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Considering Vaccination Status

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This Article examines whether policies—sometimes termed "vaccine mandates" or "vaccine requirements"—that consider vaccination status as a condition of employment, receipt of goods and services, or educational or other activity for participation are legally permitted, and whether such policies may even sometimes be legally required. It does so with particular reference to COVID-19 vaccines.

Part I explains the legality of private actors, such as employers or private universities, considering vaccination status, and concludes that such consideration is almost always legally permissible unless foreclosed by specific state legislation. Part II examines the consideration of vaccination status by state or federal policy. It concludes that such consideration is similarly allowed at the state level unless expressly foreclosed, and is allowed at the federal level if appropriately supported by federal regulatory authority. Part III examines what may be a future front in these debates: whether policies considering vaccination status may be required rather than merely permitted, just as some courts have found that mask requirements may be federally required in certain circumstances.

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INTRODUCTION

By reducing people's susceptibility to diseases, especially communicable diseases, vaccines have averted immense harm to individuals and populations, saving millions of lives yearly worldwide.[1] Vaccinations recently reduced death and hospitalization from COVID-19 by more than 90% and averted hundreds of thousands of hospitalizations and deaths, even in the face of new variants.[2] Despite vaccination's immense power to prevent harm, some refuse vaccination. During the COVID-19 pandemic, about 15% of eligible adult Americans have staunchly refused to be vaccinated against COVID-19, and around 7% are uncertain about becoming vaccinated, or are only willing to do so if it is required.[3]

In order to prevent harm from infectious diseases and respond to vaccine refusal, some laws and policies consider vaccination status: they treat individuals who are vaccinated differently from those who are not. Vaccination status is almost invariably considered in primary and secondary education,[4] and widely considered in higher education as well.[5] Even before the COVID-19 pandemic, vaccination against certain illnesses was a condition of employment in some settings, such as healthcare.[6]

The COVID-19 pandemic heightened interest in policies that consider vaccination status. Some private businesses made vaccination a condition of employment.[7] Universities expanded their vaccination policies to include

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1. *Vaccines and Immunization*, WORLD HEALTH ORG., https://www.who.int/health-topics/vaccines-and-immunization#tab=tab_1 (last visited Jan. 28, 2023) ("Immunization currently prevents 3.5–5 million deaths every year . . . .").

2. Eli S. Rosenberg, David R. Holtgrave, Vajeera Dorabawila, MaryBeth Conroy, Danielle Greene, Emily Lutterloh, Bryon Backenson, Dina Hoefer, Johanne Morne, Ursula Bauer & Howard A. Zucker, *New COVID-19 Cases and Hospitalizations Among Adults, by Vaccination Status — New York, May 3–July 25, 2021*, 70 MORBIDITY & MORTALITY WKLY. REP. 1150, 1151 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7034e1-H.pdf; Alison Galvani, Seyed M. Moghadas & Eric C. Schneider, *Deaths and Hospitalizations Averted by Rapid U.S. Vaccination Rollout*, COMMONWEALTH FUND (July 7, 2021), https://www.commonwealthfund.org/publications/issue-briefs/2021/jul/deaths-and-hospitalizations-averted-rapid-us-vaccination-rollout.

3. Grace Sparks, Lunna Lopes, Alex Montero, Liz Hamel & Mollyann Brodie, *KFF COVID-19 Vaccine Monitor: April 2022*, KFF (May 4, 2022), https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-april-2022/.

4. *See* Erik Skinner, *State Vaccination Policies: Requirements and Exemptions for Entering School*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 2017), https://www.ncsl.org/research/health/state-vaccination-policies-requirements-and-exemptions-for-entering-school.aspx.

5. Leila Barraza, James G. Hodge, Jr., Chelsea L. Gulinson, Drew Hensley & Michelle Castagne, *Immunization Laws and Policies Among U.S. Institutes of Higher Education*, 47 J.L. MED. & ETHICS 342, 343–44 (2019).

6. *State Flu Vaccine Requirements for Health Care Workers in Hospitals and Long-Term Care Facilities*, KFF, https://www.kff.org/other/state-indicator/flu-vaccine-requirements-for-health-care-workers-in-hospitals-and-long-term-care-facilities/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited Jan. 28, 2023); Abigale L. Ottenberg, Joel T. Wu, Gregory A. Poland, Robert M. Jacobson, Barbara A. Koenig & Jon C. Tilburt, *Vaccinating Health Care Workers Against Influenza: The Ethical and Legal Rationale for a Mandate*, 101 AM. J. PUB. HEALTH 212, 212–15 (2011).

7. Haley Messenger, *From Amex to Walmart, Here Are the Companies Mandating the Covid Vaccines for Employees*, NBC NEWS, https://www.nbcnews.com/business/business-news/amex-walmart-are-companies-mandating-covid-vaccine-employees-rcna11049 (Jan. 25, 2022, 7:44 PM).

COVID-19 vaccinations.[8] The federal government made nursing home and Medicare and Medicaid funding conditional on workers' vaccination,[9] and required vaccination for military members.[10] States, localities, and businesses offered a range of benefits to the vaccinated.[11] During severe surges in which hospitals were overwhelmed by unvaccinated patients, some discussed the legitimacy of health insurers considering vaccination status,[12] medical professionals turning away patients who refuse vaccination,[13] and hospitals considering vaccination status when making prioritization decisions.[14] Debates over considering vaccination status became less prominent as the omicron variant receded, with some employers and jurisdictions electing to drop policies that consider vaccination status.[15] Future variants or the availability of future vaccines may, however, reawaken these debates. In September 2022, COVID-19 vaccines reformulated to counter the omicron variant became available in the United States, and experts expect them to more effectively reduce transmission.[16] Nasal vaccines that may better block transmission are also being studied.[17]

At the same time, many have objected on various grounds to policies considering vaccination status. Most prominently, a few jurisdictions have made

8. Andy Thomason & Brian O'Leary, *Here's a List of Colleges That Require Students or Employees To Be Vaccinated Against Covid-19*, THE CHRON. OF HIGHER EDUC., https://www.chronicle.com/blogs/live-coronavirus-updates/heres-a-list-of-colleges-that-will-require-students-to-be-vaccinated-against-covid-19 (Jan. 26, 2022, 1:04 PM).

9. Allie Reed, *Health Worker Vaccine Mandate Stays Intact as Pandemic Recedes*, BLOOMBERG L. (Mar. 21, 2022, 2:35 AM), https://news.bloomberglaw.com/health-law-and-business/health-worker-vaccine-mandate-stays-intact-as-pandemic-recedes.

10. Lolita C. Baldor, *COVID Vaccines To Be Required for Military Under New US Plan*, AP NEWS (Aug. 9, 2021), https://apnews.com/article/coronavirus-vaccine-us-military-requirement-pentagon-3975940c732352f72e41f6e34a3a2669.

11. Devon Delfino, *Incentives for COVID-19 Vaccination: Food, Cash, & Other Perks*, GOODRX (June 24, 2021), https://www.goodrx.com/blog/covid-19-vaccination-incentives/.

12. James Kwak, John Aloysius Cogan, Jr. & Peter Siegelman, *Two Insurance-Based Ways To Get More Americans Vaccinated*, STAT (Sept. 1, 2021), https://www.statnews.com/2021/09/01/two-insurance-based-ways-to-get-more-americans-vaccinated/.

13. *Q&A: Can Providers Refuse To Treat Patients Who Are Unvaccinated Against COVID-19?*, MLMIC INS. CO. (July 29, 2021), https://www.mlmic.com/blog/hospitals/patients-who-are-unvaccinated-against-covid-19.

14. Dave Lieber, *North Texas Doctor's Group Retreats on Policy Saying Vaccination Status To Be Part of Care Decisions*, DALL. MORNING NEWS (Aug. 19, 2021, 1:53 PM), https://www.dallasnews.com/news/watchdog/2021/08/19/if-north-texas-runs-out-of-icu-hospital-beds-doctors-can-consider-a-patients-vaccination-status/.

15. Corky Siemaszko, *Vaccine Requirements Are Being Lifted Across America as Covid Cases Wane*, NBC NEWS, https://www.nbcnews.com/news/us-news/vaccine-requirements-lifted-us-covid-cases-wane-rcna16700 (Feb. 18, 2022, 8:14 AM).

16. Lena H. Sun, *U.S. Plans To Shift to Annual Coronavirus Shots, Similar to Flu Vaccine*, WASH. POST, https://www.washingtonpost.com/health/2022/09/06/covid-booster-shot-flu-pandemic/ (Sept. 6, 2022, 3:34 PM) (reporting statement of White House coronavirus coordinator Ashish Jha that "it is reasonable to expect, based on what we know about immunology and science of this virus, that these new vaccines will provide better protection against infection . . . [and] transmission").

17. Emily Waltz, *How Nasal-Spray Vaccines Could Change the Pandemic*, 609 NATURE 240, 240–42 (2022), https://www.nature.com/articles/d41586-022-02824-3.

vaccination status a legally protected category or prohibited government entities and private businesses from considering COVID-19 vaccination status.[18] These prohibitions on considering vaccination status are often defended on the basis that they preserve individual freedom not to be vaccinated.[19] Other critics claim that policies considering vaccination status create and entrench social division between vaccinated and unvaccinated people, exacerbate preexisting inequality, or entrench unjust social structures and practices.[20]

This Article examines the current state of policies that consider vaccination status, particularly during the COVID-19 pandemic. Part I focuses on private nongovernment actors. This Part explains that courts have generally rejected challenges under federal constitutional and statutory law to private entities' policies that consider workers', customers', or participants' vaccination status. Some states, however, have recently adopted statutes that constrain private businesses' ability to consider vaccination status. Part II turns to government action. It explains that there are no fundamental constitutional obstacles to considering vaccination status. This Part then details how courts, including the Supreme Court, have nonetheless invalidated some regulatory decisions to consider vaccination status, typically on the basis that they go beyond regulators' legislatively conferred power. It does so by analyzing and critiquing two recent decisions: the Fifth Circuit's decision to uphold a preliminary injunction against the Occupational Safety and Health Administration (OSHA) vaccine mandate in *BST Holdings, L.L.C. v. OSHA*,[21] and the Supreme Court's subsequent decision to uphold that same injunction in *National Federation of Independent Business v. Department of Labor* (*NFIB*).[22] Part III turns to the other side of the coin, evaluating whether federal or state law *requires* the consideration of vaccination status. It concludes that the question is close, and that the arguments for requiring vaccination appear comparably strong to the arguments in favor of similar laws requiring measures like mask mandates during the COVID-19 pandemic, or similar measures in other respiratory disease pandemics.

The developing literature in this area uses a variety of terms to discuss vaccine-based policies, such as "vaccine credentials," "vaccine passports," "vaccine verification," "vaccine mandates," and "vaccine requirements." I

18. *State Efforts To Ban or Enforce COVID-19 Vaccine Mandates and Passports*, THE NAT'L ACAD. FOR STATE HEALTH POL'Y, https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/ (July 11, 2022).

19. *See infra* Parts I–II.B.

20. Nita Farahany, *Proof of Vaccination Will Be Very Valuable – and Easy To Abuse*, WASH. POST (Dec. 15, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/12/15/vaccine-cards-discrimination-immunity-passports/; Natalie Kofler & Françoise Baylis, *Covid-19 Vaccination Certificates: Prospects and Problems*, THE HASTINGS CTR. (Mar. 10, 2021), https://www.thehastingscenter.org/covid-19-vaccination-certificates-prospects-and-problems/; Zackary Sholem Berger & Andray Domise, *Vaccine Passports Pose an Equity Problem*, THE GLOBE & MAIL (Sept. 2, 2021), https://www.theglobeandmail.com/opinion/article-vaccine-passports-pose-an-equity-problem/.

21. 17 F.4th 604 (5th Cir.), *dissolving stay*, *In re* MCP No. 165, 21 F.4th 357 (6th Cir. 2021), *granting application for stay*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022).

22. 142 S. Ct. 661 (2022), *granting application for stay in BST*, 17 F.4th 604.

prefer to use "considering vaccination status," for two reasons. First, the fundamental structure of the policies at issue is conditional, not categorical. Those who are vaccinated are treated differently from those who are not. This is different from a categorical requirement that everyone be vaccinated. Second, *whether* vaccination status should be considered should not be confused with *how* such consideration should be implemented. Credentialing ("passports") and the enforcement of requirements depend on whether considering vaccination status is appropriate in the first place.

