and Lindsay Mancini, who respectfully petition for a writ of certiorari to review the order of the Third Circuit Court of Appeals dismissing their appeal.

Respondents (Defendants-Appellees below) are Rutgers, the State University of New Jersey; Board of Governors; Rutgers School of Biomedical and Health Sciences; Chancellor Brian L. Strom; and President Jonathan Halloway.

## RULE 29.6 STATEMENT

Petitioner CHD is a nonprofit corporation; CHD does not have a parent corporation or shares held by a publicly traded company.

## LIST OF PROCEEDINGS

U.S. Court of Appeals for the Third Circuit, No. 22-2970

*Children's Health Defense. et. al. v. Rutgers, The State University of New Jersey, et. al.*

Date of Final Order: February 15, 2023

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U.S. District Court for the District of New Jersey, Civ. No. 3:21-cv-15333.

*Children's Health Defense. et. al. v. Rutgers, The State University of New Jersey, et. al.*

Date of Final Opinion: September 2, 2022.

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit ("Court of Appeals" or "Fifth Circuit"), dated February 15, 2024 is reported at 93 F.4th 66 (2024) and is included in the Appendix ("App.") App. 1a.

The Opinion and Order of the U.S. District Court, District of New Jersey (the "District Court") is included at App. 71a. The District Court opinion was not designated for publication.

## JURISDICTION

The Court of Appeals entered its Opinion and Order on February 15, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

**U.S. Constitution**

Fourteenth Amendment, Section 1

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III)**

(e) Conditions of authorization

(1) Unapproved product

(A) Required conditions

With respect to the emergency use of an unapproved product, the Secretary, to the extent practicable given the applicable circumstances described in subsection (b)(1), shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:

(i) Appropriate conditions designed to ensure that health care professionals administering the product are informed--

(I) that the Secretary has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of the emergency use of the product, and of the extent to which such benefits and risks are unknown; and

(III) of the alternatives to the product that are available, and of their benefits and risks.

(ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are informed--

(I) that the Secretary has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and

(III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

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**N.J.S.A. 18A:61D-1**

Every public and independent institution of higher education in this State shall, as a condition of admission or continued enrollment, require every graduate and undergraduate student who is 30 years of age or less and is enrolled full-time or part-time in a program or course of study leading to an academic degree, to submit to the institution a valid immunization record which documents the administration of all required immunizations against vaccine-

preventable disease, or evidence of immunity from these diseases, in accordance with regulations promulgated by the Department of Health. The institution shall keep the records on file in such form and manner as prescribed by the department.

**N.J.A.C. § 8:57-6.4**

(a) A student shall be exempt from immunization requirements for medical or religious reasons, provided that he or she meets the criteria as set forth at N.J.A.C. 8.57-6.14 and 6.15, respectively.

(b) In addition, an institution may make an exemption for the following categories of students:

> 1. Students born before 1957 for the measles, mumps, and rubella (MMR) vaccination requirements only; or
>
> 2. Students enrolled in a program for which students do not congregate, on campus or in an off-campus facility, whether for classes or to participate in institution-sponsored events, such as those enrolled in programs for individualized home study or conducted entirely via electronic media.

(c) Nothing in this subchapter shall be construed as limiting the authority of a New Jersey institution of higher education to establish additional requirements for student immunizations and documentation that such institution shall determine appropriate and which is recommended by the ACIP.

**N.J.A.C. § 8:57-6.14(d)**

(d) An institution may temporarily exclude a student with medical exemptions from receiving specific immunizations, from classes and from participating in institution-sponsored activities during a vaccine-preventable disease outbreak or threatened outbreak.

1. The decision to exclude a student with a medical exemption shall be made by the institution in consultation with the Commissioner and the exclusion shall continue until the outbreak is over or until proof of the student's immunization or immunity is furnished.

**N.J.A.C. § 8:57-6.15(c)**

(c) An institution may temporarily exclude a student with a religious exemption from receiving immunizing agents, from classes and from participation in institution-sponsored activities during a vaccine-preventable disease outbreak or threatened outbreak.

> 1. The decision to exclude a student with a religious exemption shall be made by the institution in consultation with the Commissioner and the exclusion shall continue until the outbreak is over.

## INTRODUCTION

Vaccine injury is real. Vaccine death is real. The federal government's National Vaccine Injury Compensation Program has paid over $5.2 billion[1] in compensation to Americans who suffered injury or death from vaccines while the pharmaceutical industry enjoys immunity from civil liability under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §300aa-1, *et seq.* For COVID-19 vaccines the pharmaceutical industry has even more robust protection under the Public Readiness and Emergency Preparedness Act (the "Prep Act"), 42 U.S.C. §247d-6d.

But with each passing day Petitioners' allegations about COVID-19 vaccines are proven true: COVID-19 vaccines have caused serious injuries and death and do not prevent disease transmission. When Petitioners filed suit, CDC's Vaccine Adverse Event Reporting System ("VAERS") recorded over 12,000 deaths from COVID-19 vaccines. As of the date of this Petition, those figures have exploded: over 314,353 people report serious injury and 37,544 people have reportedly died from COVID-19

1. *See* Health Resources and Services Administration, Data and Statistics at https://www.hrsa.gov/sites/default/files/hrsa/vicp/vicp-stats-05-01-24.pdf (last visited May 13, 2024).

vaccines.[2] Moreover, it is well known that VAERS captures only a fraction of the actual injuries caused by vaccines. In fact, a 2010 federal study commissioned by HHS and performed by Harvard consultants on behalf of the Agency for Healthcare Research and Quality (AHRQ) found that "fewer than 1% of vaccine adverse events" are ever reported to VAERS.[3] As a result, Petitioners alleged the COVID-19 vaccines could be responsible for hundreds of thousands or even millions of deaths in the United States in just eight months of use. If that number is accurate, COVID-19 vaccines could prove more deadly than COVID-19 itself. (JA214-215).[4] Meanwhile, CDC now admits these vaccines did not work to stop infection or transmission of COVID-19.

All COVID-19 vaccines were emergency-use authorized injections made available to the public by the Food and Drug Administration ("FDA") pursuant to Section 564 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3 ("Section 564"). Since the rise of COVID-19, the FDA has emergency-use authorized numerous versions of these experimental injections from different manufacturers while those companies enjoy

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2. Tabulated in National Vaccine Information Center, VAERS database at https://www.medalerts.org/vaersdb/findfield.php. (last visited May 14, 2024).

3. *See* Children's Health Defense Team, *RFK. Jr. Tells Co-Chair of New COVID Advisory Board: VAERS is Broken, You Can Fix It,* The Defender (Dec. 18, 2020) at https://childrenshealthdefense.org/defender/rfk-jr-david-kessler-covid-vaccine-vaers/ (last visited May 14, 2024).

4. "JA" refers to the Joint Appendix in the record of the appeal below.

immunity from suit and liability for any harm these injections cause. *See* 42 U.S.C. §247d-6d.

The initial COVID-19 vaccines were manufactured and authorized for emergency use in less than one year – at so-called "warp speed." None of the COVID-19 vaccines has ever completed clinical testing to determine if they actually prevent infection or transmission. None of the COVID-19 vaccines have ever been tested to determine if they cause cancer, miscarriages, birth defects, infertility, disability or death, among other adverse reactions. COVID-19 vaccines were never tested on pregnant women. COVID-19 boosters were never even tested on people before FDA emergency-use authorized them for the public. Rutgers mandated the COVID-19 booster knowing it had never been tested on humans.

In 2021, fear drove mandates of experimental COVID-19 vaccines. President Biden's mandates applied to millions of Americans in different sectors of society. Almost every state Governor mandated COVID-19 vaccines. Employers mandated these injections on their employees. Colleges and universities mandated these vaccines upon millions of students, faculty and staff. At the peak, about 1,200 four-year colleges and universities in the U.S. mandated these experimental injections.[5]

During the pandemic, in some parts of the country, a person could not easily travel, eat at a restaurant, or attend a public gathering without proof of COVID-19 vaccination. A vaccine card became almost *de rigueur*

5. *See* NoCollegeMandates.com, Which Colleges Mandate list, at https://nocollegemandates.com/ (last visited May 13, 2024).

for participation in civil society even though from the outset the manufacturers of the vaccines told FDA they did not know whether these vaccines prevented infection or transmission of the disease. (JA151).

Rutgers conducted clinical trials for the three main vaccine manufacturers, Pfizer, Moderna and Johnson & Johnson. Rutgers knew there was no evidence the vaccines prevented infection or transmission. Rutgers was aware of the countless injury and death reports in VAERS. Rutgers knew that vaccinated or unvaccinated people were equally capable of spreading COVID when it mandated experimental vaccines only on college students, even students attending classes remotely – but not on faculty or employees. Rutgers has never explained why it chose initially to mandate the vaccine only on college students but not anyone else on campus. And Rutgers has never explained why it kept the mandate long after circumstances had changed: two years after New Jersey ended the public health emergency, over a year after the President ended the national health emergency. However, it should be noted that in 2023, Rutgers was rewarded by Pfizer to conduct clinical trials of Pfizer's experimental bivalent COVID vaccine for the Omicron strain of the virus in children under age five.[6] Now, Rutgers is working to develop its own COVID-19 vaccine.[7]

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6. *See* Press Release, *Rutgers recruiting participants for Pfizer COVID-19 pediatric bivalent vaccine clinical trial,* at https://www.rutgers.edu/news/rutgers-recruiting-participants-pfizer-covid-19-pediatric-bivalent-vaccine-clinical-trial (last visited May 13, 2024).

7. *See* Andrew Smith, *Novel Rutgers COVID Vaccine May Provide Long Lasting Protection* (May 2, 2023), at https://www.

When the Court of Appeals ruled just three months ago, Rutgers was still requiring students to receive these experimental injections. Today, about 30 colleges and universities around the country still require COVID-19 vaccination. Rutgers is fortunately no longer one of them, but it has never explained why it waited so long to drop its mandate and it has never been required to present a shred of evidence or go on the record to justify its executive action.

Rutgers is aware of the thousands of reports of injury and death attributed to COVID-19 vaccines. Rutgers is certainly also aware that COVID-19 vaccines can cause myocarditis and pericarditis (irreversible heart damage),[8] blood clotting and other serious side effects,[9] including cardiac events in young people, especially males. Rutgers must also be aware that, since the rollout, in the U.S. and around the world there is an excess rate of mortality, an excess rate of miscarriage and sudden death.[10] COVID-19 vaccines may be responsible for the increase in the

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rutgers.edu/news/novel-rutgers-covid-vaccine-may-provide-long-lasting-protection (last visited May 13, 2024).

8. *See* CDC, *Clinical Considerations: Myocarditis and Pericarditis After Receipt of COVID-19 Vaccines Among Adolescents and Young Adults* at https://www.cdc.gov/vaccines/covid-19/clinical-considerations/myocarditis.html (last visited May 13, 2024)

9. *See* Kathy Katella, *The Link Between J&J's COVID Vaccine and Blood Clots: What You Need to Know*, YALE MEDICINE (updated May 17, 2023) at https://www.yalemedicine.org/news/coronavirus-vaccine-blood-clots (last visited May 13, 2024).

10. *See* Ed Dowd, "Cause Unknown": The Epidemic of Sudden Deaths in 2021 and 2022 (2022), pp. 53-57, 69-71.

excess mortality rate since the rollout, especially among the healthiest people in our society – teenagers, young adults, and the working class.[11] COVID-19 vaccines may be responsible for increases in cancer mortality too, since the rollout.[12]

The authorization of COVID-19 vaccines constituted the single largest and most profound experiment on humanity with multiple experimental vaccines for COVID-19 employing novel mRNA and viral vector technology being mandated. Since the pandemic, FDA has granted Emergency-Use Authorization for an experimental vaccine for monkeypox (Jynneos). FDA appears poised to grant Emergency-Use Authorization for a bird flu vaccine. Without clarification from this Court, the standard for government to mandate a monkeypox or bird flu vaccine would remain unclear.

Every court that has considered whether schools, public employers or local governments could mandate COVID-19 vaccines has employed the most deferential standard – rational basis – to sustain these mandates relying primarily on this Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) decided more than

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11. *See* Dr. Joseph Mercola, *What Is the Cause of Increased Mortality Rates?,* The Defender (September 2, 2022) at https://childrenshealthdefense.org/defender/increased-mortality-rates-cola/ (last visited May 13, 2024).

12. *See* John Michael Dumais, *Significant Increases in Cancer Mortality After COVID mRNA vaccination, Japanese Researchers Find,* The Defender (April 15, 2024) at https://childrenshealthdefense.org/defender/john-campbell-japan-data-covid-mrna-vaccine-cancer/ (last visited May 13, 2024).

100 years ago. Now our constitutionally recognized right to informed consent and our power to refuse unwanted medical treatment is adjudicated like any other ordinary privilege and any conceivable rationale can justify its denial under a rational basis test.

However, COVID-19 is not a vaccine-preventable disease. It never was and may never be simply because the virus mutates so easily and so quickly (e.g., Delta, Omicron, JN1, JN.1.7, and KP.2 (the current strain, for now)). If COVID-19 is not a vaccine-preventable disease, then the public interest that was so decisive in *Jacobson* is not present and Rutgers would lack authority under its enabling statute to mandate these vaccines. If government is allowed to mandate experimental vaccines that do not prevent transmission against a person's right to freely exercise informed consent, then COVID-19 will have eroded one of our most basic liberties – the right to refuse a medical experiment. Vaccination is an irreversible medical decision. Today, thousands of people are dead and thousands more are living with injuries and disabilities caused by the vaccine. Many would not have taken the shot if they had not been mandated and coerced.

This Court should grant certiorari and reverse.

## STATEMENT OF THE CASE

### I. Factual Background

Petitioners are Children's Health Defense ("CHD") and thirteen Rutgers University students (collectively, "the Students" or "Petitioners") who challenged Rutgers' COVID-19 vaccine mandate. App. 2a-3a. CHD is a nonprofit

corporation whose mission is to "end childhood chronic health epidemics by working aggressively to eliminate harmful exposures, hold those responsible accountable, and to establish safeguards." App. 3a. CHD is a nonprofit that advocates for vaccine safety and informs its members and the public at large about the harm and injury vaccines may cause. App. Brf. 1. CHD brought suit on behalf of the students to challenge Rutgers' requirement that all students be vaccinated against COVID-19 for the start of the 2021 Fall Semester (the "Rutgers Policy"). App. 3a. During the pendency of the proceedings below, Rutgers Policy required full vaccination and later boosters for students.

Respondents are Rutgers University, its Board of Governors, the Rutgers School of Biomedical and Health Sciences, Chancellor Brian Storm, and President Jonathan Holloway. App. 3a. (hereinafter collectively "Rutgers").

On April 13, 2021, Rutgers issued the first iteration of its COVID-19 vaccination policy (the "Policy") on its students. App. 5a. Rutgers' initial mandate excluded faculty, staff and employees. Rutgers has never explained the basis for excluding so many similarly situated people from its mandate.

The Students maintained a variety of objections to COVID-19 vaccination: religious, medical, and practical. All of the students requested and received a religious exemption, except student Adriana Pinto. (JA161-177).

Ms. Pinto would have been a senior at Rutgers in the 2021 Fall semester shortly after this action was filed. (JA165-166). Ms. Pinto objected to COVID-19

vaccination because COVID-19 vaccines would alter her body's natural immunity with unknown and untested chemical substances and technologies that have not been proven safe or effective long-term. Since she has struggled with her health as a young adult and must adhere to strict requirements to remain healthy, she did not want to be injected with an experimental vaccine. (JA165). She was unable to obtain a medical exemption from a doctor and has not objected to immunization on religious grounds. For the 2021 Fall semester Ms. Pinto was registered solely for on-line coursework, nevertheless Rutgers informed her that she could not attend even remote classes without taking the vaccine. (JA165-66). In addition to their religious objections and medical concerns (exercising their right to informed consent), all of the Students reached the conclusion that the unknown risks of COVID-19 vaccination outweigh the known risks of the disease for each of them personally, and refused COVID-19 vaccination. (JA161-177). Their decisions were based on varied information about COVID-19 disease and vaccines from official sources, including the CDC, FDA and vaccine manufacturers. (JA161).

Rutgers is not an elected body or a board of health. Rutgers mandated COVID-19 vaccines after they were on the market for only a few months. (JA217-218; JA223-224). All COVID-19 vaccines available[13] in the United

13. On September 13, 2021, the National Library of Medicine within the National Institutes of Health, reported, "[a]t present, Pfizer does not plan to produce any product with these new [Comirnaty National Drug Codes] and labels over the next few months while [EUA] product is still available and being made available for U.S. distribution." *RxNorm October 2021 Monthly Release*, NLM TECHNICAL BULLETIN, National Library of Medicine, National Institutes of Health, NLM Tech Bull. 2021 Sep-

States were authorized under Section 564 of the Food Drug and Cosmetic Act ("FDCA"), 21 U.S.C. § 360bbb-3, which empowers the FDA to issue an "Emergency-Use Authorization" ("EUA") for a medical drug, device or biologic, such as a vaccine, under certain emergency circumstances; the mechanism allows the FDA to make vaccines available to the public that have not gone through FDA's full approval process; all COVID-19 vaccines were authorized for emergency use pursuant to Section 564. (JA185-186). Section 564 requires the FDA to establish certain required conditions; among them that individuals to whom the product is administered are informed of "the option to accept or refuse administration of the product." (JA186-187). FDA imposes and enforces the "option to accept or refuse" by requiring the distribution to potential vaccine recipients of Fact Sheets that state, "It is your choice to receive or not receive [the vaccine]" and this statement appears in the EUA Fact Sheet for each of the three EUA COVID-19 vaccines. (JA187).

The FDA and the National Institutes of Health ("NIH") refer to EUA products as both "investigational" and "experimental," and use those terms interchangeably to describe them. (JA20, JA216-219).[14] Furthermore, as alleged, licensed or approved COVID-19 vaccines are no less *experimental* than Emergency-Use Authorized vaccines given that FDA has conceded that "[t]he licensed

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Oct;(442):b10, https://www.nlm.nih.gov/pubs/techbull/so21/brief/so21_rxnorm_october_release.html (last visited May 13, 2024).

14. *See* FDA, *Understanding the Relevant Terminology of Potential Preventions and Treatment for COVID-19,* FDA.gov. (Oct. 2020) ("an investigational drug can also be called an experimental drug") at https://www.fda.gov/media/138490/download (last visited May 13, 2024).

vaccine has the same formulation as the EU-Authorized vaccine and the products can be used interchangeably." (JA195).

COVID-19 vaccines employ a novel technology that has never been put in widespread use in humans before. (JA207). According to the FDA, there are insufficient data to know whether the vaccines actually prevent asymptomatic infection or prevent transmission of the disease. (JA209). Therefore, these vaccines cannot promise herd immunity to any population; and their effectiveness, which remains an open question, is vastly overstated. (JA209). COVID-19 vaccines skipped testing for genotoxicity, mutagenicity, teratogenicity, and oncogenicity – in other words, these vaccines were never tested to establish if they will change human genetic material, reduce fertility, cause birth defects or cause cancer. (JA211). Plaintiffs alleged the novelty and risks of COVID-19 vaccines (JA211-213; JA219-220). Plaintiffs alleged increasing reports of COVID -19 vaccine injuries and deaths (JA213-214).

Rutgers was engaged in the investigational study of the first three experimental COVID-19 vaccines and thus has financial ties to the three COVID-19 vaccine manufacturers: Pfizer, Moderna and Johnson & Johnson. Rutgers was a clinical trial site for all three vaccines. (JA203-207); Plaintiffs alleged that Rutgers had a conflict of interest in making any decision to impose a COVID-19 vaccine mandate on its campuses. (JA206).

Rutgers has required COVID-19 student vaccination since the start of the 2021 Fall semester. Despite telling the public that it would not require COVID-19 vaccines

for students to return on campus on January 22, 2021, Rutgers quickly reversed course and announced its mandate on March 25, 2021, and formally adopted it on April 13, 2021. (JA223-226). Rutgers Policy permits students to request medical and religious exemptions, however, exempted students were subject to masking, mandatory weekly or bi-weekly testing, and were excluded from university housing. (JA232). At the time the Court of Appeals issued its decision, Rutgers Policy required students to receive at least one experimental, emergency-use authorized COVID-19 injection.

During the proceedings below a number of developments bolstered Plaintiffs' allegations about the lack of safety and effectiveness of COVID vaccines:

- Freedom of Information Act ("FOIA") requests[15] led to the release of an unredacted Pfizer pharmacovigilance safety analysis collecting 42,086 adverse event reports in the first three months of the vaccine rollout: including 1,223 deaths.[16]

- In another FOIA document release CDC admitted

15. *Public Health and Medical Prof. for Transparency v. F.D.A.*, No. 4:21-cv-1058-P, 2022 WL 90237 (N.D. Tex. Jan. 6, 2022).

16. *See* 5.3.6 CUMULATIVE ANALYSIS OF POST-AUTHORIZATION ADVERSE EVENT REPORTS OF PF-07302048 (BNT162B2) RECEIVED THROUGH 28-FEB-2021 at https://phmpt.org/wp-content/uploads/2022/04/reissue_5.3.6-postmarketing-experience.pdf ; *see also* Michael Nevradakis, *Pfizer hired 600+ People To Process Vaccine Injury Reports, Documents Reveal*, The Defender (April 5, 2022) at https://childrenshealthdefense.org/defender/pfizer-hired-600-people-vaccine-injury-reports/ (last visited May 13, 2024).

it never monitored VAERS for COVID-19 vaccine safety signals.[17]

- On October 10, 2022, Pfizer's Janine Small, President of International Developed Markets, told the European Parliament that before Pfizer released its COVID-19 vaccine into the market, neither she nor other Pfizer officials knew whether the vaccine would prevent transmission because the drugmaker had not tested for it.[18]

- Rutgers was selected by Pfizer to conduct clinical trials on children for an experimental COVID-19 bivalent vaccine.[19]

Despite recent academic studies concerning the risks associated with COVID-19 vaccination,[20] Rutgers

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17. *See* Josh Guetzkow, *CDC Admits It Never Monitored VAERS For COVID Vaccine Safety Signals*, The Defender (June 21, 2022) at https://childrenshealthdefense.org/defender/cdc-vaers-covid-vaccine-safety/ (last visited May 13, 2024).

18. Jack Phillips, *Pfizer Exec Admits COVID Vaccine Was Not Tested For Preventing Transmission*, The Defender (Oct. 12, 2022) at https://childrenshealthdefense.org/defender/pfizer-covid-vaccine-never-tested-prevent-transmission-et/ (last visited May 13, 2024).

19. *See* Patti Zielinski, *Rutgers Recruiting Participants for Pfizer COVID-19 Pediatric Bivalent Vaccine Clinical Trial* (Nov. 4, 2022), at https://www.rutgers.edu/news/rutgers-recruiting-participants-pfizer-covid-19-pediatric-bivalent-vaccine-clinical-trial (last visited May 13, 2024).

20. *See* K. Bardosh, et al., *COVID-19 Vaccine Boosters for Young Adults: A Risk-Benefit Assessment and Five Ethical Arguments against Mandates at Universities* (Aug. 31, 2022), at

maintained its Policy mandating COVID-19 vaccines through March 2024. Arbitrarily, on April 1, 2024, Rutgers dropped the mandate. Rutgers no longer requires the COVID-19 vaccine for students, faculty, staff and university affiliates.[21] Rutgers has never explained why it waited so long to drop the mandate (two years after Governor Murphy ended the public health emergency in New Jersey, one year after President Biden ended the federal public health emergency). Rutgers may well have dropped the mandate to moot this case to dissuade this Court from granting certiorari.

## II. Legal Background

FDA authorized COVID-19 vaccines for emergency use pursuant to its authority under Section 564 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360bbb-3. Although, FDA authorized these vaccines for public use, no agency of the federal government mandated COVID-19 vaccines on colleges and universities. In New Jersey, no government official who is expressly authorized to mandate vaccines during an outbreak – the Department of Health, the Governor, the Commissioner of Health or local health officers – ever mandated COVID-19 vaccines on students at colleges and universities. *See* N.J.S.A. §§ 26:1A-7; 26:13-14; 26:13-36.

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4206070 (last visited May 13, 2024).

