

HEALTH CARE LAW ADVISOR ALERT: ESTABLISHED U.S. PUBLIC HEALTH PRECEDENT ON MANDATORY VACCINATION REQUIREMENTS UPHELD (AT LEAST FOR NOW)

American law long has recognized the authority of government officials to address public health emergencies. *See, e.g., Gibbons v. Ogden*, 22 U.S. 1, 205 (1824) (recognizing the “power of a State, to provide for the health of its citizens”).

More than a century ago, the U.S. Supreme Court decided the seminal case on the power of the states to respond to a public health crisis in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), where it affirmed the constitutionality of a state statute authorizing local health boards to require residents to be vaccinated against smallpox. As explained in *Jacobson*, the authority to respond to a public health crisis must be “lodged somewhere,” and it is “not an unusual, nor an unreasonable or arbitrary, requirement” to vest that authority in officials “appointed, presumably, because of their fitness to determine such questions.” *Id.* at 27. The Court intermittently emphasized the necessity of the state’s smallpox vaccination regulation, as well as the utilitarian aspect of rules protecting the many at the expense of the few, but ultimately seemed to rely on the basic police power of the state to regulate public health as the basis for its decision upholding the vaccination requirement. *Id.* at 26, 28, 29, 31.

Due to the COVID-19 pandemic, courts around the country have had the opportunity to revisit the *Jacobson* decision. Last year, the U.S. Supreme Court discussed *Jacobson* in a decision enjoining an executive order by New York’s governor establishing certain occupancy limits to combat the spread of COVID-19. In *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 141 S. Ct. 63 (2020), Justice Neil Gorsuch explained *Jacobson*’s imposition on individual rights was “avoidable and relatively modest” and “easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs [to the smallpox vaccine requirement] available to certain objectors.” *Id.*, 141 S. Ct. 63 at 71 (Gorsuch, J., concurring). And Chief Justice John Roberts quoted from *Jacobson*, stating that “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” *Id.* at 76 (Roberts, C.J., dissenting) (quoting *Jacobson*, 197 U.S. at 38).

Jacobson also played a pivotal role in two cases addressing COVID-19 vaccination

requirements recently considered by the U.S. Supreme Court.

In the first case, *Klaassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926 (N.D. Ind. July 18, 2021), *Pls.' mot. for inj. pending appeal denied*, 7 F.4th 592 (7th Cir. 2021), eight students filed a federal lawsuit seeking to bar enforcement of Indiana University's requirement that its faculty, staff and students be vaccinated against COVID-19, unless exempt from the requirement for religious or medical reasons. Students who do not get vaccinated are restricted from participation in on-campus activities and their class registrations and university identification cards are cancelled. Exempt students are required to wear masks in public spaces while on campus and be tested for COVID-19 two times a week. The plaintiffs claim the University's rules violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *Klaassen*, slip. op. at *1.

In July 2021, the district court denied the plaintiffs' request for a preliminary injunction. *Id.* at *45. It ruled Indiana University's COVID-19 vaccination requirement "isn't forced vaccination" and that the U.S. Constitution permits the school to pursue vaccination "in the legitimate interest of public health for its students, faculty and staff." *Id.* at *46. A few days later, the plaintiffs filed a notice of appeal with the Seventh Circuit Court of Appeals and moved for an injunction against the university's requirements pending appeal. *Klaassen*, 7 F.4th 592.

In early August 2021, the Seventh Circuit denied the plaintiffs' injunction request, citing *Jacobson*. Judge Frank Easterbrook, writing for the three-judge panel, found the case "is easier than *Jacobson*" for two reasons. *Id.* at 593. First, *Jacobson* upheld a vaccination requirement that lacked any exception for adults, but the university's requirement has certain religious and medical exceptions. Second, unlike *Jacobson*, the university's requirements do not require any adult member of the public to be vaccinated. Instead, they are "a condition of attending Indiana University. People who do not want to be vaccinated may go elsewhere." *Id.* The court recognized that "vaccination requirements, like other public-health measures, have been common in this nation" and that "given *Jacobson* . . . which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2." *Id.* The court found that:

Each university may decide what is necessary to keep other students safe in a congregate setting. Health exams and vaccinations against other diseases (measles, mumps, rubella, diphtheria, tetanus, pertussis, varicella, meningitis, influenza, and more) are common requirements of higher education. Vaccination protects not only the vaccinated persons but also those who come in contact with them, and at a university close contact is inevitable.

