IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CATALINA MESSINA, KATHERINE DIEKER, CHRISTOPHER JACOB, ANNA ZIMBERG, and ISABELLA WALZ Plaintiffs, vs. THE COLLEGE OF NEW JERSEY THE BOARD OF TRUSTEES OF THE COLLEGE OF NEW JERSEY Defendants.	Hon. Zahid N. Quraishi, U.S.D.J Civil Action No. 3-21-CV-175-76-ZNQ-DEA **CIVIL ACTION** **(Electronically Filed)** **Brief due: October 7, 2021**

REPLY BRIEF IN SUPPORT OF APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Oral Argument Requested.

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PRELMINARY STATEMENT

TCNJ has mandated that its students get a "vaccine" for Covid-19. Students who do not comply and are granted an exemption are subject to a range of discriminatory actions that range from the severely intrusive twice weekly medical testing to the plainly unfair being *de facto* prohibited from participating in club sports. Mandates like TCNJ's are being promulgated and imposed across the country and the state of the law is unsettled. In all cases so far, litigants and courts have taken for granted that the pharmaceuticals at the center of these mandates are "vaccines" and that *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) controls. However, as set forth in Plaintiffs' moving papers and herein, the common definitions of "vaccine" do not encompass these pharmaceuticals. Consequently, *Jacobson* does not apply.

Moreover, TCNJ's regime of mandatory medical testing of students is without precedent and without legal support as are the measures disclosing students' personal health information to professors and disallowing them from living on campus.

The entire Mandate is unconstitutional on its face and as applied. A temporary restraining order and/or preliminary injunction is therefore warranted.

LEGAL ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE MANDATE

Plaintiffs have standing when they (1) have suffered an "injury in fact," (2) there is a "causal connection between the injury and the conduct complained of," and (3) there is a likelihood the injury "will be redressed by a favorable decision. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (internal citations omitted). A personal stake in the outcome establishes the "injury in fact" requirement. *Id.* at 159.

Here, Plaintiffs have standing to challenge the Mandate because the testing, segregation, and other impositions on Plaintiffs are imposed on them *because* of their status as exempt from the Mandate. If the Mandate is stricken as unconstitutional, then their status as exempt and the impositions that go with it are no longer applicable on that basis. TCNJ acknowledges this. Dkt. 7 at 34 ("these challenged rules apply to Plaintiffs because they...obtained an exemption"). *Wade v. University of Connecticut Board of Trustees*, 2021 WL 3616035 (D. Conn. August 16, 2021) upon which TNCJ relies, is distinguishable because the plaintiffs there did not allege they were subjected to disparate treatment or other constitutional violations predicated on their exempt status and therefore had no injury in fact. They were simply exempt with no repercussions for being exempt. Ex. A to Declaration of Dana Wefer.

II. TCNJ HAS FAILED TO SHOW *JACOBSON* APPLIES

Plaintiffs demonstrate in their moving brief that *Jacobson* does not apply for four reasons: 1) *Jacobson* applies only to "vaccines" and the mandated pharmaceuticals are not "vaccines," 2) TCNJ's Mandate is not legislative, 3) the mandated pharmaceuticals are outside the scope of *Jacobson* due to their novelty, and 4) the consequences for declining the pharmaceuticals are more serious and extreme than the $5 fine in *Jacobson*. TCNJ does not attempt to refute the last two points and fails to refute the first two.

