United States Court of Appeals

for the

Third Circuit

Case 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.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY IN CASE NO. 3-21-CV-15333 HONORABLE ZAHID N. QURAISHI, DISTRICT JUDGE

BRIEF FOR DEFENDANTS-APPELLEES

JEFFREY S. JACOBSON
ANDREW B. JOSEPH
W. JOSHUA LATTIMORE
FAEGRE DRINKER BIDDLE & REATH LLP
600 Campus Drive
Florham Park, New Jersey 07932
(973) 549-7000
Attorneys for Defendants-Appellees

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INTRODUCTION

For decades, New Jersey State law has required Rutgers, the State University of New Jersey ("Rutgers") to ensure that students have received vaccinations against certain communicable diseases. The law that lists the vaccines all New Jersey college students must take also authorizes Rutgers and other institutions of higher learning to require other vaccines if the Advisory Committee on Immunization Practices ("ACIP") within the federal Centers for Disease Control and Prevention ("CDC") has recommended them. In March 2021, the ACIP recommended immunizations against COVID-19. ACIP's recommendation empowered Rutgers to add COVID-19 to its list of required inoculations, and Rutgers made that decision as part of the steps it took to get students back to on-campus learning after a semester-and-a-half of remote-only education necessitated by the pandemic and Governor Philip D. Murphy's Executive Orders issued to mitigate it.

An anti-vaccine group, Children's Health Defense, Inc. ("CHD"), has partnered with a small group of Rutgers students to bring this lawsuit. Although the lawsuit's ostensible purpose is to argue, incorrectly, that Rutgers lacked State statutory authorization to mandate vaccination against COVID-19 as a condition of matriculating for Fall 2021, and that Rutgers'

policy violated the United States or New Jersey Constitution, Plaintiffs' brief to this Court devotes more attention to attacking COVID-19 vaccines than to their incorrect legal arguments. Importantly, all but one of the Rutgers student Plaintiffs in this case sought and received exemptions from the vaccine mandate. Students also could avoid vaccination requirements if they pursued a degree from a Rutgers *online* program.

Only one plaintiff, Adriana Pinto, did not request an exemption. She chose to enroll only in a single Rutgers class that met remotely, but she did not enroll in an online program of study. She asked the District Court to exempt her from the vaccination requirement, but the District Court correctly refused Ms. Pinto's request to allow her to define for herself what it meant to be an "online student," rather than abiding by Rutgers' actual policy.

Although Rutgers could respond to each and every one of Plaintiffs' false or misleading assertions about the Food and Drug Administration ("FDA")-approved COVID-19 vaccines, there should be no need for Rutgers to do so on this appeal, for three reasons. First, as the Supreme Court held in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), a state may require all residents to take a vaccine, without exemptions, if a rational basis exists to determine that such a step is necessary to mitigate a public health

emergency. Second, cases subsequent to *Jacobson*, including all those decided in the context of the COVID-19 pandemic, have reaffirmed the imperative for courts to defer to the legislative and executive branches with respect to public health decisions, unless those decisions implicate fundamental rights. Third, the specific step Rutgers took—giving its students nearly five months of lead time to decide whether they wanted to take a COVID-19 vaccine, seek an exemption from the requirement, or continue their studies elsewhere (or through a Rutgers online degree program)—violated no fundamental right and certainly did not require any student to take a vaccine against his or her will or without informed consent.

Rutgers did not burden religious practices; it facilitated them through an exemption program. Nor did Rutgers improperly "discriminate" against the unvaccinated (and being unvaccinated does not give rise to a protected class in any event) by requiring them to test periodically for COVID-19 and by excluding them from Rutgers' communal housing. Plaintiffs' federal constitutional challenges to Rutgers' policies thus fare no better than their claims based on New Jersey statutes. The District Court (Quraishi, J.) acted correctly in dismissing Plaintiffs' First Amended Complaint with prejudice, and this Court should affirm the District Court's decision in all respects.

JURISDICTIONAL STATEMENT

Rutgers concurs with Plaintiffs' Jurisdictional Statement.

STATEMENT OF THE ISSUES

Did the District Court correctly determine that, under the United States and New Jersey Constitutions; the United States Supreme Court's decision in *Jacobson v. Massachusetts* and cases decided subsequent to *Jacobson*; and federal and New Jersey state law, Rutgers, a state university, was authorized to enact a policy which required students, absent an exemption, to provide proof of COVID-19 vaccination as a condition of in-person enrollment for the Fall 2021 semester?

STATEMENT OF RELATED CASES AND PROCEEDINGS

Pursuant to Third Circuit Local Appellate Rule 28.1(a)(2), Rutgers states that there are no related cases or proceedings that are completed, pending, or about to be presented in any state or federal court or agency.

STATEMENT OF THE CASE

A. BACKGROUND

Rutgers assumes general and judicially noticeable familiarity with the COVID-19 pandemic which began in early 2020, the loss of life it has caused, and the years-long disruptions to nearly every aspect of daily life in New Jersey and elsewhere around the country occasioned by the pandemic and by the extraordinary governmental response to it. (*See generally* JA182-183, First Amended Complaint ["FAC"] ¶¶ 44-51.) On March 21, 2020, Governor Murphy issued Executive Order ("EO") No. 107, an unprecedented directive for "[a]ll New Jersey residents [to] remain at home or at their place of residence" except for certain specified exigencies. EO 107 closed all non-"essential" retail businesses and ordered the cancellation of all "gatherings of individuals, such as parties, celebrations, or other social events." It also closed "[a]ll public, private, and parochial" schools and directed "[a]ll institutions of higher education" to "cease in-person instruction." Following EO 107, Rutgers conducted the second half of its Spring 2020 semester

remotely, and it continued in a remote-only mode throughout the Fall 2020 and Spring 2021 semesters.

Since 1988, N.J.S.A. § 18A:61D-1 has obligated Rutgers to require every student to be vaccinated against certain diseases and to provide proof of vaccination as a condition of admission or continued enrollment. A series of New Jersey Department of Health ("NJDOH") regulations, N.J.A.C. §§ 8:57-6.5 to -6.8, mandate Rutgers to require measles, mumps, rubella, and other vaccinations, unless students request and receive exemptions from those requirements. A different regulation, N.J.A.C. § 8:57-6.4, gives Rutgers and every other New Jersey institution of higher learning "authority . . . to establish additional requirements for student immunizations and documentation that such institution shall determine appropriate and which is recommended by" the ACIP.