I. PRIVATE CONSIDERATION OF VACCINATION STATUS

A. FEDERAL LITIGATION

Much consideration of vaccination status in the United States has been carried out by private decisionmakers: employers, customer-facing businesses, and other in-person settings like universities. As this Part explains, challenges to such consideration under federal law have almost invariably been unavailing. Businesses enjoy broad discretion to decide whom to hire or fire, making the specific merits of COVID-19 vaccination as a condition for starting or continuing employment irrelevant.[23] Employees who decline vaccination may pursue opportunities elsewhere:

> Although her claims fail as a matter of law, it is also necessary to clarify that [the plaintiff] has not been coerced. [The plaintiff] says that she is being forced to be injected with a vaccine or be fired. This is not coercion. Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer. [The plaintiff] can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.
>
> If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain.[24]

Other cases have similarly observed that no employee is "being imprisoned and vaccinated against his or her will," but rather that employees are "choosing whether to comply with a condition of employment, or to deal with the potential consequences of that choice."[25] Policies establishing vaccination as a condition

23. Bridges v. Hous. Methodist Hosp., 543 F. Supp. 3d 525, 526 (S.D. Tex. 2021) (explaining that "Texas law only protects employees from being terminated for refusing to commit an act carrying criminal penalties" and that plaintiff's reasons for rejecting vaccination were based on scientific claims that were "false" and "irrelevant"), *aff'd*, No. 21-20311, 2022 WL 2116213 (5th Cir. June 13, 2022).

24. *Id.* at 528.

25. Beckerich v. St. Elizabeth Med. Ctr., 563 F. Supp. 3d 633, 644 (E.D. Ky.), *reconsideration denied*, No. CV 21-105, 2021 WL 4722915 (E.D. Ky. Sept. 30, 2021); *see also id.* at 646–47 ("Plaintiffs agree to wear a certain uniform, to arrive at work at a certain time, to leave work at a certain time, to park their vehicle in a

of employment do not categorically require vaccination, but present employees with a choice.[26] The same is true for businesses' discretion to decide which customers to serve or admit. Other in-person participants, such as university students, are treated similarly.[27]

Courts have, however, recognized that medical and religious objections to conditions of employment or participation, including but not limited to vaccination, merit special solicitude under statutes and other precedents requiring reasonable accommodation. As an early case puts it, "employers can require employees be vaccinated against COVID-19 subject to reasonable accommodations for employees with disabilities or sincerely held religious beliefs that preclude vaccination."[28] Federal statutes likewise require employers to reasonably accommodate medical and religious needs, including the need to not be vaccinated.[29] However, employers need not endure undue hardship to offer a reasonable accommodation,[30] nor does reasonable accommodation require identical treatment or the employee's preferred form of accommodation.[31] Furthermore, decisions to place employees on unpaid leave or terminate them generally cannot be enjoined because of failure to accommodate.[32]

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certain spot, to sit at a certain desk and to work on certain tasks. They also agree to receive an influenza vaccine, which Defendants have required of their employees for the past five years.").

26. We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 293–94 (2d Cir.) ("Although individuals who object to receiving the vaccines on religious grounds have a hard choice to make, they do have a choice. Vaccination is a condition of employment in the healthcare field; the State is not forcibly vaccinating healthcare workers."), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021), *denying injunction pending appeal sub nom.*, Dr. A v. Hochul, 142 S. Ct. 552 (2021), *and cert. denied sub nom.*, Dr. A v. Hochul, 142 S. Ct. 2569 (2022).

27. Klaassen v. Trs. of Ind. Univ., 7 F.4th 592, 593 (7th Cir. 2021) ("Indiana does not require every adult member of the public to be vaccinated, as Massachusetts did in *Jacobson*. Vaccination is instead a condition of attending Indiana University. People who do not want to be vaccinated may go elsewhere."); Messina v. Coll. of N.J., 566 F. Supp. 3d 236, 248 (D.N.J. 2021) ("Plaintiffs have the choice to become fully remote students, defer enrollment for a semester . . . or transfer to a school with no COVID-19 vaccination policy."); Dixon v. De Blasio, 566 F. Supp. 3d 171, 184 (E.D.N.Y. 2021) ("The[] [emergency executive orders] merely place reasonable restrictions on those who choose not to get vaccinated, given the current dynamics of the global pandemic."), *vacated and remanded*, No. 21-2666, 2022 WL 961191 (2d Cir. Mar. 28, 2022).

28. *Bridges*, 543 F. Supp. 3d at 527.

29. *See, e.g.*, Rehabilitation Act of 1973, 29 U.S.C. § 794; Sch. Bd. v. Arline, 480 U.S. 273, 273 (1987).

30. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 75 (1977).

31. *E.g.*, Noll v. Int'l Bus. Machs. Corp., 787 F.3d 89, 95 (2d Cir. 2015) ("[E]mployers are not required to provide a perfect accommodation or the very accommodation most strongly preferred by the employee."); Breyer v. Pac. Univ., No. 17-CV-00036, 2020 WL 1161434, at *22 (D. Or. Mar. 10, 2020) (explaining that those seeking accommodations need not "be provided an experience identical to" others), *aff'd*, No. 20-35304, 2021 WL 3829966 (9th Cir. Aug. 27, 2021).

32. The decision departing furthest from this norm has been *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610 (5th Cir. Feb. 17), *rev'g and remanding* 570 F. Supp. 3d 409 (N.D. Tex. 2021), *reh'g denied*, 45 F.4th 877 (5th Cir. 2022). The *Sambrano* majority reversed a district court's refusal to grant a preliminary injunction on the unusual basis that while being placed on unpaid leave due to a religious objection to vaccination is a reparable injury that would not ordinarily justify an injunction, receiving a postcard stating that unpaid leave will begin unless one becomes vaccinated is "ongoing coercion" that supported the injunction. *Id.* at *9–10. The decision prompted a vigorous dissent. *See id.* at *10–37 (Smith, J., dissenting). The First Circuit subsequently declined to follow *Sambrano* in a similar case. Together Emps. v. Mass Gen. Brigham Inc., 32

B. STATE-LEVEL ENACTMENTS

As the prior Subpart explains, courts have not found a specific prohibition on private consideration of vaccination status either in federal statutory or common law. As this Subpart explains, however, some states have acted by statute or executive order to limit private consideration of vaccination status. The most extensive restrictions have been adopted in Florida, Montana, and Tennessee, which seek to prohibit private businesses from requiring vaccination as a condition of employment or service provision.[33] Alabama, Iowa, North Dakota, and Texas do not prohibit employee vaccination requirements, but do restrict requirements for customer vaccine documentation.[34] Although South Carolina allows private employers to make vaccination a condition of employment, it restricts the enforcement of vaccination requirements for customers, vendors, and independent contractors.[35]

F.4th 82, 86 (1st Cir. 2022) ("It is black-letter law that 'money damages ordinarily provide an appropriate remedy' for unlawful termination of employment.").

33. Montana law provides that, other than a limited exception for healthcare facilities,

> it is an unlawful discriminatory practice for: (a) a person or a governmental entity to refuse, withhold from, or deny to a person any local or state services, goods, facilities, advantages, privileges, licensing, educational opportunities, health care access, or employment opportunities based on the person's vaccination status or whether the person has an immunity passport; (b) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status or whether the person has an immunity passport; or (c) a public accommodation to exclude, limit, segregate, refuse to serve, or otherwise discriminate against a person based on the person's vaccination status or whether the person has an immunity passport.

MONT. CODE ANN. § 49-2-312 (West 2022); *see also* FLA. STAT. ANN. § 381.00316(1) (West 2022) ("A business entity . . . may not require patrons or customers to provide any documentation certifying COVID-19 vaccination or postinfection recovery to gain access to, entry upon, or service from the business operations in this state."); TENN. CODE ANN. § 14-2-102 (2022) ("A private business, governmental entity, school, or local education agency shall not compel or otherwise take an adverse action against a person to compel the person to provide proof of vaccination if the person objects to receiving a COVID-19 vaccine for any reason.").

34. TEX. HEALTH & SAFETY CODE ANN. § 161.0085 (West 2022) ("A business in this state may not require a customer to provide any documentation certifying the customer's COVID-19 vaccination or post-transmission recovery on entry to, to gain access to, or to receive service from the business. A business that fails to comply with this subsection is not eligible to receive a grant or enter into a contract payable with state funds."); N.D. CENT. CODE ANN. § 23-12-20 (West 2022) ("A private business located in this state or doing business in this state may not require a patron, client, or customer in this state to provide any documentation certifying COVID-19 vaccination, the presence of COVID-19 pathogens, antigens, or antibodies, or COVID-19 post-transmission recovery to gain access to, entry upon, or services from the business."); IOWA CODE ANN. § 27C.2 (West 2022) ("[A] business or governmental entity shall not require a customer, patron, client, patient, or other person who is invited onto the premises of the business or governmental entity to furnish proof of having received a vaccination for COVID-19 . . . prior to entering onto the premises of the business or governmental entity."); ALA. CODE § 22-11B-5 (2022) ("An entity or individual doing business in this state may not refuse to provide any goods or services, or refuse to allow admission, to a customer based on the customer's immunization status or lack of documentation that the customer has received an immunization.").

35. H. 3126, Gen. Assemb., 124th Sess. § 7 (S.C. 2022) ("A private employer's vaccine mandate may not: (1) extend to independent contractors, nonemployee vendors, or other third parties that provide goods or services to the employer . . . and (2) be used to coerce independent contractors, nonemployee vendors, or other third parties that provide goods or services to the employer into implementing a vaccine mandate to maintain the business relationship."); *id.* § 9 ("All persons shall be entitled to the full and equal enjoyment of the goods,

While Oklahoma has not prohibited employer consideration of vaccination status, it prohibits "the governing board of a private postsecondary educational institution . . . [from] requir[ing] a vaccination against [COVID-19] as a condition of admittance to or attendance of the school or institution," "requir[ing] a vaccine passport as a condition of admittance to or attendance of the school or institution," or "[i]mplement[ing] a mask mandate for students who have not been vaccinated against COVID-19."[36] Iowa similarly prohibits private universities from requiring COVID-19 vaccination as a condition of attendance.[37]

Several states that do not categorically bar employers from considering vaccination status have nonetheless mandated that private businesses offer expansive exemptions. For example, Florida forbids businesses from establishing vaccination as a condition of employment for pregnant employees and those with "anticipated pregnancy."[38] This directive exempting pregnant employees from vaccine requirements came despite the Centers for Disease Control and Prevention (CDC) and other expert organizations' strong recommendation of vaccination for those who are or expect to be pregnant.[39] Other states require employers to allow exemptions for those who test weekly or show "the presence of antibodies, T cell response, or proof of a positive coronavirus 2019 (COVID-19) or its variants test."[40] Utah and Tennessee require private employers to treat prior infection identically to vaccination.[41]

Some states that do not limit private actors' ability to consider vaccination status nonetheless have limited their own subdivisions, such as state employers and universities, from doing so. For instance, South Carolina prohibits state

services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination or segregation on the basis of the person's vaccination status.").

36. OKLA. STAT. ANN. tit. 70, § 1210.189 (West 2022).

37. IOWA CODE ANN. § 139A.8B (West 2022); *see* Letter from Kim Reynolds, Governor, Off. of the Governor of Iowa, to Hon. Paul Pate, Sec'y of State, Off. of the Iowa Sec'y of State (June 14, 2022), https://www.legis.iowa.gov/docs/publications/LGE/89/Attachments/HF2298_GovLetter.pdf.

38. FLA. STAT. ANN. § 381.00317 (West 2022) ("A private employer may not impose a COVID-19 vaccination mandate for any full-time, part-time, or contract employee without providing individual exemptions that allow an employee to opt out of such requirement on the basis of medical reasons, including, but not limited to, pregnancy or anticipated pregnancy; religious reasons; COVID-19 immunity; periodic testing; and the use of employer-provided personal protective equipment.").

39. *COVID-19 Vaccines While Pregnant or Breastfeeding*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/pregnancy.html (July 14, 2022). As the CDC explains, this recommendation is based on strong evidence that pregnancy increases the risk of severe complications from COVID-19 infection. *Id.*

40. *See* ARK. CODE ANN. § 11-5-118 (2022); *see also* IOWA CODE ANN. § 27B.2 (West 2022) (referencing exemptions for "periodic testing" and "COVID-19 immunity").

41. TENN. CODE ANN. § 14-2-105 (2022) ("A private business shall not adopt or enforce a rule, policy, procedure, or practice arising from COVID-19 that . . . [f]ails to recognize natural immunity as providing a level of immune protection that is at least as protective as a COVID-19 vaccine; or . . . [t]reats individuals with acquired immunity differently than individuals who have received the COVID-19 vaccine."); H.R. 63, 2022 Gen. Sess. (Utah 2022) (requiring that an employer exempt an employee from a COVID-19 vaccine requirement on receipt of "a letter from the employee or prospective employee's primary care provider stating that the employee or prospective employee was previously infected by COVID-19").

universities from selectively exempting vaccinated students from mask requirements.[42] Arkansas prohibits state employers from "[w]ithholding the opportunity for career advancement from an employee who does not consent to receiving a vaccine or immunization for coronavirus 2019 (COVID-19)[,] or . . . [w]ithholding a salary, a wage increase, insurance, or insurance discounts from" such an employee.[43] Utah has adopted similar restrictions, but confined to COVID-19 vaccines under emergency-use authorization.[44]

Some litigants have challenged these state-level efforts to limit consideration of vaccination status, with occasional success. Arizona's enactments were enjoined for procedural reasons: they failed to satisfy the state's single-subject rule for legislation.[45] Florida's prohibition on private businesses requiring vaccine verification was initially enjoined as an unconstitutional restriction on speech and, as applied to cruise lines, as a likely violation of the Dormant Commerce Clause, but the injunction was vacated on appeal.[46] Some similar enactments may also be preempted by federal enactments that aim to stem the harms of communicable diseases. Perhaps in recognition of this, Montana's statute recognizing unvaccinated people as a legally protected class contains an exemption for businesses complying with federal rules on the receipt of Medicare and Medicaid funds.[47]

Montana's limits on private vaccine requirements were also challenged under the state constitution, but the plaintiff's rights under the Montana Constitution to a clean and healthful environment and to protect his life and liberty were found not to encompass a right to establish vaccination as a condition of employment.[48] The court's opinion rested on the dubious leap from the claim that "even vaccinated individuals can carry and transmit the virus" to the conclusion that the plaintiff "ha[d] not shown that without the prohibitions, his exposure would decrease as vaccinated individuals can still carry viruses."[49] While vaccination does not completely prevent transmission, it does reduce the odds that someone is infected and the duration and probability of transmission once infected.[50] Vaccination requirements therefore do likely decrease exposure.