A. TCNJ has not shown that the GTPs are vaccines

TCNJ asserts that the mandated pharmaceuticals are "vaccines" within the meaning of *Jacobson* because the FDA classifies them as such. However, the Supreme Court and Third Circuit Court of Appeals have noted that courts must look at substance over form and are not bound by an agency classification. *Azar v. Allina Health Servs.*, 139 *U.S.* 1804, 1812 (2019) (noting that in determining whether statutory notice-and-comment requirements apply to agency actions "courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label.*" (emphasis in original); *State of New Jersey v. Dep't of Health and Hum. Servs.*, 670 F.2d 1262 (3d Cir. 1981) (holding that HHS Secretary's designation of New Jersey's failure to comply with regulatory reporting as "disallowance" rather than "non-conformity" would not control because "a court of appeals is

obligated to look beyond the label the Secretary puts on his or her actions, and instead is required to conduct an independent evaluation of the underlying substance" since "[t]o do otherwise would be to elevate form over substance and...make the jurisdiction of a court of appeals contingent upon the Secretary's unfettered discretion"). Thus, it is necessary to look at the substance of what the pharmaceuticals are, not just how they are labeled by federal agencies. This is especially important when more than 100 years separate the precedential case law and the subsequent classification of pharmaceuticals as falling within that case law.

Here, the word that needs to be interpreted, "vaccine," comes not from a statute, but from a Supreme Court case. Thus, the question is not whether a particular statute applies, but rather whether a particular *case* applies. There is little precedent where a court has had to interpret what another court means by a term, but rules of statutory construction are useful.

"[I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 *U.S.* 532, 540 (2019) (internal citations omitted). This same logic applies to interpreting and applying court cases cited as precedent where the meaning of a word in another case is essential to resolution of a present legal matter. Thus, one definition of "vaccine" that could be adopted by the court is that

used in 1905, which defined "vaccine" as only the smallpox vaccine. This would be in line with strict rules of statutory construction. However, because so much time has passed since *Jacobson* was decided and because compulsory vaccination as to at least some pharmaceuticals has been adopted by every state, it may be reasonable to turn to common definitions since that time, which can be done by looking in dictionaries.

In *Taniguchi v. Kan Pac. Saipan, Ltd.,* 566 U.S. 560 (2012) the Supreme Court was tasked with determining whether the word "interpreter" referred to oral translation only or written translation as well. The Court stated that the "term is not defined in the Court Interpreters Act or in any other relevant statutory provision" and "[w]hen a term goes undefined in a statute, we give the term its ordinary meaning." The Court went on to analyze no fewer than eleven dictionaries to determine the word's common meaning *at the time the statute was enacted*. *Id.* at 567-68 (emphasis added). In *Amoco Prod. Co. v. S. Ute Indian Tribe,* 526 *U.S.* 865 (1999) the Court was called upon to decide whether coalbed methane gas ("CBM") was encompassed within the statutory definition of "coal" under the Coal Land Acts. The Court held that the question was "not whether, based on what scientists know today, CBM gas is a constituent of coal, but whether Congress so regarded it in 1909 and 1910." *Id.* at 865-66.

Here, Plaintiffs' moving papers provided a wide range of potential definitions of the word "vaccine," a word that has undergone significant change over the past century. Notably, all but the most recent online dictionary definitions *exclude* the GTPs and TCNJ has not provided any definition that includes them. TCNJ relies entirely on the FDA's decision to classify these novel technologies as "vaccines," but the agency's classification of them as such is not determinative and the court is required to look at substance over form. Here, it is clear that these pharmaceuticals are not "vaccines" under *Jacobson* or the ordinary meaning that would be found in the dictionary of most libraries.

B. The Mandate is distinguishable from *Jacobson* because of the novelty of the mandated medical procedure and the extreme consequences for declining the procedure

Jacobson involved a vaccine with a century of data and history that the Court specifically relied upon in reaching its decision and determining that there was no need for expert witnesses. *Jacobson*, at 23-24. In contrast, the pharmaceuticals TCNJ wishes to mandate are novel themselves, use a novel technology that has been tested on healthy people for less than two years, have been available to the public for less than a year, and are still in clinical trials. These medical products are clearly not alike and TCNJ has not shown how they are the same beyond the common label.

Neither did TCNJ address the gulf between the $5 fine in *Jacobson* versus the imposition of medical surveillance, invasive

testing procedures, segregation, and more that TCNJ imposes as a consequence of declining to take the GTPs.