The FDA issued Emergency Use Authorizations ("EUAs") for COVID-19 vaccinations beginning on December 11, 2020, and the ACIP recommended COVID-19 vaccinations almost immediately thereafter. *See, e.g.,* https://www.cdc.gov/mmwr/volumes/69/wr/mm6950e2.htm (ACIP statement dated December 13, 2020, recommending Pfizer-BioNTech COVID-19 vaccine to all persons aged 16 and older). On March 25, 2021, with the expectation

that these ACIP-recommended COVID-19 immunizations would shortly become available to all adults in the United States, Rutgers exercised its State-delegated authority under N.J.A.C. § 8:57-6.4 and announced that students would have to provide proof of COVID-19 vaccination in order to matriculate for the Fall 2021 semester (the "Policy"). (JA225, FAC ¶ 194; *see also* JA284, Rutgers Mot. to Dismiss, *citing Our Path Forward: COVID-19 Vaccination and the Fall Term*, Office of the Rutgers President (Mar. 25, 2021), https://www.rutgers.edu/president/our-path-forward).

When Rutgers formally adopted the Policy on April 13, 2021, it did so to "prevent and reduce the risk of transmission" and to "promote the public health of the community in a manner consistent with federal, State, and local efforts to stem the COVID-19 pandemic." (JA350.) The Policy required all students to "present evidence of COVID-19 immunization" via upload to an online portal before beginning classes. (JA351.) It also set forth exemptions for students with religious objections, medical contraindications to vaccination, or those whose "degree-granting programs at Rutgers are entirely online." (JA351.) The last category was defined as students who "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." (JA351.)

The Fall 2021 semester was more than five months away when Rutgers made this announcement, and no student had yet paid for Fall 2021 matriculation. Students who did not wish to take a COVID-19 vaccination thus had plenty of time to seek a religious or medical exemption from the requirement, if they qualified; to change to a Rutgers online-only degree program; or to arrange to continue their education elsewhere. Students also could have sued over the requirement immediately, had they chosen to do so, but CHD and its student allies elected to wait to file this lawsuit until August 16, 2021, just days before the start of the semester (and long after Fall 2021 students had to provide proof of all required immunizations). (JA42, Compl.) With vaccines widely available, no Plaintiff asserted an inability to comply with the requirement. (JA161-77, FAC ¶¶ 12-32.) All Plaintiffs other than Ms. Pinto received exemptions, excusing them from the Policy's requirement actually to take a COVID-19 vaccine. (*Id.*)

B. PROCEDURAL HISTORY

Plaintiffs' original Complaint alleged that Rutgers' Policy was an unconstitutional and illegal invasion of Plaintiffs' fundamental rights. (JA44,

Compl. ¶ 2.) On August 30, 2021, after the Fall 2021 semester had begun, Plaintiffs CHD and Ms. Pinto (the only student plaintiff excluded from classes because she received neither the vaccine nor an exemption) moved for a temporary restraining order allowing her to attend a class in which she had enrolled, which at the time was meeting remotely, but which was not part of an online-only degree program. (JA68, Pl. Mot. for TRO.) Less than one week later, Plaintiffs moved for the District Judge's recusal, on the grounds that he had graduated from Rutgers Law School and previously served as a Lecturer at Rutgers Law School. Plaintiffs prioritized that briefing over their pending TRO. (JA36-38.) The District Court denied Plaintiffs' motions for recusal and later denied their request for a TRO. (JA38, 135-36, 149.)

In denying Plaintiffs' TRO motion, the District Court devoted the bulk of its opinion to the unlikelihood of Plaintiffs' success on the merits of their case. (JA142-46.) Beginning with an analysis of *Jacobson*, 197 U.S. at 26, the Court noted the "deferential standard" mandated by the Supreme Court and *Jacobson*'s holding that state public-health policies were unconstitutional only where they "did not have any 'real or substantial relation' to protecting public health." (JA143). Even "fundamental rights . . . are not absolute." (*Id.*) *Jacobson*, moreover, actually required all residents to take a vaccine or

to pay a monetary penalty, with no religious or medical exemptions. (JA143-44.) Rutgers' Policy, therefore, was significantly less burdensome than the policy at issue in *Jacobson* because it provided for exemptions, carried no penalty, and students could avoid it entirely by suspending their education or arranging to study elsewhere or through a Rutgers online degree program. The District Court held there to be "a public health rationale via the ongoing COVID-19" pandemic for a university vaccine mandate. (JA144). It found persuasive guidance in the Seventh Circuit's decision in *Klaassen v. Trustees of Indiana University*, 7 F.4th 592, 594 (7th Cir. 2021), which considered a similar challenge to a university's COVID-19 vaccine policy, and agreed that "[i]if conditions of higher education may include surrendering property [*i.e.*, paying tuition and fees] and following instructions about what to read and write, it is hard to see a greater problem with medical conditions that help all students remain safe when learning." (JA144.)

It bears noting that this appeal concerns only Rutgers' Policy as of Fall 2021. Although Plaintiffs' brief points to information "now generally known"—a characterization Rutgers would dispute—and developments occurring "[s]ince briefing on the motion to dismiss" with respect to COVID-19 vaccinations (Br. at 2, 10), Plaintiffs neither appealed the District Court's

denial of their application for a TRO nor made any subsequent request for injunctive relief. (*See* JA149).

Plaintiffs filed their First Amended Complaint ("FAC") on October 19, 2021. (JA150.) The FAC, like Plaintiffs' original complaint, sought to have Rutgers' Policy declared unconstitutional and illegal. (JA151-52.) Plaintiffs alleged that Rutgers was acting beyond the scope of its authority under federal and state law, that the Policy violated Plaintiffs' rights to informed consent and to refuse unwanted medical treatment under both the United States Constitution and New Jersey Constitution, and that the Policy did not satisfy the standard set forth in *Jacobson*. (JA152.)

Rutgers moved to dismiss the FAC on November 19, 2021. (JA271.) Plaintiffs opposed the motion, (JA309), and Rutgers filed a reply brief in further support of its motion. (JA417.) The parties submitted supplemental legal support for their respective positions. (JA433-65.) By the Order appealed from, entered on September 22, 2022, the District Court granted Rutgers' motion to dismiss the FAC with prejudice. (JA 4.)