The court's strained reasoning would imply that an employer cannot prohibit drivers from having a beer on duty, even though alcohol consumption

42. Creswick v. Univ. of S.C., 862 S.E.2d 706, 710 (S.C. 2021) ("[Recently adopted legislative provisions] clearly and unambiguously prohibit a state-supported institution of higher education from discriminating against unvaccinated students, faculty, and staff by requiring them to wear masks").

43. ARK. CODE ANN. § 20-7-143(e)(2)–(3) (2022).

44. UTAH CODE ANN. § 26-68-102 (West 2022).

45. Ariz. Sch. Bds. Ass'n, Inc. v. State, 501 P.3d 731, 734 (Ariz. 2022).

46. Norwegian Cruise Line Holdings Ltd. v. State Surgeon Gen., Fla. Dept. of Health, 50 F.4th 1126 (11th Cir. 2022), *vacating* Norwegian Cruise Line Holdings, Ltd. v. Rivkees, 553 F. Supp. 3d 1143 (S.D. Fla. 2021).

47. MONT. CODE ANN. §§ 49-2-312 to -313 (West 2022).

48. *See generally* Netzer L. Off., P.C. v. State *ex rel.* Knudsen, No. DV-21-89 (Mont. 7th Jud. Dist. Ct. Feb. 1), *aff'd and remanded on other grounds*, 520 P.3d 335 (Mont. 2022).

49. *Id.* at 10.

50. *See* Natalie E. Dean & M. Elizabeth Halloran, *Protecting the Herd with Vaccination*, 375 SCI. 1088, 1088–89 (2022), https://doi.org/10.1126/science.abo2959.

increases risk. After all, sober individuals can still get into car accidents. The court could have reached the same result by conceding that vaccine requirements do decrease exposure, but concluding that the state's interest in preventing the consideration of vaccination status outweighs the plaintiff's interest in minimizing exposure to COVID-19. The court's actual reasoning implies that a vaccine shown to markedly decrease transmission (for instance, a variant-specific or nasal vaccine)[51] could potentially be required under the state constitution.

II. GOVERNMENTAL CONSIDERATION OF VACCINATION STATUS

Governments have often also considered vaccination status or directed others to do so. When the government acts as an employer or vendor, it is treated akin to a private decisionmaker.[52] The legal issues particular to government action arise when the government acts as a regulator—for instance, by requiring or incentivizing private businesses to consider vaccination status.

A. STATE POLICE POWER

States have a long-recognized permission to consider vaccination status, or require businesses to do so, as part of their broad "police powers" to promote public health.[53] During the COVID-19 pandemic, some voluntarily limited their own power,[54] or the power of localities within the state,[55] to consider vaccination status. However, as this Subpart explains, in states that reserve the power to consider vaccination status, courts typically find that state efforts to consider vaccination status, or to direct private parties to do so, fall within the state's police power.

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51. *See id.*

52. *E.g.*, Smith v. Biden, No. 21-CV-19457, 2021 WL 5195688, at *7 (D.N.J. Nov. 8) (explaining that "the federal government has at least as much, if not broader, power and deference . . . where it is acting as an employer" than a state has when exercising its police power, and therefore applying rational basis review), *appeal filed*, No. 21-3091 (3d Cir. 2021); Mass. Corr. Officers Federated Union v. Baker, 567 F. Supp. 3d 315, 326 (D. Mass. 2021) (upholding a vaccine requirement for state employees and noting that the "vaccine requirement ha[d] a significant nexus to the employment of the Plaintiffs").

53. Jacobson v. Massachusetts, 197 U.S. 11, 35 (1905).

54. *E.g.*, ARK. CODE ANN. § 20-7-143(b)(1) (2022) ("The state, a state agency or entity, a political subdivision of the state, or a state or local official shall not mandate or require an individual to receive a vaccine or immunization for coronavirus 2019 (COVID-19)."); N.H. REV. STAT. ANN. § 141-C:1-a (2022) ("[N]o person may be compelled to receive an immunization for COVID-19 in order to secure, receive, or access any public facility, any public benefit, or any public service from the state of New Hampshire, or any political subdivision thereof . . . ."); ALA. CODE § 22-11B-5(b) (West 2022) ("A state or local government entity or agency, or any of its officers or agents, may not require an individual to receive an immunization or present documentation of an immunization as a condition for receiving any government service or for entry into a government building, except as otherwise required by . . . applicable state law.").

55. MO. ANN. STAT. § 67.308 (West 2022) ("No county, city, town or village in this state receiving public funds shall require documentation of an individual having received a vaccination against COVID-19 in order for the individual to access transportation systems or services or any other public accommodations.").

States, unlike private businesses, are directly subject to the Fourteenth Amendment.[56] Some have challenged states' consideration of vaccination status on the basis that vaccine refusers are a protected class for equal protection purposes, or that refusal is a fundamental right. These claims have been unsuccessful. For instance, when plaintiffs argued that a New Mexico public health order requiring vaccination against COVID-19 for entry to certain settings unconstitutionally targeted "a class of individuals who . . . are punished for being unvaccinated and discriminated against without any real justifiable basis and without providing them any alternative," their challenge was rejected on the basis that the "classification of individuals as to whom vaccination requirements apply[] is grounded in medicine and science" and "does not categorize persons based on suspect classifications, such as race and national origin, or on 'quasi-suspect' classifications, such as gender and illegitimacy."[57] Another court similarly rejected a plaintiff's argument that a state university policy considering vaccination status unfairly "discriminate[d] against the unvaccinated, who [the plaintiff] describe[d] as 'a politically unpopular group.'"[58] Other cases similarly recognize that unvaccinated people are not by virtue of their unvaccinated status a constitutionally protected class for the purpose of heightened equal protection scrutiny.[59]

Courts have likewise rejected the argument that prior COVID-19 infection legally must be treated similarly to vaccination.[60] It is worth explaining some of the factual differences between prior infection and vaccination, which amply surpass the "rational speculation" that suffices to pass the rational basis test. First, even if some people with prior infection were as well protected as some vaccinated, but never-infected people, vaccination after infection provides additional "hybrid immunity," which serves the compelling state interest of

56. Blum v. Yaretsky, 457 U.S. 991, 1002 (1982) ("[A]ction inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (internal quotation marks and citations omitted) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948))).

57. Valdez v. Grisham, 559 F. Supp. 3d 1161, 1177–78 (D.N.M. 2021) (internal quotation marks omitted), *aff'd*, No. 21-2105, 2022 WL 2129071 (10th Cir. June 14, 2022).

58. Kheriaty v. Regents of Univ. of Cal., No. SACV 21-1367, 2021 WL 5238586, at *8 (C.D. Cal. Sept. 29, 2021).

59. Bauer v. Summey, 568 F. Supp. 3d 573, 597 (D.S.C. 2021) ("Although the Policies treat unvaccinated individuals differently than those vaccinated by only subjecting the former to potential termination, such differential treatment does not target a suspect class."); Rodriguez-Vélez v. Pierluisi-Urrutia, No. 21-CV-1366, 2021 WL 5072017, at *14 (D.P.R. Nov. 1) ("[U]nvaccinated persons do not conform a suspect or quasi-suspect classification, and based on the record, there is a rational basis to treat unvaccinated persons differently than vaccinated individuals."), *appeal filed*, No. 21-2005 (1st Cir. 2021); *see also* Williams v. Brown, 567 F. Supp. 3d 1213, 1227–28 (D. Or. 2021) (describing a "growing consensus" that "no fundamental right or suspect classification is implicated by" policies considering vaccination status, such as vaccine requirements).

60. *Kheriaty*, 2021 WL 5238586, at *7 (rejecting the application of strict scrutiny to a public health order considering vaccination status, given "no precedent showing a court that extended the heightened protections provided to other suspect or quasi-suspect classes to vaccination status").

increasing both individual and population-level protection.[61] In other contexts, the government may use analogous "belt and suspenders" approaches, such as continuing to require seat belts in all vehicles even if riding unbelted in a modern vehicle with collision-detection systems and air bags proves as safe as riding belted in an older car. Second, both proof of prior infection and the amount of protection prior infection (especially with pre-omicron strains) alone confers remain difficult to assess. Third, for other vaccination requirements, decisionmakers are not legally required to exempt people with prior infection from other, non-COVID-19 vaccination requirements. Fourth, regarding prior infection as equivalent to vaccination can create perverse incentives to seek out infection. These incentives present an additional reason for prioritizing immunity through vaccination over immunity via prior infection.[62]

Contentions that remaining unvaccinated is a fundamental right have likewise been unavailing. In upholding a state public health order requiring proof of vaccination for certain activities or occupations, one court observed that the plaintiffs never "address[ed] how the right to work in a hospital or attend the State Fair, unvaccinated and during a pandemic, is 'deeply rooted in this Nation's history and tradition.'"[63] The opinion then noted, with respect to the plaintiffs' right to employment claim, that the "right to practice in [one's] chosen profession . . . does not invoke heightened scrutiny."[64] Other courts have explained that the fundamental right to refuse medical treatment does not encompass consequence-free vaccine refusal.[65]

An important difference between vaccine refusal and constitutionally protected conduct or class membership is that any unpopularity vaccine refusal incurs stems from its costs to others. Analogously, while smokers and drinkers may be politically unpopular, taxes or fees on cigarettes and alcohol and the enforcement of prohibitions on smoking and drinking in certain settings are not legally problematic, because these laws attempt to reduce or counterbalance the social costs of smoking and drinking, such as the burden on healthcare systems.[66] Such enactments aimed at offsetting social cost contrast with laws targeting marginalized groups that have been struck down as pure animus because they were not grounded in a judgment regarding harm to others.[67] Equal protection

61. Ewen Callaway, *COVID Super-Immunity: One of the Pandemic's Great Puzzles*, 598 NATURE 393, 394 (2021), https://www.nature.com/articles/d41586-021-02795-x.

62. Daniel J. Hemel & Anup Malani, *Immunity Passports and Moral Hazard* 3 (Univ. Chi. L. Sch., Coase-Sandor Inst. for L. & Econ., Working Paper No. 905, 2020), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2682&context=law_and_economics.

63. Valdez v. Grisham, 559 F. Supp. 3d 1161, 1173 (D.N.M. 2021) (quoting ETP Rio Rancho Park, LLC v. Grisham, 522 F. Supp. 3d 966, 1029–31 (D.N.M. 2021)), *aff'd*, No. 21-2105, 2022 WL 2129071 (10th Cir. June 14, 2022).

64. *Id.* (quoting Guttman v. Khalsa, 669 F.3d 1101, 1118 (10th Cir. 2012)).

65. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

66. *See* Gallagher v. City of Clayton, 699 F.3d 1013, 1018 (8th Cir. 2012) (explaining that smokers are not a legally protected class).

67. *E.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996).

claims by unvaccinated plaintiffs that appeal to other nonprotected classifications—for instance, making vaccination a condition of employment for health workers but not teachers—have similarly been unavailing.[68]

Against this general trend, a few decisions do suggest that policies disadvantaging unvaccinated people raise special concerns compared to other conditions of employment or participation, even when these concerns do not rise to a level that supports policy invalidation. For instance, in the course of upholding a university policy that considers vaccination status, the Seventh Circuit determined that requiring plaintiffs with religious objections to "wear masks and be tested" is not "constitutionally problematic," but distinguished that "problems . . . may arise when a state refuses to make accommodations" for those who refuse vaccination.[69] But there is no obvious reason why required vaccination is more *legally* concerning, or more inherently problematic when it conflicts with religious objections, than required masking or testing. Indeed, many people perceive masking as more burdensome than vaccination, as indicated by the fact that most Americans are vaccinated against COVID-19, whereas most no longer regularly wear masks.[70] Relevantly, vaccination against various diseases has long been required for school attendance, while regular, universal masking has not. Testing, meanwhile, involves a physical sample that in principle discloses genetic and other personal information,[71] whereas vaccination does not. The brief, occasional, single-purpose bodily imposition involved in vaccination is arguably less substantial a burden than testing weekly, particularly at one's own expense,[72] or masking for the entirety of a work or school day. Vaccination is certainly more *politically* controversial than masking and testing because of a better-resourced and longer-standing anti-vaccination movement, but this does not make vaccine refusal a more *legally* significant interest than going unmasked or untested.