21. *See* Rutgers, COVID-19 Information, Vaccination Requirements at https://www.rutgers.edu/covid19#:~:text=Vaccination%20Requirements,against%20the%20COVID%2D19%20virus. (current Rutgers COVID-19 requirements)

In 2021, Rutgers University became arguably the first four-year college in the nation to mandate COVID-19 vaccines as a condition of attendance. To mandate Rutgers relied on a statute that only allows it to collect immunization records from students under 31 years of age for *vaccine-preventable* diseases, N.J.S.A. § 18A:61D-1, and a regulation that only allows Rutgers to establish "additional requirements for student immunizations and documentation" not additional immunizations for students. N.J.A.C. § 8:57-6.4(c). Rutgers relied on two additional regulations to exclude unvaccinated students from university housing, N.J.A.C. § 8:57-6.14(d) and N.J.A.C. § 8:57-6.15(c), but those regulations do not concern housing and only authorize action when there is a *vaccine-preventable* disease – which COVID-19 is not.

**III. Procedural History**

Plaintiffs filed this action against Rutgers in the United States District Court for the District of New Jersey on August 16, 2021, seeking a declaratory judgment, injunctive relief and damages. (JA42). Plaintiffs challenged Rutgers Policy as preempted by federal law and *ultra vires* under state law; they claimed that it violated the right to informed consent and to refuse unwanted medical treatment under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment; and sought damages under Section 1983 and the New Jersey Civil Rights Act, among other claims not appealed.

On August 30, 2021, student Adriana Pinto sought an injunction. (JA64). The district court denied her motion. (JA134-149). Plaintiffs did not appeal.

On October 19, 2021, Plaintiffs amended their Complaint. (JA150). Rutgers moved to dismiss the Amended Complaint on November 19, 2021. (JA271); Plaintiffs opposed on January 11, 2022 (JA309); Rutgers filed its reply on January 31, 2022. (JA417). Subsequently both parties filed letters with the district court citing supplemental authority and changed circumstances, (JA 433-446), most notably CDC's decision to give the same guidance to people regardless of vaccination status and Governor Murphy's Order ending the COVID test mandate for unvaccinated teachers, childcare workers and state workers in August 2022. (JA449). Rutgers Policy was not modified accordingly.

On September 22, 2022, the district court issued its Opinion and Order dismissing Plaintiffs' complaint with prejudice and instructing the Clerk to close the matter. (JA4-5). The district court ruled that students who received religious exemptions to Rutgers Policy, and challenged it, lacked standing as a result of their exemptions and that their claims were moot. (JA13-16). The district court also held that *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), requires the use of rational basis review to assess challenges to Rutgers Policy. (JA12-13). Concluding that Plaintiffs' claims did not involve fundamental rights or a suspect classification, the district court applied rational basis to rule that Rutgers Policy was rationally related to the legitimate government interest of protecting the members of its community from COVID-19 disease and preventing disruptions that COVID-19 caused for three semesters. (JA14-17). Presuming that COVID-19 vaccines are safe and effective, and that despite conducting clinical trials for all three vaccine manufacturers, Pfizer, Moderna, and Johnson & Johnson, "Rutgers' financial interests could

not have played a role in the implementation of the Policy," – a fact that is specifically controverted by Plaintiffs' allegations – the district court ruled that Rutgers Policy satisfied rational basis review. (JA19). The district court also ruled that unvaccinated students are not members of a protected class and that their claims of disparate treatment satisfy rational basis. (JA15-17). The district court found no conflict between Rutgers Policy and 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III), requiring informed consent for the administration of COVID vaccines. (JA25-26). The district court also found that Rutgers had legal authority under state law and regulations, N.J.S.A. § 18A:61D-1, N.J.A.C. § 8:57-6.4(c), to mandate these experimental COVID vaccines as a condition of enrollment during an outbreak, and under N.J.A.C. § 8:57-6.14(d), -6.15(c) to exclude unvaccinated students from university housing. (JA26-27). The remainder of the district court's ruling was not appealed.

Despite the fact that this case was at the pleading stage, the district court avoided issues of law and failed to accept the Students' allegations as true. Namely, the district court did not accept as true that COVID-19 vaccines were experimental medical products; that there was insufficient evidence that they prevented infection or transmission of COVID-19; they were not safe and were known to cause numerous serious adverse effects, including serious injury and death. Notably, the district court failed to accept as true that COVID-19 is not a *vaccine-preventable* disease. In doing so, the district court erroneously applied its own facts to the legal analysis.

On appeal, the Third Circuit panel issued a split decision, reversing and affirming the district court.

The panel majority reversed the district court's decision that the religiously exempt students did not have standing. App. 12a-13a. On the merits, the panel affirmed the district court's dismissal of the Students' federal preemption claim because 21 U.S.C. § 360bbb-3 did not impose obligations on Rutgers and the Students were not deprived of the right "to accept or refuse" the vaccine. App. 14a-16a. The panel also concluded that Rutgers Policy was not *ultra vires* because it interpreted "the interplay between N.J.S.A. § 18A:61D-1 and N.J. Admin. Code § 8:57-6.4" gave Rutgers statutory authority to mandate any vaccines recommended by ACIP (CDC's Advisory Committee on Immunization Practices) and its exercise of that authority did not conflict with 21 U.S.C. § 360bbb-3. App. 17a-18a. The panel also affirmed that the exclusion of religiously exempted students from university housing was authorized by longstanding historical practice and the statutory authority provided by N.J.A.C.§§ 8:57-6.14(d) and 6.15(c). App. 18a-19a. Finding no fundamental right to refuse vaccination or an unconstitutional condition, App. 20a-24a, the panel applied rational basis review to the Students' Due Process and Equal Protection claims. App. 26a-41a. The panel concluded that minimizing outbreaks of COVID-19, preventing or reducing the risk of transmission, and promoting public health consistent with federal, state and local efforts to stem the pandemic were rational and the mandate adequately related. App. 26a-27a. The Students' allegations of Rutgers being motivated by its ties to vaccine manufacturers were not material, CDC's authorization of the vaccines gave Rutgers "the requisite nexus" to relate its mandate to a "compelling interest in curbing the spread of COVID-19", and the allegations were speculative App. 28a-29b. The panel also ruled that Rutgers set forth a rational basis

for its differential treatment between students and staff, and between vaccinated and unvaccinated students and that neither of those groups are similarly situated. App. 35a-41a. The panel denied Petitioners remand to amend their complaint to compel Rutgers to justify its mandate after so many circumstances had changed and state officials had revoked their COVID-19 policies. The panel reached these decisions by failing to accept the Students' allegations as true, especially that COVID-19 is not a vaccine-preventable disease.

The dissenting circuit judge concurred in part and dissented in part. App. 43a-70a. He concurred with the disposition of the federal preemption claim and the state law *ultra vires* claim, the equal protection claim as it related to natural immunity. App. 45a. He also agreed that the Students' substantive due process and equal protection constitutional challenges were subject to rational basis review. App. 46a-50a.

He departed from the panel concerning the Students' equal protection claim based on Rutgers' unexplained initial decision to impose a vaccine mandate on students but not faculty or staff and would have remanded for Rutgers to present a rationale to review. App. 51a-65a. Additionally, he would have remanded to allow the Students to amend their complaint to challenge the continued imposition of the mandate because the reasons Rutgers gave in support of its Policy "namely, compliance with federal and state government pandemic policies – were circumstance-specific and those circumstances have manifestly changed." App. 65a-70a.

Students did not seek *en banc* rehearing and this petition followed.

## REASONS FOR GRANTING THE WRIT

Review on writ of certiorari may be granted for compelling reasons, which include that a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, …" Rule 10 (c).[22] Whether Americans have a fundamental right to informed consent and to freely and voluntarily refuse unwanted experimental medical treatment should be settled by this Court; whether a university has authority to mandate vaccines during an outbreak on whomever it chooses, and whether Section 564 of the FDCA has any bearing should be settled by this Court.

### I. The Panel's Decision Below Conflicts with a Fundamental Issue of Constitutional Law That Has Evolved Since *Jacobson v. Massachusetts* Was Decided More Than 100 Years Ago.

*Jacobson* did not employ a rational basis test in 1905 because tiers of constitutional scrutiny did not exist at that time. *Jacobson* stands for the proposition that a state legislature has police power to determine whether vaccination is necessary, may delegate that authority to a board of health, and that such authority may be exercised over a single person's liberty interest to protect everyone else. However, *Jacobson* does not stand for the proposition that government may mandate an experimental vaccine – especially one that was never tested to determine if it actually prevents infection or

22. "Rule" refers herein to the Rules of the Supreme Court of the United States.

transmission. If an experimental vaccine does not prevent infection or transmission, then the only reason to mandate it – to protect the rest of society – is not present and the reasoning of *Jacobson* should not control because harm to others is no longer part of the equation.

*Jacobson* has been cited or relied upon as controlling legal precedent for almost every vaccine mandate across the country. *See, e.g.*, *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (college mandate), *injunction denied* 2021 WL 11710867 (U.S. 2021); *Harris v. Univ. Mass. Lowell*, 557 F. Supp. 3d 304 (D. Mass. 2021) (college mandate); *Norris v. Stanley*, 558 F. Supp. 3d 556, 558-559 (W.D. Mich. 2021) (college mandate); *Kheriaty v. Regents of Univ. California*, 2022 WL 17175070, *1 (9th Cir. 2022) (college mandate); *Messina v. College of New Jersey*, 566 F. Supp. 3d 236, 246 (D.N.J. 2021) (college mandate); *We The Patriots USA, Inc. v. Hochul*, 17 F4th 266, 293-294 (2d Cir. 2021) (healthcare worker mandate) *denying injunction* 142 S. Ct. 734 (2021); *Halgren v. City of Naperville*, 577 F. Supp. 3d 700, 728-735 (N.D. Ill. 2021) (firefighter EMS mandate); *Lukaszczyk v. Cook County*, 47 F.4th 587, 599-603 (7th Cir. 2022) (public employee mandates); *Norris v. Stanley*, 73 F.4th 431, 435 (6th Cir. 2023) (college mandate).

It has also been cited to support pandemic restrictions that were never at issue in *Jacobson*. *See, e.g.*, *Illinois Repub. Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020) (for restrictions on public gatherings), *cert. denied* 2020 WL 13853362 (2020); *Big Tyme Invest., LLC v. Edwards*, 985 F.3d 456, 465-466 (5th Cir. 2021) (for bar closure orders).

Employing *Jacobson* courts have applied rational basis to avoid the most important question that confronts us today, whether a person has a fundamental right to exercise freely – without any coercion – informed consent to medical treatment in the form of an experimental vaccine and refuse it without forfeiting their education, losing their job, or being banned from places of public accommodation.

As applied, *Jacobson* has been used to deny the existence of a fundamental right to informed consent and to permit public entities to mandate experimental vaccines that do not prevent infection or transmission on any group, sometimes without explanation, and under any conceivable theory or rationale. Solely on the basis of *stare decisis* courts employed the most lenient test in our modern jurisprudence to deny people the right to refuse unwanted experimental medical treatment almost universally across the country. Even Rutgers, a state university operated by unelected officials, has been given the power to mandate an experimental vaccine that does not prevent infection or transmission.

The decisions of the panel and sister courts have given passing consideration to a line of cases decided since *Jacobson*, examining the right to informed consent and its corollary right to refuse unwanted medical treatment under the Due Process Clause of the Fourteenth Amendment. *See Washington v. Glucksberg*, 521 U.S. 702, 710-725 (1997) (examining the right to informed consent); *Washington v. Harper*, 494 U.S. 210, 221-222 (1990) (the significant liberty interest in avoiding unwanted administration of antipsychotic drugs); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 269

(1990) (the constitutionally protected right to refuse lifesaving hydration); *see also Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (liberty from bodily restraints); *Ingraham v. Wright*, 430 U.S. 651 673 (1977) (freedom from unjustified intrusions into the body); *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ("As against the right of an individual that his person be held inviolable…"); *Washington v. Harper*, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"); *Vitek v. Jones*, 445 U.S. 480, 495-496 (1980) (transfer to a mental hospital coupled with mandatory behavior modification treatment implicated liberty interests), and *Parham v. J.R.*, 442 U.S. 584, 600 (1979) ("[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment"); *see also White v. Napoleon*, 897 F.2d 103 (3d Cir. 1990) (the right to information necessary to exercise informed consent); *Rennie v. Klein*, 653 F.2d 836, 844 (3d Cir. 1981) (the right to refuse unwanted medical treatment).

Since *Jacobson*, this Court has recognized the right to informed consent and to refuse unwanted medical treatment as "deeply rooted in this Nation's history and tradition" and so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721 and 725 (holding "[t]he right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's

history and constitutional traditions."); *see also Cruzan*, 497 U.S. at 277 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions").

*Jacobson* cannot be read in isolation, as though no case since 1905 has addressed its issues, supersedes or modifies it.

In *Cruzan*, this Court described *Jacobson* as employing a test that "balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease" – not as employing a rational basis test. 497 U.S. at 278.. *Cruzan* also held that the liberty to refuse medical treatment emanates from the common law principle that "even touching of one person by another without consent and without legal justification was a battery." *Id.* at 269. "Before the turn of the century, [the Supreme Court] observed that no right is held more sacred, or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* (citing *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Since *Jacobson*, "[t]his notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment." *Id.* (quoting *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-130 (1914) ("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."). Hence, this Court concluded "[t]he informed consent doctrine has become firmly entrenched in American tort law." *Id.* In *Cruzan,* this Court further held, "[t]he right to refuse unwanted medical treatment" – to not consent – is "the logical corollary of the doctrine of informed consent." *Id.* at 270. And most importantly it held that "[a] person's liberty interest under the Due Process Clause in avoiding unwanted medical treatment must be determined by balancing his liberty interests against the relevant state interests." *Id.* at 278-79 (internal citation and quotation marks omitted). Rational basis is not a balancing test.

Rational basis cannot be the standard by which we weigh deprivation of a right this Court found so deeply rooted in our Nation's history, traditions and law. The position that a person does not have a fundamental right to refuse experimental medical treatment conflicts with numerous pronouncements and current statutes guaranteeing informed consent. *See, e.g.*, 21 U.S.C. § 360bbb-0a (investigational drugs for use by patients with life-threatening disease or conditions require written informed consent); 21 U.S.C. § 360bbb-3 (emergency-use authorized product require option to accept or refuse administration); 42 U.S.C. § 9501 (requiring informed consent for mental health patients); 38 U.S.C. § 7331 (same for veterans); 42 U.S.C. § 300ff-61 (HIV/AIDS testing must be voluntarily made); 45 C.F.R. § 46.116 (for unlicensed products in research "basic elements of informed consent" include a "statement that participation is voluntary" and "refusal to participate will involve no penalty or loss of benefits," and investigators must "minimize the possibility of coercion or undue influence"); FDA's *Information Sheet: Informed Consent* ("Coercion occurs when an overt

threat of harm is intentionally presented by one person to another in order to obtain compliance… Undue influence, by contrast, occurs through an offer of an excessive, unwarranted, inappropriate or improper reward or other overture in order to obtain compliance.").[23] *See also Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 184 (2d Cir. 2009) ("The Nuremberg Code, Article 7 of the ICCPR, the Declaration of Helsinki, the Convention on Human Rights and Biomedicine, the Universal Declaration on Bioethics and Human Rights, the 2001 Clinical Trial Directive, and the domestic laws of at least eighty-four States all uniformly and unmistakably prohibit medical experiments on human beings without their consent, thereby providing concrete content for the norm.").

The panel's holding and the decisions of its sister courts that "there is not a fundamental right to refuse vaccination" ignored the constitutionally protected liberty interest to refuse unwanted medical treatment recognized by *Cruzan*, *Glucksberg*, and later cases and the balancing test they employed. It also completely ignored the fact that COVID-19 vaccines are experimental treatment. The panel distinguished *Cruzan* and its progeny claiming simply that they "involved health decisions with consequences for only the individual involved." App. 23a. However, if the Students' facts are true, and COVID-19 vaccines do not prevent infection or transmission, and are *experimental*, then taking (or mandating) a COVID-19 vaccine only has consequences for the individual, not other members of the public, and these precedents must carry more weight in

23. *See* FDA, Guidance Document, *Informed Consent*, at https://www.fda.gov/regulatory-information/search-fda-guidance-documents/informed-consent#coercion (last visited May 13, 2024).

deciding the constitutionality of COVID-19 experimental vaccine mandates. Only this Court can reconcile *Jacobson* with *Glucksberg* and *Cruzan* and establish whether COVID-19 vaccine challenges are subject to a heightened level of review that is not "rational basis" or a balancing test to protect these important liberty interests against mandates of experimental medical products that do not prevent spread or transmission of disease.

Recognition of the right to informed consent as a personal right protected by the Constitution would also affect the analysis under the Equal Protection Clause and require heightened review. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (holding that "[s]imilar oversight [to strict scrutiny] by the courts is due when state laws impinge on personal rights protected by the Constitution" under the Equal Protection Clause). Neither the panel nor any sister court has applied strict scrutiny or heightened review in the equal protection context.

Regardless, no court below ever required Rutgers to explain why vaccinated and unvaccinated students were not similarly situated given the allegation (which must be accepted as true) that COVID-19 vaccines do not prevent transmission. No court below required Rutgers to explain why students were not similarly situated with professors and staff given the allegation (which must be accepted as true) that both can become infected with and spread COVID-19 equally. App. 56a-57a. In the performance of "executive" action, Rutgers should have been required to provide a rationale for its disparate treatment. *See Dept. Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) ("We start with settled propositions. First, in order to permit

meaningful judicial review, an agency must 'disclose the basis' of its action") (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-169 (1962) and *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.")). Every appellate court and district court that has addressed these issues gave no weight to the fact that COVID-19 vaccines are experimental and do not stop transmission; as a result, there are no distinctions between the vaccinated and unvaccinated. As early as July 2021, CDC acknowledged that both vaccinated and unvaccinated people can spread COVID-19 or become infected.[24]

Additionally, if the rights to informed consent and to refuse unwanted medical treatment are constitutionally protected, then they also implicate the now well-settled unconstitutional conditions doctrine that "the government may not deny a benefit to a person because he exercises a constitutional right." *See Koontz v. St. Johns River Water Mngmt. Dist.*, 570 U.S. 595, 604 (2013); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 269 (1974). This doctrine applies in

24. *See* Media Statement, CDC Director R. Walensky on Today's MMWR (July 30, 2021) ("On July 27th, CDC updated its guidance for fully vaccinated people, recommending that everyone wear a mask in indoor public settings, in areas of substantial and high transmission, regardless of vaccination status.") at https://archive.cdc.gov/www_cdc_gov/media/releases/2021/s0730-mmwr-covid-19.html (last visited May 13, 2024).

the university context. *See Perry v. Sindermann*, 408 U.S. 593 (1972) (public college violates a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration). "Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 570 U.S. at 604 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972). "[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz*, 570 U.S. at 606.

Finally, the panel below and other federal courts have failed to analyze rigorously if a specific statute delegates authority to mandate experimental vaccines during an outbreak. *Jacobson* recognized that "the state may invest local bodies called into existence for purposes of local administration with authority in some way to safeguard the public health and safety." 197 U.S. at 25. Recently, this Court decided such a delegation of authority must "speak clearly" and "plainly authorize" a mandate. *See NFIB v. OSHA*, 142 S. Ct. 661 (2022); *Cf. Biden v. Missouri*, 595 U.S. 87 (2022) ("[t]he challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it"). Similarly, courts must ask whether a public university may mandate an experimental vaccine on students during an outbreak when local health officers, state health commissioners or governors have not deemed it necessary to do so. In this case Rutgers acted unilaterally: no local

or state health officer, not even the Governor, mandated COVID-19 vaccines on college students or even asked colleges and universities to do so. Moreover, the statute and regulations upon which Rutgers relies do not "speak clearly" or "plainly authorize" any college or university in New Jersey to mandate anything, especially during an outbreak, much less an experimental vaccine. *See* N.J.S.A § 18A:61D-1; N.J.A.C.§ 8:57-6.4(c). That power is expressly reserved for the State Commissioner of Health and the Governor – not Rutgers, which is run by an unelected body. N.J.S.A. § 26:13-14; 26:13-36; *see also South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) ("Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect.") (Roberts, C.J. concurrence) (citing *Jacobson*).

These questions have profound implications not only for Rutgers students, bur for millions of college students, professors and staff around the country. If a university does not have clear authority to mandate an experimental vaccine, then it should not be allowed to do so when state health officials have not. These questions also affect the legal analysis of the Students' other claims. If a fundamental right is involved, then the Student's Due Process and Equal Protection claims are not subject to rational basis review. If a fundamental right is involved then the Students' argument that Rutgers violated the unconstitutional conditions doctrine, carries water.

Since 1905 when *Jacobson* was decided, humanity has come to learn a difficult but important lesson: every human being has an unqualified right to refuse unwanted experimental medical treatment. Experimental medical

treatment carries with it so many unknown risks that its mandate cannot possibly be rationalized in a free society. To the extent that *Cruzan* and its progeny did not address experimental medical treatment, this Court is obliged to address that question now. If our Constitution permits government to mandate experimental treatment, the public must be told clearly and in no uncertain terms so that we can exercise our collective power and influence on the other branches of government to ban it.

## II. The Questions Presented Are Frequently Recurring And Profound.

Mandates pervaded almost every sector of civil society in America in 2021. Throughout the country all manner of employees were subject to mandates, healthcare workers, firefighters, police officers, teachers, students.

During the course of the pandemic, mandates continued as more experimental vaccines were authorized. It was not enough to have the initial series of COVID-19 vaccines to attend Rutgers. In January 2022 Rutgers modified its Policy to also require students to receive the experimental COVID-19 booster, which was never tested on human beings before FDA made it available to the public.

Since the pandemic ended, authorities have warned that other more dangerous pathogens are imminent. In 2022, monkeypox replaced COVID and the World Health Organization declared the monkeypox outbreak a public health emergency of international concern.[25]

25. *See* https://www.who.int/europe/news/item/23-07-2022-who-director-general-declares-the-ongoing-monkeypox-

By July 30, 2022, New York City declared a public health emergency due to the monkeypox outbreak.[26] In November 2022, the Children's Hospital Association and the American Academy of Pediatrics called on the Biden administration to declare an emergency for respiratory syncytial virus ("RSV").[27] Avian influenza virus, otherwise known as H5N1 bird flu dominates current headlines, CDC is monitoring human infections,[28] and the federal government is investigating novel bird flu vaccines.[29]

Public health emergencies suddenly are no longer rare events. Emboldened by the ease with which officials were able to exercise extraordinary power to control

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outbreak-a-public-health-event-of-international-concern. (last visited May 13, 2024).

26. *See* Press Release, *New York City Health Department Declares Monkeypox a Public Health Emergency* at *https://www.nyc.gov/office-of-the-mayor/news/555-22/new-york-city-health-department-declares-monkeypox-public-health-emergency* (last visited May 13, 2024).

27. *See* Spencer Kimball, *Children's hospitals call on Biden to declare emergency in response to 'unprecedented' RSV surge* at https://www.cnbc.com/2022/11/18/biden-asked-to-declare-emergency-over-rsv-flu-kids-hospitalizations.html (last visited May 13, 2024).

28. *See* CDC, *Highly Pathogenic Avian Influenza A (H5N1) Virus Infection Reported in a Person in the U.S.,* at https://www.cdc.gov/media/releases/2024/p0401-avian-flu.html (last visited May 13, 2024).

29. *See U.S. Could Produce and Ship One Hundred Million Vaccine Doses Within Months,* at https://www.healthline.com/health-news/bird-flu-u-s-could-produce-and-ship-100-million-vaccine-doses-within-months (last visited May 13, 2024).

public interaction during the COVID-19 pandemic (*e.g.*, restrictions, lockdowns, mandates), and as emergency-use authorization becomes more widely accepted and employed by the FDA, the public is likely to face more mandates for experimental vaccines or other experimental medical products in the future. That is especially true today where Big Pharma is poised to profit lucratively from mandates of its experimental medical products while enjoying full immunity for product liability under the PREP Act. Enjoying essentially impermeable immunity, it is estimated that Big Pharma made an extraordinary $90 billion in profits from COVID-19 vaccines and medicines.[30] In 2022, Pfizer alone reached a record revenue of $100 billion, largely due to its COVID vaccine sales.[31]

In sum, the questions presented here are frequently recurring, of monumental importance, and the circumstances they address are likely to repeat themselves in the near future. This Court should grant certiorari to ensure that these questions are adequately addressed by the courts and that *Jacobson*, *Cruzan* and their progeny are appropriately applied and followed.