At the outset, the District Court found that all Plaintiffs other than Ms. Pinto lacked standing to sue because they requested and received exemptions to the Policy. (JA15.) Moreover, because those Plaintiffs' allegations of

potential future harm if Rutgers were to withdraw their exemptions were "conjectural and hypothetical," their claims were moot. (JA15.) The District Court next considered Plaintiffs' constitutional claims, again looking to *Jacobson*, and noted that "[c]ourts interpret the review applied in *Jacobson* as 'rational basis review.'" (JA17.) The District Court rejected "Plaintiffs' entreaties to apply a higher level of scrutiny." (JA17.)

Applying rational basis review to Plaintiffs' Due Process claims, the court found that "Rutgers undoubtedly has a legitimate interest" in enforcing its Policy, and "Plaintiffs' claims do not involve a suspect class or fundamental right." (JA18.) The court also rejected Plaintiffs' Equal Protection challenge, "[m]ost importantly . . . because Plaintiffs are not members of a protected class alleging that 'disparate treatment was based on [their] membership in the protected class.'" (JA20, *quoting Kaul v. Christie*, 372 F. Supp. 3d 206, 254 (D.N.J. 2019).) In short, "[b]eing unvaccinated does not confer protected status." (JA20.) Finally, Plaintiffs' Free Exercise claims failed because Rutgers' Policy does not burden the exercise of religion—it "does not target religious conduct for distinctive treatment nor does it advance legitimate government interest only against conduct with a religious

motivation." (JA21-22.) The court found that Rutgers had indeed "chosen to *enable* the practice of religion by providing a religious exemption." (JA22.)

The District Court also rejected Plaintiffs' claims brought under the New Jersey Constitution. New Jersey Supreme Court precedents clearly limit "constitutional liberties" in light of the general public welfare and other countervailing societal interests, including the protection of innocent third parties. (JA23-24.) "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 . . . the New Jersey Constitution." (JA24.) Having failed to allege a violation of the United States or New Jersey Constitution, Plaintiffs' 28 U.S.C. § 1983 and New Jersey Civil Rights Act claims were necessarily dismissed. (JA24-25.)

The District Court dismissed Plaintiffs' statutory claims, too. Rutgers' Policy was not preempted by federal law because nothing in the Policy conflicted with federal law—namely, Section 564 of the Federal Food, Drug, and Cosmetic Act. (JA25.) And the plain language of New Jersey's statutory and regulatory regime actually "*require* Rutgers to obtain proof from students that they have taken certain immunizations and authorize Rutgers to require other ACIP-recommended vaccinations." (JA26.) "[B]y requiring COVID-19

vaccination as a condition of 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*." (JA26 (emphasis added).)

In sum, the District Court correctly found that Plaintiffs failed plausibly to allege that anything about Rutgers' Policy was violative of any statute or constitution, state or federal.

SUMMARY OF ARGUMENT

This Court should affirm the District Court's order. Rutgers had the statutory authority under New Jersey law to require students to take one of the three ACIP-approved COVID vaccinations. Rutgers' exercise of its statutory authority raised no federal or state constitutional issues, because even a true vaccine *mandate* to stem a public health emergency, which Rutgers' Policy was *not*, is subject to rational basis scrutiny, and Rutgers had a rational basis for its Policy. Students who received exemptions from the vaccination requirement do not have standing to challenge the requirement in any event, and the sole student-plaintiff who did not seek an exemption has no valid claim. Rutgers' masking policies during the Fall 2021 semester applied to all persons equally, regardless of vaccination status, and the two conditions Rutgers imposed specially on vaccine-exempt students—periodic

testing for COVID-19 and exclusion from communal living where constant masking was not possible—were reasonable under the circumstances and did not violate any student's constitutional rights.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE RUTGERS POLICY IS AUTHORIZED UNDER FEDERAL AND STATE LAW.

This Court exercises plenary review of "the granting of a motion to dismiss under Rule 12(b)(6)." *Black v. Montgomery County*, 835 F.3d 358, 364 (3d Cir. 2016) (considering a Section 1983 claim). The Court reviews matters of statutory construction *de novo*, as "statutory construction is 'peculiarly appropriate for independent judicial ascertainment.'" *Estate of Arrington v. Michael*, 738 F.3d 599, 604 (3d Cir. 2013), *quoting Dunat v. Hurney*, 297 F.2d 744, 746 (3d Cir. 1961). Moreover, review of a District Court's preemption analysis on a motion to dismiss is also plenary. *N.J. Carpenters & the Trs. Thereof v. Tishman Const. Corp.*, 760 F.3d 297, 302 (3d Cir. 2014); *see also Vurimindi v. Atty. Gen. U.S.*, 46 F.4th 134, 139 (3d Cir. 2022) (stating that the Court's "review of [any] purely legal question presented . . . is plenary.").

A. The Rutgers Policy is authorized under State law.

The District Court appropriately analyzed New Jersey's statutory and regulatory regime and correctly determined that the Rutgers Policy was authorized by law. (JA26-27.) For the past three decades, N.J.S.A. § 18A:61D-1 has obligated Rutgers to require every student to provide proof that they obtained certain vaccinations prior to matriculation. Beyond an enumerated list of mandatory vaccinations (measles, mumps, etc.), the implementing regulation, 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 vaccines are "recommended by the ACIP." Although Plaintiffs contend that the ACIP should *not* have recommended COVID-19 vaccinations for the general population, Plaintiffs have not disputed and cannot dispute that the ACIP—echoed by public officials at all levels of government—recommended COVID-19 vaccinations for every eligible person. Nothing in the statute or regulation, moreover, distinguishes between ACIP-recommended vaccines in EUA status from those that have received full governmental approval.

Plaintiffs ask this Court, as they asked the District Court, to ignore the word "and" in N.J.A.C. § 8:57-6.4, which the Legislature placed in the statute

between "requirements for student immunizations" and "documentation." (Br. at 29.) Plaintiffs contend that this regulation allows Rutgers only to require additional "documentation" of explicitly enumerated vaccinations, not to require unenumerated vaccinations. (*Id.*) This interpretation cannot be squared with the regulation's actual wording, not just because the regulation expressly allows Rutgers to "establish additional requirements for student immunizations," but also because the separate requirement that such "additional requirements for student immunizations" must have been "recommended by the ACIP" would be meaningless if Rutgers lacked authority to require such newly recommended vaccinations. *See* N.J.A.C. § 8:57-6.4. Plaintiffs tried this same flawed argument at the preliminary injunction stage. (*See* JA126-28, Pl. Reply Br. ("[T]his Court should not be so persuaded that a cryptic 30+ year old regulation gave Rutgers and every college in the State the broad and express authority to mandate whatever vaccines they see fit.").) The District Court correctly rejected it. (JA149.) Rutgers has never argued that it may require "whatever" vaccines, or that the State of New Jersey delegated general police powers with regard to vaccination requirements. Rutgers has argued only that the applicable

regulation allows it to require a vaccine "recommended by the ACIP," which is exactly what it did.