The only successful challenges to policies that consider vaccination status have been what I call "incidental" challenges. These seek to enjoin policies not because vaccine refusal is a protected interest or unvaccinated people are a protected class, but because some other constraint on government power precludes the consideration of vaccination status. With respect to state law, these challenges have involved the Constitution's Free Exercise Clause.

The leading case upholding a free exercise challenge to vaccine mandates is *Dahl v. Board of Trustees*, in which the Sixth Circuit declined to stay a

68. Andre-Rodney v. Hochul, 569 F. Supp. 3d 128, 136 (N.D.N.Y. 2021) ("A classification based on one's profession or work setting is not a suspect classification subject to strict scrutiny.").

69. Klaassen v. Trs. of Ind. Univ., 7 F.4th 592, 593 (7th Cir. 2021).

70. *Despite Awareness of Covid-19 Risks, Many Americans Say They're Back to 'Normal*,*'* ANNENBERG PUB. POL'Y CTR. OF THE UNIV. OF PA. (Aug. 9, 2022), https://www.annenbergpublicpolicycenter.org/despite-awareness-of-covid-19-risks-many-americans-say-theyre-back-to-normal/.

71. *Cf.* People v. Buza, 413 P.3d 1132, 1152 (Cal. 2018).

72. Rodriguez-Vélez v. Pierluisi-Urrutia, No. 21-CV-1366, 2021 WL 5072017, at *18 (D.P.R. Nov. 1, 2021), *appeal filed*, No. 21-2005 (1st Cir. 2021).

preliminary injunction prohibiting Western Michigan University from requiring students, including those with religious objections, to receive COVID-19 vaccination as a condition of athletic participation.[73] The university "did not dispute that taking the vaccine would violate plaintiffs' 'sincerely held Christian beliefs.'"[74] The case therefore concerned a legal issue not special to vaccination that has prompted much recent debate: whether and when a policy that burdens sincere religious exercise is constitutionally permissible under the Free Exercise Clause. The *Dahl* court determined that, "having announced a system under which student-athletes can seek individualized exemptions, the University must explain why it chose not to grant any to plaintiffs," and "did not fairly do so here."[75] The court then concluded, relying on the Supreme Court's 2021 decision in *Fulton v. City of Philadelphia*,[76] that "a policy that provides a 'mechanism for individualized exemptions' is not generally applicable."[77] Such a policy, including the university policy at issue, was therefore subject to strict scrutiny.[78] Because the university policy only applied to athletes, it was somewhat underinclusive and "falter[ed] on the narrow tailoring prong" of strict scrutiny analysis.[79]

While the court enjoined the university policy, it took pains to explain that "[t]he University's interest in fighting COVID-19 is compelling," and that "other attempts by the University to combat COVID-19, even those targeted at intercollegiate athletics, may pass constitutional muster."[80] The court also noted that the decision was "a close call,"[81] and carefully qualified its holding as "narrow."[82] The holding of *Dahl* is not that considering vaccination status is categorically inappropriate, but only that doing so in the specific way the university selected violated other constitutional strictures.

B. FEDERAL DECISIONMAKERS

Outside of situations where the federal government is an employer or regulator, federal efforts to consider vaccination status or direct others to do so have faced greater headwinds than state efforts. This reflects the difficulty of passing federal legislation, as well as courts' recent narrow interpretation of federal agency authority to protect public health. As in the *Dahl* decision, the obstacles to federal consideration of vaccination status have stemmed not from anything unique to vaccination status, but rather from other purported limits on

73. 15 F.4th 728, 730 (6th Cir. 2021) (per curiam), *appeal dismissed*, No. 21-2945, 2021 WL 7501792 (6th Cir. Nov. 18, 2021).
74. *Id.* at 732.
75. *Id.* at 736.
76. 141 S. Ct. 1868 (2021).
77. *Dahl*, 15 F.4th at 733 (quoting *Fulton*, 141 S. Ct. at 1877).
78. *Id.* at 734.
79. *Id.* at 735.
80. *Id.* at 736.
81. *Id.* at 730.
82. *Id.* at 736.

government power. This Subpart focuses on two recent decisions upholding an injunction against one prominent federal effort to consider vaccination status: OSHA's emergency rule requiring large employers to ensure that their employees were either vaccinated or tested weekly.

1. BST Holdings, L.L.C. v. OSHA

The most voluminous example of how courts have stymied federal efforts to consider vaccination status is the Fifth Circuit's opinion in *BST Holdings, L.L.C. v. OSHA*, enjoining OSHA's emergency temporary standard (ETS) requiring employers with 100 or more employees to ensure that all employees without recognized exemptions were tested weekly unless vaccinated.[83] *BST* describes the OSHA ETS as having the effect of "forcing unwilling employees to take their shots, take their tests, or hit the road."[84] Yet this description illustrates how, rather than being a "vaccine mandate,"[85] as the Fifth Circuit panel described it, the ETS's consideration of vaccination status offered two alternative options. Instead of being vaccinated, workers had the alternative option of taking weekly COVID-19 tests. The "vaccine mandate" could just as easily have been described as a testing requirement with an exception for vaccinated employees. Additionally, as with the private employer policies discussed above, the ETS contained no categorical mandate that people either be tested or vaccinated: testing and vaccination were only required conditional on continued employment at a covered business, giving workers the option to seek employment elsewhere.

The court in *BST* could have elected, paralleling *Dahl*, to enjoin the ETS on fairly narrow grounds. As the opinion observes, OSHA rarely issues an ETS.[86] But the *BST* court chose otherwise. Rather than focusing on the core administrative law issue of whether the ETS fell within OSHA's authority, the opinion makes a number of dubious scientific, political, and legal claims unnecessary to the ultimate resolution of the case, thereby introducing a great deal of confusion.

a. Federal Power To Regulate Firms and Individuals

The *BST* opinion wrongly claims that "[a] person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity" that Congress cannot reach under its Commerce Clause powers.[87] However, the ETS in no way directly regulated individual choices, such as "[a] person's choice to remain unvaccinated and forgo regular testing."[88] Someone outside an employment

83. 17 F.4th 604, 619 (5th Cir.), *dissolving stay*, *In re* MCP No. 165, 21 F.4th 357 (6th Cir. 2021), *granting application for stay*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022).

84. *Id.* at 610.

85. *Id.* at 609.

86. *Id.*

87. *Id.* at 617.

88. *Id.*

setting could thus remain unvaccinated and forgo regular testing without fear of OSHA action. What the ETS regulated were *firms*, not individuals: in particular, firms' choices to conduct in-person operations with workers who are neither vaccinated nor regularly tested.[89] If anything is economic activity, in-person employment surely is, and regulations on the conditions of such employment have been recognized since the 1930s as standing at the core of Congress's Commerce Clause powers.[90] Indeed, the Supreme Court's modern Commerce Clause jurisprudence began by upholding rules that limited workers' ability to voluntarily accept certain risks at work.[91] And while states, unlike the federal government, enjoy broad police power to require vaccination regardless of its connection to economic activity, the existence of state power does not negate federal power to require firms to protect workers from infectious disease.

The claim in *BST* that the ETS "commandeer[ed] U.S. employers to compel millions of employees to receive a COVID-19 vaccine or bear the burden of weekly testing"[92] similarly stretches the concept of commandeering beyond recognition. The duty to abide by employment regulation is not "commandeering," but a core duty of employers. The Supreme Court recognized that *states*—independent sovereigns—have a Tenth Amendment right not to have their resources commandeered by the federal government,[93] but there is no parallel amendment shielding *private firms* from regulatory oversight.

The *BST* opinion also dubiously claims that "the Mandate threaten[ed] to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)."[94] But unlike the First Amendment freedoms that the court cites, the interest in continued employment at the same private employer is not a constitutionally protected one: courts recognize no "constitutional freedom" or fundamental right to remain in one's present job.[95]

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89. The subsequent Sixth Circuit opinion dissolving the stay issued in *BST* recognized this: "It has long been understood that regulating employers is within Congress's reach under the Commerce Clause. To hold otherwise would upend nearly a century of precedent upholding laws that regulate employers to effectuate a myriad of employee workplace policies." *In re* MCP No. 165, 21 F.4th 357, 384 (6th Cir. 2021), *dissolving stay*, 17 F.4th 604, *granting application for stay*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022).

90. MICHAEL A. FOSTER & ERIN H. WARD, IF11971 CONG. RSCH. SERV., CONGRESS'S AUTHORITY TO REGULATE INTERSTATE COMMERCE (2021). *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941).

91. *E.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 394 (1937) (upholding a minimum wage statute and stating, with respect to a worker who may wish to work pursuant to an unfair labor contract, that "[t]he State still retains an interest in his welfare, however reckless he may be," and has an interest in avoiding circumstances where "the individual health, safety, and welfare are sacrificed or neglected").

92. 17 F.4th at 617.

93. New York v. United States, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

94. 17 F.4th at 618.

95. Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 201 (1979) (rejecting the substantive due process and equal protection claims of a worker who was "not willing to comply with the continuing-education requirement or to give up her job"); *see also* Conrad v. Cnty. of Onondaga Examining Bd. for Plumbers, 758 F. Supp. 824, 828 (N.D.N.Y. 1991) ("The Supreme Court indicated . . . that a person is not deprived of liberty when he or she is denied one job but remains as free as before to seek another." (internal quotation marks omitted)); Franceschi v. Yee, 887 F.3d 927, 939 (9th Cir. 2018) (holding that even if a substantive due process right was implicated,

Similarly, nothing about the ETS undermined "the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps particularly, when those decisions frustrate government officials."[96] The ETS did not tell any individual how they must decide: it only required that individuals who decide to refuse vaccination and testing accept the economic consequences of those decisions rather than externalize those costs onto others.

b. Agency Action To Address Disease

With the spurious constitutional claims cleared away, the ETS can be recognized as presenting a familiar administrative law question: does OSHA's enabling statute authorize it to issue regulations like the ETS? Even with respect to this narrower issue, the *BST* opinion quickly devolves into misleading rhetoric. The opinion asserts that OSHA's enabling statute was not "intended to authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping 'pronouncements' on matters of public health affecting every member of society in the profoundest of ways."[97] But the issue presented in *BST* was not whether OSHA can make pronouncements—it was whether OSHA has the authority to regulate the safety of employment conditions. Nor does the court explain how OSHA's ETS affects "every member of society in the profoundest of ways."[98] The ETS may reduce the incidence of COVID-19 spread and hospitalization, but it is hardly unprecedented or profound. Many workplace and other government regulations increase safety. The ETS may also have lead, as *BST* emphasizes, to workers who refuse both vaccination and testing leaving their jobs. But, again, the effect of regulations on employment is hardly unprecedented or profound. Indeed, unlike regulations that prohibit firms from manufacturing or buying certain products, the ETS left employers free to do exactly as they previously did; all they needed to show is that their workers were vaccinated or tested. While the ETS possibly narrowed employment opportunities for workers who chose to both remain unvaccinated and refuse testing, it widened employment opportunities for others. Rather than causing jobs to be lost, the ETS merely altered who could occupy job positions.

The opinion subsequently complains that the ETS is the "rare government pronouncement that is both overinclusive . . . *and* underinclusive."[99] To the contrary, as myriad courts have observed[100]—including in cases involving

the regulation would need only a rational connection with the applicant's fitness or capacity to engage in the type of professional employment at issue).

96. *BST*, 17 F.4th at 618–19.

97. *Id.* at 611.

98. *Id.*

99. *Id.*

100. Vance v. Bradley, 440 U.S. 93, 108 (1979) ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn . . . imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'" (quoting Phillips Chem. Co. v. Dumas Sch. Dist., 361 U.S. 376, 385 (1960))); St. Joan Antida High Sch. 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

various pandemic policies such as consideration of COVID-19 vaccination status[101]—many legally acceptable regulations are both overinclusive and underinclusive. Indeed, even the way in which the ETS was accused as "underinclusive"—drawing a line between employers with 100 employees and those with fewer—involves a species of underinclusiveness courts have recognized as less concerning.[102] So long as a regulation like the ETS does not impinge on a fundamental right or protected class, its underinclusiveness or overinclusiveness does not itself warrant invalidation.

The opinion then claims that "a 28 year-old trucker spending the bulk of his workday in the solitude of his cab is simply less vulnerable to COVID-19 than a 62 year-old prison janitor," and that "a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus."[103] Many factors, including age and occupational exposure—as well as, of course, vaccination—indeed affect how likely someone is to contract COVID-19 and the severity of their ensuing symptoms.[104] But the cited evidence does not make the vaccinate-or-test rule obviously overinclusive, nor does it show, more importantly, that underinclusiveness is fatal to the rule's legality. The same goes for the opinion's assertion that "the Mandate is a one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in workplaces (and workers) that have more than a little bearing on workers' varying degrees of susceptibility to the supposedly 'grave danger' the Mandate purports to address."[105] But most other regulation of workplace dangers is adopted in contexts where employee susceptibility varies and workplaces differ. The ETS was unexceptional in this regard.