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30. *See* Esther De Haan, Big Pharma raked in USD 90 billion in profits with COVID-19 vaccines at https://www.somo.nl/big-pharma-raked-in-usd-90-billion-in-profits-with-covid-19-vaccines/ (last visited May 13, 2024).

31. *See* Spencer Kimball, *The COVID pandemic drives Pfizer's 2022 revenue to a record $100 billion* at https://www.cnbc.com/2023/01/31/the-covid-pandemic-drives-pfizers-2022-revenue-to-a-record-100-billion.html#:~:text=The%20Covid%20pandemic%20drives%20Pfizer's%202022%20revenue%20to%20a%20record%20%24100%20billion&text=Pfizer%20sold%20%2437.8%20billion%20of,demand%20for%20the%20shots%20slowed. (last visited May 13, 2024).

## III. This Case Is Essential To Answering The Questions Presented.

This case is uniquely poised because the facts must be accepted as true and it concerns a mandate phased-in over time.

First, the facts are not in dispute because this case was dismissed at the pleading stage. Therefore, Petitioners' facts must be accepted as true (as the courts below failed to do). To wit, COVID-19 vaccines are not safe; they have caused serious injury and death; they are not effective at preventing infection or transmission: they were not tested to prevent infection or transmission; and COVID-19 is not a *vaccine-preventable* disease. That fact alone – that COVID-19 is not a *vaccine-preventable* disease – strikes at the heart of not just the constitutional analysis, but any legal analysis of statutes governing Rutgers' authority since its power turns on whether there is a *vaccine-preventable* disease, or not. *See* N.J.S.A. § 18A:61D-1; N.J.A.C.§ 8:57-6.14(d) and -6.15(c).

Additionally, it must be accepted as true that the mandate in this case undisputedly concerned an *experimental* injection. COVID-19 vaccines were still under clinical investigation when Rutgers mandated them. They are still under clinical investigation today. As a clinical trial site for the three vaccine manufacturers, Rutgers was keenly aware of the limitations and risks, known and unknown, posed by COVID-19 vaccines. Rutgers did not possess any information on long-term health effects because there are none. Rutgers had financial ties to the three principal vaccine manufacturers; Rutgers was engaged in clinical research for all of them;

Rutgers was doing its own independent clinical research on COVID-19 vaccines; its work and investment would benefit from COVID-19 vaccine mandates.

Second, since the mandate was phased in by Rutgers at different times in different ways (first students, later faculty and employees, later boosters, then maintained after public emergencies ended) this Court would be in a unique position to consider the questions presented *vis-à-vis* remote students, students attending in person, distinctions between students and professors or other staff without explanation, the competing interests of mandating a vaccine that does not prevent transmission, mandating a booster that was never tested on humans, maintaining an experimental vaccine mandate a year beyond the termination of both state and federal public health emergencies – again without explanation.

This case presents an opportunity for this Court to assess not only whether a fundamental right to informed consent exists, but also whether that individual right was properly balanced against society's interest when it concerned an experimental vaccine that was not tested to prevent infection or transmission. This case is an opportunity to clarify whether *Jacobson* in fact employed a standard akin to rational basis review, whether such a standard still applies in view of this Court's jurisprudence since *Jacobson*, or whether some form of heightened review or a balancing test is required when experimental medical products are concerned, when there is conflicting information about effectiveness, when there are reports of serious injury and death from the vaccine, or when the entity mandating the vaccine is financially entangled with for-profit manufacturers and stands to gain economically from pervasive use of these vaccines under mandates.

This case also allows the Court to consider the standard for mandating on different groups at different times. Rutgers did not mandate the vaccine for faculty, staff or employees until President Biden issued his federal contractor mandate. Rutgers has never explained why it was necessary or rational to mandate an experimental vaccine on students (even remote students) but not on professors, staff or employees who were equally capable of becoming infected and spreading the disease. This Court can decide whether an entity can draw such distinctions or whether it must provide an explanation for doing so that can be tested by the courts.

It is deeply rooted in our Nation's history and constitutional traditions that people possess the right to be free from unwanted experimental medical treatment; that right achieved profound recognition at Nuremberg; it is indispensable in medical ethics and regulatory compliance. Vaccines are irreversible medical interventions; no vaccine is completely safe or effective; but if a vaccine does not prevent infection or transmission, then the argument that it is necessary to protect others has no basis in fact and deserves no legal weight. Under these circumstances, in a free society, if such a vaccine causes injury and death, then a person's right to forgo such an experimental medical intervention must tip the scales in favor of liberty.

## CONCLUSION

For the reasons set forth, certiorari should be granted to answer these important questions.

Respectfully submitted,

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May 15, 2024

# APPENDIX

## TABLE OF APPENDICES

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED FEBRUARY 15, 2024**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2970

CHILDREN'S HEALTH DEFENSE, INC.; PETER CORDI; RAELYNNE MILLER; KAYLA MATEO; ADRIANA PINTO; JAKE BOTHE; ANTHONY LAMANCUSA; JESSICA MOORE; RYAN SANDOR; GIANNA CORALLO; RYAN FARRELL; SEBASTIAN BLASI; MAGGIE HORN; LINDSAY MANCINI,

*Appellants,*

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY; BOARD OF GOVERNORS; RUTGERS SCHOOL OF BIOMEDICAL AND HEALTH SCIENCES; CHANCELLOR BRIAN L. STROM; PRESIDENT JONATHAN HOLLOWAY, IN THEIR OFFICIAL CAPACITIES

June 27, 2023, Argued
February 15, 2024, Filed

On Appeal from the United States District Court for the District of New Jersey. (D.C. No. 3-21-cv-15333). District Judge: Honorable Zahid N. Quraishi.

*Appendix A*

Before: JORDAN, KRAUSE, and
MONTGOMERY-REEVES, *Circuit Judges.*

OPINION OF THE COURT

**KRAUSE**, *Circuit Judge.*

The core educational mission of a university presupposes a safe and healthy student body to educate. For that reason, a university's responsibilities necessarily extend beyond the curriculum to the significant challenge, even in normal times, of safeguarding its population. Of course, the past few years have been anything but normal. The challenges posed by the COVID-19 pandemic were unprecedented, and universities around the country, indeed, around the world, had to wrestle with hard choices like whether to mask, to require vaccination, to "go remote," or to "go hybrid." They also faced hard choices in the sequencing of such safety measures across different components of the university as they attempted, in novel and fast-changing circumstances, to resume in-person classes and target the spread of the virus among those most at risk for "super spreader" transmission.

In preparing for a safe return to campus in the fall of 2021, Appellee, Rutgers University, took a phased approach that, in the first instance, prioritized the health of the student body. That spring, as the prior school year came to a close, Rutgers announced that student vaccination would be a condition of attending fall classes in person or having physical access to campus resources. At the same time, it provided students the options to

decline vaccination for medical or religious reasons, to become a fully remote student, or to disenroll and attend a different university. Within a few months, it extended that in-person vaccination requirement to its health care and public safety personnel, and a few months after that, to all in-person faculty and staff.

Appellants include thirteen Rutgers University students who took issue with the student policy. Along with Appellant Children's Health Defense, Inc.,[1] these students filed suit against Rutgers, raising various constitutional and statutory claims. Although vaccination was one among the other options for matriculating and was required only for in-person attendance, Appellants' complaint pejoratively labelled the policy a "vaccine mandate" and sought general damages as well as declaratory and injunctive relief. The District Court dismissed all claims as either moot or failing to state a claim.

We will affirm the District Court's judgment because, even accepting the complaint's factual allegations as true, as we must at this stage, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), the

1. Children's Health Defense, Inc. ("CHD") identifies itself as an organization that seeks to "end childhood health epidemics by working aggressively to eliminate harmful exposures, [to] hold those responsible accountable, and to establish safeguards." JA 160. For ease of reference and because CHD brought suit on behalf of the student plaintiffs, we will refer to the appellants, collectively, as "the Students" or "Appellants." Likewise, we will refer to Appellees Rutgers, the Board of Governors, Rutgers School of Biomedical and Health Sciences, Chancellor Brian Strom, and President Jonathan Holloway, in their official capacities, as "Rutgers."

Students have not stated any plausible claim for relief. We reach this conclusion based on the application of well-settled law and in line with every other federal court to have considered similar challenges.[2]

## I. Factual and Procedural Background

The essential contours of the COVID-19 pandemic are well-known. The first wave of cases came to the United States in early March 2020, and by mid-to-late March, several states had in place emergency orders closing non-essential businesses and limiting large gatherings.[3] New

2. *See, e.g., Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592 (7th Cir. 2021); *Norris v. Stanley*, 73 F.4th 431 (6th Cir. 2023); *Kheriaty v. Regents of the Univ. of Cal.*, No. 22-55001, 2022 U.S. App. LEXIS 32406, 2022 WL 17175070 (9th Cir. Nov. 23, 2022); *Harris v. Univ. of Mass., Lowell*, 557 F. Supp. 3d 304 (D. Mass. 2021), *appeal dismissed*, 43 F.4th 187 (1st Cir. 2022); *Messina v. Coll. of N.J.*, 566 F. Supp. 3d 236 (D.N.J. 2021); *Pavlock v. Perman*, No. RDB-21-2376, 2022 U.S. Dist. LEXIS 159032, 2022 WL 3975177 (D. Md. Sept. 1, 2022); *George v. Grossmont Cuyamaca Cmty. Coll. Dist. Bd. of Governors*, No. 22-cv-0424-BAS-DDL, 2022 U.S. Dist. LEXIS 201835, 2022 WL 16722357 (S.D. Cal. Nov. 4, 2022).

3. *2020-2021 Executive Orders*, The Council of State Gov'ts, https://web.csg.org/covid19/executive-orders/ (last visited December 19, 2023). Where we rely on information beyond what the parties included in their filings, "that information is publicly available on government websites and therefore we take judicial notice of it." *Vanderklok v. United States*, 868 F.3d 189, 205 n.16 (3d Cir. 2017); *see also Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 705 n.5 (3d Cir. 2004) (same). This includes materials available on the website of Rutgers, which, as an instrumentality of the State of New Jersey for regulatory purposes, *see San*

Jersey was one of them: On March 21, 2020, Governor Murphy issued Executive Order No. 107, which directed "[a]ll New Jersey residents [to] remain at home" except for certain exigencies. JA 284. The order closed most businesses, cancelled social gatherings, and required "[a]ll institutions of higher education," including Rutgers, to "cease in-person instruction." *Id.* But New Jersey, like most of the country, began a slow return to normalcy in spring 2021, when two, then three, COVID-19 vaccines received emergency use authorization and were made available to the public.[4]

One year into the pandemic, Rutgers announced that it would resume in-person learning for the fall 2021 semester, and on April 13, 2021, it issued the first iteration of its COVID-19 vaccination policy (the "Policy").[5]

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*Filippo v. Bongiovanni*, 961 F.2d 1125, 1134 n.12 (3d Cir. 1992); *Fine v. Rutgers*, 163 N.J. 464, 750 A.2d 68, 71-72 (N.J. 2000), is subject to public records laws, *see Sussex Commons Assocs., LLC v. Rutgers*, 210 N.J. 531, 46 A.3d 536, 544 (N.J. 2012); N.J.S.A. 47:1A-1.1 (defining "Government record" and "Public agency").

4. *Emergency Use Authorization—Archived Information*, Food and Drug Administration, https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization-archived-information#H1N1 (last updated December 15, 2023).

5. Interim COVID-19 Immunization Record Requirement for Students at 1, Children's Health Defense, Inc. et al v. Rutgers et al, 3:21-cv-15333-ZNQ-TJB (Aug. 30, 2021), ECF No. 10-3, (hereinafter "ECF No. 10-3"). In full, the "Reason for Policy" in April 2021 read: "[t]o minimize outbreaks of COVID-19 among students; to prevent or reduce the risk of transmission of

Consistent with Rutgers' decision to prioritize student health, the initial goal of the Policy was "[t]o minimize outbreaks of COVID-19 among students,"[6] and by the fall, Rutgers had expanded that goal "[t]o minimize outbreaks of COVID-19 in the Rutgers University community" at large. JA 350. Thus, the April 2021 Policy required students, as a condition of in-person campus access, to be vaccinated before the start of the new school year. Two months later, in June 2021, Rutgers extended the Policy to "health care personnel and all Rutgers University public safety personnel at all locations,"[7] and by October 2021, tracking President Biden's Executive Order,[8] it had expanded the in-person vaccine requirement to the remainder of its population, *i.e.*, all staff and faculty.[9]

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COVID-19 among all persons at Rutgers University and Rutgers-affiliated health care units; and to promote the public health of the community consistent with federal, State, and local efforts to stem the pandemic."

6. *Id.*

7. Antonio M. Calcado, *Guide to Returning to Rutgers—Update 7/28/21*, Rutgers (July 28, 2021), https://coronavirus.rutgers.edu/guide-to-returning-to-rutgers-update-7-28-21/; *Section 100.3.1, Immunization Policy for Covered Individuals*, Rutgers (Jun. 21, 2021), https://web.archive.org/web/20210628160715/https://policies.rutgers.edu/sites/default/files/100-3-1-current.pdf.

8. *See* Antonio M. Calcado, *President Biden's Executive Order Requiring Coronavirus Vaccines*, Rutgers (Oct. 25, 2021), https://coronavirus.rutgers.edu/president-bidens-executive-order-requiring-coronavirus-vaccines/.

9. *Id.*

The student policy included three exemptions: (1) students enrolled in fully online degree-granting programs;[10] (2) students with a documented medical contraindication to the COVID-19 vaccination; and (3) students with a conflicting *bona fide* religious belief or practice.[11] Exempt students, however, were subject to certain restrictions, including that they were excluded from university housing, required to test weekly, and in addition to the indoor mask requirement, required to mask in congregate settings.[12] As the Policy was informally announced in March 2021, students had approximately six months to seek exemptions on health or religious grounds, take classes at a different university, change their status at Rutgers to fully remote,[13] or, for students who required a

10. The Policy specified: "Students enrolled in those programs generally do not receive Rutgers student identification, are not given access to Rutgers campus resources, and are not expected to have any physical presence on campus during the course of their pursuit of a Rutgers degree." JA 351. In contrast, "[m]atriculated students who select courses denoted as 'remote,' but who are not enrolled in a fully online degree-granting program, are not exempt." *Id.*

11. Per the Policy, "[a] general philosophical or moral objection to immunization shall not suffice[.]" JA 352.

12. The masking requirements have since been lifted.

13. As set forth above, students enrolled in one of Rutgers' online degree-granting programs had no access to Rutgers' campuses and were, therefore, considered to be "fully remote." *See supra* note 10. A student enrolled in the regular program, in contrast, retained access to campus even if that student's professors opted to hold their classes remotely.

particular in-person-only course to graduate, to take that class over the summer before the Policy came into effect.

Appellants objected to the Policy and filed a complaint against Rutgers in the District of New Jersey in August 2021.[14] Twelve of the thirteen Students had applied for and received medical or religious exemptions. JA 165. The remaining student, Adriana Pinto, also "struggled with her health" but opted not to seek a medical exemption. JA 138. While one of the remaining classes that Pinto needed to graduate allegedly was an in-person-only course, she opted not to take it over the summer before the vaccine requirement became effective and instead became a plaintiff in this action.[15] *See* JA 139-40.

The Students' Complaint broadly alleged that "[a]ll available vaccines in the United States are emergency-authorized COVID-19 vaccines made by Pfizer, Moderna and Johnson & Johnson. They are not FDA approved, and are not proven safe and effective." JA 194. It also alleged: "Rutgers has been involved in the clinical trials for all three COVID vaccines—those of Pfizer, Moderna, and Johnson & Johnson," and, although it does not explain how, it asserts Rutgers "will gain financially from universal mandates for the vaccines it has helped to develop." JA 157. The upshot, according to the Complaint, was that:

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14. The Operative Complaint ("the Complaint") is the First Amended Complaint, filed on October 19, 2021.

15. *See also* JA 95; Decl. of Adriana Pinto, Children's Health Defense, Inc. v. Rutgers et al, 3:21-cv-15333-ZNQ-TJB (Sep. 20, 2021), ECF No. 24-11 at 2.

> As a result of its financial ties to COVID-19 vaccine manufacturers, its involvement in clinical trials for all of the currently available COVID-19 vaccines, and its stake in the approval and widespread dissemination and use of COVID-19 vaccines, [Rutgers is] conflicted from making any objective decision or imposing any mandate concerning the administration of COVID-19 vaccines upon its students.

JA 206. Based on these allegations, the Complaint asserted seven claims, three of which have been abandoned on appeal.[16] The four remaining claims, for which the Students sought damages as well as injunctive relief,[17] are: (1) preemption under the federal Emergency Use Authorization ("EUA") statute, 21 U.S.C. § 360bbb-3; (2) lack of authorization under New Jersey law; (3) violation of substantive due process under the Fourteenth Amendment; and (4) violation of equal protection under the Fourteenth Amendment for the unequal treatment of (a) staff and students, as only the latter were initially

16. The abandoned claims are for violations of the First Amendment's Free Exercise Clause, breach of contract, and promissory estoppel.

17. Although the pandemic has largely subsided, rendering claims for injunctive relief moot in a number of COVID-19 related appeals, *see, e.g., Sczesny v. Murphy*, No. 22-2230, 2023 U.S. App. LEXIS 17479, 2023 WL 4402426, at *1 (3d Cir. June 14, 2023); *Clark v. Governor of N.J.*, 53 F.4th 769, 781 (3d Cir. 2022); *County of Butler v. Governor of Pa.*, 8 F.4th 226, 232 (3d Cir. 2021), the Students' request for damages in this case ensures that we have a live controversy, *see Bd. of Pardons v. Allen*, 482 U.S. 369, 370 n.1, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987).

required to vaccinate; and (b) vaccinated and unvaccinated students (including unvaccinated students with "natural immunity" from having had COVID-19).

The District Court granted Rutgers' motion to dismiss, brought under Federal Rule of Civil Procedure 12(b)(6), concluding that none of the claims pleaded stated a viable cause of action. At the outset, the District Court found that all Students, other than Pinto and CHD, lacked standing and that their claims were moot, because they were exempt from Rutgers' vaccine requirement. It then considered the Students' constitutional claims, first recognizing that the Supreme Court's seminal decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905) permitted a state to require its residents to be vaccinated, even without exemptions, if a rational basis exists to determine that such a step is necessary to mitigate a public health emergency. Because the District Court found Rutgers "undoubtedly has a legitimate interest" in enforcing its Policy to curb the spread of the COVID-19 pandemic, JA 18, it dismissed the Students' substantive due process and equal protection claims. And because Rutgers had required staff to be vaccinated a few months after it imposed that requirement on students, the District Court dismissed as moot their equal protection claim concerning the disparate treatment of students and staff.

As to the Students' preemption claim, the District Court rejected the argument that federal law preempted Rutgers' Policy, in part because "Rutgers has not mandated any medical products" in violation of 21 U.S.C. § 360bbb-3,

but rather "has simply made adherence to the mandate a condition to [] enrollment at the university." JA 26. Finally, the District Court concluded that Rutgers' Policy was not *ultra vires* under state law because the university was authorized to require COVID-19 vaccinations under N.J.S.A. § 18A:61D-1 and N.J. Admin. Code § 8:57-6.4(c), and to exclude exempted students from university housing under N.J. Admin. Code §§ 8:57-6.14(d), 6.15(c).

## II. Jurisdiction and Standard of Review

The District Court had jurisdiction over the Students' federal claims under 28 U.S.C. § 1331 and related state law claims under 28 U.S.C. § 1367(a). We have appellate jurisdiction under 28 U.S.C. § 1291.

We review a district court's ruling on a motion to dismiss *de novo*. *Doe v. Univ. of the Scis.*, 961 F.3d 203, 208 (3d Cir. 2020). In conducting that review, we construe the complaint in the light most favorable to the plaintiff, accept all "well-pleaded factual allegations" as true, and examine whether the complaint contains "sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Iqbal*, 556 U.S. at 678-79 (internal quotation omitted). We need not accept as true legal conclusions or unwarranted factual inferences. *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 133 (3d Cir. 2006) (citation omitted).

## III. Discussion

Because Article III standing is a prerequisite for our jurisdiction, we will address the question of the exempt Students' standing before turning to the merits of the Students' four claims.

### A. Standing

Article III of the Constitution requires that a plaintiff establish standing to sue in federal court. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203, 210 L. Ed. 2d 568 (2021). A plaintiff meets that burden by showing "(i) that [the plaintiff] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id.* (citation omitted). When multiple plaintiffs sue, at least one plaintiff must have standing to assert each claim. *Horne v. Flores*, 557 U.S. 433, 445, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009) (citations omitted).

Here, it is beyond dispute that at least two of the Appellants have standing to challenge Rutgers' vaccine requirement: (1) Adriana Pinto, the Rutgers student who did not request or receive an exemption—and who, per Rutgers' Policy, has been disenrolled from her classes; and (2) CHD itself, whose standing mirrors that of Pinto (a member).

It is a closer question whether the exempt students have standing to challenge Rutgers' exclusion of

unvaccinated students from university housing and other exemption conditions. If we read the Students' Complaint to allege no injury beyond "their fear of future potential harm," we might agree that they have not suffered any actual or imminent injury. JA 15. But other aspects of the Complaint can be read to allege more concrete injuries fairly traceable to Rutgers' Policy, like the loss of student housing, which could be redressed by a decision in the Students' favor. *See* JA 232 (alleging that denial of university housing is a condition of exemptions, which can further subject students to "loss of scholarships, Honors Program enrollments, athletics"); 173-74 (alleging that "Doe 9 is incurring additional cost and expense to reside off-campus as a result of Defendants' actions"); 176 (same for Doe 13).[18] Thus, we conclude that even the exempt students have standing, and we may consider all of the Students' claims.

### B. Appellants' Claims

Proceeding to the merits, we address below the Students' four claims on appeal.

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18. The concepts of standing and mootness are "closely related" because both deal with the Court's ability to provide redress. Because the exempt students here have a legally cognizable interest in the outcome, and we could grant them "effectual relief," their claims are not moot. *Calderon v. Moore*, 518 U.S. 149, 150, 116 S. Ct. 2066, 135 L. Ed. 2d 453 (1996).

*Appendix A*

### 1. Federal Preemption[19]

The Students first contend that Rutgers' Policy conflicts with "[t]he principle that it is illegal to coerce an individual to accept an experimental medical product," grounded in federal law governing EUA products, namely 21 U.S.C. § 360bbb-3, which requires "that individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product." Opening Br. 55, 57. But the District Court correctly dismissed this claim for two reasons.

First, § 360bbb-3(e)(1)(A) obligates only the Secretary of Health and Human Services to act, by establishing

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19. We assume for purposes of the appeal that the Students have a private cause of action under § 360bbb. Rutgers does not contend otherwise, and the District Court did not consider the issue. *But see Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 817, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986) (holding that private actors have no federal cause of action for a violation of the Federal Drug and Cosmetic Act); *Bridges v. Houston Methodist Hosp.*, 543 F. Supp. 3d 525, 527 (S.D. Tex. 2021) (holding that § 360bbb "does not confer a private opportunity to sue the government, employer, or worker"), *aff'd sub nom. Bridges v. Methodist Hosp.*, No. 21-20311, 2022 U.S. App. LEXIS 16243, 2022 WL 2116213 (5th Cir. June 13, 2022); *Crosby v. Austin*, No. 8:21-cv-2730, 2022 U.S. Dist. LEXIS 35955, 2022 WL 603784, at *1 (M.D. Fla. March 1, 2022) (no right of action under 21 U.S.C. § 360bbb-3); *Norris v. Stanley*, No. 1:21-cv-756, 2022 U.S. Dist. LEXIS 17083, 2022 WL 247507, at *5 (W.D. Mich. Jan. 21, 2022) (same).

"conditions designed to ensure" informed consent.[20] Because Section 360bbb-3(e)(1)(A) does not impose any obligations on *state universities*, it cannot conflict with Rutgers' Policy.