Rutgers also possessed sufficient authority to exclude exempt and therefore unvaccinated students from communal living situations. Indeed, a State regulation permits Rutgers to exclude vaccine-exempt students from the *entire campus* during a disease outbreak. *See* N.J.A.C. § 8:57-6.14(d) ("An institution may 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.") There is a nearly identical provision in the regulation governing religious exemptions. *See* N.J.A.C. § 8:57-6.15(c). It stands to reason that if Rutgers could exclude unvaccinated students from all activities, it had the ability to preclude them from communal dormitory living.

Because New Jersey State law explicitly allowed Rutgers to require students to demonstrate proof of having received an ACIP-recommended vaccine, Plaintiffs' reliance upon *National Fed. of Ind. Bus. ("NFIB") v. Dep't of Labor, Occupational Safety & Health Admin ("OSHA")*, 142 S. Ct. 661 (2022), and *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), is misplaced. (Br. at 25.) In *NFIB*, the Supreme Court held that OSHA

"possess[es] only the authority that Congress has provided," that it "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance," and that OSHA lacked statutory authority to require all employers with at least 100 employees to impose vaccine COVID-19 mandates on those employees. *NFIB*, 142 S. Ct. at 665. In *Biden v. Missouri*, by contrast, the Supreme Court held that the Centers for Medicare and Medicaid Services *did* possess statutory authority to adopt an interim rule imposing COVID-19 vaccine mandates on the staff of all healthcare facilities participating in Medicare and Medicaid. *Biden*, 142 S. Ct. at 653. The text of New Jersey's applicable law and regulations provides the clear statutory basis for Rutgers' Policy that was present in *Biden v. Missouri* and lacking in *NFIB*.

B. The Rutgers Policy is not preempted by federal law.

Plaintiffs' brief to this Court spills much ink analyzing various federal laws involving vaccines, but fails to describe any conflict between those laws and Rutgers' Policy. (Br. at 55-58.) Rutgers does not dispute that federal law governing EUA products requires "that individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). Rutgers, however,

allowed for exemptions to the Policy and never forced anyone to take the vaccine against their will. *See Klaassen v. Tr. of Ind. Univ.*, 549 F. Supp. 3d 836, 870 (N.D. Ind. 2021) (no violation of EUA requirements because "[t]he university isn't forcing the students to undergo injections"). All students had the opportunity to refuse the vaccine, but with the consequence of not being able to continue their education at Rutgers in a non-online degree program.

In addition, nothing about the Rutgers Policy conflicts with federal law governing EUAs. (*See* Br. at 57-58.) Section 564 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3 ("Section 564"), obligates only the Secretary of Health and Human services to act. 21 U.S.C. § 360bbb-3(e)(1)(A). The Secretary—and no other—is commanded 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 presumably met the informed consent requirements of Section 564 via the authorized Fact Sheets distributed by healthcare providers administering the vaccine to persons receiving it. (*See* JA187, FAC ¶ 70-71.) None of the student plaintiffs took the vaccine, and they do not claim that any student who did

take the vaccine failed to receive the federally required information sheet explaining the vaccines' then-EUA status and what that status meant.

Contrary to Plaintiffs' wholly unsupported assertion that "Section 564 incorporates the principle that unlicensed medical products cannot be mandated," (*id.* ¶ 72), Rutgers has not "mandated" any particular action, but has only made adherence to its Policy a condition of matriculation to a non-online degree program. Nothing about that requirement conflicts with the Secretary's responsibilities or the right to informed consent reflected in Section 564. *See, e.g., Valdez v. Grisham*, No. 21-cv-783, 2021 WL 4145746, at *4 (D.N.M. Sept. 13, 2021) (rejecting FDCA-based challenge to mandate that hospital workers must receive COVID vaccinations).

II. THE DISTRICT COURT APPROPRIATELY DISMISSED PLAINTIFFS' CONSTITUTIONAL CLAIMS.

This Court reviews *de novo* "constitutional claims or questions of law and the application of law to facts." *See Garcia v. Att'y Gen.*, 665 F.3d 496, 502 (3d Cir. 2011); *see also Lewis v. Guadagno*, 445 Fed.Appx. 599, 601-04 (3d Cir. 2011) (Equal Protection claims); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 207 (3d Cir. 2004) (Free Exercise claims). The Court also exercises *de novo* review over the grant of a motion to dismiss. *Doe v. Univ. of Sciences*, 961 F.3d 203, 208 (3d Cir. 2020). The Court "accept[s] all factual allegations

in the complaint as true," which facts must "state a claim to relief that is plausible on its face." *Newark Cap Ass'n v. City of Newark*, 901 F.3d 146, 151 (3d Cir. 2018).

A. The District Court correctly found that *Jacobson* and its progeny require rational basis review of university vaccination requirements and that Rutgers had a rational basis for adopting its Policy.

Plaintiffs fault the District Court for supposedly "[p]resuming that COVID-19 vaccines are safe and effective." (Br. at 14, *citing* JA19.) That is not so. On pages 14-15 of its Order (JA18-19), the District Court said only that when "[t]he government turned its attention to prioritizing public welfare" after "[t]he outbreak of the COVID-19 virus launched the entire world into an unprecedented, unexpected pandemic," the government "determined that a vaccine—a similar answer to past pandemics—was the best way to do so." The Court did not itself opine on efficacy questions because, per *Jacobson*, "it is for the legislature to determine what method of protection would likely be effective." (*Id.*) The District Court correctly interpreted the law in this regard. It did not engage in a dispute over efficacy that *Jacobson* held belongs in the executive and legislative branches of government, absent violations of fundamental rights.

Here, the NJDOH authorized Rutgers to respond to public health exigencies by requiring vaccines if, and only if, the ACIP recommended them. That regulation is entitled to rational basis review, and if Plaintiffs wish to dispute the basis for the ACIP having recommended COVID-19 vaccines, or want the NJDOH to change its regulation to rely on criteria other than the ACIP's recommendation, they should redirect their arguments accordingly. Because duly empowered public health authorities determined that the COVID-19 vaccines were safe and effective, Rutgers—which "undoubtedly has a legitimate interest in protecting the members of its broad community from a potentially deadly disease"—had a rational basis "to require students to take a COVID-19 vaccine as a condition of matriculation for the Fall 2021 semester." (JA18-19, *citing Klaassen*, 7 F.4th at 593). *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest . . . .").