The *BST* opinion also falters doctrinally in its attempt to hold the ETS to standards used when evaluating regulations that impinge on fundamental rights.

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means-ends fits."); Olson v. Bonta, No. CV-19-10956, 2021 WL 3474015, at *2 (C.D. Cal. July 16, 2021) ("Under Supreme Court and Ninth Circuit precedent, classifications that are 'to some extent both underinclusive and overinclusive' may survive rational-basis review, since 'perfection is by no means required' of legislatures." (quoting Gallinger v. Becerra, 898 F.3d 1012, 1018 (9th Cir. 2018))); Johnson v. Dep't of Just., 341 P.3d 1075, 1086 (Cal. 2015) ("A classification is not arbitrary or irrational simply because . . . it may be to some extent both underinclusive and overinclusive." (internal quotation marks and citation omitted)).

101. Kheriaty v. Regents of Univ. of Cal., No. SACV-21-1367, 2021 WL 5238586, at *8 (C.D. Cal. Sept. 29, 2021) ("[E]ven if a classification is 'to some extent both underinclusive and overinclusive and hence the line drawn [is] imperfect,' perfection is not required." (quoting *Bradley*, 440 U.S. at 108)); Let Them Play MN v. Walz, 517 F. Supp. 3d 870, 883 (D. Minn. 2021) ("A challenged law may survive even if it is both overinclusive and underinclusive in advancing the asserted interest . . . ."); Oakes v. Collier Cnty., 515 F. Supp. 3d 1202, 1210 (M.D. Fla. 2021) (holding that congressional "perfection is by no means required").

102. State v. Jodi D., 264 A.3d 509, 524 n.11 (Conn. 2021) ("[When] [the] legislature . . . [is] faced with a choice of drawing lines that would inevitably be somewhat arbitrary—in the sense that the lines could be moved in one direction or the other without significantly undermining the purpose of the legislation[,] . . . courts will defer to the legislature's [overinclusive] choice out of necessity.").

103. *BST*, 17 F.4th at 615.

104. *Assessing Risk Factors for Severe COVID-19 Illness*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/assessing-risk-factors.html (Nov. 30, 2020).

105. *BST*, 17 F.4th at 612.

The underinclusive law at issue in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, cited in *BST* as an analogue to the ETS, was legally infirm because it violated the First Amendment's requirement that "laws burdening religious practice must be of general applicability."[106] *Lukumi* does not set forth a general rule against underinclusive laws that do not target religious practice or other fundamental rights.

In addition to both overstating and attributing excessive significance to the ETS's imperfect tailoring, the *BST* opinion dramatically overstates the scope of the ETS itself, misrepresenting it as a "virtually unlimited power to control individual conduct under the guise of a workplace regulation."[107] The only power the ETS purported to exercise was modest: to remain employed at an employer with over 100 workers, you must either receive a COVID-19 vaccine or be tested weekly. This hardly reaches even the onerousness of typical conditions of employment, which can include wearing uniforms, covering up body art, and wearing contact lenses rather than glasses;[108] avoiding use of widely used, legal substances;[109] and even not posting constitutionally protected statements on social media.[110] Such employer power may seem "unlimited" to federal judges, who enjoy far more autonomy than most workers, but is well within typical employment norms.

Departing from other opinions' recognition of the seriousness of the COVID-19 pandemic, *BST* then repeatedly understates the government's interest in addressing the pandemic. It argues that the ETS addressed only "a purported 'emergency' that the entire globe has now endured for nearly two years."[111] But of course an ETS addressing vaccination would not have been practicable during the months before vaccines were available, nor during the period when vaccines remained in short supply, which prevented many workers from being fully vaccinated. Even afterward, it was reasonable for federal

106. 508 U.S. 520, 542 (1993).

107. 17 F.4th at 617.

108. Gerdom v. Cont'l Airlines, 692 F.2d 602, 606 (9th Cir. 1982); Frank v. United Airlines, Inc., 216 F.3d 845, 855 (9th Cir. 2000) ("An airline can require all flight attendants to wear contacts instead of glasses . . . ."); *In re* Jimmy John's Overtime Litig., No. 14 C 5509, 2018 WL 3231273, at *17 (N.D. Ill. June 14, 2018) ("Jimmy John's also mandates the dress and appearance of franchise employees. Jimmy John's requires all franchise employees to wear a Jimmy John's-approved t-shirt and hat and circumscribes the colors of the pants, shoes, and belt that employees can wear. Moreover, Jimmy John's has strict policies on facial hair, tattoos, jewelry, and other aspects of personal appearance. It even goes so far as to disallow employees from becoming managers if they have tattoos on their lower forearms."); Ruiz v. Affinity Logistics Corp., 754 F.3d 1093, 1098 (9th Cir. 2014) ("Affinity also required that tattoos and piercings be covered or removed and that facial hair be 'neatly groomed and properly shaved surrounding the beard.'"); Inturri v. City of Hartford, 365 F. Supp. 2d 240, 249 (D. Conn. 2005) ("[C]ourts consistently have upheld the ability of public employers to regulate the appearance of their employees."), *aff'd*, 165 F. App'x 66 (2d Cir. 2006).

109. Christopher Valleau, *If You're Smoking You're Fired: How Tobacco Could Be Dangerous to More Than Just Your Health*, 10 DEPAUL J. HEALTH CARE L. 457, 462 (2007).

110. Anders W. Lindberg, *Social Media Posts: A Fireable Offense?*, 21 NO. 5 W. VA. EMP. L. LETTER 1 (2015) ("[M]ost private-sector employees can be terminated for engaging in speech that doesn't meet with their employer's approval, including 'speech' in the form of social media postings.").

111. *BST*, 17 F.4th at 611.

regulators to wait to institute regulations until they were necessary. Indeed, some experts believed that rules like the ETS first required that COVID-19 vaccines receive full FDA approval.[112] The emergency supporting the ETS was not the mere existence of COVID-19, but the uncontrolled spread of COVID-19 through unvaccinated populations, causing widespread hospitalization and death. For much of 2021, regulators could have reasonably expected that an exceptionally well-resourced nation like the United States, able to procure multiple vaccine types in abundance, would attain sufficient rates of vaccination without necessitating policies like the OSHA ETS. Yet *BST* faults OSHA for issuing the ETS as a last, rather than a first, resort in response to the pandemic, despite expert consensus that vaccine requirements should only be adopted if voluntary measures have proven ineffective.[113]

In support of downplaying the government interest in quelling the pandemic, the Fifth Circuit cites a dissent by Justice Gorsuch, in which he states that society's interest in slowing the spread of COVID-19 "cannot qualify as [a compelling interest] forever."[114] But there is no legal or scientific reason why society's interest in preventing the uncontrolled spread of disease diminishes with the mere passage of time, unless effective medical or public health measures reduce the risk of spread or the harm spread produces. The government's interest in preventing the spread of tuberculosis, measles, mumps, diphtheria, pertussis, rubella, smallpox, and other communicable infections is no less compelling today than it was at the founding of the United States. The reason why governments do not close workplaces and places of worship to prevent measles or smallpox outbreaks is not because the interest in preventing such outbreaks has become any less compelling. Rather, such onerous measures are rarely needed or justified because high rates of vaccination, or in occasional cases other public health measures like eradication, have effectively prevented spread and harm from infection without requiring substantial restraints on liberty. But if outbreaks of infectious disease occur, courts agree that governments are justified not only in considering vaccination status, but also in enforcing far more intrusive measures like quarantining infected persons or categorically—rather than only conditionally—mandating treatment.[115] Such

112. *Compare* Efthimios Parasidis & Aaron S. Kesselheim, *Assessing the Legality of Mandates for Vaccines Authorized via an Emergency Use Authorization*, HEALTH AFFS. FOREFRONT (Feb. 16, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210212.410237/full/ (arguing that vaccines under emergency-use authorization cannot be required as a condition of work or educational participation), *with* I. Glenn Cohen & Dorit Rubinstein Reiss, *Can Colleges and Universities Require Student Covid-19 Vaccination?*, HARV. L. REV. BLOG (Mar. 15, 2021), https://blog.harvardlawreview.org/can-colleges-and-universities-require-student-covid-19-vaccination/ (arguing that vaccines under emergency-use authorization can be required as a condition of participation).

113. Michelle M. Mello, Ross D. Silverman & Saad B. Omer, *Ensuring Uptake of Vaccines Against SARS-CoV-2*, 383 NEW ENG. J. MED. 1296, 1296–99 (2020).

114. Does 1-3 v. Mills, 142 S. Ct. 17, 21 (2021) (Gorsuch, J., dissenting).

115. *E.g.*, Hickox v. Christie, 205 F. Supp. 3d 579, 590–95 (D.N.J. 2016) (collecting Supreme Court and other case law establishing the authority to quarantine); Levin v. Adalberto M., 156 Cal. App. 4th 288, 295 (2007) ("[Public health] orders may include a mandate that [tuberculosis patients] . . . complete an appropriate

measures can involve far greater side effects than the COVID-19 tests or vaccines required in the ETS.[116] Justice Gorsuch is right "that civil liberties face grave risks when governments proclaim indefinite states of emergency,"[117] but policies that increase the rate of vaccination—including policies that consider vaccination status—serve to protect important civil liberties like worship, expression, and assembly by ensuring that these activities can be performed with reduced risk of infection and minimal risk of catastrophic illness. The only civil liberty they limit, meanwhile, is the liberty to remain unvaccinated without consequence—a liberty far less fundamental than the religious and expressive liberties that a state of emergency threatens.

c. Emergency Temporary Standards

The ETS was a reasonable effort to realize a compelling government interest. If it were legislation or ordinary administrative action, that would have been enough. But the statute permitting OSHA to issue emergency temporary standards requires such standards to satisfy the requirement that workers face a harmful or new hazard at work, that this hazard is grave, and that an emergency regulatory response is necessary to address the hazard.[118]

Thoughtful scholars have argued that the COVID-19 pandemic does not meet the statutory standard for an ETS.[119] But the Fifth Circuit's opinion largely eschews their legal argument. Rather, it engages in amateur epidemiology, unsupported by citation, claiming that COVID-19 is "non-life-threatening to a vast majority of employees."[120] Yes, most people who contract COVID-19 survive without even requiring hospitalization. But studies of COVID-19 prior to the advent of the less severe omicron variant estimated a hospitalization rate

course of treatment and follow required infection control measures . . . or submit to 'directly observed therapy' for the disease."); City of New York v. Antoinette R., 165 Misc. 2d 1014, 1020 (N.Y. Sup. Ct. 1995) ("[The] respondent shall continue to be detained in a hospital setting until the petitioner or the court determines that the respondent has completed an appropriate course of medication for tuberculosis, or a change in circumstances indicates that the respondent can be relied upon to complete the prescribed course of medication without being in detention."); *see also In re* Washington, 735 N.W.2d 111, 121 (Wis. 2007) (explaining that public health officials can petition for an order that a patient "shall remain confined until the department or local health officer . . . determines that treatment is complete or that the individual is no longer a substantial threat to himself or herself or to the public health").

116. Niyi Awofeso, *Anti-Tuberculosis Medication Side-Effects Constitute Major Factor for Poor Adherence to Tuberculosis Treatment*, 86 BULL. WORLD HEALTH ORG. B, C (2008).

117. *Mills*, 142 S. Ct. at 21 (Gorsuch, J., dissenting).

118. 29 U.S.C. § 655(c)(1).

119. Ilya Somin, *OSHA Employer Vaccination Mandate Is Narrower Than Earlier White House Announcement—but Still Has Legal Vulnerabilities [Updated with Brief Response to Jonathan Adler]*, VOLOKH CONSPIRACY (Nov. 4, 2021, 5:30 PM), https://reason.com/volokh/2021/11/04/osha-employer-vaccination-mandate-is-narrower-than-earlier-white-house-announcement-but-still-has-legal-vulnerabilities/; Jonathan H. Adler, *OSHA (Finally) Issues Emergency Standard Mandating Large Employers Require Vaccination or Testing (Updated)*, VOLOKH CONSPIRACY (Nov. 4, 2021, 9:55 AM), https://reason.com/volokh/2021/11/04/osha-finally-issues-emergency-standard-mandating-large-employers-require-vaccination-or-testing/.

120. BST Holdings, L.L.C. v. OSHA, 17 F.4th 604, 613 (5th Cir.), *dissolving stay*, *In re* MCP No. 165, 21 F.4th 357 (6th Cir. 2021), *granting application for stay*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022).

of over 6% among cases.[121] While this estimate included older retirees at high risk, it also included lower-risk children and teenagers not yet working. At the time of the *BST* decision, COVID-19 was the number one cause of death among people aged forty-five through fifty-four—prime working age.[122] True, the vast majority of COVID-19 infections kill or hospitalize nobody[123]—but neither do the vast majority of drivers whose blood alcohol level exceeds the legal limit.[124] Such data hardly renders either COVID-19 or drunk driving "non-life-threatening."

