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**IS THERE A FUNDAMENTAL RIGHT TO PRIVACY WHEN AN  
EDUCATIONAL INSTITUTION REQUIRES A STUDENT TO  
DISCLOSE PROOF OF HIS OR HER VACCINATION STATUS?**

*Mary D. Fatscher\**

**ABSTRACT**

In 2020, the coronavirus disease (“COVID-19”) dominated the world. Although the public has progressively become more informed about the disease and how to safeguard itself, challenges persist as there is still much unknown. Aside from wearing masks, social distancing, and despite its undetermined consequences, the COVID-19 vaccination has emerged as a primary solution to substantially reducing the incidence and severity of the virus in our country. Many COVID-19 vaccine mandates were initiated once three pharmaceutical and biotechnology companies including Pfizer-BioNTech, Moderna, and Johnson & Johnson received Emergency Use Authorization from the Food and Drug Administration (“FDA”).<sup>1</sup>

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<sup>1</sup> *COVID-19 Frequently Asked Questions*, U.S. FOOD & DRUG ADMINISTRATION (Oct. 26, 2021), [https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-frequently-asked-questions#:~:text=On%20December%2011%2C%202020,\)of%20a%20vaccine](https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-frequently-asked-questions#:~:text=On%20December%2011%2C%202020,)of%20a%20vaccine).

## I. INTRODUCTION

The right to privacy has historically been a contentious topic in the United States. Although the right to privacy has previously been invoked in the medical setting, this right became more apparent during the COVID-19 pandemic. Disclosure of one's vaccination status has been required for years to attend public school, participate in certain activities or even travel internationally.<sup>2</sup> State laws vary on the types of acceptable proof of immunization for educational enrollment.<sup>3</sup> The first legal mandate for vaccinations emerged in the United States in the late nineteenth century.<sup>4</sup> The Supreme Court upheld a Massachusetts law in 1905, ruling that the state had the authority to enforce vaccination requirements, but not disclosure requirements specifically.<sup>5</sup> Although the Supreme Court held that no one has a constitutional right to refuse a vaccine,<sup>6</sup> it has never ruled on vaccine disclosures specifically.

This Note addresses whether a mandatory requirement implemented by an educational institution for its students to disclose proof of COVID-19 vaccination status violates an individual's fundamental right to privacy. It reviews how far an educational institution's authority extends with regard to the pandemic and, moreover discusses how this mandate may threaten an individual's fundamental right to privacy, especially when requiring someone to demonstrate his or her vaccination status. Part II of this Note summarizes the timeline of the COVID-19 pandemic. Part III reviews the history of vaccination mandates in educational institutions and whether exemptions have become more restrictive during the COVID-19 pandemic. Part IV elaborates on the history of vaccinations. Part V addresses the fundamental right

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<sup>2</sup> Hadley Barndollar, *Have You Had the Vaccine? Here Are Ways We Had to Show Our Vaccination Status Before COVID*, THE PROVIDENCE J. (Aug. 26, 2021), <https://www.providencejournal.com/story/news/2021/08/26/vaccine-requirement-school-enrollment-travel-requirement-immigration-covid-card-hipaa/8242298002/>.

<sup>3</sup> *State School Immunization Requirements and Vaccine Exemption Laws*, PUB. HEALTH L. (Feb. 2022), <https://www.cdc.gov/phlp/docs/school-vaccinations.pdf>.

<sup>4</sup> Asma Khalid, *The U.S. Has A Long Precedent For Vaccine Mandates*, NPR (Aug. 29, 2021), <https://www.npr.org/2021/08/29/1032169566/the-u-s-has-a-long-precedent-for-vaccine-mandates>.

<sup>5</sup> *Id.*

<sup>6</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); Efthimios Parasidis, *COVID-19 Vaccine Mandates At The Supreme Court: Scope And Limits Of Federal Authority*, HEALTH AFFAIRS FOREFRONT (Mar. 8, 2022), <https://www.healthaffairs.org/doi/10.1377/forefront.20220303.102051/>.

to privacy in regard to the vaccination mandates. Part VI applies the current status of the right to privacy both at the federal and state level. Finally, Part VII proposes a formal method that state courts could adopt to bridge the gap remaining in the law between educational institutions and disclosure of vaccination status mandates.