In *Jacobson*, as the District Court correctly summarized, the 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 vacation." (JA16, *quoting Jacobson*, 197 U.S. at 12, 39.) Acting under authority of that state law, "the city of Cambridge adopted

regulations requiring the 'vaccination or revaccination of all inhabitants of Cambridge.'" (*Id.*, *quoting Jacobson*, 197 U.S. at 12.) The plaintiff in *Jacobson* "refused the vaccine," subjecting him to criminal charges under the statute and a mandated fine of five dollars. (*Id.*, *citing Jacobson*, 197 U.S. at 14, 22.) In rejecting arguments against the vaccination requirement, the Supreme Court "emphasized that the 'liberty secured by the Constitution . . . does not import an absolute right to be, at all times and in all circumstances, wholly freed from restraint." (JA17, *quoting 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,' including the 'safety of the general public' and a community's 'right to protect itself against an epidemic of a disease which threatens the safety of its members.'" (*Id.*, *quoting Jacobson*, 197 U.S. at 26, 27, 29.) The Supreme Court "used a deferential standard" and "stated that it would strike down" a public health step "only if it had no 'real or substantial relation to [public health]' or if it amounted to a 'plain, palpable invasion of rights secured by fundamental law.'" (*Id.*, *quoting Jacobson*, 197 U.S. at 31.)

In *Jacobson*, 197 U.S. at 30, the Supreme Court made clear that it is not for a court to determine "which of two modes was likely to be the most

effective for the protection of the public against disease." So long as the law bears a "real or substantial relation" to protecting public health and is not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law," the law must be upheld. *Id.* at 31. For the State has the right to impose requirements "which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases." *Id.* at 35. The 1905 Supreme Court even presciently anticipated the all-too-political debates in 2021 over COVID-19 vaccines: "The fact that the belief [in effectiveness] is not universal is not controlling, for there is scarcely any belief that is accepted by everyone." *Id.*; *see also Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015) (concluding that determination of effectiveness of vaccine requirement was "for the legislature, not the individual objectors," citing *Jacobson*).

Jacobson thus was a classic "who decides" case, and the Supreme Court could not have been clearer about the need to defer to public health authorities and the legislative and executive branches absent violations of fundamental rights. Plaintiffs claim that they are not asking this Court "to determine the most *effective* method of protection," but in the very next sentence, their brief "ask[s] this Court to determine," contrary to the

conclusion reached by the federal agencies tasked with making these decisions, that the ACIP-approved COVID-19 vaccines are not "fully understood" and therefore "cannot be mandated to stop disease spread." (Br. at 19.) This is nothing more or less than a debate over effectiveness, and the Supreme Court held in *Jacobson* that such debates are not for judges to resolve. Plaintiffs' oft-repeated desire to have this Court opine on whether COVID-19 vaccines "work" (Br. at 19; JA48, 49, 52, 54) is directly contrary to *Jacobson*'s mandate.

Jacobson predated the Supreme Court's first articulation of the "rational basis" standard for review of statutes alleged to infringe Constitutional rights. Nevertheless, the District Court in this case (JA17), and every Circuit Court of Appeals to consider *Jacobson* in the context of COVID-19 vaccine mandates, has interpreted it as applying a standard of review akin to rational basis. *See, e.g., Kheriaty v. Regents of the Univ. of Cal.*, No. 22-55001, 2022 WL 17175070, at *1-2 (9th Cir. Nov. 23, 2022); *Bryan v. Gage Hotel, L.P.*, No. 22-50035, 2022 WL 16756388, at *2 n.1 (5th Cir. Nov. 8, 2022); *Bogicic v. DeWine*, No. 21-4123, 2022 WL 3585636, at *5 (6th Cir. Aug. 22, 2022); *Antietam Battlefield KOA v. Hogan*, No. 20-2311, 2022 WL 1449180, at *2 (4th Cir. May 9, 2022); *We the Patriots USA, Inc. v.*

Hochul, 17 F.4th 266, 293-94 (2d Cir. 2021); *Klaassen*, 7 F.4th at 593. *Cf. Roman Catholic Diocese*, 141 S.Ct. at 70 (Gorsuch, J., concurring) ("Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review . . . ."). Applying *Jacobson*, therefore, this Court should judge Plaintiffs' Constitutional claims using a rational basis standard.

The District Court correctly held that *Jacobson* has "continued vitality." (JA17.) Numerous litigants have challenged COVID-19 vaccine requirements and, while doing so, have sought to portray *Jacobson* as outdated or otherwise inapplicable to COVID-19 vaccines. (*See also* Br. at 35.) None of these challenges succeeded. Court after court has reaffirmed that, in the absence of palpable invasions of fundamental rights, judges should leave it to the legislative and executive branches to decide what measures are necessary to protect public health. Among the federal appellate cases reaffirming *Jacobson* and upholding COVID-19 vaccination requirements are *We the Patriots*, 2021 WL 5121983, at *15 (subjecting COVID vaccine mandate to rational basis review and denying injunctive relief); *Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021) (same); *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020) ("The district court appropriately looked to *Jacobson* for guidance [in reviewing government action to stem the spread of COVID-

19], and so do we."), *cert. denied*, 141 S.Ct 1754 (2021); *Klaassen*, 7 F.4th at 593 (approving state university vaccine mandate, recognizing that "the rational-basis standard used in *Jacobson*" is "the law established by the Supreme Court"); and *League of Independent Fitness Facilities and Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 127 (6th Cir. 2020) ("the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts," citing *Jacobson*).[1]

Without addressing this unbroken precedent, Plaintiffs here similarly attempt to argue that *Jacobson* is outdated. (*See* Br. at 44.) They cite *Halgren v. City of Naperville*, 2021 WL 5998583 (N.D. Ill. Dec. 19, 2021), but