Later, the opinion claims that "OSHA cannot possibly show that every workplace covered by the Mandate currently has COVID-positive employees, or that every industry covered by the Mandate has had or will have 'outbreaks.'"[125] This is not the proper standard. OSHA can prohibit, for instance, the use of fire extinguishers containing needlessly hazardous chemicals even if such fire extinguishers are used outside of workplaces, and even if some workplaces do not have fire extinguishers at all. OSHA need not show that all and only workplaces face danger from fire extinguisher chemicals before taking steps to reduce the chances that a dangerous product enters workplaces. The same goes for a dangerous virus.

The Fifth Circuit misstates the scientific and legal evidence in other ways. It selectively quotes from a past opinion to suggest that even cancer or kidney damage from cadmium fumes would not constitute a "grave danger" to workers, when the issue in that opinion was not the *magnitude* of the danger, but the probability of exposure to cadmium.[126] But workers are far more likely to be exposed at work to COVID-19 than to cadmium fumes. To downplay the severity of the pandemic, the court strangely contends that *vaccinated* Americans are largely protected from COVID-19, even though the ETS aimed, in a targeted way, to address the danger to *unvaccinated* workers—a group at much higher risk. Moreover, the *BST* opinion bases its arguments that OSHA reversed its position on considering vaccination status on a more than thirty-year-old document concerning vaccination against a bloodborne, not respiratory, disease and some statements prior to the wide availability of vaccination or the

121. Shiwani Mahajan, César Caraballo, Shu-Xia Li, Yike Dong, Lian Chen, Sarah K. Huston, Rajesh Srinivasan, Carrie A. Redlich, Albert I. Ko, Jeremy S. Faust, Howard P. Forman & Harlan M. Krumholz, *SARS-CoV-2 Infection Hospitalization Rate and Infection Fatality Rate Among the Non-Congregate Population in Connecticut*, 134 AM. J. MED. 812, 813 (2021).

122. Jared Ortaliza, Kendal Orgera, Krutika Amin & Cynthia Cox, *COVID-19 Preventable Mortality and Leading Cause of Death Ranking*, PETERSON-KFF: HEALTH SYS. TRACKER (Dec. 10, 2021), https://www.healthsystemtracker.org/brief/covid19-and-other-leading-causes-of-death-in-the-us/ [http://web.archive.org/web/20211215000039/https://www.healthsystemtracker.org/brief/covid19-and-other-leading-causes-of-death-in-the-us/].

123. Mahajan et al., *supra* note 121.

124. Douglas N. Husak, *Is Drunk Driving a Serious Offense?*, 23 PHIL. & PUB. AFFS. 52, 65 (1994).

125. *BST*, 17 F.4th at 613.

126. *See id.* at 613–14.

rise of the highly transmissible delta variant—none of which concern a vaccinate-or-test requirement in employment settings.[127]

The opinion also, based on a retweet by the White House Chief of Staff, characterizes the ETS as a "work-around" to impose a "national vaccine mandate."[128] Regardless of whether retweets are endorsements, the ETS is judged by its actual effects,[129] not the tweets of government officials. Notwithstanding political debates over an ETS's desirability, the actual effect and status of an ETS is that of a government regulation of workplace safety.

Lastly, the *BST* opinion's complaint that the ETS "purports to definitively resolve one of today's most hotly debated political issues" also goes too far.[130] The politicization of an issue in the public square does not debar an administrative agency from regulating (or declining to regulate) the debated activity. To allow the political salience of an issue to settle its regulability is to judicially implement a heckler's veto.

2. National Federation of Independent Business v. Department of Labor

BST's stay of the OSHA ETS was later dissolved.[131] But immediately afterward, even as the omicron variant overwhelmed hospitals and closed workplaces nationwide, the Supreme Court decided to reinstate the stay. The legal basis for its decision was narrower than the meandering language of *BST*: according to the Court, the OSHA rule fails because although "COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most," since it "can and does spread at home, in schools, during sporting events, and everywhere else that people gather."[132] In essence, because COVID-19 often infects people outside work, it cannot be a workplace hazard.

The idea that COVID-19 is not a workplace hazard rightly struck the three dissenting justices as strange. Fires can happen at home and at work, yet OSHA regulates for fire safety.[133] And consider an even closer analogy: what about employees who are *actively infected* with COVID-19? OSHA can surely require that they be excluded from work until no longer contagious. Yet the majority would seem bound to disagree. After all, people actively infected with COVID-19 are not uniquely or predominantly located at work: they are "at home, in schools . . . and everywhere else that people gather."[134]

127. *Id.* at 614.

128. *Id.* at 612.

129. *See* Megan R. Murphy, *Context, Content, Intent: Social Media's Role in True Threat Prosecutions*, 168 U. PA. L. REV. 733, 753 (2020).

130. 17 F.4th at 617.

131. *In re* MCP No. 165, 21 F.4th 357, 388 (6th Cir. 2021), *granting application for stay*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022).

132. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022), *granting application for stay in* BST Holdings, L.L.C. v. OSHA, 17 F.4th 604 (5th Cir. 2021).

133. *Id.* at 673–74 (Breyer, Sotomayor & Kagan, JJ., dissenting).

134. *Id.* at 665.

How, exactly, is excluding unvaccinated and untested workers legally different from excluding actively infected ones? Quoting a lower-court dissenter, the majority complains that a vaccination "cannot be undone at the end of the workday."[135] But by this logic, the testing requirement should stand. More importantly, nothing in the language of any federal statute requires that OSHA regulations' effects turn into a pumpkin at midnight. OSHA could require that workers be trained on how to lift fifty pounds safely, even though they would remember and feel the muscle aches from that training at the end of the workday, too.

The Court's requirement that workers must leave work no more protected from COVID-19 than when they arrived counterproductively favors more burdensome, less effective measures like capacity restrictions, plexiglass shields, and social-distancing stickers over low-burden, effective options like vaccination and testing. Vaccinations are among the most narrowly tailored employment requirements available. They neither constrain what employees do, say, or believe, nor restrict how, where, or when they conduct their work. In these respects, vaccinations are akin to dog sniffs, which the Court did not even consider a search because of the strictly circumscribed "content of the information revealed by the procedure."[136] Just as—at least in the Court's view—a dog sniff only reveals contraband and nothing more, a COVID-19 vaccination is narrowly targeted to the prevention of COVID-19. Of course, requiring employers to make sure their workers are vaccinated or tested is more *politically* controversial than requiring them to practice lifting with their legs. But the growth of a political movement that morally objects to dogs sniffing luggage for contraband would not raise that moral objection to the level of a constitutional liberty or privacy interest.

C. MEDICAL DECISIONS

Vaccination status has been proposed or used as a decision-making factor in medical settings, in particular the distribution of scarce medical resources. Some policies have prioritized vaccinated people for certain medical interventions, such as transplantable organs.[137] Other policies have prioritized *un*vaccinated people for other interventions, such as scarce COVID-19 therapies.[138]

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135. *Id.* (quoting *In re MCP*, 20 F.4th at 274 (Sutton, C.J., dissenting)).

136. United States v. Place, 462 U.S. 696, 707 (1983).

137. Daniel J. Hurst, Jordan Potter & Luz A. Padilla, *Organ Transplant and Covid-19 Vaccination: Considering the Ethics of Denying Transplant to Unvaccinated Patients*, 36 CLINICAL TRANSPLANT., Jan. 14, 2022, at 1.

138. *Prioritization of Anti-SARS-CoV-2 Therapies for the Treatment and Prevention of COVID-19 When There Are Logistical or Supply Constraints*, NAT'L INST. OF HEALTH: COVID-19 TREATMENT GUIDELINES, https://files.covid19treatmentguidelines.nih.gov/guidelines/section/section_175.pdf (Dec. 1, 2022) [https://web.archive.org/web/20220910173016/https://files.covid19treatmentguidelines.nih.gov/guidelines/section/section_175.pdf].

The use of vaccination status to prioritize candidates of medical resources and treatments raises no legal concerns under federal law. In fact, for the allocation of scarce medical resources such as organs or ICU beds, prioritizing people who have chosen to be vaccinated can avoid some concerns that have been raised about alternative approaches, such as allocation based on prospect of benefit.[139] Those who are less likely to benefit from an organ or critical care because of poor health typically have not chosen their poor health and are in no place to reverse it. In contrast, vaccine refusal is an easily reversible choice.[140] Perhaps reflecting the appropriateness of allocation based on choice, scarce monoclonal antibodies for COVID-19 preexposure prophylaxis have been made available to those who cannot be vaccinated for medical reasons, but not to those who refuse to be vaccinated.[141] Courts' skepticism of compassionate release petitions by unvaccinated prisoners who are at risk of COVID-19 further underscores choice's relevance.[142] If courts are willing to accept that even incarcerated prisoners' choice to refuse vaccines can limit their medical options, there should be no legal issue with considering the choice of free adults to refuse vaccination.

Even where choices to refuse vaccination stem from a sincere religious belief, medical decision-making can still legally take such choices into account. Patients who on religious grounds refuse recommended medical procedures, such as blood transfusions, are responsible for the consequences of that refusal.[143] Accordingly, ethicists have argued that patients who intend to refuse medically needed procedures during or after their transplant (whether on religious or other grounds) should not be listed for scarce transplantable organs.[144] Given the strong evidence that transplant patients who were not vaccinated before their transplant procedure are highly vulnerable to severe COVID-19, pretransplant vaccination may be, and is increasingly recognized as,

139. Teneille R. Brown, *Of Course Hospitals in Crisis Mode Should Consider Vaccination Status*, WASH. POST (Sept. 23, 2021, 3:58 PM), https://www.washingtonpost.com/opinions/2021/09/23/hospitals-ration-covid-vaccination-status/.

140. Govind Persad & Emily A. Largent, *COVID-19 Vaccine Refusal and Fair Allocation of Scarce Medical Resources*, 3 JAMA HEALTH F., Apr. 8, 2022, at 1; Christopher Robertson, *What the Harm Principle Says About Vaccination and Healthcare Rationing*, 9 J.L. & BIOSCIS. 1, 15 (2022).

141. Govind Persad & Emily Largent, *In the Line for Scarce Covid Treatments, Immunocompromised Americans Should Go Before the Unvaccinated*, WASH. POST (Jan. 26, 2022, 8:00 AM), https://www.washingtonpost.com/opinions/2022/01/26/line-scarce-covid-treatments-immunocompromised-americans-should-go-before-unvaccinated/.

142. United States v. Henderson, No. 19-CR-785, 2022 WL 424907, at *2 (E.D. Mo. Feb. 11, 2022).

143. *See, e.g.*, Shorter v. Drury, 695 P.2d 116, 123 (Wash. 1985) (asserting, in a case involving refusal of transfusions by a Jehovah's Witness patient, that "[t]he risk of death from a failure to receive a transfusion . . . was created by, and must be allocated to, the [plaintiff's choice]").

144. K.A. Bramstedt, *Transfusion Contracts for Jehovah's Witnesses Receiving Organ Transplants: Ethical Necessity or Coercive Pact?*, 32 J. MED. ETHICS 193, 194 (2006) ("Patients refusing to consent to rescue transfusion should not be considered transplant candidates unless they are eligible to receive an organ via living donation, and both the donor and the recipient share the same values with regard to transfusion refusal.").

one such procedure.[145] In sum, while refusals to vaccinate on the basis of sincere religious beliefs must be honored, the believer must accept the consequences, which may include organ ineligibility.

Two state laws, however, may limit medical prioritization, whether of vaccinated or unvaccinated people, that is based on vaccination status. Montana has prohibited decisions to "refuse, withhold from, or deny to a person any . . . health care access . . . based on the person's vaccination status," where "'[v]accination status' means an indication of whether a person has received one or more doses of a vaccine."[146] Mississippi has a similarly worded provision, though limited to state agencies and COVID-19 vaccines.[147] Read literally, these provisions would appear to prohibit both the prioritization of unvaccinated people for COVID-19 therapies and the prioritization of vaccinated people for organs. Indeed, Montana's requirement would even prohibit longstanding requirements that organ transplant recipients be vaccinated against illnesses like hepatitis.

III. REQUIRING CONSIDERATION OF VACCINATION STATUS

In this Part, I turn from whether considering vaccination status is permissible to whether doing so is required. As this Part explains, some courts have recently concluded that disability law requires that masks be mandated in certain settings. If we accept this view, other steps to reduce pandemic harm—in particular vaccination requirements—could be reasonable accommodations as well.

A. ANTIDISCRIMINATION LAW

In adjudicating disputes over school mask requirements during the COVID-19 pandemic, some courts have recently concluded that requiring all primary or secondary school students to wear masks is required as a reasonable accommodation for students who are at higher risk of COVID-19 infection or complications.[148] These arguments diverge from earlier work by scholars

145. *COVID-19 Vaccination for Transplant Candidates*, BRIGHAM & WOMEN'S HOSP., https://www.brighamandwomens.org/about-bwh/newsroom/transplant-candidate-vaccination (last visited Jan. 28, 2023).