Id.

After the Seventh Circuit's ruling, the plaintiffs filed an emergency application for writ of injunction with the U.S. Supreme Court, again seeking to enjoin enforcement of Indiana University's vaccination requirements. See *Klaassen*, Emergency Appl. 21A15 (Aug. 6, 2021). The plaintiffs argued that the university "is coercing students to give up their rights to bodily integrity, autonomy, and of medical treatment choice in exchange for the discretionary benefit of matriculating at IU." *Id.* at 14. But Justice Amy Coney Barrett, the Circuit Justice for the Seventh Circuit, denied the plaintiffs' application without referring it to the full Court for consideration. *Id.*, *denied* (Aug. 12, 2021) (Barrett, J.). At the time of the writing of this article, the plaintiffs' case continues at the district court.

In the second case, *Maniscalco v. New York City Dep't of Educ.*, No. 21-CV-5055 BMC, 2021 WL 4344267 (E.D.N.Y. Sept. 23, 2021), *Pls.' mot. for inj. pending appeal denied*, 2021 WL 4437700 (2d Cir. Sept. 27, 2021), four New York City public school employees filed a federal class action lawsuit seeking to bar enforcement of New York City's requirement that its public school teachers provide proof of COVID-19 vaccination or face suspension without pay. This requirement does not contain a provision allowing teachers to opt-out of vaccination through COVID-19 testing. The plaintiffs claimed different reasons for not wanting to get the vaccine, including the concern of its long term side effects, and argued that the requirement violates their substantive due process and equal protection rights under the Fourteenth Amendment. *Id.*, slip. op. at *1.

On September 23, 2021, the district court denied the plaintiffs' motion for a preliminary injunction against the requirement, ruling that the plaintiffs could not show a likelihood of success on the merits of their claims. Citing *Jacobson*, the court found that the law allows a state to "'curtail constitutional rights in response to a society-threatening epidemic so long as the [public health] measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plan and palpable invasion of rights secured by fundamental law.'" *Id.* at *3 (citation omitted). The court noted that requiring teachers to "take a dose of ivermectin as a condition of employment" might qualify as an improper invasion of rights, but that "mandating a vaccine approved by the FDA does not." *Id.* The court stated "'the Due Process Clause secures the liberty to pursue a calling or occupation, and not the right to a specific job.'" *Id.* (citation omitted).

Later that day, the plaintiffs filed a notice of appeal with the Second Circuit Court of Appeals and moved for an expedited injunction against New York City's vaccination requirement pending appeal. The Second Circuit issued a temporary injunction in favor of the plaintiffs for administrative purposes so that their motion could be considered by a three-judge motions panel. But on September 27, 2021, that three-judge panel denied the plaintiffs' motion and dissolved the temporary injunction. See *Order of USCA as to [No.] 17*, No. 21-CV-5055, No. 19 (E.D.N.Y. Sept. 24, 2021).

After the Second Circuit's ruling, the plaintiffs filed an emergency application for writ of

injunction with the U.S. Supreme Court, again seeking to enjoin enforcement of New York City's vaccination requirement. See *Maniscalco*, Emergency Appl. 21A50 (Sept. 30, 2021). Justice Sonja Sotomayor, the Circuit Justice for the Second Circuit, denied the plaintiffs' application without even waiting for New York City to reply to it, and without referring it to the full Court for consideration. *Id.*, *denied* (Oct. 1, 2021) (Sotomayor, J.). This case also continues at the district court at the time of the writing of this article.

While the rise of various COVID-19 requirements inevitably will lead to additional litigation in various courts around the country, at least for now it seems clear that the *Jacobson* decision continues to provide guidance to public health officials, attorneys and the courts around the country on vaccination issues, as it has for over a century.

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