[1] Numerous district courts have reached the same conclusions. *See, e.g., Harris v. University of Massachusetts, Lowell*, No. 21-CV-11244-DJC, 2021 WL 3848012, at *6 (D. Mass. Aug. 27, 2021) (granting university's motion to dismiss complaint challenging its vaccine mandate and applying rational basis standard established in *Jacobson*); *Johnson v. Brown*, No. 3:21-CV-1494-SI, 2021 WL 4846060, at *12 (D. Or. Oct. 18, 2021) (rejecting argument that strict scrutiny applies to challenge of vaccine mandate and collecting cases "considering vaccine mandates issued during the COVID-19 pandemic" that applied rational basis as required by *Jacobson*); *Messina v. Coll. of New Jersey*, No. CV2117576ZNQDEA, 2021 WL 4786114, at *8 (D.N.J. Oct. 14, 2021) ("[O]ther courts—including this one—reviewed similar challenges to COVID-19 vaccine policies and have uniformly concluded that *Jacobson* controls."); *Norwegian Cruise Lines Holdings, Ltd. v. Rivkees*, No. 21-22492-CIV-WILLIAMS, 2021 WL 3471585, at *14 (S.D. Fla. Aug. 8, 2021) ("courts have suggested that the unvaccinated population is not a protected class that enjoys a fundamental Constitutional right to remain unvaccinated," citing *Jacobson* and the lower court decision in *Klaassen*)

the *Halgren* court rejected the same arguments that Plaintiffs make here. *See id.* at *23-33 (rejecting arguments for applying strict scrutiny and holding that Illinois had a rational basis to require healthcare workers to take the vaccine). Plaintiffs also cite Justice Alito's dissent in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020), which addressed restrictions on worship services where state officials imposed greater restrictions on First Amendment-protected activities like religious services than they did on other activities. *Calvary Chapel* did not involve a vaccination requirement with an express religious exemption.

Just as the mandate in *Jacobson* did not violate the Constitution, Rutgers' less onerous Policy certainly does not. As Plaintiffs concede, "[t]here is no penalty or sanction provision expressed in the Policy for a student's failure to submit evidence of a COVID-19 immunization." (JA226, FAC ¶ 197.) "If conditions of higher education may include surrendering property [tuition money] and following instructions about what to read and write, it is hard to see a greater problem with medical conditions that help all students remain safe while learning." *Klaassen*, 7 F.4th at 594.[2]

[2] Because Plaintiffs' State and federal constitutional claims fail, their Section 1983 and New Jersey Civil Rights Act claims should necessarily fail as well. (*See* Br. at 54, JA24-25.)

B. The District Court correctly found that Plaintiffs did not assert a fundamental right and properly dismissed Plaintiffs' Due Process claims.

The District Court correctly found that "[v]accination requirements are well established in the law, with approval from the United States and New Jersey Supreme Courts." (JA18.) Although New Jersey law provides for religious and medical exemptions to university vaccination requirements, the District Court correctly held that being unvaccinated does not make one part of a protected class. (*See id.*). Plaintiffs contend that Rutgers' Policy infringed on a fundamental right, but they are mistaken. Although the Supreme Court has held in certain contexts that one may refuse unwanted personal "medical treatment," none of the cases Plaintiffs rely upon disturbed *Jacobson*'s holding that states may mandate *vaccinations* to curb public health emergencies. And, more importantly, Rutgers did not require anyone to take a vaccine, but instead made vaccination—or receipt of an exemption—a requirement of continued studies at Rutgers in non-online degree programs.

Plaintiffs' attempt to characterize Rutgers' vaccination requirement as an act of "assault" or "battery" (Br. at 38-40), lacks merit. The Supreme Court has decided cases regarding unwanted medical treatment and has separately decided cases involving vaccine requirements. It has made

perfectly clear in both sets of cases that the state's ability to mandate vaccinations differs from other issues because of the public health interests implicated by disease outbreaks.

Plaintiffs rely, for example, on *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 265-66 (1990), which addressed whether parents could terminate life-sustaining treatment to their daughter, who had fallen into "a persistent vegetative state." The Supreme Court assumed there exists "a constitutionally protected right to refuse lifesaving hydration and nutrition," but balanced that interest against the government's interest in the "preservation of human life," which it sought to achieve by imposing upon the parents a clear and convincing standard of proof. *Id.* at 279-82. *Cruzan* did not recognize an absolute right to refuse medical treatment, and certainly did not recognize such a right when the safety of the community at large is involved. In fact, *Cruzan* cited *Jacobson* approvingly as a case where the Court sided with "the State's interest in preventing disease." *Id.* at 278.

Equally flawed is Plaintiffs' reliance on *Washington v. Harper*, 494 U.S. 210 (1990), and on this Court's pre-*Harper* decision in *Rennie v. Klein*, 653 F.2d 836 (3d Cir. 1981). *Rennie* and *Harper* considered a prisoner's liberty interest in avoiding the forced administration of antipsychotic drugs. *Rennie*,

653 F.3d at 838; *Harper*, 494 U.S. at 213. The Supreme Court had "no doubt" that the prisoner had such a liberty interest but held that it had to be balanced against "the [s]tate's interest in prison safety and security," and authorized the forced medication. *Harper*, 494 U.S. at 221-27. The Supreme Court did not consider issues other than prisoners' rights and did not mention *Jacobson* or immunization requirements.[3]

Plaintiffs here, like the unsuccessful plaintiffs in *Klaassen* and *Harris*, also cited *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), a physician-assisted suicide case. The Supreme Court recognized in *Glucksberg* that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* But the Supreme Court was "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended," and courts avoid transforming "the liberty

[3] As held by the district court in *Klaassen*, 549 F. Supp. 3d at 868, "[t]he Supreme Court has assumed (using its word) and strongly suggested that individuals have a constitutional right to refuse unwanted medical treatment," but also that "this liberty interest has remained confined either by duly enacted and constitutional state laws or the state's legitimate interest that it had rationally pursued in regulation." *Id.* The *Klaassen* district court recognized that neither *Cruzan* nor *Harper* established a fundamental right to refuse a mandated vaccine, and in no event applied anything more than rational basis scrutiny. *Id.*

protected by the Due Process Clause . . . into the policy preferences of the Members of [the Supreme] Court." *Id.*, *quoting Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Accordingly, "heightened protection" of substantive due process applies only to "concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." *Id.* at 720, 722. Government actions implicating rights not meeting that threshold merely require "a reasonable relation to a legitimate state interest to justify the action"—in other words, rational basis review. *See id.* at 722. Justice Stevens referenced *Jacobson* in his concurring opinion, noting that "[i]n most cases, the individual's constitutionally protected interest in his or her own physical autonomy, including the right to refuse unwanted medical treatment, will give way to the State's interest in preserving human life." *Id.* at 742 (Stevens, J., concurring).