146. MONT. CODE ANN. § 49-2-312 (West 2022).

147. MISS. CODE. ANN. § 41-23-49(2)(a) (West 2022).

148. G.S. *ex rel.* Schwaigert v. Lee, No. 21-5915, 2021 WL 5411218, at *3 (6th Cir. Nov. 19, 2021) (rejecting the argument that "universal mask wearing in K–12 schools is unreasonable because it imposes significant burdens on third parties" (internal quotation marks omitted)); Douglas Cnty. Sch. Dist. RE-1 v. Douglas Cnty. Health Dep't, 568 F. Supp. 3d 1158, 1165 (D. Colo. 2021) (concluding that a public health order prohibiting mask requirements "has the effect of discriminating against [plaintiffs with disabilities] in violation of federal law"); R.K. v. Lee, 568 F. Supp. 3d 895, 913 (M.D. Tenn. 2021) ("[A] universal masking requirement instituted by a school is a reasonable modification that would enable disabled students to have equal access to the necessary in-person school programs, services, and activities."); Disability Rts. S.C. v. McMaster, 564 F. Supp. 3d 413, 427 (D.S.C. 2021) ("No one can reasonably argue that it is an undue burden to wear a mask to accommodate a child with disabilities."), *vacated in part*, 24 F.4th 893 (4th Cir. 2022).

contending that disability law not only does not require mask requirements, but in fact counsels against them.[149] They align, however, with other experts' arguments that the Americans with Disabilities Act (ADA) can support requiring employers and schools to institute mask requirements in order to accommodate employees or participants with certain disabilities.[150]

Statutes protecting individuals with disabilities, such as the ADA and the Rehabilitation Act, have generally been applied differently to those who oversee an activity, such as employers or vendors, than to fellow employees or participants in an activity. Employers and businesses are required to reasonably accommodate employees and customers with disabilities, so long as the cost does not impose an undue hardship. For example, employers might be required to provide employees at risk of respiratory illness improved ventilation, allow outdoor or remote participation, or allow employees to wear masks.[151]

In contrast to their willingness to impose compliance requirements on institutional actors like employers, courts have historically declined to require *individual* employees or activity participants to make personal choices that would protect individuals with disabilities. For instance, courts have typically hesitated to read disability antidiscrimination laws as requiring *other* employees, students, or tenants to accommodate participants with chemical sensitivities.[152]

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149. Elizabeth Pendo, Robert Gatter & Seema Mohapatra, *Resolving Tensions Between Disability Rights Law and COVID-19 Mask Policies*, 80 MD. L. REV. ONLINE 1, 10 (2020), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1069&context=endnotes (arguing that mask requirements will lead to objectionable discrimination against individuals with disabilities and that mask recommendations are preferable to mask requirements).

150. Mical Raz & Doron Dorfman, *Bans on COVID-19 Mask Requirements vs Disability Accommodations: A New Conundrum*, JAMA HEALTH F., Aug. 6, 2021, at 2 ("[A]llowing immunocompromised individuals to require masking of unvaccinated individuals in their presence is a reasonable accommodation. . . . The accommodation would require others around the disabled employee to wear masks during meetings or classes.").

151. *E.g.*, Hebert v. Ascension Par. Sch. Bd., 396 F. Supp. 3d 686, 703 (M.D. La. 2019) (listing wearing "a mask or other device when in common areas or outdoors to avoid exposure to allergens or offending odors" as an accommodation); Matos v. DeVos, 317 F. Supp. 3d 489, 496–97 (D.D.C. 2018), *aff'd*, No. 18-5281, 2019 WL 2563721 (D.C. Cir. June 3, 2019).

152. *E.g.*, Montenez-Denman v. Slater, 208 F.3d 214, 214 (6th Cir. 2000) (unpublished table decision) (concluding that an accommodation that would "prohibit plaintiff's co-workers and those who occasionally come into the office of their right to wear 'scents'" and require the employer "to engage in the burdensome and unseemly task of enforcing such a prohibition" was not reasonable); Buckles v. First Data Res., Inc., 176 F.3d 1098, 1101 (8th Cir. 1999) ("An employer is not required by the ADA to create a wholly isolated work space for an employee that is free from numerous possible irritants . . . ."); McDonald v. Potter, No. 06-CV-1, 2007 WL 2300332, at *41 (E.D. Tenn. Aug. 7, 2007) ("Plaintiff's request for . . . a fragrance-free [workplace], or a more strictly enforced light fragrance environment is not objectively reasonable under the circumstances."), *aff'd*, 285 F. App'x 260 (6th Cir. 2008); Kaufmann v. GMAC Mortg. Corp., No. 04-CV-5671, 2006 WL 1371185, at *13 (E.D. Pa. May 17, 2006) (concluding that "a completely scent-free environment to be policed by her supervisors and enforced with disciplinary punishment" was not a required accommodation), *aff'd*, 229 F. App'x 164 (3d Cir. 2007); Call v. Panchanathan, No. 20-CV-260, 2021 WL 4206423, at *4 (E.D. Va. Sept. 15, 2021), *dismissing appeal*, No. 21-2291, 2022 WL 1554985 (4th Cir. Apr. 26, 2022). *But see* Diaz v. Viagran, No. 16-CV-9106, 2018 WL 4360790, at *17 (S.D.N.Y. Aug. 29, 2018) (concluding that a mandatory scent-free policy for elementary school students can be a required accommodation); Brady v. United Refrigeration, Inc., No. 13-6008, 2015 WL 3500125, at *13 (E.D. Pa. June 3, 2015) (denying summary judgment for defendant employer because they could have taken their "no fragrance policy more seriously," such as "by instituting and enforcing disciplinary consequences").

In doing so, courts often stress that requiring such accommodations burdens others.[153] Instead, they have suggested that employers could accommodate employees with chemical sensitivities by altering the work environment in ways that do not burden third parties.[154] Employers may encourage employees not to wear fragrances, for instance, but are not typically directed to enforce a universal prohibition on fragrances.[155] Similarly, courts have refused to require low-light policies,[156] or to ban smoking in multi-unit residences.[157] During the pandemic, however, several courts were willing to conclude that mandated universal masking is required by disability law,[158] though others have disagreed,[159] and

153. *Montenez-Denman*, 208 F.3d at 214; Hunt v. St. Peter Sch., 963 F. Supp. 843, 853 (W.D. Mo. 1997) (concluding that a private school need not enforce a "mandatory scent-free policy" in part because this "limits the choices" of other students at the school and requires intrusive enforcement); Jimenez-Jimenez v. Int'l Hosp. Grp., No. 15-1461, 2017 WL 5905529, at *10 (D.P.R. Nov. 30, 2017) (rejecting low-allergen environment as required accommodation in part because of "the burden it would impose on other employees"); Heaser v. AllianceOne Receivables Mgmt., Inc., No. 07-CV-2924, 2009 WL 205209, at *4 (D. Minn. Jan. 27, 2009) (concluding that "[a] mandatory scent-free workplace is not a reasonable accommodation," because "co-workers' rights would be intimately affected by a mandatory scent-free policy," and that "such a policy unduly burdens both those who must comply with it and those obliged to enforce it"); Core v. Champaign Cnty. Bd. of Cnty. Comm'rs, No. 11-CV-166, 2012 WL 4959444, at *6 (S.D. Ohio Oct. 17, 2012) (refusing to require a fragrance-free policy, because of "the burden that such a broad policy would have on individual employees"), *appeal dismissed*, No. 12-4438 (6th Cir. May 9, 2013); Campos v. Res. for Cmty. Dev., No. 01-cv-04317 (N.D. Cal. Oct. 27, 2003) ("[A] mandatory no scent policy would . . . infringe upon the rights of other tenants"), *aff'd*, 128 F. App'x 674 (9th Cir. 2005).

154. *E.g.*, Rotkowski v. Ark. Rehab. Servs., 180 F. Supp. 3d 618, 625 (W.D. Ark. 2016) (suggesting that, rather than adopting a "mandatory scent-free workplace," the employer could provide a reasonable accommodation by procuring equipment that would limit the employee's need to be in common areas and by adding an air purifier to the common area); *see also Hunt*, 963 F. Supp. at 853 ("The purpose of the Rehabilitation Act of 1973 is to prevent discrimination against disabled persons and, if necessary, to add things to the environment to permit greater participation by the disabled . . . . There is nothing in the Act to suggest that the non-disabled population was expected to give up or substantially alter their lifestyle.").

155. *See* cases cited *supra* notes 153–54.

156. Rittelmeyer v. Univ. of N.C. at Chapel Hill, 799 S.E.2d 378, 387 (N.C. App. 2017) (concluding that the requested "accommodation that the overhead lights over the entire [work division] remain turned off" was not required because of its "impact on other employees' abilities to perform their work," even though that accommodation had been provided for a time previously).

157. Davis v. Echo Valley Condo. Ass'n, 945 F.3d 483, 492 (6th Cir. 2019); Grover-Tsimi v. Millpond Partners, No. 09-3544, 2010 WL 4979092, at *9 (D. Minn. Oct. 18, 2010) ("Plaintiff presumably seeks, although without expressly stating as much, to have Defendants compel other residents to stop smoking in their apartments. But Plaintiff has not shown she could be entitled to any such remedy that would inevitably infringe upon another tenant's rights."), *report and recommendation adopted*, No. 09-3544, 2010 WL 4979082 (D. Minn. Dec. 2, 2010).

158. *See* cases cited *supra* note 148.

159. E.T. v. Paxton, 19 F.4th 760, 768 (5th Cir. 2021) ("Given the availability of vaccines, voluntary masking, and other possible accommodations . . . the record before us likely does not support the conclusion that a mask mandate would be both *necessary* and *obvious* under the ADA or the Rehabilitation Act."); E.T. v. Paxton, 41 F.4th 709, 722 (5th Cir. 2022) ("Plaintiffs' theory . . . would require federal courts to enforce mobile mask mandates that go where plaintiffs go and require everyone around them to wear masks. That theory of standing is equal parts sweeping and unprecedented. Today we reject it."); L.E. v. Ragsdale, 568 F. Supp. 3d 1364, 1369 (N.D. Ga. 2021) ("While Plaintiffs may prefer a mask mandate and other stricter policies, Defendants are not required to provide Plaintiffs with their preferred accommodation."), *rev'd and remanded sub nom.*, L.E. *ex rel.* Cavorley v. Superintendent of Cobb Cnty. Sch. Dist., No. 21-13980, 2022 WL 17729911 (11th Cir. Dec. 16, 2022); Hayes v. DeSantis, 561 F. Supp. 3d 1187, 1210 (S.D. Fla. 2021) ("[A]lthough a universal mask mandate might be of some benefit to Plaintiffs' children, the Court finds that the balance of harms weighs in

some early decisions requiring universal masking have been vacated on appeal.[160]

This Article's task is of course not to analyze mask requirements, but vaccine requirements. But the recent decisions regarding universal mask requirements in schools as required accommodations under the ADA would seem to support the view that the ADA may also require COVID-19 and other vaccination requirements when those requirements reduce the risks to more vulnerable students, employees, or other participants.[161] Apart from a pandemic, masks are not typically required in schools or other settings, because they do impede various activities such as eating and drinking, athletics, conversation, and musical and theatrical performances. In contrast, vaccination is almost universally required for school attendance, even for diseases like tetanus that pose little or no threat of in-school spread between students.[162] Given the clear, though incomplete, reduction in transmission that vaccination affords[163] and the ubiquity of vaccination requirements in school settings prior to the pandemic, if the ADA requires schools to universally mandate masks during the school day, it would also seem to support requiring vaccination for similar reasons.

Advocates for required universal masking have approached parallels with vaccination in different ways. Notably, in response to the defendants' contention that mask requirements were excessively burdensome to fellow students, one case cited *Jacobson v. Massachusetts*[164] and other vaccination precedents in support of the view that the ADA requires masking.[165] In contrast, counsel for the plaintiffs in *E.T. v. Paxton* attempted to distinguish a mask mandate from a vaccine requirement by arguing that "there is a difference between a vaccine and a mask requirement with respect to whether it is an accommodation that protects

favor of Plaintiffs exhausting their administrative remedies in order to better address the specific harms posed to each child."); *see also* Selene v. Legislature of Idaho, 514 F. Supp. 3d 1243, 1256–57 (D. Idaho 2021) (concluding that a mask recommendation along with other infection control measures and a remote participation option is a sufficient accommodation for participation in legislative hearings).

160. *See generally, e.g.*, Arc of Iowa v. Reynolds, 566 F. Supp. 3d 921 (S.D. Iowa 2021), *aff'd in part and vacated in part*, 24 F.4th 1162 (8th Cir. 2022), *and vacated as moot*, 33 F.4th 1042 (8th Cir. 2022); Doe 1 v. Upper Saint Clair Sch. Dist., No. 22-1141, 2022 WL 2951467 (3d Cir. Mar. 1, 2022), *vacating* Doe 1 v. N. Allegheny Sch. Dist., 580 F. Supp. 3d 140 (W.D. Pa. 2022), *and vacating* Doe 1 v. Upper Saint Claire Sch. Dist., 581 F. Supp. 3d 711 (W.D. Pa. 2022).