These distinctions are so great *Jacobson* does not apply.

III. TCNJ FAILED TO PROVIDE *ANY* PRECEDENTIAL SUPPORT FOR ITS MEDICAL TESTING AND SURVEILLANCE PROGRAM

There is *no* precedential case law that even suggests the government possesses the power to coerce free individuals to submit to ongoing and routine medical testing. The fact that there is no precedent demonstrates that the right to be free from such testing is deeply embedded in our nation's history and tradition.

It is unquestionable that testing of an individual's bodily products involves at least two seizures, the first relating to the taking of the body product and the second concerning its analysis. *Skinner v. Ry. Lab. Executives' Ass'n,* 489 *U.S.* 602, 616-17 (1989) (holding that both the taking of a person's blood and breath and the subsequent analysis are seizures under the Fourth Amendment).

The question of whether the government may compel a person to undergo medical testing without probable cause arises most frequently in the context of prisoners and suspected criminals. However, TCNJ is not a prison and Plaintiffs are accused of no crime, so that case law is not applicable. Another context in which compelled medical testing has been upheld is the forced HIV testing of criminals convicted of sexual assaults that result in the exchange of bodily fluids. It is telling that even in this extreme circumstance, NJ's Supreme Court carefully analyzed and

limited the application of the testing. *See State of New Jersey in the Interest of J.G., N.S. and J.T.*, 151 *N.J.* 565, 581 (1997). Precedential analysis shows clearly that government intrusion in the form of coerced medical testing is a serious matter requiring serious consideration. TCNJ's blithe treatment of it is not in line with this established case law. Moreover, it is notable that even in the case of prisoners and sexual assailants, testing is limited to one or two tests, not ongoing indefinite weekly testing.

The only invasive testing the government has ever been allowed to systematically mandate for adults not suspected of any crime is drug and alcohol testing for employees of "highly regulated industries," which TCNJ correctly notes involves government employees who carry guns, are involved in train accidents or safety violations, and are responsible for seizing drugs. These *job duties* have been held to create a "special need" for the government.

These cases are nothing like the students at TCNJ. First, the special needs that courts have allowed apply to *jobs* not people. In the special needs cases, it is the nature of the jobs, not individual characteristics of the people performing the jobs, that is relevant. Moreover, to the extent testing has been allowed it is related to a specific incident, like a train accident or safety violation as in *Skinner* or at random intervals. There is *no* precedent at all for ongoing surveillance through medical testing.

The Supreme Court has held that minor schoolchildren have a reduced expectation of privacy and that periodic, random drug testing may be permitted as to them in some circumstances. *Board of Education v. Earls*, 122 S.Ct. 2559 (2002). However, this has never been extended to adult college students and the Eight Circuit specifically declined to extend this to college students. *Kittle Aikeley v. Strong*, 844 F.3d 727 (8th Cir.), *cert. denied.*

Ignoring the Fourth and Fourteenth Amendment intrusions, TCNJ instead argues that *Jacobson* applies not just to vaccines, but also to medical testing. TCNJ cites *nothing* in *Jacobson* nor any other precedential case law to support this dramatically expansive interpretation except its own blithe assertion that having a nasal swab put into a person's nose twice a week to extract their bodily fluids for analysis is "less problematic" than coerced injections and so therefore must be Constitutional.

TCNJ asserts that if Plaintiffs do not wish to submit to the medical testing or an irreversible injection, they can just abandon their investment at TCNJ. This ignores the unconstitutional conditions doctrine raised in Plaintiffs' moving papers.