The other cases in Plaintiffs' string cites on pages 35 and 36 of their brief are equally inapposite and unavailing. *Youngberg v. Romeo*, 457 U.S. 307, 319-20 (1982), held that a man with severe mental disabilities and violent tendencies, involuntarily confined to a state treatment facility, was constitutionally entitled to safe conditions of confinement and to be free from unreasonable bodily restraint, but that "these interests are not absolute" and

must be balanced against the institution's needs to protect other residents. *White v. Napoleon*, 897 F.2d 103 (3d Cir. 1990), involved a prison doctor's systemic and deliberate indifference to serious medical needs, which is not analogous. *Ingraham v. Wright*, 430 U.S. 651 (1977), found Florida's procedures for allowing corporal punishment in public schools *not* to violate constitutional strictures. Of these three cases, only *Ingraham* cited *Jacobson*, and it did so approvingly. *See Ingraham*, 430 U.S. at 673 n.42.[4]

C. The "unconstitutional conditions" doctrine does not apply.

Plaintiffs' characterization of COVID-19 vaccines as "experimental" has no legal significance. (*E.g.*, Br. at 40-41.) The vaccines received FDA authorization for emergency use and were ACIP-recommended when Rutgers announced the Policy. The Policy thus did not "pressur[e] someone into forfeiting a constitutional right." (Br. at 42.) Plaintiffs rely for this argument principally on a land use case, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013), in which the Supreme Court reiterated that "a unit

[4] Plaintiffs also cite *Burson v. Freeman*, 504 U.S. 191, 198 (1992), contending the case is relevant because it holds that "when fundamental rights are at stake," the state must show that its policy is "narrowly tailored to a compelling state interest." (Br. at 40-41.) *Burson* is a free speech case upholding a law that precluded electioneering within 100 feet of a polling place. The case did not cite *Jacobson* and did not involve or discuss public health issues.

of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." Plaintiffs cite no support for their assertion that "[c]hallenges to vaccine mandates must consider" this doctrine. (Br. at 42.)

Plaintiffs assert that "[t]his doctrine applies in the university context" (Br. at 37), but the case they cite for this premise, *Perry v. Sindermann*, 408 U.S. 593 (1972), says no such thing. *Perry* and like cases involve a different principle, that the government may not "deny a benefit to a person," including "public employment," on "a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.* at 597. The Supreme Court in *Perry* reversed a grant of summary judgment against a professor who claimed a state junior college failed to renew his contract because he articulated a public position at odds with the preferences of the college's Board of Regents. Nothing in *Perry* suggests any reconsideration by the Supreme Court of its public health jurisprudence.

The district court in *Klaassen* considered and rejected the same argument Plaintiffs make here, and the *Klaassen* plaintiffs did not even attempt to appeal to the Seventh Circuit from that aspect of the *Klaassen*

decision. Vaccines "address a collective enemy, not just an individual one." *Klaassen*, 549 F. Supp. 3d at 869. "A vaccine is implemented as a matter of public health, and historically hasn't been constitutionally deterred from state mandate." *Id.*, *citing Jacobson*, 197 U.S. at 30-31. "Given a century's worth of rulings" rejecting challenges to vaccination mandates, not to mention that "the Constitution never provides a fundamental right to a collegiate education," the *Klaassen* plaintiffs' unconstitutional conditions argument failed. *Id.* at 870. Universities which impose vaccination mandates on students who prefer not to be vaccinated may "present[] the students with a difficult choice" that students may wish to avoid, but they are not "forcing the students to undergo injections." *Id.* at 870-71. Requiring students who do not wish to be vaccinated to "transfer to a different school, or forego school for the semester or altogether" to avoid vaccination "doesn't amount to coercion." *Id.*

D. The District Court correctly found that Plaintiffs are not members of a protected class and properly dismissed Plaintiffs' Equal Protection claims.

The gist of Plaintiffs' two Equal Protection claims are that (1) Rutgers "discriminated" against students who received religious or medical exemptions by requiring them to test periodically; and (2) students who had

contracted and recovered from COVID-19 prior to the start of the Fall 2021 academic semester had immunity from reinfection similar to the immunity conferred by vaccination, and that Rutgers failed to treat these purportedly "naturally-immune" students equally. (*See* Br. at 52.) Neither claim has merit.

The District Court correctly analyzed and rejected Plaintiffs' claims that Rutgers was treating unvaccinated students and employees differently. Rutgers' masking policies, when it had such policies, applied to all persons, vaccinated or not. (*See* JA20-21.) Rutgers' testing policy also "applies equally to all unvaccinated students and employees insofar as it requires that unvaccinated individuals be tested for COVID-19." (JA21.) Further, even had Rutgers continued to apply the Policy only to students, and not to employees, this would have been consistent with New Jersey law, which explicitly authorizes institutions of higher education to require *students* to take ACIP-recommended vaccines. *See* N.J.S.A. § 18A:61D-1; N.J.A.C. § 8:57-6.4(c). And, as the District Court noted, New Jersey State law explicitly allows Rutgers to exclude unvaccinated persons from communal living (or, indeed, to exclude unvaccinated persons from the campus *entirely*) during a viral outbreak. (*See* JA21); N.J.A.C. § 8:57-6.14(c).

Plaintiffs' opposition to dismissal below devoted one throwaway line to an unsupported claim that "naturally immune students are similarly situated to vaccinated students and should be treated similarly." (JA334.) In both Rutgers' opening and reply briefs below, Rutgers noted that the applicable law and regulation, N.J.S.A. § 18A:61D-1 and N.J.A.C. § 8:57-6.16, permit evidence of natural immunity in lieu of vaccinations only where students can provide "laboratory evidence of immunity," but no approved tests currently exist, or existed when Rutgers adopted the Policy, to determine when someone has active immunity from COVID-19. (*See* JA307-08, 429 n.5.) Proof of vaccination, by contrast, is readily demonstrable. In the absence of approved laboratory tests for immunity conferred by infection, Rutgers does not violate Equal Protection rights by requiring proof of vaccination. *See St. Joan Antida High School Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1010 (7th Cir. 2019) ("Rational-basis review tolerates overinclusive classifications, underinclusive ones, and other imperfect means-ends fits.")