Second, the Students were not deprived of the right "to accept or refuse" the vaccine. In fact, all but one Student exercised their right to refuse and remain unvaccinated. Rutgers' Policy simply provided the Students with three options: get the vaccine, apply for an exemption, or pursue education elsewhere (*i.e.*, in a remote Rutgers program or at another university). That choice may have been difficult. But there is no unqualified right to decide whether to "accept or refuse" an EUA product without consequence.[21] To the contrary, being advised of the consequences is precisely what § 360bbb-3(e)(1)(A)(ii)(III) requires, providing explicitly that the recipient of an EUA product shall be informed «of the consequences, if any, of refusing

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20. As the Students acknowledge, the Secretary enforces these requirements by requiring healthcare providers to distribute to potential vaccine recipients an authorized fact sheet which states: "[i]t is your choice to receive or not receive [the vaccine]." JA 187; *accord Norris*, 73 F.4th at 438 ("The EUA statute's relevant language . . . addresses the interaction between the medical provider and the person receiving the vaccine . . . . ").

21. *Accord Norris*, 73 F.4th at 438 ("The statute is meant to ensure patients' consent to the pharmaceutical they are receiving, but this does not mean that MSU cannot require vaccination as a term of employment."); *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1256-57 (D. Or. 2021) (Plaintiffs had informed consent where they retained the option to "get the vaccine, apply for an exception, or look for employment elsewhere").

administration of the product.» Nor is there an unqualified right to attend a university, let alone the university of one›s choice, without conditions. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (no fundamental right to education); *Kolbeck v. Kramer*, 84 N.J. Super. 569, 202 A.2d 889, 889-90 (N.J. Super. Ct. Law. Div. 1964) (recognizing vaccination as a permissible condition of university admittance, with accordance for religious exemptions).

We will therefore affirm the dismissal of the Students' preemption claim.

### 2. State Law Authorization

Next, the Students assert that Rutgers' Policy is *ultra vires* under New Jersey law. Though a "state university" of New Jersey, N.J.S.A. 18A:65-1, Rutgers has aspects of both a private and public institution.[22] Thus, while it is not a state actor for Eleventh Amendment purposes, *see Kovats v. Rutgers*, 822 F.2d 1303, 1312 (3d Cir. 1987), it is still considered a government instrumentality for purposes of constitutional and federal civil rights law, *San Filippo*, 961 F.2d at 1134 n.12. As the New Jersey Supreme

22. Nothing we say here limits the authority of private universities to require vaccines as a condition of attendance or participation, within the bounds of any applicable statutory limitations. *See, e.g., Bishop v. Univ. of Scranton*, No. 3:22-CV-01831, 2023 U.S. Dist. LEXIS 122884, 2023 WL 4565468, at *3-5 (M.D. Pa. July 17, 2023); *Storino v. N.Y. Univ.*, 193 A.D.3d 436, 146 N.Y.S.3d 594, 596 (N.Y. App. Div. 2021); *Doe v. N.Y. Univ.*, 537 F.Supp.3d 483, 494-496 (S.D.N.Y. 2021).

Court explained, unless Rutgers' "public status"—and, therefore, the applicability of a state law or rule to the university—would "frustrate the purposes of Rutgers' charter or the primary purpose of the underlying law or [r]ule, Rutgers ordinarily should be considered an instrumentality of the state." *Fine*, 750 A.2d at 71-72 (citations omitted).

In this case, pointing to particular state statutes and rules, Appellants contend that Rutgers lacks authority either (i) to require COVID-19 vaccination as a condition of attendance; or (ii) to exclude unvaccinated students from university housing. Yet both claims fail as a matter of law.

As for the first, Rutgers' authority to require COVID-19 vaccination is found in the interplay between N.J.S.A. § 18A:61D-1 and N.J. Admin. Code § 8:57-6.4. The former obligates state universities to require students to provide proof of certain mandatory vaccinations in accordance with New Jersey Department of Health regulations. *See* N.J.S.A. § 18A:61D-1. The latter, N.J. Admin. Code § 8:57-6.4, is the implementing regulation that authorizes state universities "to establish additional requirements for student immunizations and documentation that [they] shall determine appropriate," if, as here, the vaccines are "recommended by the ACIP"—the Advisory Committee on Immunization Practices within the CDC. *See COVID-19 ACIP Vaccine Recommendation*, Centers for Disease Control and Prevention, https://bit.ly/3x7u7ee (recommending all COVID-19 vaccines with emergency use authorization).

The Students retort that "[t]he ACIP recommendations . . . require compliance with 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III)." Opening Br. 34. But even aside from the fact that the Students have not demonstrated a violation of § 360bbb-3(e)(1)(A), this response misses the mark. N.J. Admin. Code § 8:57-6.4 authorizes Rutgers to require any immunization that, as here, has been recommended by ACIP. That statutory authority does not depend on whether ACIP *should have* recommended the immunization or whether the HHS Secretary adequately ensured that medical providers obtain informed consent.

The Students' second claim—that Rutgers lacks authority to exclude exempt students from university housing—is debunked by longstanding historical practice, for schools have long required vaccination as a prerequisite for in-person attendance. *See Jacobson*, 197 U.S. at 25, 31-33 ("[T]he principle of vaccination as a means to prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools.") (citations omitted); *Kolbeck*, 202 A.2d at 889-90 (recognizing vaccination as a permissible condition of university admittance, with accordance for religious exemptions). Consistent with that practice, Rutgers' general vaccination policy required students to provide proof of certain vaccinations as a condition of attendance, "subject to amendment,"[23] and while that policy provided

23. *See Section 10.3.13, Student Immunizations and Health Requirements*, Rutgers (Dec. 3, 2020), https://policies.rutgers.edu/sites/default/files/10-3-13-current.pdf (hyperlinked in Rutgers' April 13, 2021 student vaccination policy, *available at* Children's

for medical and religious exemptions, it also alerted unvaccinated students that they may be removed from campus in case of a disease outbreak.[24]

Even aside from the terms to which the students agreed on as a condition of matriculation, N.J. Admin. Code §§ 8:57-6.14(d) and 6.15(c) provided Rutgers with statutory authority to "temporarily exclude a student with [medical or religious] exemptions . . . from classes and from participating in institution-sponsored activities" during outbreaks after a consultation with the Commissioner of Health.

In view of Rutgers' explicit statutory authority to take the actions it did, we perceive no error in the District Court's dismissal of the claim that the Policy was *ultra vires* under state law.

### 3. Substantive Due Process

The Students next allege that Rutgers' Policy violated their substantive due process rights under the Fourteenth Amendment. In reviewing such claims, we apply rational basis review unless there has been a violation of a fundamental right. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 2283, 213 L. Ed. 2d 545 (2022). Seeing none, we review the Policy for a rational basis and conclude that it satisfies this standard.

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Health Defense, Inc. et al v. Rutgers et al, 3:21-cv-15333-ZNQ-TJB (Aug. 30, 2021), ECF No. 10-3) (hereinafter "Rutgers' Student Immunization Policy").

24. *Id.*

### i. Fundamental Right to Refuse Vaccination and Rational Basis Review

As federal courts have uniformly held, there is no fundamental right to refuse vaccination.[25] A "fundamental right" must be either enumerated in the Bill of Rights or "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (quotations and citations omitted). The Students fail to offer any historical example to establish a "fundamental right" to be free from a vaccine requirement at a public university. To the contrary, the Supreme Court's decision in *Jacobson*, which sustained a criminal conviction for refusing to be vaccinated, conclusively demonstrates that there is no such right. 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643.

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25. *See, e.g., Klaassen*, 7 F.4th at 593; *Lukaszczyk v. Cook County*, 47 F.4th 587, 603 (7th Cir. 2022); *Kheriaty*, 2022 U.S. App. LEXIS 32406, 2022 WL 17175070, at *1; *Clark v. Jackson*, No. 22-5553, 2023 U.S. App. LEXIS 8318, 2023 WL 2787325, at *6 (6th Cir. Apr. 5, 2023); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 293 (2d Cir. 2021); *Bauer v. Summey*, 568 F. Supp. 3d 573, 592-93 (D.S.C. 2021); *Dixon v. De Blasio*, 566 F. Supp. 3d 171, 185 (E.D.N.Y. 2021), *vacated as moot*, No. 21-2666, 2022 U.S. App. LEXIS 8785, 2022 WL 961191, at *1 (2d Cir. Mar. 28, 2022); *Harris*, 557 F. Supp. 3d at 313; *Norris v. Stanley*, 567 F. Supp. 3d 818, 821 (W.D. Mich. 2021); *Valdez v. Grisham*, 559 F. Supp. 3d 1161, 1173 (D.N.M. 2021); *Williams v. Brown*, 567 F. Supp. 3d 1213, 1224-25 (D. Or. 2021).

*Appendix A*

In *Jacobson*, the Supreme Court considered the constitutionality of a Massachusetts statute authorizing "the board of health of a city or town" to require all persons older than 21 to be vaccinated against smallpox. *Id.* at 12. In response to the state law, the city of Cambridge adopted a regulation requiring that all city inhabitants be vaccinated. *Id.* at 12-13. Jacobson did not comply with the mandate, was criminally prosecuted, was sentenced to pay a fine, and was ordered to "stand committed until the fine was paid." *Id.* at 13-14. He appealed, claiming the Massachusetts law authorizing the local mandate violated his constitutional rights under the Fourteenth Amendment. *Id.* at 14.

The Supreme Court upheld the statute, and in so doing, rejected the notion that individuals have a fundamental or unfettered right to refuse vaccination. As it explained, the "liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* at 26. Instead, the Court recognized, "[t]here are manifold restraints to which every person is necessarily subject for the common good," *id.*, including a community's "right to protect itself against an epidemic of disease which threatens the safety of its members," *id.* at 27.

Finding no fundamental right, *Jacobson* applied a standard similar to modern rational basis review, stating that it would overturn "statute[s] purporting to have been enacted to protect the public health . . . or the public safety" only if they lacked any "real or substantial relation to those objects, or [were], beyond all question, a plain, palpable invasion of rights secured by the fundamental

law." *Id.* at 31; *see Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70, 208 L. Ed. 2d 206 (2020) (Gorsuch, J., concurring) ("Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review.").

Appellants' attempts to distinguish *Jacobson* on the basis that it involved a "nearly 100-year old smallpox vaccine and a $5 fine" are unpersuasive. Opening Br. 44. While the Students allege that "so much remains unknown" about COVID-19 vaccines, JA 208, which, at the time of the Complaint, were in public use "for less than a year," *id.* at 207, *Jacobson* did not turn on the longevity of the vaccine or consensus regarding its efficacy. To the contrary, the Court recognized:

> The fact that the belief [in effectiveness] is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the 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.

197 U.S. at 35. And the penalties for non-compliance in *Jacobson* were more, not less, severe than those at issue here: The city ordinance authorized criminal prosecution and imprisonment for up to fifteen days.[26] *Id.* at 13.

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26. *See* Michael R. Albert et al., *The Last Smallpox Epidemic in Boston and the Vaccination Controversy, 1901-1903*, 344 New Eng. J. Med. 375, 375 (2001).

Nevertheless, the Students assert a right "to refuse unwanted medical treatment" based on cases they say supersede *Jacobson*. Opening Br. 4. For instance, they point to *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990), which recognized "the right of a competent individual to refuse medical treatment," *id.* at 277, in a case involving a request to refuse life support following a serious car accident, and *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997), which acknowledged a right to "bodily integrity."[27]

These cases, however, are categorically distinct. In stark contrast to *Jacobson* and its progeny, they involved health decisions with consequences for only the individual involved, rather than broad-based matters of "public health and safety." 197 U.S. at 12. For that reason, the Supreme Court did not even have occasion to reference *Jacobson* in *Glucksberg*, and in *Cruzan*, the Court explained *Jacobson* as a case where "an individual's liberty interest in declining an unwanted smallpox vaccine" was

27. To be sure, the Court in *Glucksberg* declined to recognize a fundamental right to physician-assisted suicide. *Id.* at 728. It observed that in *Cruzan*, it "assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." *Id.* at 720. But, it continued, "[t]he right assumed in *Cruzan* [] was . . . entirely consistent with this Nation's history and constitutional traditions," *id.* at 725, whereas there was no history supporting a fundamental right to assisted suicide, which had long been banned in the United States, *id.* at 728.

outweighed by "the State's interest in preventing disease." 497 U.S. at 278.

The Court's more recent pronouncements confirm *Jacobson*'s vitality. Just last term, the Supreme Court declined to recognize a substantive due process right against substantial and lengthy intrusions on a person's right to control her body where even one "life or potential life" is at risk. *See Dobbs*, 142 S. Ct. at 2277 (citation omitted). Surely, then, it would not now recognize a fundamental right to avoid the "relatively modest" intrusion of a vaccine, *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 71 (Gorsuch, J., concurring), where innumerable lives are at risk. To the contrary, in the last three years alone, the Supreme Court has cited *Jacobson* five times,[28] and the federal appellate courts, for their part, have uniformly relied on *Jacobson* in dismissing challenges to vaccination requirements.[29]

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28. *See Chrysafis v. Marks*, 141 S. Ct. 2482, 2484, 210 L. Ed. 2d 1006 (2021) (Breyer, J., dissenting); *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 70-71 (Gorsuch, J., concurring); *id.* at 75-76 (Roberts, C.J., dissenting); *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 10, 11-12, 208 L. Ed. 2d 155 (2020) (Alito, J., dissenting); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608, 207 L. Ed. 2d 1129 (2020) (Alito, J., dissenting); *id.* at 2614 (Kavanaugh, J., dissenting); *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14, 207 L. Ed. 2d 154 (2020) (Roberts, C.J., concurring).

29. *See Lukaszczyk*, 47 F.4th at 601; *Klaassen*, 7 F.4th at 593; *Clark*, 2023 U.S. App. LEXIS 8318, 2023 WL 2787325, at *5-6; *We The Patriots USA, Inc.*, 17 F.4th at 293-94; *Norris*, 73 F.4th at 435-38; *Phillips v. City of New York*, 775 F.3d 538, 542-43 (2d Cir. 2015).

Our conclusion that *Jacobson* controls and the Students failed to state a substantive due process claim also resolves their claim under the unconstitutional conditions doctrine. To establish an unconstitutional condition, the Students needed to demonstrate that a state actor—here, Rutgers—"burden[ed] the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013). But there is no constitutional right either to refuse vaccination, *Jacobson*, 197 U.S. at 31, or to receive a public higher education, *San Antonio Indep. Sch. Dist.*, 411 U.S. at 35; *cf.* N.J. Const. art. VIII, § 4, para. 1 (requiring "thorough and efficient" education only for children ages 5 through 18). Thus, we join other courts in holding that, even viewing higher education as a government benefit, requiring vaccination as a condition of in-person matriculation is not an unconstitutional condition.[30]

30. *See Andre-Rodney v. Hochul*, 618 F. Supp. 3d 72, 84 (N.D.N.Y. 2022) (state employees "failed to plausibly allege a constitutional violation based on the unconstitutional conditions doctrine" because there is no fundamental right to refuse vaccination during a public health emergency); *Legaretta v. Macias*, 603 F. Supp. 3d 1050, 1071 (D.N.M. 2022) (because vaccine requirement does not violate fundamental rights, county employees could not state a claim for violation of the unconstitutional conditions doctrine); *Klaassen v. Trs. of Ind. Univ.*, 549 F. Supp. 3d 836, 870 (N.D. Ind. 2021) ("[T]he Constitution never provides a fundamental right to a collegiate education. Nor does it secure as a fundamental liberty a student's right to attend a public university no matter his or her vaccinated status."), *vacated and remanded with instructions to dismiss as moot*, 24 F.4th 638 (7th Cir. 2022);

In short, there is no fundamental right to refuse vaccination, nor any unconstitutional condition implicated here. Accordingly, we apply rational basis review to Rutgers' Policy as did the Court in *Jacobson* and as we have done traditionally with the policies of other universities. *See, e.g., Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 447 n.6 (3d Cir. 2000); *Bowers v. NCAA*, 475 F.3d 524, 553-54 (3d Cir. 2007); *Benner v. Oswald*, 592 F.2d 174, 183-84 (3d Cir. 1979).

### ii. Rutgers' Policy and Rational Basis Review

Under rational basis review, Rutgers need only "set forth a satisfactory, rational explanation" for its Policy. *Nazareth Hosp. v. Sec'y United States HHS*, 747 F.3d 172, 180 (3d Cir. 2014). Curbing the spread of COVID-19 is "unquestionably a compelling interest." *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67. So, *a fortiori*, Rutgers' stated purpose—"to minimize outbreaks of COVID-19 among students; to prevent or reduce the risk of transmission of COVID-19 among all persons at Rutgers University and Rutgers-affiliated health care units; and to promote the public health of the community consistent with federal, State and local efforts to stem the

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*Smith v. Biden*, No. 21-cv-19457, 2021 U.S. Dist. LEXIS 215437, 2021 WL 5195688, at *8 (D.N.J. Nov. 8, 2021) ("Plaintiffs are undeniably being presented with a difficult choice—comply with the vaccine mandate or risk losing their employment. They are, however, presented with a choice and are not being coerced to give up a fundamental right since there is no fundamental right to refuse vaccination.").

pandemic"—is undoubtedly rational.[31] It is also grounded in the recommendations of experts, including at the CDC and FDA, which only authorized the vaccines for emergency use after determining "based on the totality of scientific evidence available . . . the known and potential benefits of the [vaccines] . . . outweigh the known and potential risks." 21 U.S.C. § 360bbb-3(c)(2)(B).

The Students acknowledge that at least one reason Rutgers adopted its vaccine Policy was to minimize the spread of COVID-19 among students, consistent with public health efforts. But they allege there was a second motive: that Rutgers "*also* adopted the Policy to curry favor with vaccine manufacturers with which they have partnered to investigate and develop COVID-19 vaccines." *Id.* (emphasis added). Because Rutgers was a clinical trial site for COVID-19 vaccine testing and had other existing relationships with pharmaceuticals, they contend, it was "conflicted from making any objective decision or imposing any mandate concerning the administration of COVID-19 vaccines upon its students," *id.* at 206, and "will gain financially if every man, woman and child in the state, the country and globally is coerced to take a COVID-19 vaccine it helped develop," *id.* at 207.

These allegations do not alter our conclusion that Rutgers' Policy is rational for three reasons. First, even assuming that Rutgers also had a secondary financial incentive to require vaccines for on-campus access, its other incentive—protecting the health of its student body—is "unquestionably a compelling interest," *Roman*

31. ECF No. 10-3 at 1.

*Cath. Diocese of Brooklyn*, 141 S. Ct. at 67, and thus more than sufficient to satisfy rational basis review.

Second, Rutgers' "objectivity . . . to decide that emergency-use authorized COVID-19 vaccines are safe enough" and that the "benefits of these vaccines outweigh their risks" is irrelevant. JA 201. The decision as to the "safety and potential effectiveness" of the vaccines and that "the[ir] known and potential benefits . . . outweigh the[ir] known and potential risks," was made not by Rutgers but by the CDC, which made those findings as a precondition for emergency use authorization. *See* 21 U.S.C. § 360bbb-3(c)(2)(B).[32] What matters for rational basis review is that the CDC's objective, scientific judgment about the safety and relative benefits of the vaccines established the requisite nexus between vaccination and Rutgers' "compelling interest" in curbing the spread of COVID-19. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67.[33]

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32. Under the EUA statute, 21 U.S.C. § 360bbb-3(c)(2)(B), the HHS Secretary may authorize a product for emergency use only if, after consultation with the Director of the CDC, among others, the Secretary concludes that "the known and potential benefits of the product . . . outweigh the known and potential risks." The authorization of the product must state the Secretary's conclusions "concerning the safety and potential effectiveness of the product[.]" *Id.* § 360bbb-3(d)(3).

33. As the Students candidly admitted at oral argument, the crux of their Complaint is not that Rutgers lacked a rational basis for following the CDC's recommendation, but that the CDC's recommendation itself lacked a rational basis and that the Students should therefore have "the opportunity to take this case to discovery . . . to assess the statement of the CDC and test it." Oral Arg. Tr. 49:15-18.

Lastly, as Rutgers pointed out in its motion to dismiss, the assertion that, by virtue of participating in clinical trials or its other ties with pharmaceutical companies, Rutgers had some "stake in the approval and widespread dissemination and use of COVID-19 vaccines," JA 206, is the sort of "conclusory or 'bare-bones' allegation[] [that] will no[t] [] survive a motion to dismiss," *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678). The Complaint identifies nothing but "information and belief" for the proposition that allowing Johnson & Johnson or Pfizer to conduct clinical trials on site somehow gave Rutgers an interest in the outcomes of those trials or the eventual decision of the FDA. JA 206-07. Neither do its allegations of a prior Pfizer grant to the School of Engineering or a fellowship program that the pharmaceutical industry had been funding, *id.* at 205-06—without more—support the inference that Rutgers would gain financially from "every man, woman and child . . . globally [being] coerced to take a COVID-19 vaccine," *id.* at 207. The Students hypothesize that linkage, but that is not "enough to raise a right to relief above [a] speculative level." *Twombly*, 550 U.S. at 555; *see also Xi v. Haugen*, 68 F.4th 824, 841 (3d Cir. 2023) ("We may not fill this gap in [their] pleading with speculation.").[34]

34. It is not clear from the Students' briefing whether they intend to pursue an independent claim for Rutgers' masking and testing requirements or if they challenge those requirements only as part of their claim for disparate treatment under the Equal Protection Clause. To the extent they pursue a freestanding claim, it is meritless. As federal courts have routinely recognized, such challenges do not state constitutional claims. *See, e.g., Klaassen*, 7 F.4th at 593 ("These plaintiffs just need to wear masks and be tested, requirements that are not constitutionally problematic.");

### 4. Equal Protection

In the third count of their Complaint, the Students claimed that Rutgers denied them equal protection of the law by discriminating against (1) students relative to faculty and staff, and (2) vaccinated students relative to unvaccinated students (including "naturally immune" students). We consider whether the first of these arguments is moot, the proper standard of review, and, finally, the merits of the Students' equal protection claim.

#### i. Mootness

By the time the District Court ruled on Rutgers' motion to dismiss, Rutgers had extended the in-person vaccination requirement of its Policy to all of its employees pursuant to President Biden's Executive Order 14042.[35] The District Court thus dismissed this aspect of the Students' equal protection claim, reasoning that the Students "are now treated similarly to [staff and faculty] with respect to the vaccination requirements and the Court can no longer give meaningful relief." JA 16. But that was true only in part: The District Court could no

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*Pavlock*, 2022 U.S. Dist. LEXIS 159032, 2022 WL 3975177, at *4; *George*, 2022 U.S. Dist. LEXIS 201835, 2022 WL 16722357, at *11-12; *McArthur v. Brabrand*, 610 F. Supp. 3d 822, 835 (E.D. Va. 2022). The Students' equal protection challenge is addressed below. *See infra* Section III.B.4.

35. *See* Antonio M. Calcado, *President Biden's Executive Order Requiring Coronavirus Vaccines*, Rutgers (Oct. 25, 2021), https://coronavirus.rutgers.edu/president-bidens-executive-order-requiring-coronavirus-vaccines/.

longer provide injunctive relief as to staff and faculty, but the Complaint also sought general damages, and even nominal monetary compensation qualifies as "effectual relief" for a constitutional violation. *Calderon*, 518 U.S. at 150. So, to the extent the Students seek monetary relief with regard to this aspect of their equal protection claim, *see infra* note 40, the District Court erred in holding that it was moot.