Moreover, TCNJ cannot assert any special need for the testing and has not shown any data that testing students who have not taken the GTPs is protecting the campus. It has not presented *any* evidence specific to TCNJ concerning whether cases on the campus are predominantly occurring among exempt students and the

documents it has presented concerning other schools show conclusively that outbreaks are occurring predominantly among students who have taken the pharmaceuticals. For example, at Connecticut College, where 98-99% of the student body has complied with its mandate, the dean of students stated that most cases are among the "vaccinated." Dkt. 7-5 at 59. At Harvard, the virus is "mostly infecting the university's fully vaccinated graduate students." Dkt. 7-5 at 65. At Rice University the dean of undergraduates wrote candidly to students: "I'll be blunt: the level of breakthrough cases is much higher than anticipated." Dkt. 7-6 at 6. TCNJ's interest in mandating a pharmaceutical to prevent spread among college students is clearly undermined when its own evidence shows that the pharmaceutical is not preventing spread among college students at other colleges. Moreover, TCNJ's assertion that it has to test students who did not take the GTPs is also severely undermined by the data it presents.

The unprecedented ongoing medical testing violates Plaintiffs' 4th Amendment rights.

IV. TCNJ'S EXHIBITS AND DOCUMENTS SUPPORT PLAINTIFFS' LIBERTY AND PRIVACY RIGHTS UNDER STRICT SCRUTINY ANALYSIS

As detailed in Plaintiffs' moving papers, because the GTPs are not "vaccines," they are medical procedures and strict scrutiny applies. Plaintiffs' liberty rights in declining the GTPs is very

strong compared to TCNJ's asserted interests.[1]

Plaintiffs set forth thirteen factors that weigh in favor of their liberty interests under strict scrutiny. TCNJ addressed only two: the failure to account for students immune through recovery and the GTPs' questionable efficacy. Even though TCNJ did not attempt to argue the other factors, TCNJ's exhibits do provide further support for Plaintiffs' liberty rights. Moreover, and more importantly, the volume of scientific studies presented by TCNJ and the fact TCNJ's documents contradict each other and TCNJ's own position is further demonstration of the fact that this Mandate is distinguishable from *Jacobson.* In *Jacobson* the court needed no expert testimony or scientific information because the science was actually settled. Here, on the other hand, both parties have pointed to data that has emerged, and often changed, just in the last few months due to the uncertain nature of the GTPs *and* the virus. Below are some notable examples of how TCNJ's documents undermine its positions.

A. TCNJ's documents undermine its interesting in mandating both the "vaccine" and the testing

TCNJ's exhibit "Considerations for Reopening Institutions of Higher Education for the Spring Semester 2021" published by the American College Health Association ("ACHA") undermines TCNJ's

[1] TCNJ's asserted interests is "to minimize outbreaks of Covid-19 within the TCNJ community, to prevent or reduce the risk of transmission of Covid-19, and to promote the public health of the community." Dkt. 7 at 9-10.

asserted interests in a number of ways. It is especially illuminating because it was published in December 2020 before the "vaccines" had been authorized, so its findings are applicable even in a scenario where 0% of the students have been "vaccinated." It states: "[t]here is very little evidence to show secondary transmission is occurring either student-to-student or student-to-faculty member in instructional settings where everyone is wearing masks and proper physical distancing is maintained." Dkt. 7-5 at 28. This demonstrates TCNJ's Mandate is not narrowly tailored with regard to the mandated pharmaceuticals and testing.

B. TCNJ's documents weigh against TCNJ's Mandate concerning sports

The ACHA document also discusses Covid-19 and sports in depth. With regard to sports, it states "proven transmission between teams *during* an athletic competition appears to have been rare, even in contact sports." Dkt. 7-5 at 40. It goes on to note that "[m]ost campus outbreaks among athletic teams occurred due to social interactions outside of practices and competitions" and that for outdoor sports such as football and soccer "on-field risk of infection is low...even with close contact." *Id.* This undermines TCNJ's *de facto* exclusion of exempt students from club sports.