When a court confronts an Equal Protection challenge, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

"The general rule gives way" only where "a statute classifies by race, alienage, or national origin"—classifications warranting "strict scrutiny"—or where the statute requires "a heightened standard of review," such as in the case of classifications based on gender. *Id.* at 440-41; *see also Nat'l Ass'n of Theatre Owners v. Murphy*, No. 3:20-CV-8289 (BRM) (TJB), 2020 WL 5627145, at *12 (D.N.J. Aug. 18, 2020). "[I]f a law neither burdens a fundamental right nor targets a suspect class, [courts] will uphold the legislative classification so long as it bears a rational relationship to some legitimate end." *Brian B. ex rel. Lois B. v. Commonwealth of Pa. Dep't of Educ.*, 230 F.3d 582, 586 (3d Cir. 2000) (alteration in original), *quoting Romer v. Evans*, 517 U.S. 620, 631 (1996); *Nat'l Ass'n of Theatre Owners*, 2020 WL 5627145, at *12 ("If, however, the challenged regulation does not discriminate against a suspect class or interfere with a fundamental right, a court applies a rational-basis review."). "In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest." *Brian B.*, 230 F.3d at 586, *quoting Romer*, 517 U.S. at 632.

The District Court rejected Plaintiffs' Equal Protection arguments on the correct basis that "[b]eing unvaccinated does not confer protected status." (JA20.) "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.'" (JA20, *quoting Phillips v. City of New York*, 775 F.3d 538, 543-44 (2d Cir.), *cert. denied* 557 U.S. 822 (2015).)

III. THE DISTRICT COURT PROPERLY DISMISSED THE VACCINE-EXEMPT PLAINTIFFS' CLAIMS FOR LACK OF STANDING AND MOOTNESS.

This Court exercises plenary review of a District Court's dismissal for lack of standing, and the question "is whether [P]laintiffs have alleged facts which, if true, would be sufficient to establish Article III standing." *Finkelman v. Nat'l Football League*, 810 F.3d 187, 192 (3d Cir. 2016); *Ballentine v. U.S.*, 486 F.3d 806, 807 (3d Cir. 2007) ("We also review *de novo* a district court's jurisdictional determinations.")

Plaintiffs and Rutgers appear to agree that (1) all student-plaintiffs but Ms. Pinto requested and received exemptions from the COVID-19 vaccine requirement (JA161-177, FAC ¶¶ 12-32); (2) those exempt students did not assert standing to challenge the vaccine requirement (Br. at 20-21); but (3) Ms. Pinto does have standing to challenge the requirement (Br. at 20),

and (4) CHD's standing mirrors that of Ms. Pinto (*id.*).[5] Plaintiffs argue that the District Court should have found the exempt students possessed standing to challenge Rutgers' periodic COVID-19 testing requirements and exclusion of unvaccinated students from communal housing, but as the Seventh Circuit correctly held, masking and periodic testing requirements "are not constitutionally problematic." *Klaassen*, 7 F.4th at 593. Accordingly, Plaintiffs' claims regarding masking and testing lack merit irrespective of the District Court's correct conclusion that they lack standing to assert them.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the District Court's Order dismissing Plaintiffs' First Amended Complaint with prejudice.

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[5] Plaintiffs challenge the District Court's finding that the plaintiffs who received exemptions from the vaccination requirement lack standing to challenge Rutgers' Policy. They contend the District Court's decision as to standing conflicts with the same judge's opinion in *Messina v. College of New Jersey*, __ F. Supp.3d __, No. 21-17576, 2022 WL 4078501, at *2 n.2 (D.N.J. Aug. 31, 2022), but it does not. In *Messina*, the plaintiffs asserted standing on the basis that the defendant college's vaccination policy required them to "choose between complying with the requirement or applying for an exemption," which they contended invaded their "legally protected interest." *Id.* Here, because Rutgers did not dispute that the non-exempt Ms. Pinto (and, through her, CHD) had legal standing to challenge the vaccine mandate, the District Court had no occasion to reach the question of whether the exempt students possessed standing. The District Court in this case correctly rejected the exempt Plaintiffs' attempt to assert fear of potential *future* harms as basis for standing, which is not the argument made by the exempt student plaintiffs in *Messina*.

STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully request oral argument concerning all issues that form the subject matter of this Appeal.

Dated: FEBRUARY 9, 2023
FLORHAM PARK, NEW JERSEY

Respectfully submitted,

s/ *Jeffrey S. Jacobson*

Jeffrey S. Jacobson (NJ Bar 000772011)
Andrew B. Joseph (NJ Bar 044231992)
W. Joshua Lattimore (NJ Bar 308642019)
FAEGRE DRINKER
BIDDLE & REATH LLP
600 Campus Drive
Florham Park, New Jersey 07932
(973) 549-7000
Counsel for Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 8,573 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface: Microsoft Word; 14-point Century Schoolbook.

Dated: FEBRUARY 9, 2023
FLORHAM PARK, NEW JERSEY

Respectfully submitted,

s/ *Jeffrey S. Jacobson*

Jeffrey S. Jacobson (NJ Bar 000772011)
FAEGRE DRINKER BIDDLE & REATH LLP
600 Campus Drive
Florham Park, New Jersey 07932
(973) 549-7000
Counsel for Appellees

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Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies.

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Dated: FEBRUARY 9, 2023
FLORHAM PARK, NEW JERSEY

Respectfully submitted,

s/ *Jeffrey S. Jacobson*

Jeffrey S. Jacobson (NJ Bar 000772011)
FAEGRE DRINKER BIDDLE & REATH LLP
600 Campus Drive
Florham Park, New Jersey 07932
(973) 549-7000
Counsel for Appellees

CERTIFICATE OF BAR ADMISSION

Pursuant to Third Circuit Local Appellate Rule 28.3(d), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

Dated: FEBRUARY 9, 2023
FLORHAM PARK, NEW JERSEY

Respectfully submitted,

s/ *Jeffrey S. Jacobson*

Jeffrey S. Jacobson (NJ Bar 000772011)
FAEGRE DRINKER BIDDLE & REATH LLP
600 Campus Drive
Florham Park, New Jersey 07932
(973) 549-7000
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on February 9, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: FEBRUARY 9, 2023
FLORHAM PARK, NEW JERSEY

Respectfully submitted,

s/ *Jeffrey S. Jacobson*

Jeffrey S. Jacobson (NJ Bar 000772011)
FAEGRE DRINKER BIDDLE & REATH LLP
600 Campus Drive
Florham Park, New Jersey 07932
(973) 549-7000
Counsel for Appellees