Although we disagree with the District Court's reasoning, "'[w]e exercise plenary review of the District Court's dismissal of the [Complaint],' and 'may affirm on any basis supported by the record, even if it departs from the District Court's rationale.'" *Host Int'l v. Marketplace, PHL, LLC*, 32 F.4th 242, 247 n.3 (3d Cir. 2022) (second alteration in original) (citations omitted); *see also Guerra v. Consol. Rail Corp.*, 936 F.3d 124, 135 (3d Cir. 2019) (concluding that district court erred in dismissing the complaint for lack of jurisdiction and affirming on alternative grounds); *Int'l Internship Program v. Napolitano*, 718 F.3d 986, 988 n.2, 405 U.S. App. D.C. 336 (D.C. Cir. 2013) (Kavanaugh, J.) (holding that district court erred in declining to reach arguments on mootness grounds and affirming on the merits). Here, as in the District Court, Rutgers has argued that it had a rational basis for imposing the in-person vaccine requirement on students before it extended that requirement to its employees. We therefore proceed to consider whether rational basis is the proper standard of review and, if so, whether it has been satisfied here.[36]

36. The Dissent would remand for the District Court to consider Rutgers' other arguments for dismissing the Students'

### ii. The Proper Standard of Review

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. But as we and the Supreme Court have clarified, "[t]his is not a command that all persons shall be treated alike but, rather, 'a direction that all persons *similarly situated* should be treated alike.'" *Artway v. Attorney Gen.*, 81 F.3d 1235, 1267 (3d Cir. 1996) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)). So to bring a successful equal protection claim, plaintiffs "must demonstrate that they received different treatment from that received by other individuals similarly situated." *Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 196 (3d Cir. 2009) (quotation omitted). At the pleading stage, that means plaintiffs must adequately allege that they are

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equal protection claims. It is not apparent why the Dissent would dismiss the Students' *ultra vires* claim on the ground that Rutgers may act "as could a private university," Dissent 7, but would treat the Students' equal protection claim as if Rutgers were a government actor. In any event, a Court of Appeals "review[s] a district court's ruling granting a motion to dismiss *de novo*," *Hickey v. Univ. of Pittsburgh*, 81 F.4th 301, 308 (3d Cir. 2023), so as long as an alternative ground for dismissal was presented to the District Court, the Court of Appeals may affirm on that basis, *see Guerra*, 936 F.3d at 135; *Beck Chevrolet Co. v. Gen. Motors LLC*, 787 F.3d 663, 679-80 (2d Cir. 2015); *Napolitano*, 718 F.3d at 988 n.2; *Moncrief Oil Int'l v. OAO Gazprom*, 481 F.3d 309, 311 (5th Cir. 2007); *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 974 (7th Cir. 2001); *In re Best Prods. Co. v. Resol. Trust Corp.*, 68 F.3d 26, 30 (2d Cir. 1995).

"alike 'in all relevant respects,'" *Harvard v. Cesnalis*, 973 F.3d 190, 205 (3d Cir. 2020) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992)), and must offer more than conclusory assertions, *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 663.

The level of scrutiny applied also differs depending on the nature of the classification at issue.[37] In the normal

37. Our dissenting colleague would apply a heightened form of rational basis review to executive, as opposed to legislative, action that would not be satisfied by the state offering a conceivable rational basis for its action or the court hypothesizing the motivations of the state actor. Dissent 11-13. *Jacobson*, however, did not turn on the legitimacy of legislative action as opposed to executive action. The law in *Jacobson* granted significant power and discretion to local boards of health to determine how the mandate would be enacted. *Jacobson*, 197 U.S. at 12, 27. The Court stated that investing local, non-legislative bodies with "authority" over matters of public health was not only "appropriate" but also not "unusual" given "their fitness to determine such questions." *Id.* at 27; *see also Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 142 S. Ct. 661, 668, 211 L. Ed. 2d 448 (2022) (Gorsuch, J. concurring) (noting that "[h]istorically, such matters [as vaccine mandates] have been regulated at the state level by authorities who enjoy broader and more general governmental powers" in contrast to federal agencies). That observation is no less true today: In times of crisis, agencies, governors, and local authorities may often be best-positioned to respond to conditions on the ground, a fact that state legislatures have recognized in granting emergency powers. *See, e.g.*, Emergency Health Powers Act, N.J. Stat. Ann. §§ 26:13-1 to -31; Civilian Defense and Disaster Control Act, N.J. Stat. Ann. app. A:9-30 to -63. There is simply no general principle under which we apply a more demanding rational basis review to non-legislative state action than we do to legislative state action during pandemics.

course, classifications need only survive rational basis review. *See City of Cleburne*, 473 U.S. at 440. However, classifications affecting either fundamental rights or involving a protected class are subject to heightened scrutiny. *Id.* Unsurprisingly, the Students attempt to argue they fall into one of those two categories.

They do not. For the reasons explained above, the Students' claims do not involve a fundamental right. And though they posit that they "invoke[d] their Due Process rights," Opening Br. 52, that argument conflates the fundamental-rights and protected-class inquiries. The due process right by which they seek to distinguish themselves is, in any court, a meritless claim.[38] *See supra* Section III.B.3. Thus, we review only for rational basis.

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38. Being unvaccinated or "naturally immune" to COVID-19 also does not confer protected status, as courts have uniformly held. *See, e.g., Clark*, 2023 U.S. App. LEXIS 8318, 2023 WL 2787325, at *9 (holding, in COVID-19 vaccine mandate challenge, that "naturally immune" persons are not a suspect or quasi-suspect class); *Norris*, 567 F. Supp. 3d at 820-23 (same); *Kheriaty*, 2022 U.S. App. LEXIS 32406, 2022 WL 1715070, at *1 (applying rational basis review to equal protection challenge to state university COVID-19 vaccine mandate); *Doe 1-6 v. Mills*, 16 F.4th 20, 35 (1st Cir. 2021) (same, for state regulation requiring all workers in licensed healthcare facilities to be vaccinated against COVID-19); *George*, 2022 U.S. Dist. LEXIS 201835, 2022 WL 16722357, at *10 ("Plaintiffs acknowledge unvaccinated individuals do not constitute a suspect class and, thus, their equal protection claim does not trigger strict scrutiny."); *Williams*, 567 F. Supp. 3d at 1228 (agreeing with "growing consensus" that "no fundamental right or suspect classification is implicated by [COVID-19] vaccine mandates and so rational basis review will apply").

### iii. Adequacy of Pleadings Under the Proper Standard

To ascertain whether Rutgers had a rational basis for treating students differently from staff or vaccinated students differently from unvaccinated students, we first assess whether the Students met their burden to adequately allege that the comparator groups were "similarly situated." Here, again, conclusory assertions are insufficient at the pleading stage. *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 663. Only if the comparator groups were indeed similarly situated do we then consider whether it was nevertheless rational for Rutgers to treat these groups differently.

#### a. Differential Treatment of Students and Staff

Appellants contend that Rutgers' decision to impose the in-person vaccine requirement on them as of August 2021, and to only include health and safety personnel, and then all faculty and staff in October 2021, violated the Equal Protection Clause because staff and faculty were, in their view, "similarly situated." Opening Br. 52. But Appellants have failed to plead how and why students and staff are similarly situated, let alone to show that they were "alike 'in all relevant respects,'" *Harvard*, 973 F.3d at 205 (quoting *Nordlinger*, 505 U.S. at 10), and that is fatal to their equal protection claim, *see Melrose v. City of Pittsburgh*, 613 F.3d 380, 394 (3d Cir. 2010) (observing that an equal protection inquiry "properly places the initial burden on the complaining party first to demonstrate that

it is 'similarly situated' to an entity that is being treated differently"). They allege no specifics as to why these different populations are similarly situated vis-à-vis the university's authority or their relative risks of communal spread. In fact, all the Students plead is that Rutgers violated equal protection because it required in-person vaccination for its students but not its staff and faculty.

Because that *ipse dixit* does not suffice under *Twombly* and *Iqbal*, 550 U.S. at 555; 556 U.S. at 663, it is readily apparent that the Students have failed to state a claim. And the reason for that, as Rutgers highlighted in the District Court and on appeal, is that students and faculty are not similarly situated.[39] First and

39. Far from "conced[ing] that the students are similarly situated" to faculty and staff, Dissent 16, Rutgers argued to the contrary *even though the Students appeared to waive this claim on appeal*. In their opening brief, the Students observed—without objection or argument—that the District Court had "resolved [the staff and faculty] classification as moot." Opening Br. 52. What they alleged as error was that the District Court failed to recognize that the "students also alleged" two other equal protection claims: (1) "that Rutgers Policy unlawfully discriminates against [the Students] for invoking their Due Process rights," and (2) "that naturally-immune students . . . are similarly situated to vaccinated students and should be treated similarly." *Id.* And because "[t]he district court did not rule or otherwise address *those two particular claims of disparate treatment*," the Students argued, "those claims must survive." *Id.* (emphasis added). Of course, the only way the Students' staff-and-faculty claim would be moot, as they appeared to concede, was if the District Court correctly assumed they were seeking only equitable relief and not damages for that claim. *See Merle v. United States*, 351 F.3d 92, 94 (3d

foremost, those populations are treated very differently under the laws governing vaccination. New Jersey law explicitly authorizes institutions of higher education to require students to take ACIP-recommended vaccines. *See* N.J.S.A. § 18A:61D-1; N.J. Admin. Code § 8:57-6.4. Thus, students, even before the pandemic, were subject to Rutgers' immunization policy, which required them to submit their complete vaccination history at least six months before enrollment, required in-person students to be vaccinated against even less virulent viruses like influenza, and reserved Rutgers' right to deny unvaccinated students access to housing or class registration in the "case of a public health emergency."[40] That policy was "subject to" unilateral amendment by Rutgers.[41]

In contrast, Rutgers' ability to impose such requirements on staff and faculty is far more constrained.

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Cir. 2003) (we lack jurisdiction over claims that are no longer live or where "the parties lack a legally cognizable interest in the outcome") (citation omitted). Rutgers thus focused primarily on what it reasonably perceived to be "Plaintiffs' two Equal Protection claims" on appeal, Answering Br. 37, and argued only secondarily why its disparate treatment of students and employees would satisfy rational basis review "even had Rutgers continued to apply the Policy only to students." *Id.* at 38. Prioritizing its response this way makes perfect sense in view of the Students' bait-and-switch, *see* Reply Br. 26 (arguing for the first time on appeal that the District Court erred in finding the faculty-and-staff claim moot), and regardless, does not constitute a concession.

40. Rutgers' Student Immunization Policy.

41. *Id.*

*See, e.g.*, N.J.S.A. § 34:13A (discussing public employee collective bargaining rights); Oral Arg. Tr. 43:11-16 (same); N.J.S.A. § 18A:6-18 (discussing tenure rights). Not until President Biden's Executive Order 14042, concerning university faculty and staff in September, was it even clear that universities were legally authorized to require that population be vaccinated. When that became clear, Rutgers extended the requirement to staff and faculty as well—just one month after the start of the school year.[42]

Rutgers' adoption of the Policy for students before staff and faculty was also consistent with its stated priority for the start of the fall term "[t]o minimize outbreaks of COVID-19 among students,"[43] even before taking on the more ambitious goal of requiring employee vaccinations to protect the broader "Rutgers University community," JA 350. As Rutgers explained in the District Court and on appeal, "even if a university only require[d] students to be vaccinated, this [would] ha[ve] a rational basis" for the reasons set forth in *Harris v. University of Massachusetts, Lowell*, JA 297; Answering Br. 29 n.1, 38, namely, "the higher transmission rate among young people, and the fact that it is the students who are congregating in close quarters on campus," 557 F. Supp. 3d 304, 313 (D. Mass. 2021) (citations omitted); *see also* Oral Arg. Tr. 43:24-25 (Rutgers' counsel explaining that

42. *See* Antonio M. Calcado, *President Biden's Executive Order Requiring Coronavirus Vaccines*, Rutgers (Oct. 25, 2021), https://coronavirus.rutgers.edu/president-bidens-executive-order-requiring-coronavirus-vaccines/.

43. ECF No. 10-3 at 1.

students, who sit "shoulder to shoulder" in classrooms and live in communal settings present a greater risk of transmission than faculty and staff who are typically at a distance). Rutgers also highlighted "the logic of excluding unvaccinated persons from communal living situations during a pandemic, because alternatives like masking are not feasible in dormitory life." JA 283. In sum, Rutgers adequately explained why Students are situated differently in the most "relevant respect[]," *i.e.*, containing a virus that spreads through close personal contact. *Harvard*, 973 F.3d at 205 (quoting *Nordlinger*, 505 U.S. at 10).

In view of these differences, Rutgers easily passes the low threshold for a "rational basis" to require vaccination for students in April 2021 before requiring the same of health care workers in June and other staff and faculty in October 2021. And that does not change even if the Policy is viewed (at least initially and briefly) as underinclusive because rational-basis review, unlike strict scrutiny, tolerates an "imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 321, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). In other words, "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 486-87, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) (citation omitted). Rutgers' action in requiring in-person vacation for students matriculating in September 2021 and requiring the same of staff and faculty in October 2021 satisfies that rational basis standard.

**b. Differential Treatment of Vaccinated Students and Unvaccinated Students with "Natural Immunity"**

The Students next contend that "naturally immune students (who recovered from a COVID-19 infection) are similarly situated to vaccinated students" and, therefore, must be treated similarly. Opening Br. 52. Again, they are mistaken.

For one, the CDC itself determined that these groups posed different risks. *See Frequently Asked Questions about COVID-19 Vaccination*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html (last visited December 19, 2023) ("People who already had COVID-19 and do not get vaccinated after their recovery are more likely to get COVID-19 again than those who get vaccinated after their recovery."). And per N.J. Admin. Code 8:57-6.4, Rutgers followed the CDC's recommendations. That Appellants would reach a different conclusion than those experts does not render Rutgers' vaccine Policy arbitrary or irrational.

Second, Rutgers sought to comply with "[s]tate law," JA 350, and New Jersey allows evidence of immunity in lieu of vaccination only where a student is able to provide "laboratory evidence of immunity." *See* N.J.S.A. § 18A:61D-1 (providing that students may submit "evidence of immunity" as an alternative to a valid immunization record, "in accordance with regulations promulgated by the Department of Health"); N.J. Admin.

Code § 8:57-6.16 (directing institutions to maintain student records of immunization or "laboratory evidence of immunity"). At the time Rutgers enacted its Policy, "no laboratory test exist[ed]" that would satisfy that requirement. JA 307. And still today, "[a]ntibody tests are not recommended or authorized by FDA to assess someone's immunity after COVID-19 vaccination." *Antibody Testing*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing/antibody-tests-guidelines.html?CDC_AA_refVal=https%3A%2F2Fwww.cdc.govO%2Fcoronavirus%2F2019-ncov%2Flab%2Fresources%2Fantibody-tests.html#AntibodyTests (last visited December 19, 2023).

And again, even if Rutgers' Policy was "to some extent both underinclusive"—by (initially) excluding certain staff members—"and overinclusive"—by including students with 'natural immunity'—"perfection is by no means required" under rational basis review. *Vance v. Bradley*, 440 U.S. 93, 108, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979) (citation omitted).

In sum, Rutgers set forth a rational basis for its differential treatment not only of students and staff, but also of vaccinated and unvaccinated students with "natural immunity."

* * *

We conclude by acknowledging the difficult choices confronted by all parties here as they navigated the uncharted territory of the COVID-19 pandemic and its aftermath. Rutgers had to decide in real time, on a changing landscape of executive pronouncements and medical judgments, how to sustain its educational mission while protecting the safety of its student body. Students had to choose whether to vaccinate and resume in-person or to decline and proceed masked (for exempt students) or remotely or elsewhere (for non-exempt students). None of these options were ideal, and no doubt they created hardship for many. What we judge today, however, is not the wisdom of any party's choice but whether the Complaint stated a claim. It did not. Because Rutgers was statutorily permitted to impose the requirements it did, and Appellants have not pleaded a constitutional violation on rational basis review, the District Court properly granted Rutgers' motion to dismiss, and we will affirm.

## IV. Conclusion

For the foregoing reasons, we will affirm the judgment of the District Court.

JORDAN, *Circuit Judge*, concurring in part, dissenting in part.

I agree with much of what my colleagues have said in their Majority opinion, though I doubt that there is anything inherent in the nature of a university that required imposing the vaccine mandate, as my colleagues seem to imply. The administrators of Rutgers University had a range of choices, and the wisdom of the one they selected is open to debate. That doesn't make it unlawful, but it doesn't make it laudatory either. Given that Rutgers allowed its faculty and staff to begin the Fall 2021 semester unvaccinated while compelling students to have a COVID-19 shot (as if the SARS-CoV-2 virus[1] were careful about academic status), and further given that Rutgers stopped Plaintiff Adriana Pinto - a student just a few credits shy of qualifying for graduation - from attending a single course remotely, even though the course allowed remote attendance and even after she submitted a sworn statement that she would not set foot on campus for the entire semester, there is ample room to question why the University chose to force vaccines on students as it did.

Indeed, in a video circulated to the entire Rutgers student body two-and-a-half months before the mandate was announced, Rutgers Vice President for Health Affairs, Vicente H. Gracias, M.D., rejected the idea of mandatory vaccination. His words are worth repeating:

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1. The SARS-CoV-2 virus is the cause of the illness the world has come to know as COVID-19.

> "[I]t is America. And Rutgers is part of America. So, the vaccine at this point is not mandatory across the United States or here in New Jersey. And certainly Rutgers, with our stance of human liberties and our history of protecting that, the vaccine is not mandatory. It is something that we think, because we are a university, we can educate our community and we can educate ourselves. And I think we can show everyone that it is essential that our Rutgers community vaccinate itself."[2]

This Court is not tasked with assessing the wisdom of Rutgers's about-face on education versus compulsion when it comes to vaccination. One can wonder why it made that turn and, further, why the University is still mandating vaccination when the rest of the world has largely put the COVID-19 pandemic in the rearview mirror, but our role is confined to ascertaining whether the mandate comports with controlling law.[3] The constitutional questions here turn on whether the University's articulated reason for imposing the vaccine mandate rationally justified that

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2. The video is available on the internet at the following link: https://vimeo.com/502384549/10286f6cb1?utm_campaign=5370367&utm_source=affiliate&utm_channel=affiliate&cjevent=ea9051b9045311ec80c547850a82b838&clickid=ea9051b9045311ec80c547850a82b838 [https://perma.cc/8DNE-6B9U]. The relevant 40 seconds of the clip begins at approximately 7:30.

3. As of February 5, 2024, the University's website states that "COVID-19 vaccines are **required** of students and employees unless granted a medical or religious exemption by the university." *COVID-19 Information*, Rutgers, https://coronavirus.rutgers.edu/ [https://perma.cc/6US6-2CK3] (emphasis in original).

imposition. And my colleagues' answers to the questions on appeal are mostly correct.

For example, I concur in their disposition of the Plaintiffs' federal preemption claim. I also concur in their judgment as to both the Plaintiffs' state law *ultra vires* claim and the equal protection claim as it relates to natural immunity, though I differ on the analytical approach to the former and conclude that the latter was not properly preserved for our review. Further, I agree that we ought to apply rational basis review to the challenged vaccine mandate, which is an executive action of the University.

Nevertheless, I depart from the Majority's judgment on two significant issues. First, I believe we should remand the Plaintiffs' equal protection claim as it relates to Rutgers's still unexplained initial decision to impose a vaccine mandate on students while leaving the faculty and staff free to abstain. Rational basis review requires us to look to the rationale Rutgers gave for imposing the mandate, not to some hypothetical rationale the University might wish it had given, or, as in this case, one the Majority devises.[4]

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4. The rationale for the University's vaccine mandate policy is stated under the apt heading: "Reason for Policy." JA 350. It provides that vaccination is mandated:

> [t]o minimize outbreaks of COVID-19 in the Rutgers University community; to prevent or reduce the risk of transmission of COVID-19 among all persons at Rutgers University and Rutgers-affiliated health care units; and to promote the public health of the community in a manner consistent with federal, State,

Second, as to the substantive due process claim, while I do not gainsay my colleagues' conclusion that the University's vaccine mandate satisfied rational basis review when it was issued, I believe we should remand to allow the Plaintiffs the opportunity to amend their complaint to challenge the continued imposition of the mandate. The reasons Rutgers gave to justify the mandate's continued existence - namely, compliance with federal and state government pandemic policies - were circumstance-specific and those circumstances have manifestly changed.

## I. Points of Agreement

### A. Rational Basis Review

The Majority holds that there is not a fundamental right to refuse vaccination, citing the Supreme Court's

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> and local efforts to stem the COVID-19 pandemic as well as federal and State law.

(*Id.*)

On April 13, 2021, Rutgers formally adopted policy section 10.3.14 entitled, "Interim COVID-19 Immunization Record Requirement for Students." JA 226 ¶ 196. The Policy that the parties provided in the Joint Appendix is not the original policy; it is the one revised in November 2021. The original appears on the District Court's docket. The reason given in both the original and revised sections is the same except that, before the Rutgers faculty and staff were subjected to the vaccine mandate, the phrase, "To minimize outbreaks of COVID-19 in the Rutgers University community," had read, "To minimize outbreaks of COVID-19 among students[.]" ECF No. 10-3 at 1.

decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), and the apparent uniform treatment of *Jacobson* by federal courts that have reviewed COVID-19 vaccination mandates. I agree that, although *Jacobson*, which dealt with a smallpox vaccine mandate, "pre-date[s] the modern tiers of scrutiny" used to analyze constitutional rights, the opinion in that case "essentially applied rational basis review[.]" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70, 208 L. Ed. 2d 206 (2020) (Gorsuch, J., concurring). Accordingly, rational basis review is rightly applied to the Plaintiffs' equal protection and substantive due process challenges.

The Majority is also on logically sound ground when it observes that, if the University's proffered reasons for imposing the vaccine mandate pass rational basis review, those reasons do not become irrational if one accepts, as we must at this stage, the truth of the Plaintiffs' allegation that the vaccine mandate was "*also* adopted ... to curry favor with vaccine manufacturers with which [Rutgers] ha[s] partnered to investigate and develop COVID-19 vaccines." Maj. Op. 28 (quoting JA 253) (emphasis added by Majority). That conclusion is consistent with precedent showing the parallels between rational basis review of executive action and arbitrary and capricious review under the Administrative Procedure Act ("APA"). *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573, 204 L. Ed. 2d 978 (2019) ("[A] court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons."). Thus, I agree with my colleagues that the outcome is not changed by allegations of mixed motive.

**B. The Ultra Vires Claim**

I likewise agree with the Majority that the Plaintiffs' *ultra vires* claim is untenable. But I would reach that conclusion for the reasons we explored at oral argument, in particular the interplay of our decision in *Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303 (3d Cir. 1987) (discussed *infra* note 6), and the subchapter of the New Jersey Administrative Code dealing with vaccination requirements for college students. Section 8:57-6.4(c) of the New Jersey Administrative Code provides: "Nothing in th[e aforementioned] subchapter shall be construed as limiting the authority of a New Jersey institution of higher education to establish additional requirements for student immunizations and documentation that such institution shall determine appropriate and which is recommended by the ACIP."[5] The Plaintiffs do not dispute that the ACIP has recommended the mandated vaccines.

But, of course, not "limiting" authority is different than granting authority. The authority must have been granted in the first place. And the source of Rutgers's authority is what we recognized in *Kovats*: that the State of New Jersey has expressly granted Rutgers, a previously private institution, the authority to continue to function, in effect, as a private university with respect to its operations, with minimal limitations, none of which prevents its imposing a vaccine mandate on its students,

5. As noted by the Majority, ACIP is the acronym for the Advisory Committee on Immunization Practices within the Centers for Disease Control and Prevention.

faculty, and staff, as could a private university.[6] 822 F.2d at 1311.

The Plaintiffs have not identified any restriction on Rutgers's ability to impose vaccine mandates on its students under state law. Instead, they go far afield, asserting the incompatibility of allowing Rutgers to require vaccines beyond those already specified in state regulations. *See* N.J. Admin. Code §§ 8:57-6.5 through 8:57-6.9 (requiring vaccination for measles, mumps, rubella, meningitis, hepatitis-B). But once it is understood that Rutgers has been broadly empowered to operate like a private university, unless expressly restricted, the Plaintiffs' *ultra vires* claim crumbles. It is on that basis that I concur in the dismissal of the claim.