161. *Cf.* Arc of Iowa v. Reynolds, 24 F.4th 1162, 1178–79 (8th Cir.) ("[R]equiring masks . . . is not an unreasonable infringement on third parties' rights . . . [because] schools and the State routinely impose similar requirements, including . . . immunization."), *vacated as moot*, 33 F.4th 1042 (8th Cir. 2022); *Reynolds*, 566 F. Supp. 3d at 936 ("[C]ourts have routinely upheld the ability of schools to implement health requirements that intrude on individuals' rights.").

162. Robin Kundis Craig, *The Regulatory Shifting Baseline Syndrome: Vaccines, Generational Amnesia, and the Shifting Perception of Risk in Public Law Regimes*, 21 YALE J. HEALTH POL'Y, L. & ETHICS 1, 30 (2022).

163. *See* Dean & Halloran, *supra* note 50, at 1089.

164. 197 U.S. 11 (1905).

165. *Reynolds*, 566 F. Supp. 3d at 936.

other people."[166] Given the plaintiffs' desire for a mask rather than vaccine requirement, this concession is strategically understandable, though factually dubious. Both masks and vaccination reduce transmission.[167] Indeed, vaccination—particularly with a booster—is likely more effective at reducing transmission than the use of cloth masks in real-world settings.[168]

Some might argue that requiring others to be vaccinated is less justifiable than requiring them to be masked, because vaccination is more intrusive or burdensome. But while COVID-19 vaccination requirements may be politically controversial, vaccine requirements have far more precedent and require far less ongoing enforcement than mask requirements.[169] Effectively enforcing universal masking necessitates constantly observing students, employees, or other participants to verify that they are always properly wearing well-fitting, high-quality masks. Mask enforcement also requires frequent discretionary determinations, such as whether someone is actively eating or drinking. This need for constant enforcement to prevent mask requirements from collapsing into de facto mask recommendations presents some of the same challenges that have led other types of requirements to be found unreasonable.[170] Constant enforcement also presents risks that enforcement may be inequitable.[171] In contrast, vaccine requirements in settings like schools are "set-and-forget," requiring no ongoing enforcement once participants have been vaccinated, which may explain their widespread use prior to COVID-19.

Ultimately, the recent cases treating mask requirements as reasonable accommodations are supportive of vaccine requirements being reasonable accommodations as well. Some of these recent decisions, however, rely on inaccurate reasoning. For instance, the U.S. District Court for the Eastern District of Tennessee in *S.B. ex rel. M.B. v. Lee* stated that "whether an accommodation would cause 'third parties' to endure an undue burden is irrelevant, as far as the ADA is concerned."[172] This misdescribes the law

166. Oral Argument at 38:47, E.T. v. Paxton, No. 21-51083 (5th Cir. Feb. 2, 2022), https://www.ca5.uscourts.gov/OralArgRecordings/21/21-51083_2-2-2022.mp3. The plaintiffs ultimately lost the case. E.T. v. Paxton, 41 F.4th 709, 721–22 (5th Cir. 2022).

167. *See* Dean & Halloran, *supra* note 50, at 1089; *Types of Masks and Respirators*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/types-of-masks.html (Sept. 8, 2022) ("Masks and respirators are effective at reducing transmission of SARS-CoV-2, the virus that causes COVID-19, when worn consistently and correctly.").

168. *See* Dean & Halloran, *supra* note 50, at 1088–89; Michael Bonner, *Health Experts Say Cloth Masks Are 'Not Effective' Against Omicron COVID Variant, Suggest N95 for Best Protection*, MASSLIVE (Jan. 7, 2022, 4:02 PM), https://www.masslive.com/coronavirus/2022/01/health-experts-say-cloth-masks-are-not-effective-against-omicron-covid-variant-suggest-n95-for-best-protection.html.

169. *See generally, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905).

170. *Cf.* Hunt v. St. Peter Sch., 963 F. Supp. 843, 853 (W.D. Mo. 1997) (explaining that the enforcement burdens of a fragrance-free school policy weighed against regarding it as a required accommodation); Montenez-Denman v. Slater, 208 F.3d 214, 214 (6th Cir. 2000) (unpublished table decision) (similar, employment setting).

171. *Cf.* Pendo et al., *supra* note 149, at 10.

172. 566 F. Supp. 3d 835, 863 (E.D. Tenn.), *denying stay pending appeal sub nom.*, M.B. v. Lee, No. 21-6007, 2021 WL 6101486 (6th Cir. Dec. 20, 2021).

applying the ADA and similar statutes, under which "courts . . . reject requested changes that interfere with the rights of third parties."[173]

The *S.B.* decision also misleads when attempting to distinguish mask requirements from prior cases concerning fragrance-free policies. It wrongly claims that the plaintiff requesting a fragrance-free policy had a "mere 'sensitivity' to fragrances in perfumes and colognes," whereas the plaintiffs requesting a mask requirement "have medical conditions that would likely cause them to die from COVID-19."[174] This both inappropriately trivializes multiple chemical sensitivity and dramatically overstates the absolute risk of death from COVID-19. The fragrance-free policy request distinguished in *S.B.* did not obviously concern a "mere sensitivity": while the appellate opinion does not describe how severe the sensitivity was, other plaintiffs with the same condition experienced severe reactions.[175] Meanwhile, experts testified only that the plaintiffs seeking a universal mask mandate were "*more* likely to face severe symptoms, require hospitalization, and potentially die."[176] The court's conclusion that plaintiffs would be *likely* to die if they contracted COVID-19 is seriously implausible and unsupported by the expert testimony. As other courts have observed, "[s]omething is 'likely' to occur if it is more probable than not to occur."[177] The odds that the plaintiffs would die if infected fall far short of being more probable than not.[178] Decisions mandating mask requirements would

173. Davis v. Echo Valley Condo. Ass'n, 945 F.3d 483, 492 (6th Cir. 2019). The relevance of third-party burden to the reasonableness of an accommodation is widely recognized. *See, e.g.*, *id.* (explaining that a plaintiff with asthma was not entitled to a smoking ban in her condominium complex because this ban would "intrude on the rights of third parties"); Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039, 1046 (6th Cir. 2001) (holding that a neighbor could not be forced to move to accommodate a tenant with a disability); Burdett v. United Parcel Serv., Inc., No. 18-CV-00418, 2021 WL 5115642, at *6 (N.D. Ind. Nov. 3, 2021) (collecting cases that examine "situations in which an employee's requested accommodation increases the workload of other employees" and explaining that such an accommodation is not reasonable); Cohen v. Clark, 945 N.W.2d 792, 803 (Iowa 2020) (explaining that an employment accommodation was not reasonable when it would undermine the reasonable "expectations" of other employees, even if those expectations were not contractual rights); *see also* U.S. COMM'N ON C.R., ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 128–29 (1983) ("In each particular context, the determination of what accommodations are legally mandated is a process of weighing various factors, including . . . the degree to which it will inconvenience others . . . .").

174. *S.B.*, 566 F. Supp. 3d at 864.

175. *E.g.*, Dickerson v. Sec'y, Dep't of Veterans Affs. Agency, 489 F. App'x 358, 361 (11th Cir. 2012) ("It is undisputed that during an allergic reaction or when treating such a reaction with medication, Dickerson would be unable to concentrate, react to an emergency, make clinical judgments, or deliver patient care. Moreover, Dickerson's allergic reactions frequently forced her to leave the workplace and not return for extended periods of time.").

176. *S.B.*, 566 F. Supp. 3d at 841–42 (emphasis added).

177. *In re* Altaba, Inc., 264 A.3d 1138, 1164 (Del. Ch. 2021).

178. *See* Reed J.D. Sorenson et al., *Variation in the COVID-19 Infection–Fatality Ratio by Age, Time, and Geography During the Pre-Vaccine Era: A Systematic Analysis*, 399 THE LANCET 1469, 1475 (2022), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)02867-1/fulltext (concluding that the absolute infection fatality rate among patients ten to twelve years of age is under 0.005%). Even if this risk is multiplied tenfold, it is still lower than the absolute risk faced by thirty-year-olds, and certainly far from being likely that these individuals will die from infection. Studies suggest that some conditions in pediatric patients do materially increase risk, but not so greatly as to make death anywhere near "likely" from COVID-19. *See, e.g.*, Lyudmyla Kompaniyets et al., *Underlying Medical Conditions Associated with Severe COVID-19 Illness Among*

be more compelling if they instead emphasized the higher *relative* risk of COVID-19 complications associated with certain conditions and argued that mask requirements are justified accommodations that allow people with those conditions to participate on more equal terms. This would be preferable to minimizing the severity of other illnesses or overstating the absolute likelihood of death from COVID-19.

Meanwhile, contrary to suggestions in some cases, the prior adoption of mask or vaccine requirements earlier in the pandemic does not necessarily make them a required accommodation under the ADA or other disability laws.[179] Some requirements, like universal remote participation, could be appropriate to impose during the peak of a pandemic despite burdening third parties too substantially for disability law to mandate.

Finally, to rebut the concern that interpreting the ADA to require mask requirements would "infring[e] on the rights of third parties" such as "other students, employees, and visitors," one later vacated order observes that "courts have routinely upheld the ability of schools to implement health requirements that intrude on individuals' rights."[180] States and localities certainly possess the *ability* to require vaccination and other measures such as universal masking in service of public health. But states' ability to impose requirements does not entail federal legislation such as the ADA imposing a *duty* on states, localities, or schools to implement such requirements.

B. FUNDAMENTAL RIGHTS

Professors Kevin Cope, Ilya Somin, and Alexander Stremitzer have proposed the inventive argument that constitutional law requires consideration of vaccination status when it enhances individual freedom to exercise fundamental rights.[181] For instance, rather than imposing universal restrictions on interstate travel, assembly, or speech, governments might be obligated to exempt people who are vaccinated because their activities no longer place them or others at sufficient risk to justify those restrictions.

Children, JAMA NETWORK OPEN, June 7, 2021, at 7 (concluding that some conditions, such as type 1 diabetes and cardiac conditions, are associated with relative risk increases of two to four times).

179. *See, e.g.*, Rittelmeyer v. Univ. of N.C. at Chapel Hill, 799 S.E.2d 378, 388 (N.C. App. 2017) ("Respondent in this case is not bound by the ADA to continue to offer Petitioner the previous accommodation of having all the overhead lights . . . turned off. From a policy standpoint, holding employers liable for prior efforts that went beyond federal law would discourage them from accommodating above the bare minimum federal requirements."); Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995) ("A particular accommodation is not necessarily reasonable, and thus federally mandated, simply because the County elects to establish it as a matter of policy.").

180. Arc of Iowa v. Reynolds, 566 F. Supp. 3d 921 (S.D. Iowa 2021), *aff'd in part and vacated in part*, 24 F.4th 1162 (8th Cir. 2022), *and vacated as moot*, 33 F.4th 1042 (8th Cir. 2022).

181. Kevin Cope, Ilya Somin & Alexander Stremitzer, *Vaccine Passports as a Constitutional Right*, 51 ARIZ. ST. L.J. 505, 512 (2021); Kevin Cope & Alexander Stremitzer, *Governments Are Constitutionally Permitted To Provide "Vaccine Passports"—Some May Also Be Constitutionally Obligated To Do So*, 62 J. NUCLEAR MED. 771, 771–72 (2021).

These arguments align with the compelling public health law and ethics principle that liberty-limiting public health policies must be the least restrictive alternative.[182] But the applicability of such policies is limited in the United States, given the domestic rarity of genuine "lockdowns" that exclude everyone from being able to engage in constitutionally protected activities. That policies considering vaccination status may sometimes be legally preferable to blanket lockdowns does not demonstrate that such policies are legally preferable to broad reopening without consideration of vaccination status. Such a broad reopening may increase inequity and worsen a public health crisis without being foreclosed by law, particularly in countries like the United States that provide few positive guarantees of protection against disease.

CONCLUSION

Policies considering vaccination status have been a common response to the COVID-19 pandemic. While some have relaxed as the pandemic has waned, many are likely to continue in the future, especially as next-generation COVID-19 vaccines are developed and pediatric COVID-19 vaccines gain full FDA approval. These policies may also return with force if a new, more harmful COVID-19 variant or another pandemic disease manageable by vaccination arises. This Article strives to present and legally evaluate the universe of current or proposed policies considering vaccination status. Policies considering vaccination status are generally permissible at the state level absent specific legislation to the contrary. These policies are also permissible at the federal level in areas subject to federal regulation. And consideration of vaccination status may even potentially be required, rather than merely permitted, if doing so is needed to reasonably accommodate individuals at high risk. These evaluations can help assess the legal implications of potential public health responses to current and future pandemics.

182. *Cf.* Govind Persad, *Tailoring Public Health Policies*, 47 AM. J.L. & MED. 176, 177 (2021).