C. TCNJ's documents weigh in the students' favor on the issue of the pharmaceuticals' efficacy and experimental nature

TCNJ points to other colleges that have moved to remote learning due to outbreaks to justify its Mandate and the medical

surveillance of Plaintiffs, but, as detailed above, the documents submitted by TCNJ in support of this flatly undermine its asserted interest because the students becoming infected are "vaccinated." Moreover, TCNJ's exhibit "Assessing Covid-19 Prevention Strategies to Permit the Safe Reopening of Schools" shows that TCNJ's testing policy is unnecessary. It provides "if 90% coverage with an 85%-effective vaccine can be attained, the model finds that campus activities can be fully resumed while holding cumulative cases below 5% of the population without the need for routine, asymptomatic testing." Dkt. 7-5 at 4. TCNJ has 97% coverage, so if the GTPs are 85% effective at preventing contraction and transmission of Covid-19, the testing is unnecessary. On the other hand, if they are not at least 85% effective, then it undermines TCNJ's interest in mandating that students take them.

Perhaps they are not 85% effective, because TCNJ's exhibit "Delta Variant: What We Know About the Science" states twice that "fully vaccinated" people can still get and transmit the virus, which accords with another CDC document TCNJ's cites, which states three times that "fully vaccinated people who do become infected with the Delta variant can transmit it to others." Dkt. 7-2 at 39; Dkt. 7-5 at 11-12. Further TCNJ exhibits undermining the effectiveness of the GTPs are the EUA approval letters for the Moderna and J&J GTPs, which venture no further than to say the

products "may be effective" and refer to the products as "investigational." Dkt. 7-3 at 15-16; Dkt. 7-3 at 26-27.

Highlighting the uncertainty about the GTPs efficacy and duration, even Pfizer's own study on duration (TCNJ Ex. 25) covers only six months after injection and states that "[o]ngoing follow-up is needed to understand persistence of the vaccine effect" over more time and that the question of "whether vaccination prevents asymptomatic infection" is "ongoing." Dkt. 7-3 at 75-76.

D. TCNJ's documents weigh in the students' favor on the issue of the GTPs risks

TCNJ's 19th exhibit highlights that FDA approved Comirnaty carries the same myocarditis risk as GTPs authorized under EUA. Specifically, the FDA states: "data demonstrate increased risks" of myocarditis that is "higher among males under 40 years of age," a group which includes Plaintiff Christopher Jacob Dkt. 7-3 at 38.

E. TCNJ's documents do not refute the NIH study on natural immunity and support Plaintiffs' position

In support of the natural immunity factor of strict scrutiny, Plaintiffs cited in its moving papers at footnote 26 a National Institute of Health study titled "Lasting immunity found after recovery from COVID-19." TCNJ ignored this study, but its own documents support the conclusion. For example, the document "Antibody Persistence through 6 months after the Second Dose of mRNA-1273 Vaccine for Covid-19" states that the results are "consistent with published observations of convalescent patients

with Covid-19 through 8 months after symptom onset." Dkt. 7-4 at 2.

The very fact that TCNJ's exhibits are so contradictory and voluminous shows that *Jacobson* is not the right framework to analyze the Mandate. In addition, they bolster the factors weighing in Plaintiffs' favor under strict scrutiny.

V. TCNJ'S SOVEREIGN IMMUNITY ARGUMENTS ARE IRRELEVANT TO THE REQUEST FOR A PRELIMINARY INJUNCTION

Plaintiffs' motion is based on Constitutional violation. TCNJ's sovereign immunity argument belongs in a motion to dismiss.

VI. THE OTHER FACTORS WEIGH IN FAVOR OF ENJOINING THE MANDATE

The Mandate and its impositions on exempt students are unconstitutional. Allowing them to continue will irreparably harm Plaintiffs as they continue to be subject to the measures. The students' delay is irrelevant and excusable because they are college students, disadvantaged at securing legal counsel.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court enter an order enjoining TCNJ's Mandate.

Respectfully submitted,

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Dated: October 7, 2021

BY: s/Dana Wefer

DANA WEFER, ESQ.