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6. In articulating why Rutgers does not have sovereign immunity under the Eleventh Amendment, we explained in detail how Rutgers functions, tracing its origin as "a private institution" to becoming a "corporation which is an 'instrumentality of the state'" in 1956. *Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303, 1306-12 (3d Cir. 1987). In short, Rutgers is governed primarily by two bodies: a Board of Governors and a Board of Trustees. *Id.* at 1311. For our purposes, those boards are free to govern Rutgers as if it were a private university. "In running the university, the governors and trustees are 'given a high degree of self-government.'" *Id.* at 1311 (quoting N.J. Stat. Ann. § 18A:65-27(I)(a)). And, "[m]ore generally, both boards may exercise their powers 'without recourse or reference to any department or agency of the state, except as otherwise expressly provided by this chapter or other applicable statutes.'" *Id.* (quoting N.J. Stat. Ann. § 18A:65-28). Further, we explained that the "two limitations [imposed] on the boards' operation" of Rutgers, namely, that they comply with the "state's budget appropriations" and "state laws and regulations[,]" result in "minimal" "state intervention." *Id.*

Likewise unavailing is the Plaintiffs' assertion that, under N.J. Admin. Code §§ 8:57-6.14(d) and -6.15(c), Rutgers cannot deny university housing to unvaccinated students, even those who were exempted from the mandate because of medical or religious reasons. As the Plaintiffs observe, those regulatory provisions restrict Rutgers from excluding exempted students from two - and only two - things: "classes" and "participat[ion] in institution-sponsored activities[,]" N.J. Admin. Code §§ 8:57-6.14(d) and 6.15(c), unless two circumstances are met. First, there must be "a vaccine- preventable disease outbreak." *Id.* And, second, the "decision to exclude" an exempted student must be "made by the institution in consultation with the Commissioner [of Health.]" *Id.* §§ 8:57-6.14(d)(1) and 8:57-6.15(c)(1). As the Plaintiffs see it, because those regulations are silent on whether a university can exclude students from university housing, there is no authority for Rutgers to do so. They also argue that the two required conditions were not met here.

The Plaintiffs fail to appreciate that §§ 8:57-6.14(d) and 6.15(c) provide *no* limitation on Rutgers's authority to exclude the Plaintiffs from housing. As just noted, those two provisions operate as a limitation on authority only with respect to the two things identified, classes and activities, not as to housing, which the Plaintiffs acknowledge is not covered by the text of those provisions. Consequently, I concur in the Majority's conclusion that the exempted students were not improperly excluded from university housing under state law.

## II. Points of Disagreement

### A. Equal Protection Claim Relating to Faculty and Staff

I now turn to the equal protection claim relating to the University's different treatment of students on the one hand and faculty and staff on the other. I have two points of agreement with my colleagues, and a whole lot of disagreement on this subject. As to where we can agree, I concur in my colleagues' judgment regarding the Plaintiffs' equal protection claim as it relates to natural immunity, but I do so without reaching the merits. Rutgers argues before us that, for the Plaintiffs to succeed on this claim, an "approved laboratory test for immunity conferred by infection" must have existed when the vaccine mandate was imposed. Answering Br. 39. That prompted no response by the Plaintiffs in their reply brief, which effectively concedes the point. *See Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 437 n.11 (3d Cir. 2005) (explaining that failure to respond to an opponent's arguments "waives, as a practical matter anyway, any objections not obvious to the court to specific points urged by the [opponent]"). The issue having been forfeited, Rutgers gets a win.

I further agree that the District Court erred in holding the equal protection claim to be moot. It did so at Rutgers's urging because, after the commencement of this action, the University imposed a vaccine mandate on its faculty and staff that it justified as being necessary to comply with President Biden's Executive Order 14042, which imposed a vaccine mandate on certain federal

government contractors. 86 Fed. Reg. 50,985 (Sept. 9, 2021). But the dismissal on grounds of mootness was error since, as the Majority recognizes, the Plaintiffs have put forward a claim for damages for the period that students were being treated differently than other members of the University community. Thus, we have a live equal protection claim that the District Court never analyzed on the merits.

That's where our consensus ends. Our ordinary course when a district court has not spoken on a live issue is to vacate the dismissal and remand for the court to address the issue in the first instance. *See O'Hanlon v. Uber Techs., Inc.*, 990 F.3d 757, 763 n.3 (3d Cir. 2021) (citation omitted) ("[A]s a 'court of review, not of first view,' we will analyze a legal issue without the district court's having done so first only in extraordinary circumstances."). But the Majority does not do that, despite identifying no extraordinary circumstance. Instead, it justifies dismissal on the merits on grounds that are not properly before us and, in any event, do not withstand examination.

Although a legislative enactment will survive rational basis review if "the State offers a conceivable rational basis for its action, and '[t]he court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack[,]'" *Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 367 (3d Cir. 2012), rational basis review of an executive action - like Rutgers's vaccination policy - is different. We must, under our precedent, look to the reasons Rutgers itself gave for its action, rather than

hypothesizing reasons that it could have given.[7] *Nazareth Hosp. v. Sec'y United States HHS*, 747 F.3d 172, 180 (3d Cir. 2014). As noted earlier, such review of executive action is akin to arbitrary and capricious review under the APA. *See Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 353 (3d Cir. 2017) ("We have held that the standard for determining whether an APA violation exists under the arbitrary and capricious standard is substantially similar to rational basis review[.]"); *see also Nazareth Hosp.*, 747 F.3d at 180 (noting the similarity of the two types of review and stating that, "[t]aken together, we need only consider whether the Secretary set forth a satisfactory, rational explanation for her actions here").

Bear in mind that no decisionmaker from Rutgers has ever suggested a justification for the University's disparate treatment of students as compared with faculty and staff. The single-sentence given to explain the vaccine mandate on students - the "Reason for Policy" - offers no such rationale.[8] JA 350 (quoted *supra* note 4). Furthermore,

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7. The Majority suggests that dismissing the Plaintiff's ultra vires claim because Rutgers can function as a private institution in its operations is inconsistent with treating it as a state university for the Plaintiff's equal protection claim. Maj. Op. 33 n.36. Not so. The State of New Jersey may grant Rutgers autonomy over its operations, but it cannot grant it immunity from constitutional violations. Therefore, although Rutgers has a sphere of authority to act as a private institution in its operations for state law purposes, it is not relieved from the requirement that it must provide a rational basis when it discriminates against similarly situated persons.

8. The public announcement by Rutgers's Executive Vice President and Chief Operating Officer in connection with the

Rutgers did not suggest in the District Court, or in its brief before us, that any of its decisionmakers had a rational basis for initially excluding faculty and staff. *See Simko v. United States Steel Corp.*, 992 F.3d 198, 205 (3d Cir. 2021) (explaining a party forfeits an argument for purposes of our review if it is not raised before the district court); *Geness v. Cox*, 902 F.3d 344, 355 & n.6 (3d Cir. 2018) (noting that arguments not raised on appeal are likewise forfeited). We are thus left with an executive action bereft of justification.[9]

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imposition of the vaccine requirement on faculty and staff, cited by the Majority at note 8, is titled "President Biden's Executive Order Requiring Coronavirus Vaccines." Antonio M. Calcado, Rutgers (Oct. 25, 2021), https://coronavirus.rutgers.edu/president-bidens-executive-order-requiring-coronavirus-vaccines/[https://web.archive.org/web/20230920233021/https://coronavirus.rutgers.edu/president-bidens-executive-order-requiring-coronavirus-vaccines/]. As the name suggests, it says, in effect, "President Biden made us do it."

9. My colleagues attempt to overcome that fact by suggesting that *Jacobson* "did not turn on the legitimacy of legislative action as opposed to executive action[,]" and asserting that, "[i]n times of crisis, agencies, governors, and local authorities may often be best-positioned to respond to conditions on the ground, a fact that state legislatures have recognized in granting emergency powers[.]" Maj. Op. 34 n.37. In essence, the Majority, without citing any relevant authority, says that a health pandemic relieves a state actor from providing any reason for its executive action. That is not the law. Local authorities may well have substantial authority to make, and be in the best position to make, decisions regarding public health. But, even accepting that as true, government officials must provide a rational reason to justify their decisions. And, as this case and the COVID-19 pandemic has generally shown,

My colleagues in the Majority forge ahead anyway, and, without adversary briefing, choose to answer a question that the District Court didn't. I cannot join them in that exercise. *See generally United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, 206 L. Ed. 2d 866 (2020) ("[A]s a general rule, our system is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." (internal quotation marks and citation omitted; second alteration in original)).

**1.** *Rutgers bore the initial burden on its motion to dismiss.*

First, the Majority contends that the Plaintiffs "have failed to plead how and why students and staff are similarly situated, ... and that is fatal to their equal protection claim." Maj. Op. 37. Civil litigation is indeed a contest governed by burdens of proof and persuasion. But it is well-settled that "the burden of persuasion" is on "the defendant bringing a Rule 12(b)(6) motion ... [to] show that the plaintiff has not stated a claim[.]" *Potter v. Cozen & O'Connor*, 46 F.4th 148, 155 (3d Cir. 2022); *see also Davis v. Wells Fargo*, 824 F.3d 333, 350 (3d Cir. 2016) ("[T]he burden of persuasion ... properly falls on [the movant] on a motion to dismiss under Rule 12(b)(6)[.]").

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that requirement is especially important amid a health crisis in which government authorities exercise extraordinary power. Such exercises of power without explanation may breed doubt about the government's underlying motives for implementing safety measures.

My colleagues are correct that the Plaintiffs must state in their complaint how faculty[10] and students were similarly situated, but all that is required of the Plaintiffs at this stage is to plead how they were similarly situated to faculty "in all relevant respects[;]" they are not required to show that they were identically situated to faculty. *Harvard v. Cesnalis*, 973 F.3d 190, 205 (3d Cir. 2020). The Majority's assertion that "all the Students plead is that Rutgers violated equal protection because it required in-person vaccination for its students but not its staff and faculty" is manifestly wrong. Maj. Op. 37. In fact, the Plaintiffs pled how faculty and students are similarly situated in what is arguably the only relevant way, stating in their complaint: "Defendants are applying and enforcing Rutgers' Policy in a discriminatory, arbitrary and capricious manner by excluding staff and employees who are *equally capable of being infected with SARS-CoV-2 and transmitting it to others*, including students who have recovered from COVID-19, students who have medical exemptions, students with religious exemptions, and vaccinated students."[11] JA 257-58 (emphasis added). The Plaintiffs then alleged that "Rutgers' Policy and practice of discriminating against students by mandating EUA COVID-19 vaccines for them but not for the administration, faculty, staff, employees or contractors

10. Rather than always repeating the phrase "faculty and staff," I will often refer to "faculty" with the intent that the word encompass all University employees.

11. This allegation, although in the substantive due process claim of the Plaintiff's complaint, was incorporated into the Plaintiff's equal protection claim. The Majority does not address this allegation in its opinion.

of Rutgers denies students equal protection of the law." JA 259.

The Plaintiffs thus adequately pled how they were similarly situated to faculty and staff: both students and staff can be infected and infect others with COVID-19. Upon that adequate pleading, Rutgers had the burden to rebut the Plaintiffs' contention that faculty and staff were similarly situated to students. It did not make any such argument before the District Court.[12] And on appeal, Rutgers failed to address at all the merits of the equal protection claim relating to the more favorable treatment given to faculty and staff.[13] The sole basis for the District Court's order on this equal protection claim was mootness. So, with respect to the "similarly situated" issue, the Plaintiffs were not faced with anything requiring a response and, consequently, cannot be said to have failed to discharge the burden of proving that they were similarly situated to other people on campus.

Moreover, a fair argument can be made that Rutgers has conceded that the students are similarly situated. In the District Court, the Plaintiffs claimed that "Rutgers'

12. Rutgers devoted one paragraph to this claim in its briefing before the District Court. Affording that argument the most generous possible reading, Rutgers contended that, because of Executive Order 14042, faculty and staff would no longer be treated differently and, accordingly, the claim was moot, or, if not moot, that the claim now failed on the merits. But none of that explains the period of disparate treatment.

13. The word "faculty" nowhere appears, and "staff" appears only in an unrelated context.

initial decision to mandate [vaccinations for] students but not staff and employees intentionally treated them differently from others similarly situated and that there is no rational basis for the difference in treatment[.]" ECF No. 42 at 19. They made the same assertion before us. Opening Br. 52 ("Students alleged that Rutgers' initial decision to mandate vaccines upon them, but not faculty or employees, treated them differently from others similarly situated."). Neither assertion drew a response from Rutgers that the Plaintiffs were not similarly situated with faculty and staff in some pertinent sense. So, it was Rutgers that did not discharge its burden, and a failure to meet an opponent's assertion can operate as a concession that the assertion is correct. *See In re Bestwall LLC*, 47 F.4th 233, 244 (3d Cir. 2022) (citing *In re Incident Aboard D/B Ocean King*, 758 F.2d 1063, 1071 n.9 (5th Cir. 1985)).

In any event, there was simply no suggestion that the students and the University employees were not similarly situated as alleged, and, after the Plaintiffs adequately pled that they were similarly situated, putting that issue in contention was the University's responsibility, not the Plaintiffs'. Despite my colleagues' citations to Rutgers's briefing, the fact remains that no party has made the arguments on appeal that my colleagues have made. The failure to raise an issue in the District Court and again on appeal has consequences, and, in this instance, the consequence should be clear: the "similarly situated" issue is off the table.

**2.** *Rutgers failed to proffer a rational basis for distinguishing between students and University employees.*

Even if we could rightly consider that issue, however, the arguments offered by the Majority that the Plaintiffs are not similarly situated to faculty and staff are unpersuasive. The reasons they assert are exactly the kind of after-the-fact justifications that we have been counseled to avoid. *See Dep't of Com.*, 139 S. Ct. at 2573 ("[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."); *New Jersey Hosp. Ass'n v. Waldman*, 73 F.3d 509, 517 (3d Cir. 1995) (explaining that reviewing courts have been "cautioned" to "not undertake an independent assessment" of an agency's action).

The first reason the Majority proffers is that students and faculty "are treated very differently under the laws governing vaccination." Maj. Op. 37-38. My colleagues explain that New Jersey law authorizes institutions of higher education to require certain vaccines for its students, but that Rutgers's "ability to impose such requirements on staff and faculty is far more constrained." Maj. Op. 39. The Majority, claiming Rutgers provided that reason, cites Rutgers's District Court briefing, in which Rutgers asserted that there is a rational basis to impose a vaccine mandate on students because New Jersey law requires universities to require certain vaccinations. Maj. Op. 40 (quoting JA 297 ("[E]ven if a university only requires students to be vaccinated, this has a rational

basis. That is particularly true in New Jersey, which requires universities by law to impose vaccine mandates on students."). But, even if true, that assertion does not satisfactorily address why Rutgers did not impose the COVID-19 vaccine mandate on faculty; rather, it argues only that imposing a vaccine requirement on students has its own rational basis. Consequently, that argument does not adequately describe the reason for the disparate treatment for groups of people who are both capable of contracting and transmitting COVID-19.

My colleagues also cite Rutgers's appellate briefing, in which it contended that its policy to exclude faculty from receiving the vaccine was consistent with New Jersey law. Maj. Op. 37-39, 37 n.39 (quoting Answering Br. 38 ("[E]ven [if] Rutgers continued to apply the Policy only to students, and not to employees, this would have been consistent with New Jersey law[.]")). But saying a policy is consistent with state law, after the policy was instituted, does not explain why the policy treated faculty and students differently in the first place. Because we can look only at the reasons Rutgers gave for instituting the policy, Rutgers's after-the-fact characterization of its lawfulness under state law is beside the point and wholly inadequate.[14]

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14. For the first time, at oral argument, counsel for Rutgers also explained that "the faculty were subject to collective bargaining ... so there's a whole different circumstance with regard to faculty and staff because we have collective bargaining issues with them." Oral Arg. Tr. 43:12-16. In addition to that argument being forfeited by not being raised in the District Court, *Simko v. United States Steel Corp*, 992 F.3d 198, 205 (3d Cir. 2021), it is unpersuasive. Faculty with PhDs can be infected and infect

The second reason the Majority provides is that Rutgers's "adoption of the Policy for students before staff and faculty was also consistent with its stated priority for ... the fall term to minimize outbreaks of COVID-19 among students, even before taking on the more ambitious goal of requiring employee vaccinations to protect the broader Rutgers University community." Maj. Op. 39-40 (cleaned up). According to the Majority, Rutgers was just following a sensible, "phased approach" to protecting its community, which "prioritized the health of the student body." Maj. Op. 4, 39-40. Unfortunately for Rutgers, however, it has never asserted that it had in mind a phased approach to vaccination. This argument is entirely my colleagues' invention. And the irony here is that the University's "phased approach," as the Majority would have it, was exactly backwards, at least if one accepts as wise what federal and state agencies were doing when implementing a "phased allocation" that provided vaccines first to older people and educators, rather than to students.[15] *See* Kathleen Dooling, MD et al., *The Advisory*

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others with COVID-19 in the same way as can first-year college students, and no reason was provided to explain what collective bargaining has to do with that and the consequent risks to the University community.

15. The Majority appears to have developed its "phased approach" explanation by comparing Rutgers's initial COVID vaccination policy, issued in April 2021, with the updated version of that policy released in November 2021. As noted earlier, *supra* note 4, in the April policy, its stated purpose included to "minimize outbreaks of COVID-19 among students[.]" ECF No. 10-3 at 1. The November policy changed that purpose to include, "to minimize outbreaks of COVID-19 in the Rutgers University

*Committee on Immunization Practices' Updated Interim Recommendation for Allocation of COVID-19 Vaccine - United States, December 2020*, Centers for Disease Control and Prevention (Jan. 1, 2021), https://www.cdc.gov/mmwr/volumes/69/wr/mm695152e2.htm [https://perma.cc/2X8G-YB3W] (recommending that frontline essential workers, including "those who work in the education sector (teachers and support staff members)" receive the vaccine prior to healthy young people). My colleagues rely on a remark by Rutgers's counsel when asked what in the operative complaint or associated documents established a rational basis for the vaccine mandate. He observed that students "live in dorms" and sit "shoulder to shoulder" in classrooms while professors in classrooms are approximately the same distance from students as a lawyer at the lectern is from judges on the bench.[16] Oral

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community[.]" JA 350. But the articulated purpose of both the April and November versions of the policy included "to prevent or reduce the risk of transmission of COVID-19 among *all persons* at Rutgers University and Rutgers-affiliated health care units; and to promote the public health of the community in a manner consistent with federal, State, and local efforts to stem" the pandemic. ECF No. 10-3 at 1; JA 350 (emphasis added).

16. He did not get to this suggestion right away. He first responded that, "getting people vaccinated and getting back to normal was its own rational basis." Oral Arg. Tr. 41:21-23. That prompted the further question of why, then, it was rational to exclude faculty and staff. A colloquy followed, during which counsel said four things. First, he indicated there may have been a lack of regulatory authority to impose a mandate on faculty and staff, though he did not address how that squared with *Kovats*, nor did he articulate why there was no authority under state law. He then indulged in a non-sequitur by saying that the treatment of

Arg. Tr. 43:22-44:1. Dormitory living, however, does not explain a university-wide student vaccination mandate, since a great many students do not live in dorms. Nor does the assumption - and it is a pure assumption with no record support - that students are more likely to contract COVID-19 from other students than from faculty.

My colleagues also say that Rutgers relied on *Harris v. University of Massachusetts, Lowell*, 557 F. Supp. 3d 304 (D. Mass. 2021), to argue that it had legitimate reasons to require vaccination for students but not for faculty. In that out-of- circuit case, the district court held that a university has a rational basis to impose a vaccine mandate on students, without it being imposed on faculty, because of, as the Majority quotes, "the higher transmission rate among young people, and the fact that it is the students who are congregating in close quarters on campus." Maj. Op. 40 (quoting *Harris*, 557 F. Supp. 3d at 313.). But Rutgers never relied on the reasons the Majority quotes from *Harris*. More to the point, there was no equal protection challenge in *Harris*. The district court there was tasked with determining whether the fact that university faculty were not required to be vaccinated undermined the plaintiffs' substantive due process claim. *Harris*, 557 F. Supp. 3d at 313. Thus, *Harris* is inapplicable to the argument at hand.

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faculty and staff did not matter because they had not sued Rutgers. Next, when it was pointed out that the virus wasn't choosing to avoid some people because they had the title of professor, counsel responded with the further non-sequitur that faculty and staff are subject to collective bargaining (a point addressed *supra* note 14). He saved the "close quarters" suggestion for last.

But there is still more wrong with using this "close quarters" argument to rule on the merits. It is irreconcilable with the position Rutgers took to justify its harsh treatment of Adriana Pinto, who Rutgers disenrolled from the single course she wished to attend for the Fall 2021 semester. Rutgers did so even though the professor in that course would have allowed her to attend remotely; even though Ms. Pinto executed a declaration swearing she would not set foot on campus that semester; and even though she was only a handful of credits away from graduating with her psychology degree, a degree that Rutgers does not offer though its online degree program. Rutgers took the position below - and reiterated it before us - that Ms. Pinto, being unvaccinated, will only be permitted to be a Rutgers student if she enrolls in an online degree program, with the consequence, of course, that she gives up her nearly completed psychology degree. It was not enough that she would not need to be on campus and had promised not to go. And yet it was fine, by the University's lights, for any number of faculty and staff to be on campus irrespective of their vaccination status. The inconsistency is glaring. The Plaintiffs pointed this out, saying, "[t]here is no rational basis for requiring a student enrolled in remote classes and not physically present to vaccinate ... when unvaccinated faculty and staff were permitted on campus freely when [Ms. Pinto] was deregistered." Opening Br. 20. There may be an answer to that argument, but, if there is, Rutgers has not offered it, nor is it readily apparent.

In the end, we don't really have to guess at the University's reasons; they are stated and have nothing to

do with New Jersey state law treating students differently from faculty and staff or with Rutgers developing a "phased approach." The reason actually given was not confined to students or even to the campus itself. The stated concern from the very beginning was for "*all* persons at Rutgers University[,]" and the stated purpose was "to promote the public health of the *community*[.]" ECF No. 10-3 at 1 (emphasis added). Perhaps Rutgers will want to subscribe to the arguments that the Majority now hypothesizes for them. But we should put the onus on Rutgers to make and defend those positions. *See Sineneng-Smith*, 140 S. Ct. at 1579 (see parenthetical *supra*). That is how our adversarial litigation system is supposed to function, and we should accordingly remand for consideration of the University's own arguments.

### B. The Substantive Due Process Claim

Lastly, I turn to the Plaintiffs' substantive due process claim. In support of it, the Plaintiffs have leveled a multi-prong assault on the vaccine mandate. First, they contend that they had a fundamental right to refuse vaccination and thus the mandate should be subject to strict scrutiny. Next, they contend that, if not strict scrutiny, we should apply some form of heightened scrutiny more stringent than rational basis review. Finally, they contend that Rutgers's justification of its vaccine mandate flunks even rational basis review. Specifically, they contend that, in addition to Rutgers's stated rationale, the University improperly sought to ingratiate itself with vaccine manufacturers. The Plaintiffs further argue that Rutgers's public health rationale is unsupported by science.

With respect to this claim, I am back in sync with much of my colleagues' analysis. The Plaintiffs' arguments are almost entirely without a serious legal basis. There is no doubt that "[v]accine mandates ... fall squarely within a State's police power[.]" *Biden v. Missouri*, 595 U.S. 87, 104, 142 S. Ct. 647, 211 L. Ed. 2d 433 (2022) (Thomas, J., dissenting) (citing *Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922)). So, as already discussed, rational basis review is in order. And I think it plain that Rutgers's vaccine mandate had a rational basis when it was first imposed. Moreover, vaccine mandates have often been imposed with rationales that are evergreen and so need not be constantly justified. The world is a vastly better place, for example, with polio held at bay.

The point I endeavor to make here with respect to the Plaintiffs' substantive due process claim is a modest one. It is simply this: because Rutgers chose to proffer a circumstance-specific justification for its vaccine mandate, it must live with the corollary that changed circumstances matter. Decision-makers cannot pretend changed circumstances don't exist or are irrelevant.

This is not a novel principle. To the contrary, there are two long-standing maxims recognizing the effect of changed circumstances on the continued lawfulness of challenged conduct: *Cessante ratione legis cessat et ipsa lex* ("When the reason of the law ceases, the law itself also ceases") and *Ratio est legis anima, mutata legis ratione mutatur et lex* ("Reason is the soul of the law; when the reason of the law has been changed, the law is also changed"). *Legal Maxims, Black's Law Dictionary*,

App. A (11th ed. 2019). Those maxims do not stand for the proposition that the overarching legal precept changes, or that the original precept is bad law, or that the subject conduct was unlawful ab initio. *See Rogers v. Tennessee*, 532 U.S. 451, 474-75, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001) (Scalia, J., dissenting) (discussing the two maxims, which he identifies as going back at least to Lord Coke). Rather, changes in circumstances may require a different result than would have obtained had the changes not taken place. *See id.* at 474 (As to the first maxim, stating: "It had to do, not with a changing of the common-law rule, but with a change of circumstances that rendered the common-law rule no longer applicable to the case."); *id.* at 475 (As to the second maxim, explaining the non-extension of the common law rule in such a circumstance "involves no overruling, but nothing more than normal, case-by-case common-law adjudication.").

Rutgers has repeatedly pressed the notion in its briefing and at oral argument that its vaccine mandate simply reflects the dictates of governmental authorities, including public health officials. But Congress, the President, federal public health agencies, the New Jersey Legislature, the New Jersey Governor, and the New Jersey Secretary of Health did not impose a vaccine mandate on Rutgers students. Rutgers did. The reality is that the University had the discretion not to do that, and its own justifications for its own actions are subject to challenge, albeit under a deferential standard.[17] Faced with

17. As is well-settled in the analogous APA context, however, a government official may have authority to take an action (at least in some circumstances) but nevertheless justify his action in a

the complaint in this case seeking prospective equitable relief that would prevent Rutgers from continuing its vaccine mandate, the University has to justify what it is continuing to do. It is not free to ignore the current state of the world, a point its own vaccine mandate policy expressly recognizes.[18]

The public health landscape has changed markedly since Rutgers imposed the mandate. As President Biden put it when rescinding Executive Order 14042, "[c]onsidering th[e] progress [made], and based on the latest guidance from our public health experts, we no longer need" the vaccine mandates that were earlier imposed on federal employees and contractors. Exec. Order No. 14099, 88 Fed. Reg. 30891 (May 15, 2023). Further, consistent with the President's "wind[ing] down certain remaining

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way that flunks even a very deferential standard of review. *See Dep't of Com.*, 139 S. Ct. at 2567, 2569 (holding that the Secretary of Commerce had the power "to inquire about citizenship on the census questionnaire[,]" but concluding the reasons he had given for doing so for the 2020 census - at the point the case came to the Supreme Court - were insufficient to survive the "narrow" and "deferential 'arbitrary and capricious' standard"); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905, 1912, 207 L. Ed. 2d 353 (2020) (concluding that the Secretary of Homeland Security's explanation for rescinding the Deferred Action for Childhood Arrivals program did not pass muster even though "[a]ll parties agree" she had the power to rescind the program).

18. Specifically, the policy states: "This policy is subject to change based on factors such as the progress of the COVID-19 pandemic and guidance from governmental authorities." JA 351.

COVID-19 vaccination requirements to coincide with the May 11, 2023 termination of the federal public health emergency," New Jersey's Governor rescinded vaccine mandates applicable to various employees working in a broadly defined category of covered "health care settings."[19] N.J. Exec. Order No. 332 at 7-9. In taking that important step, the Governor likewise relied on the current state of COVID-19 infection and vaccination rates, nationally and in New Jersey. *Id.*

Rutgers argues that its vaccination mandate is "consistent with federal, State, and local efforts to stem the pandemic," JA 350, and that may have once been true. But in light of the aforementioned presidential and gubernatorial vaccine-mandate rescissions, the assertion that the continuation of the vaccine mandate for students at Rutgers is still consistent with federal, state, and local policies can be viewed with a strong dose of skepticism. Consequently, I believe the Plaintiffs should be permitted to amend their complaint to test the rationality of leaving the mandate in place.

## III. Conclusion

I concur in the Majority's judgment affirming the dismissal with prejudice of the Plaintiffs' federal preemption claim, ultra vires claim, and equal protection

19. The term was defined to include places ranging from "acute [and] pediatric ... hospitals" to "specialty hospitals, and ambulatory surgical centers" to "long-term care facilities" and "dialysis centers" and facilities providing "[a]ll-inclusive [c]are for the [e]lderly." N.J. Exec. Order No. 332 at 10.

claim as it relates to natural immunity. Additionally, I concur in my colleagues' reasoning that rational basis review applies to the Plaintiffs' constitutional claims. I concur further in their conclusion that the Plaintiffs' equal protection claim relating to the faculty and staff is not moot. I dissent as to their judgment to dismiss rather than to remand the matter to the District Court for further proceedings on the merits. I would further permit the Plaintiffs to seek leave to amend their complaint to challenge the University's continued imposition of the vaccine mandate.

## APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT OF NEW JERSEY, FILED SEPTEMBER 22, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 21-15333 (ZNQ) (TJB)

CHILDREN'S HEALTH DEFENSE, INC., *et al.*,

*Plaintiffs,*

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, *et al.*,

*Defendants.*

September 22, 2022, Decided
September 22, 2022, Filed

### OPINION

**QURAISHI**, *District Judge*

**THIS MATTER** comes before the Court upon Defendants Rutgers, the State University of New Jersey ("Rutgers"), Board of Governors, Rutgers School of Biomedical and Health Sciences, Chancellor Brian L. Storm, and President Jonathan Holloway's (collectively, "Defendants") Motion to Dismiss ("Motion," ECF No. 39)

Plaintiffs' First Amended Complaint ("FAC," ECF No. 35). In support of their Motion, Defendants filed a supporting brief ("Moving Br.," ECF No. 39-1). Plaintiffs Children's Health Defense, Inc. ("CHD"), Peter Cordi, Raelynne Miller, Kayla Mateo, Adriana Pinto ("Pinto"), and Jake Bothe (collectively, "Plaintiffs") filed an opposition, ("Opp'n Br.," ECF No. 42), to which Defendants replied ("Reply," ECF No. 43). The Court has carefully considered the parties' submissions and decides the Motion without oral argument pursuant to Federal Rule of Civil Procedure 78 and Local Civil Rule 78.1. For the reasons set forth below, the Court will GRANT Defendants' Motion.

## I. BACKGROUND AND PROCEDURAL HISTORY

The Court incorporates by reference the factual background articulated in its opinion from October 14, 2021, denying Plaintiffs' Motion for Temporary Restraining Order. (ECF No. 27.) The Court, however, provides a brief factual and procedural background for context.

At the outset of this action, the Court denied Plaintiffs' Motion for Temporary Restraining Order. (ECF No. 27.) In pertinent part, the Court held that Plaintiffs had failed to establish their likelihood of success on the merits given Supreme Court precedent and persuasive authorities from other circuits on the issue of COVID-19 vaccination requirements and related restrictions. (*Id.*)

Plaintiff CHD is a non-profit organization based in Peachtree City, Georgia, whose members include the

individually named student plaintiffs. (FAC ¶ 11.) The individually named plaintiffs are Rutgers enrollees all of whom refused to receive the COVID-19 vaccination. (*Id.* ¶¶ 12–32.) On August 16, 2021, Plaintiffs initiated this action seeking a declaration that the portion of Rutgers' COVID-19 policy requiring students to be vaccinated prior to returning to campus (the "Policy") was unlawful. (Complaint ¶ 1, ECF No. 1.) The Complaint spanned seven counts and alleged the Policy was "both illegal and unconstitutional" and coerced students to accept "an experimental COVID-19 vaccine" as a precondition for their return to campus. (*Id.* ¶¶ 1,3.)

Plaintiffs subsequently filed their First Amended Complaint on October 19, 2021, which again challenges the Rutgers Policy—requiring its students to either be vaccinated or obtain an exemption—as illegal and unconstitutional. (FAC ¶¶ 1.) The named plaintiffs—all but one[1] of whom obtained a religious exemption—allege that they were discriminated against because they were denied on-campus housing and further fear retaliation from Rutgers in the form of being barred from continuing their academic studies. (*Id.* ¶¶ 11–32.) The Amended Complaint spans the same seven counts alleged in their first Complaint. (*Id.* ¶¶ 245–341.) The Seven Counts allege the following: (1) Preemption of Federal Law and Ultra Vires under State Law (First Cause of Action) (*Id.* ¶¶ 245–272); (2) Violation of the Right to Informed Consent and the Right to Refuse Medical Treatment Guaranteed

1. The only named plaintiff that has neither received the COVID-19 vaccine nor obtained an exemption from the vaccination is Adriana Pinto. (FAC ¶ 16.)

by the Fourteenth Amendment and Article 1 of the Constitution of the State of New Jersey (Second Cause of Action) (*Id.* ¶¶ 273–309); (3) Violation of Equal Protection guaranteed by the Fourteenth Amendment and Article I of the Constitution of the State of New Jersey (Third Cause of Action) (*Id.* ¶¶ 310–320); (4) Violation of Civil Rights under 42 U.S.C. § 1983 (Fourth Cause of Action) (*Id.* ¶¶ 321–325); (5) Violation of the New Jersey Civil Rights Act (Fifth Cause of Action) (*Id.* ¶¶ 326–328); (6) Estoppel or Detrimental Reliance (Sixth Cause of Action) (*Id.* ¶¶ 329–336) and; (7) Breach of Contract (Seventh Cause of Action) (*Id.* ¶¶ 337–341.)

At this juncture, Defendants move to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendants argue that: (1) virtually all of Plaintiffs' claims fail for lack of standing or mootness; (2) Plaintiff does not allege any actual constitutional violations; (3) Rutgers' policies do not violate any federal or state laws; (4) a breach of contract claim cannot exist without a contract; and (5) Plaintiffs equitable estoppel claims fail because Rutgers did not promise a vaccine-free semester. (*See generally* Moving Br., ECF No. 39-1.)

## II. PARTIES' ARGUMENTS

### A. Defendants' Motion to Dismiss

Unsurprisingly, Defendants contend that the First Amended Complaint is legally baseless and should be dismissed for lack of standing and failure to state a claim upon which relief can be granted. (Moving Br. at

2.) Defendants first contend that all Plaintiffs except for one—Pinto—have received a medical exemption from the vaccine and thus have no standing to challenge the Policy pursuant to Fed. R, Civ. P. 12(b)(1). (*Id.* at 7.) Next, Defendants argue that Plaintiffs' Equal Protection claims are moot and unripe. (*Id.* at 8.) First, because Rutgers' Policy applies equally to all students and faculty regardless of their vaccination status and second, because Plaintiffs' challenge on the possibility that Rutgers might adopt a different policy in the future is a hypothetical, future injury. (*Id.* at 8–9.) Defendants also contend that, in light of the named Plaintiffs' religious exemptions and subsequent mootness in their challenges, Plaintiff CHD lacks organizational standing to pursue claims not possessed by the student Plaintiffs. (*Id.* at 10.)

With respect to Plaintiffs' constitutional claims, Defendants argue that they should be dismissed because they fail to allege claims upon which relief may be granted (*Id.* at 11) and even more so because Rutgers' Policy is protected under the rational basis review. (*Id.* at 11–12.) Defendants next argue that Pinto's Equal Protection claim is moot in light of Rutgers' Policy applying uniformly to both students and faculty. (*Id.* at 17.) Defendants further argue that Plaintiffs' free exercise of religion claim fails because the Policy does not target "religious conduct for *distinctive* treatment or advance legitimate governmental interest *only* against conduct with a religious motivation." (*Id.* at 19) (emphasis in original). Lastly, Defendants contend that the mandate does not violate the New Jersey Constitution because the courts have already upheld public school vaccination mandates against both federal and New Jersey State Constitution-based challenges. (*Id.* at 21.)

Defendants close out their brief by arguing that Plaintiffs' 42 U.S.C. § 1983 and New Jersey Civil Rights Act ("NJCRA") claims fail because the Policy does not violate any constitutional right. (*Id.* at 23.) According to the defendants, Plaintiffs failed to allege a violation of federal law (*Id.* at 25) as New Jersey law explicitly authorizes Rutgers' policies (*Id.* at 26.) Plaintiffs also failed to allege a breach of contract claim because they do not allege the existence of a contract (*Id.* at 28) and further failed to allege an equitable estoppel claim because Rutgers never promised a vaccine-free fall 2021 academic semester. (*Id.* at 30.) Lastly, Defendants urge the Court to disregard Plaintiffs' claims that Rutgers had a financial motive to impose the Policy. (*Id.* at 32.)

**B. Plaintiffs' Opposition**

On January 11, 2022, Plaintiffs filed a memorandum in opposition to Defendants' Motion to Dismiss. (Opp'n Br., ECF No. 42.) Plaintiffs of course begin by asserting that all of their claims are well-pled and should not be dismissed. (*Id.* at 5.) Thus, Plaintiffs contend that they all have standing because the Rutgers Policy continues to impose unconstitutional conditions upon them. (*Id.* at 4.) Plaintiffs specifically note that CHD's standing mirrors Pinto's after Defendants conceded to Pinto's standing. (*Id.* at 3.) In support of that position, Plaintiffs claim that their right to informed consent and to refuse unwanted medical treatment under the Due Process Clause of the Fourteenth Amendment was violated. Plaintiffs further contend that they plausibly pled violations of equal protection because "Rutgers' decision to mandate that only exempt students

test weekly, wear masks and be banned from university housing because they are unvaccinated" is an explicit example of different treatment amongst others that are similarly situated, (*Id.* at 19.) Moreover, Plaintiffs allege that the Policy preempts and subsequently violates federal law because federal laws require individuals to exercise informed consent to a COVID-19 vaccine whereas the Policy coerces students into receiving the vaccine. (*Id.* at 22.) The Policy also violates state authority under the *ultra vires* doctrine because no New Jersey statute or regulation grants Rutgers police powers to mandate a vaccine. (*Id.* at 24.) Penultimately, Plaintiffs argue that they have successfully pled a breach of contract claim because a contract exists in the enrollment terms and conditions between a university and its students, (*Id.* at 32.) Specifically, "Plaintiffs' breach of contract claim rests on the terms and conditions of enrollment at Rutgers . . . and the alleged absence of any condition or reservation that Rutgers could command or alter public health measures as a condition of enrollment." (*Id.* at 33.) Lastly, Plaintiffs claim that they have properly pled estoppel because the named plaintiffs relied on Rutgers' representation that it would not require COVID-19 vaccinations to return to campus "to accept offers of admission to its colleges, avoid seeking transfers to other colleges and universities, or entertain other alternatives to in-person attendance." (*Id.* at 34.)

### C. Defendants' Reply

On January 31, Defendants submitted their reply memorandum in support of their Motion to Dismiss

Plaintiffs' first amended complaint, ("Reply," ECF No. 43.) Defendants begin with asserting that Plaintiffs misstated the rights at issue in their case because the "issue in this case is not whether Plaintiffs are free to decline the vaccine, but whether they can compel Rutgers to matriculate them if they do so [and] [t]hey cannot." (*Id.* at 2.) Defendants note that the court in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) further supports their position. (*Id.* at 2–3.) Defendants rebutted Plaintiffs' interpretation of *Jacobson* and instead contend that *Jacobson* "requires judicial deference to rationally-based public health decisions." (*Id.* at 4.) Defendants next pointed out that this is not an "unconstitutional conditions" case. (*Id.* at 7.) Defendants claim that Plaintiffs seem to argue that "if they have a constitutional right to refuse a COVID-19 vaccination, Rutgers cannot coerce them to forego that right by making it a condition of their matriculation" but rely on irrelevant case law to support their position. (*Id.* at 7.) With respect to Plaintiffs' equal protection claim, Defendants argue that "unvaccinated" is not a protected class and thus the restrictions Rutgers placed on exempt and therefore unvaccinated students are subject only to the rational basis test. (*Id.* at 8.) Plaintiffs next contend that New Jersey law empowers Rutgers to mandate ACIP-recommended vaccinations. (*Id.* at 9.) Namely, "N.J.S.A. § 18A:61D-1 obligates Rutgers to require every student to provide proof of certain vaccinations . . . N.J.A.C. § 8:57-6.4, allows Rutgers 'to establish additional requirements for student immunizations and documentation that [it] shall determine appropriate,' so long as the immunizations are 'recommended by the ACIP.'" (*Id.*) Defendants conclude by reiterating that Plaintiffs have no claim for breach

of contract or equitable estoppel. (*Id.* at 12.) Namely, Plaintiffs neither identified a contract nor any breached provisions aside from the claim that '"university bulletins' may form part of a contract between a university and its students," which Defendants assert, is wrong. (*Id.*) Lastly, Pinto's claim of equitable estoppel is baseless as she relied on a publicly accessible video published in January 2021 that stated that "the vaccine at this point is not mandatory across the United States or here in New Jersey," and "is not mandatory at Rutgers," (*Id.* at 13.) "Those were present-tense statements made in January 2021 that made no 'clear and definite promise' that Rutgers would not mandate the vaccine in the future." (*Id.*)

## III. LEGAL STANDARD

Rule 12(b)(1) mandates the dismissal of a case for "lack of subject-matter jurisdiction." Fed. R, Civ. P. 12(b)(1). Plaintiffs bear the burden of establishing the existence of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991). If a claim does not present a live case or controversy, the claim is moot, and a federal court lacks jurisdiction to hear it. *United States v. Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004). A challenge for mootness is properly brought by a Rule 12(b)(1) motion and constitutes a factual attack on the jurisdictional facts; thus, the court may consider evidence outside the pleadings. *See Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176-77 (3d Cir. 2000). "[T]he standard for surviving a Rule 12(b)(1) motion is lower than that for a Rule 12(b)(6) motion," however, and a "claim may be dismissed under Rule 12(b)(1) only

if it 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" *Id.* at 178 (quoting *Kehr Packages, Inc.*, 926 F.2d at 1409).

On a Rule 12(b)(6) motion, the court must accept as true all factual allegations and draw all reasonable inferences in the light most favorable to the plaintiff. *See Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). To withstand a motion to dismiss, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* Although a plaintiff is entitled to all reasonable inferences from the facts alleged, a plaintiff's legal conclusions are not entitled to deference and the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

The pleadings must contain sufficient factual allegations so as to state a facially plausible claim for relief. *See, e.g., Gelman v. State Farm Mut. Auto. Ins. Co.*, 583 F.3d 187, 190 (3d Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). In deciding a Rule 12(b)(6) motion, the Court limits its inquiry to the facts alleged in the complaint and its attachments, matters of

public record, and undisputedly authentic documents if the complainant's claims are based upon these documents. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

## IV. DISCUSSION

### A. STANDING AND MOOTNESS

Standing and mootness are two distinct justiciability doctrines that limit a court's jurisdiction to cases and controversies in which a plaintiff has a concrete stake. *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476–77 (3d Cir. 2016). Standing ensures that each plaintiff has "[t]he requisite personal interest . . . at the commencement of the litigation," while mootness ensures that this interest "continue[s] throughout" the duration of the case." *Id.* at 477 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)).

To establish constitutional standing, a plaintiff must show (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* In assessing standing, the primary project is to separate those with a true stake in the controversy from those asserting

"the generalized interest of all citizens in constitutional governance." *Id.* (citing *Valley Forge Christian Coll. v. Ams. United For Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982)).

Mootness "ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit." *Id.* The party asserting that a claim is moot must show that it is absolutely clear that the allegedly wrongful behavior is not reasonably expected to recur. *Id.* "A court will not dismiss a case as moot even if the nature of the injury changes during the lawsuit, if secondary or collateral injuries survive after resolution of the primary injury." *Id.*

A case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *A.S. v. Harrison Twp. Bd. of Educ*, 66 F. Supp. 3d 539, 545 (D.N.J. 2014) (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). The mootness doctrine requires that "an actual controversy [is] extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). '"A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). Mootness may not become an issue until the case has been brought and litigated. *Id.* at 191.

*Appendix B*

A federal court must address the question of mootness, even though it was not raised by the parties, because it implicates Article III jurisdiction, and thus, a court may raise *sua sponte* the issue of whether a suit presents a live case or controversy. *New Jersey Tpk. Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 30 (3d Cir. 1985); *Luppino v. Mercedes Bern USA*, 718 F. App'x 143, 147 (3d Cir. 2017) (explaining that federal courts have a duty to determine mootness or abstract propositions, or to declare legal principles which cannot affect the ultimate issue in the case) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); *Justin Time Chem. Sales & Mktg., Inc. v. Ironshore Specialty Ins. Co.*, Civ. No. 13-7127, 2014 WL 3784264, at *1 (D.N.J. July 31, 2014) ("A court may *sua sponte* dismiss a case on grounds of mootness.")

Pursuant to Defendants' concession that Pinto does have standing, the Court finds that Plaintiff CHD—a non-profit organization whose mission is to end childhood health epidemics by working aggressively to eliminate harmful exposures, hold those responsible accountable, and to establish safeguards—has demonstrated interests germane enough to the organization's purpose to establish standing that mirrors Pinto's. *See Friends of the Earth Inc. v. Laidlaw Env't Serv., Inc.*, 528 U.S. 167, 181 (2000) ("an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit").

On the other hand, the named Plaintiffs who received religious exemptions—all of the plaintiffs except Pinto—and challenge the Policy, lack standing as a result of their exemptions. The exceptions also render their claims moot Plaintiffs have not suffered any actual or imminent injury and instead base their claims on their fear of future potential harm. Specifically, the plaintiffs that received religious exemptions from the Policy base their claims on fears such as whether or not they "will be allowed to continue [their] academic studies at Rutgers if COVID-19 rates increase" (FAC ¶ 13–17) and Equal Protection claims premised on the theory that they may later be, but are not now, subject to different masking requirements than students who are vaccinated. (FAC ¶¶ 316–18.) Because these harms are conjectural and hypothetical, the claims and the challenges to the Policy from Plaintiffs who have received religious exemptions are moot. *See Wade v. Univ. of Conn. Bd. of Trs.*, 554 F. Supp. 3d 366, 2021 WL 3616035, at *8 (D. Conn. 2021) (dismissing two plaintiffs' challenges to University of Connecticut's vaccine mandate as moot because they were granted exemptions); *Pelekai v. Hawaii*, Civ. No. 21-343, 2021 U.S. Dist. LEXIS 203916, 2021 WL 4944804, at *1 (D. Haw. Oct. 22, 2021) (dismissing plaintiffs' claims as moot because they ail opted out of or were granted exemptions from vaccine requirements). These Plaintiffs' receipt of exemptions also moots their challenges to Rutgers' process for considering exemption requests because they have no further claim on which the Court may "make a substantive determination on the merits." *N.J. Turnpike Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 30 (3d Cir. 1985) ("If one or more of the issues involved in an action become moot . . . the adjudication of the moot issue or issues should be refused").

The exempted Plaintiffs' Equal Protection claims are also moot. Plaintiffs claim that Rutgers has treated students differently from faculty and staff because it imposed the mandate only on students. (FAC ¶¶ 295, 305, 313.) However, in light of President Joseph Biden's Executive Order 14042 which requires vaccination against COVID-19 for certain employees of federal contractors, Rutgers recently announced that all employees must receive their final dose of a COVID-19 vaccine by January 4, 2022. Plaintiffs' Equal Protection claims have thus become moot because Plaintiffs are now treated similarly to Defendants with respect to the vaccination requirements and the Court can no longer give meaningful relief. *See Joseph v. Johns*, Civ, No. 04-139, 2005 WL 3447932, at *2 (W.D. Pa, Oct. 24, 2005) ("A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." (quoting *Florida Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1217 (11th Cir.2000))).

## B. APPLICABILITY OF *JACOBSON*

In *Jacobson*, the United States Supreme Court upheld the constitutionality of a state law requiring members of the community to get smallpox vaccines when the "board of health" of the community recommended vaccination, 197 U.S. at 12, 39. Pursuant to the state law, the city of Cambridge adopted regulations requiring the "vaccination or revaccination of all inhabitants of Cambridge." *Id.* at 12. Jacobson, a resident of Cambridge, refused the vaccine and the state criminally charged him. *Id.* at 13. After a jury found him guilty under the statute and the court

ordered him to pay $5 pursuant to the statute, Jacobson appealed to the Massachusetts Supreme Court and ultimately the United States Supreme Court. *Id.* at 14, 22. He argued that the state statute requiring the smallpox vaccination violated his Fourteenth Amendment rights to "life, liberty, or property," and "equal protection under the laws." *Id.* at 14.

The Supreme Court rejected Jacobson's argument and upheld the vaccine requirement. *Id.* at 39; *see also Sczesny v. New Jersey*, Civ. No, 22-2314, 2022 WL 2047135, at *15 (D.N.J. June 7, 2022). The Court emphasized that the "liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Jacobson*, 197 U.S. at 26. Rather, the Court recognized that "[t]here are manifold restraints to which every person is necessarily subject for the common good," *id.*, including the "safety of the general public," *id.* at 29, and a community's "right to protect itself against an epidemic of a disease which threatens the safety of its members," *id.* at 27.

Applying these principles to the Massachusetts law, the Supreme Court used a deferential standard to review state legislative action that aimed to "protect the public health, public morals, or the public safety" during the smallpox epidemic. *Id.* at 30–32. In doing so, the Court stated that it would strike down such a regulation only if it had no "real or substantial relation to those objects" or if it amounted to "a plain, palpable invasion of rights secured by fundamental law." *Id.* at 31. Courts interpret

the review applied in *Jacobson* as "rational basis review." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, ___ (2020) (Gorsuch, J. concurring) (noting that the *Jacobson* court "essentially applied rational basis review" to the Massachusetts state law); *Smith v. Biden*, Civ. No. 21-19457, 2021 WL 5195688, at *67 (D.N.J. Nov. 8, 2021) (interpreting *Jacobson* to apply "rational basis" review to the smallpox vaccine mandate). Despite Plaintiffs' entreaties to apply a higher level of scrutiny in this case, the Court will again apply a rational basis review, given the continued vitality of *Jacobson*.

## C. PLAINTIFFS' CONSTITUTIONAL CLAIMS

### 1. Due Process Claims (Count II)

Plaintiffs challenge the Policy on Due Process grounds claiming that Rutgers "coerces students to accept experimental vaccines. (FAC ¶ 285.) Baked into this claim is the allegation that Rutgers also had a financial motive behind implementing the Policy because of Rutgers' "financial ties to all three COVID-19 vaccine manufacturers." (Opp'n Br. at 12–13.) These Due Process claims fail. Vaccination requirements are well established in the law, with approval from the United States and New Jersey Supreme Courts. Plaintiffs' claims do not involve a suspect class or fundamental right, and thus, the rational basis standard of review applies. *Sczesny*, 2022 WL 2047135, at *15 ("courts have routinely rejected the argument that vaccine mandates will trigger heightened scrutiny [for substantive due process claims] and have instead applied rational basis review." (quoting *Williams*

*v. Brown*, Civ. No. 21-1332, 2021 WL 4894264, at *9 (D. Or. Oct. 19, 2021))); *see also Jacobson*, 197 U.S. at 30–32. "Under rational basis review, the action of the government need only be rationally related to a legitimate government interest." *Id.* at *9. "Governmental action is rationally related to a legitimate goal unless the action is clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or general welfare." *Id.*

Rutgers undoubtedly has a legitimate interest in protecting the members of its broad community from a potentially deadly disease and in trying to prevent more of the massive disruptions that COVID-19 caused for three semesters prior to Fall 2021. *Messina v. Coll. of New Jersey*, 566 F. Supp. 3d 236, 249 (D.N.J. 2021) (upholding vaccination policies as a requirement for university attendance in the interest of protecting its students). The outbreak of the COVID-19 virus launched the entire world into an unprecedented, unexpected pandemic. The government turned its attention to prioritizing public welfare, and in doing so, determined that a vaccine—a similar answer to past pandemics—was the best way to do so. It is not this Court's function to determine the most effective method to protect the public against COVED-19. *Jacobson*, 197 U.S. at 30. Instead, it is for the legislature to determine what method of protection would likely be effective. *Id.* It is for these similar reasons that Rutgers' financial interests could not have played a role in the implementation of the Policy, Accordingly, Rutgers' decision to require students to take a COVID-19 vaccine as a condition of matriculation for the Fall 2021 semester satisfies rational basis review. *See Klaassen v. Trs. of*

*Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (approving state university vaccine mandate, recognizing that "the rational-basis standard used in *Jacobson*" is "the law established by the Supreme Court"); *Harris v. Univ. of Mass., Lowell*, No. 21-11244, 2021 WL 3848012, at *6 (D. Mass. 2021) ("[c]urbing the spread of COVID-19 is 'unquestionably a compelling interest,' and listing "other legitimate goals [that] flow from that," including "returning students safely to campus"); *Roman Cath. Diocese of Brooklyn*, 592 U.S. at ___ ("Stemming the spread of COVID-19 is unquestionably a compelling interest, . . ."); *see also Jacobson*, 197 U.S. at 31-32 ("[T]he principle of vaccination as a means to prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools").

**2. Equal Protection Claims (Count III)**

Plaintiffs next challenge the Policy on equal protection grounds, alleging that the Policy is discriminatorily applied "against students by mandating EUA COVID-19 vaccines for them but not for the administration, faculty, staff, employees or contractors of Rutgers." (FAC ¶ 313.) As addressed earlier in this opinion, this claim is moot as faculty were subsequently required to vaccinate themselves, holding them to the same standards as the students' vaccination requirements. Plaintiffs further argue that Rutgers' Policy is "not narrowly tailored to serve any compelling state interest, not substantially related to any important governmental objective, or rationally related to any legitimate government purpose."

(*Id.* at 313–19.) Plaintiffs' use of the strict and intermediate scrutiny standards is incorrect in this context, "As with substantive due process, courts have routinely rejected the argument that vaccine mandates will trigger heightened scrutiny under the Equal Protection Clause and have instead applied rational basis review." *Sczesny*, 2022 WL 2047135, at *15 (quoting *Williams v. Brown*, 2021 WL 4894264, at *9). Most importantly, Plaintiffs' Equal Protection challenge to the Policy fails because Plaintiffs are not members of a protected class alleging that "disparate treatment was based on [their] membership in the protected class." *Kaul v. Christie*, 372 F. Supp. 3d 206, 254 (D.N.J. 2019). Being unvaccinated does not confer protected status. *See Phillips*, 775 F.3d at 543-44 (students with religious exemptions to vaccines are not a protected class). Once again, Rutgers has a legitimate interest in protecting its students and staff from a pandemic-inducing virus that is COVID-19, thus satisfying the standards of rational basis review.

Plaintiffs separately challenge the Policy on Equal Protection grounds on the basis that "Rutgers' decision to mandate that only exempt students test weekly, wear masks and be banned from university housing because they are unvaccinated is another example of the university treating them differently from others similarly situated." (FAC ¶¶ 316–18; Opp'n Br. at 19.) Unfortunately for Plaintiffs, this argument fails as well. In the interest of Equal Protection, the Policy requires that all students and employees wear face coverings while indoors regardless of their vaccination status. *See Universitywide COVID-19 Information*, Rutgers Univ., https://coronavirus.rutgers.

edu/covid-19-vaccine/#:~:text=Therefore%2C% (last visited Nov. 19, 2022). Neutrally applied mask policies to combat the spread of COVID-19 do not violate the Constitution. *See, e.g.*, *Delaney v. Baker*, 511 F. Supp. 3d 55, 73-74 (D. Mass. 2021), Next, the Policy applies equally to all unvaccinated students and employees insofar as it requires that unvaccinated individuals be tested for COVID-19 to best protect its students and staff from spreading the virus. *Id.* Lastly, courts have consistently held that higher education policies barring unvaccinated students from on-campus housing are not unconstitutional. *Jacobson*, 197 U.S. at 25 ("[C]olleges and universities have long required numerous vaccinations as a prerequisite for attendance and communal living" on campus); *Messina*, 566 F. Supp. 3d at 239 (rejecting the plaintiffs' request for injunctive relief despite the College's policy requiring "exempt students to practice social distancing, bann[ing] them from living on campus, participating in non-varsity athletic clubs, engaging in high contact activities, and traveling overnight with varsity teams"); *Harris*, 2021 WL 3848012, at *5 (upholding university policy that prohibited unvaccinated students from in-person classes, dormitories, and other activities). It is thus evident to the Court that the Policy is not violative of Plaintiffs' Equal Protection rights. The Court will therefore dismiss this claim.

### 3. Free Exercise of Religion Claims (Count III)

Plaintiffs further alleged that "Rutgers' Policy of imposing restrictions and requirements on students who have received religious exemptions denies such students

. . . the free exercise of religion guaranteed by the First Amendment," (FAC ¶ 319.) The Policy, however, does not burden the free exercise of religion, Plaintiffs make the self-serving statement that the restrictions imposed on religiously exempt students burdens their exercise of free religion and failed to provide any further evidence to that extent. *See McTernan v. City of York*, 577 F.3d 521, 532 (3d Cir. 2009) (dismissing a Free Exercise challenge for failure to meet the Iqbal pleading standard where the plaintiffs made mere "conclusory allegations" that they were treated differently based on their religion). Only those government acts "burdening religious practice that [are] not neutral or not of general application must undergo the most rigorous of scrutiny," *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation" is subject to strict scrutiny. *Id.*

Rutgers' Policy clearly does not target religious conduct for distinctive treatment nor does it advance legitimate governmental interests only against conduct with a religious motivation. However, even if the Policy did not provide for religious exemptions to vaccination requirements, Plaintiffs could not argue that a vaccination requirement applicable equally to all students and faculty violates their right to free exercise, *See Phillips*, 27 F. Supp. 3d at 312-13 (*Jacobson* did not require a right for religious objectors to be exempt from vaccination laws). Courts in this district have already held that mandatory masking indoors does not infringe the right to exercise

of religion, *See Stepien v. Murphy*, 574 F. Supp. 3d 229, 248 (D.N.J. 2021). Meanwhile, other circuit courts have held that university policies that require mask-wearing and weekly testing do not pose constitutional problems. *Klaassen*, 7 F.4th at 593. Rutgers' Policy is not only a neutral rule of general applicability, but it supports the right of free exercise of religion because the university has chosen to *enable* the practice of religion by providing a religious exemption to the vaccination requirement. Moreover, Plaintiffs failed to acknowledge that the imposed restrictions apply equally and evenly to *all* exempted[2] and unvaccinated individuals regardless of their religion. This neutral applicability is consistent with the Constitution and cannot be viewed as an infringement on the right to free exercise of religion. *See Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) (religious plaintiff had no constitutional right to an exemption from mandatory vaccination law for public school students, though state provided one); *Phillips*, 775 F.3d at 543 (state "could constitutionally require that all children be vaccinated in order to attend public school . . . [but the State went] beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs"), To the extent the Amended Complaint attempts to claim a Free Exercise claim, that claim will also be DISMISSED.

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2. The Policy provides for medical and religious exemptions to the COVID-19 vaccine, and the restrictions imposed on these exempted students and faculty are the same. *See Universitywide COVID-19 Information*, Rutgers Univ., https://coronavirus.rutgers.edu/covid-19-vaccine/#:~:text=Therefore%2C% (last visited Nov. 19, 2022).

**4. Violation of New Jersey Constitution Claims (Count III)**

Plaintiffs also allege that Defendants' Policy violates Article I of the Constitution of the State of New Jersey (FAC ¶ 320), but failed to specify exactly what section of Article I they allege the Policy violates. Defendants rely on New Jersey Supreme Court case law to reject Plaintiffs' claims. (Moving Br. at 21.) Notably, Plaintiffs do not address Defendants' challenges on this issue in their opposition brief.

Defendants have accurately noted, that the New Jersey Supreme Court has soundly rejected these types of claims. In *Sadlock v. Carlstadt Board of Education*, the New Jersey Supreme Court held that the question of compulsory vaccination was strictly a legislative question, and that the resolution making vaccination of school children in the public schools of the Borough of Carlstadt compulsory was a proper exercise of the police power to protect the general public welfare. 58 A.2d 218, 221–22 (N.J. 1948). In finding that the resolution was not violative of the guarantees of the federal and New Jersey Constitutions pertaining to personal and religious liberties, it noted that "the principle is too well established to require citation that the so-called constitutional liberties are not absolute but are relative only. They must be considered in the light of the general public welfare. To hold otherwise would be to place the individual above the law." *Id.* at 222.

The New Jersey Supreme Court also recognized that "a competent adult person generally has the right

to decline to have any medical treatment initiated or continued," but "[w]hether based on common-law doctrines or constitutional theory, the right to decline life-sustaining medical treatment is not absolute" and "may yield to countervailing societal interests in sustaining a person's life." *In re In re Conroy*, 486 A.2d 1209, 1222–23 (N.J. 1985), One of the countervailing societal interests that can override a person's individual medical decisions is the need to "protect innocent third parties." *Id.* at 1225. Specifically, "[w]hen the patient's exercise of his free choice could adversely and directly affect the health, safety, or security of others, the patient's right of self-determination must frequently give way." *Id.*

Similar to the resolution that was upheld in *Sadlock*, Rutgers' Policy is not violative of the guaranties of the New Jersey Constitution pertaining to personal and religious liberties. Simply put, the Policy recognizes the societal interest to protect the welfare of the general public and thus is well within the metes and bounds of Article I of the New Jersey Constitution. Accordingly, the Court will dismiss this claim.

### D. 42 U.S.C. § 1983 AND NJCRA CLAIMS (COUNTS IV AND IV)

Plaintiffs also assert claims under 42 U.S.C. § 1983 and the NJCRA. (FAC ¶¶ 321–25.) Defendants rightly point out that both statutes require Plaintiffs to allege sufficiently that a person, acting under the color of state law, deprived them of a right secured by the Constitution. *Groman v. Twp. of Manalapan*, 47 F.3d 628, 638 (3d Cir.

1995); *Hottenstein v. City of Sea Isle City*, 977 F. Supp. 2d 353, 365 (D.N.J. 2013) ("This district has repeatedly interpreted NJCRA analogously to § 1983," and both laws require that "the Defendant must have violated a constitutional right"). Similarly, *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), provides that only "when execution of a government's policy or custom . . . inflicts [constitutional] injury that the government as an entity is responsible under 42 U.S.C. § 1983." *See also Sharp v. Kean Univ.*, 153 F. Supp. 3d 669, 675 (D.N.J. 2015) (no Section 1982 claim unless plaintiff can demonstrate that one of [the university's] policies or customs caused the alleged constitutional deprivation"). As discussed previously in this opinion, Plaintiffs have not sufficiently pled a plausible claim that the Policy has violated any constitutional right, effectively voiding their § 1983 and the NJCRA claims.

## E. VIOLATIONS OF STATE AND FEDERAL LAW (COUNT I)

Plaintiffs claim that Rutgers' Policy is "preempted by federal law and *ultra vires* under state law." (FAC ¶¶ 245–72.) Defendants disagree and argue that Plaintiffs failed to state a claim upon which relief can be granted. (Moving Br. at 25.)

### 1. Federal Law Violations

Plaintiffs base their claims on "the principle that it is illegal to coerce an individual to accept an experimental medical product." (Opp'n Br. at 21.) While Plaintiffs are

correct in the proposition that the government cannot coerce an individual to accept a medical product, they are wrong in alleging that Rutgers' Policy does the same, Rutgers' Policy simply requires students to either accept the COVID-19 vaccine or satisfy one of the Policy's exemptions. Students can thus get vaccinated, prove that they are exempted, or apply elsewhere. *Klaassen*, 7 F.4th at 593 (giving students a choice between taking the vaccine and pursuing their education elsewhere is not the same as forcing vaccination).

In theory, Plaintiffs are correct in pointing out that "where state and federal law directly conflict, state law must give way." (FAC ¶ 247.) However, nothing about New Jersey's vaccine mandate or Rutgers' Policy conflicts with federal law. Section 564 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3 ("Section 564"), obligates the Secretary of Health and Human Services to establish "conditions designed to ensure that individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product." *Id.* § 360bbb-3(e)(1)(A)(ii). The Secretary met the requirements of Section 564 by means of the authorized Fact Sheets distributed by healthcare providers administering the vaccine to persons receiving it. Moreover, contrary to Plaintiffs' allegations, Rutgers has not mandated any medical products. (FAC ¶ 72.) Instead, it has simply made adherence to the mandate a condition to its enrollment at the university. In sum, it is clear to the Court that Rutgers's Policy has not violated any federal laws and it will therefore dismiss this claim.

**2. State Law Violations**

Plaintiffs incorrectly point out that "no state statute authorizes Rutgers, or any other public . . . institution of higher learning, to require students to demonstrate COVID-19 vaccination as a condition of attendance." (FAC ¶ 266.) In fact, as Defendants note, N.J.S.A. § 18A:61D-1 and N.J.A.C. § 8:57-6.4(c) *require* Rutgers to obtain proof from students that they have taken certain immunizations and authorize Rutgers to require other ACIP-recommended vaccinations. It has further been held that the State can make vaccination status a condition of school admittance to a university, with the student accorded an exemption from such requirement if vaccination interferes with the free exercise of his religious principles, *Kolbeck v. Kramer*, 84 N.J. Super. 569, 572 (N.J. Super. Law Div. 1964); *see also Jacobson*, 197 U.S. at 25 ("[C]olleges and universities have long required numerous vaccinations as a prerequisite for attendance and communal living" on campus). Thus, by requiring COVID-19 vaccination as a condition to enrollment—less exemptions—Rutgers is not only looking at the best interests of its student population but is also required to do so by state law. The same is true of Plaintiffs' claims about exclusion of unvaccinated persons from dormitory living. N.J.A.C. § 8:57-6.14(d) permits "an institution [to] temporarily exclude a student with medical exemptions . . . from classes and from participating in institution-sponsored activities during a vaccine-preventable disease outbreak or threatened outbreak." *See also id.* § 8:57-6.15(c) (same with respect to religious exemptions). In light of the aforementioned statutes, it is evident that

Rutgers' Policy and subsequent dormitory restrictions are consistent with state law. The Court will therefore dismiss this claim.

### F. BREACH OF CONTRACT CLAIM (COUNT VII)

Plaintiffs further allege that Defendants breached their contract "by adopting unilaterally a Policy mandating EUA COVID-19 vaccines, testing and masking to attend Rutgers, without any enabling statute or requirement by any health authority." (FAC ¶ 340.) Defendants, of course, disagree with this position.

A complaint adequately pleads a breach of contract claim if it alleges (1) a contract, (2) a breach of that contract; (3) resulting damage to the plaintiff; and (4) that the plaintiff performed its own contractual duties. *MK Strategies, LLC v. Ann Taylor Stores Corp.*, 567 F. Supp. 2d 729, 735 (D.N.J. 2008). "To prove the existence of an express contract, [the plaintiff] must set forth the elements of offer, acceptance and consideration." *Id.* "Under New Jersey law, a complaint alleging breach of contract must, at a minimum, identify the contracts and provisions breached. Failure to allege the specific provisions of the contract breached is grounds for dismissal." *Potter v. Newkirk*, Civ. No. 17-08478, 2020 WL 6144756, at *13 (D.N.J. Oct. 20, 2020) (internal quotation and citation omitted).

Plaintiffs fail to state a claim for breach of contract on two grounds. First, they fail to identify a contract much less any provision(s) breached. *Id.; See also*

*Smith v. Univ. of Pa.*, 534 F. Supp. 3d 463, 475 (E.D. Pa. 2021) (dismissing the students' breach of contract claim because the students had not specifically alleged that the school violated an express, written contractual provision to provide in-person instruction and an on-campus experience in exchange for tuition). Second, by Plaintiffs' own admission, Rutgers announced the immunization requirement five months before the start of the academic semester to which it would first apply. (FAC ¶ 194.) If a contract had been formed, it would have been at this point that Rutgers extended its "offer" to create a contract. Plaintiffs, by enrolling in Fall semester courses, "accepted" the contract for valid consideration presumably in the form of tuition in exchange for course credits.[3] The Plaintiffs also had an ample amount of time to reject this "offer" and either unenroll in Rutgers' classes, transfer to a different program, or not apply for admission to Rutgers in the first place.

Even if the Court were to find that Plaintiffs had entered into a contract with Rutgers, the Court could not find that Rutgers breached such a hypothetical contract. Plaintiffs concede that Rutgers implemented the Policy terms five months before the Fall semester when the

3. To be enforceable, a contract must be supported by valuable consideration. *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959, 980 (D.N.J. 1981). Consideration involves a detriment incurred by the promisee or a benefit received by the promisor, at the promisor's request. *Id.* Legal sufficiency does not depend, however, upon the comparative value of the consideration and of what is promised in return. *Id.* Rather, the consideration must merely be valuable in the sense that it is something that is bargained for in fact. *Id.*

Policy was to go into effect. (*Id.*) Thus, the "contract" to enroll in classes for the Fall 2021 included the Policy's terms, By requiring students to either be vaccinated or qualify for an exemption from the vaccine, Rutgers strictly abided by the terms of the contract. In short, the Court finds that Plaintiffs do not state a plausible claim for breach of contract and it will dismiss this Count.

### G. PROMISSORY ESTOPPEL CLAIM (COUNT VI)

The sixth count of their Amended Complaint alleges an estoppel claim. (FAC ¶ 330.) At this juncture, it is important to note that the parties' pleadings seem to confuse equitable estoppel and promissory estoppel. Plaintiffs' Amended Complaint describes estoppel as an "equitable doctrine" which likely lead Defendants to assume their claims are grounded in equitable estoppel. (See Moving Br. at 30.) However, Plaintiffs make clear in their Opposition Brief that they allege detrimental reliance based on promissory estoppel. (Opp'n Br. at 33.) Plaintiffs claim that they relied on "Rutgers' announce[ment] in January 2021 that it would not mandate EUA COVID-19 vaccines for students to return to campus in the Fall for in-person instruction. (FAC ¶ 332.) In light of the promissory estoppel standard enumerated by the courts in this district, the Court dismisses Plaintiffs' claim.

To state a claim for estoppel, courts require that Plaintiffs plead "a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation

will probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." *Cotter v. Newark Hous. Auth.*, 422 F. App'x 95, 99 (3d Cir. 2011) (quoting *O'Malley v. Dep't of Energy*, 109 N.J. 309, 317 (N.J. 1987)). However, a "truthful statement as to the present intention of a party with regard to future acts is not the foundation upon which an estoppel may be built. The intention is subject to change." *Alexander v. Cigna Group*, 991 F. Supp. 427, 439 (D.N.J. 1998) (quoting *In re Phillips Petroleum Sec. Litig*, 881 F.2d 1236, 1250 (3d Cir. 1989)). Dr. Gracias' statements in January 2021 about Rutgers' then-present intention on requiring vaccination for students with regard to the Fall semester is not a foundation upon which an estoppel may be built because that intention was subject to change, especially in light of a worldwide pandemic. *Id.* Moreover, all of the plaintiffs' reliance—with the exception of Pinto's—on Dr. Gracias' statements did not lead to any detriment as required by the standard set forth in *Cotter*. In fact, even after Rutgers changed its Policy and required students to be vaccinated to return to campus, it provided for medical and religious exemptions. All of the plaintiffs except Pinto received a religious exemption and thus avoided the vaccination Policy *and* were allowed to return to campus for the fall semester, destroying any "detriment" that Plaintiffs could validly allege. *Id.*

As for Pinto's claims, the Amended Complaint raises an entirely different estoppel claim that Pinto reasonably expected she could avoid taking the COVID-19 vaccine if she selected only remote coursework, (FAC ¶¶ 16, 335.)

Rutgers' Policy does in fact permit "[s]tudents whose entire course of study is entirely web based, a fully online degree program, and/or fully remote" to be exempt from the Policy. *See Universitywide COVID-19 Information*, Rutgers Univ., https://coronavirus.rutgers.edu/covid-19-vaccine/#:~:text=Therefore%2C% (last visited Nov. 19, 2022). Pinto may simply "enroll in [Rutgers'] degree-granting online program." *Id.* Once she does so, Pinto will be exempted from the Policy, enrolled in Rutgers courses, and effectively avoid any detriment from Dr. Gracias' statements and the Policy.

Even if Plaintiffs had otherwise adequately pled a promissory estoppel claim, it would fail for another reason. Critically important to a promissory estoppel claim is a *detriment* suffered by the plaintiff, *Cotter*, 422 F. App'x at 99. None of the plaintiffs in this matter have suffered an injury. All of the named plaintiffs were permitted to continue their enrollment at Rutgers without receiving a vaccination despite the Policy requiring Rutgers' students to be vaccinated. Even Pinto could not claim a detriment as Rutgers allows for unexempted, unvaccinated students to continue their enrollment at Rutgers via an online program.

Thus, the Court finds that Plaintiffs do not state a plausible claim for relief with respect to promissory estoppel and it will dismiss this claim as well.

## V. CONCLUSION

For the reasons stated above, the Court will GRANT Defendants' Motion to Dismiss. Given the nature of Plaintiffs' claims and the bases for the Court's dismissal of those claims, the Court further finds that any attempt to amend the Complaint would be futile. Accordingly, the dismissal will be with prejudice. An appropriate Order will follow.

Date: **September 22, 2022**

/s/ Zahid N. Quraishi
**ZAHID N. QURAISHI**
**UNITED STATES DISTRICT JUDGE**