## II. BACKGROUND OF COVID-19

On New Year's Eve of 2019, the World Health Organization ("WHO") first learned of a cluster of mysterious pneumonia cases in Wuhan, China.<sup>7</sup> On January 14, 2020, the WHO held its first press conference on the novel virus and reassured the public that "this is something that the global community is preparing for."<sup>8</sup> However, by February 2020, the Senior Health Expert at the Center for Disease Control and Prevention, Nancy Messonnier, issued a stark warning for Americans.<sup>9</sup> Messonnier urged the public to prepare for the inevitable spread of the coronavirus within the United States.<sup>10</sup> The WHO declared COVID-19 a pandemic on March 11, 2020.<sup>11</sup> President Donald J. Trump declared a nationwide emergency two days later.<sup>12</sup> That next week many states began to shut down schools, restaurants, and cruise ships with the goal of preventing the spread of the disease.<sup>13</sup>

On March 17<sup>th</sup>, Moderna conducted the first human trial of a vaccine to protect against COVID-19 in the United States.<sup>14</sup> By the end of April, President Trump launched Operation Warp Speed, an initiative to produce a vaccine for the coronavirus as quickly as possible.<sup>15</sup> Just a few weeks later, the United States coronavirus death toll

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<sup>7</sup> Nurith Aizenman, *Back to the Beginning of the Coronavirus Pandemic*, NPR (Dec. 31, 2020), <https://www.npr.org/2020/12/31/952445574/back-to-the-beginning-of-the-coronavirus-pandemic>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Erica Werner et al., *Coronavirus's Spread in U.S. is 'Inevitable,' CDC Warns*, WASH. POST, (Feb. 28, 2020), <https://www.washingtonpost.com/us-policy/2020/02/25/cdc-coronavirus-inevitable/>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

surpassed 100,000.<sup>16</sup> By September 2020, the death toll had passed 200,000.<sup>17</sup>

On December 11, 2020, the FDA issued an Emergency Use Authorization for the first COVID-19 vaccine, the Pfizer-BioNTech COVID-19 vaccine.<sup>18</sup> As the United States COVID-19 death toll surpassed 300,000, a New York nurse became the first American to receive the vaccine on December 15, 2020.<sup>19</sup> Within the same week, a second vaccine, created by Moderna, was also given Emergency Use Authorization.<sup>20</sup> By January 2021, the United States COVID-19 death toll surpassed 400,000.<sup>21</sup> The FDA approved Emergency Use Authorization for the Johnson & Johnson one shot COVID-19 vaccine during the subsequent month; at that time the American death toll surpassed 500,000.<sup>22</sup>

By March 2021, the United States had administered over 100 million vaccinations.<sup>23</sup> The CDC announced that fully vaccinated people could gather indoors without masks and safely travel domestically that same month.<sup>24</sup> As certain hesitations surrounding the COVID-19 vaccine escalated, some officials required specific categories of workers to be vaccinated.<sup>25</sup> There were concerns about safety, fears of unknown side effects, and misinformation about COVID-19.<sup>26</sup> Many unvaccinated employees and students impacted by these mandates were required to undergo weekly testing and show proof of a negative COVID-19 test. The purported rationale behind these new policies

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (“The U.S. Food and Drug Administration announces a ‘new policy . . . for certain laboratories that develop and begin to use validated COVID-19 diagnostics before the FDA has completed review of their Emergency Use Authorization (EUA) requests,’ allowing laboratories to create tests to address testing shortages in the U.S.”).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Littler Mendelson, *Mandatory Employee Vaccines – Coming to A State Near You?*, INSIGHT (Oct. 26, 2021), <https://www.littler.com/publication-press/publication/mandatory-employee-vaccines-coming-state-near-you>.

<sup>26</sup> Kelly Elterman, *COVID-19 Vaccine Distrust: Why It’s High, and How to Respond to it*, GOODRX HEALTH, (Feb. 9, 2021), <https://www.goodrx.com/conditions/covid-19/distrust-of-the-covid-19-vaccine>.

was to improve the public health of the community and reduce the impact of COVID-19.<sup>27</sup> On July 29, 2021, President Joseph Biden announced that all federal government employees would be asked to attest to their vaccination status.<sup>28</sup> In addition, President Biden signed executive orders that mandated vaccination for all executive branch employees and some federal contractors.<sup>29</sup> These new orders eliminated the testing option for those who were not vaccinated unless they qualified for an approved exemption.<sup>30</sup>

Officials in twenty-five states announced that “all state and county employees must provide vaccination status to their department, office or agency.”<sup>31</sup> On September 30, 2021, the U.S. Department of Health and Human Services Office for Civil Rights announced that it had issued guidance—“HIPAA, COVID-19 Vaccination, and the Workplace”—to increase understanding of when the HIPAA (Healthcare Insurance Portability and Accountability Act) Privacy Rule applied to disclosures and requests for information about whether a person has received a COVID-19 vaccine.<sup>32</sup> The guidance informed the public that HIPAA rules do not apply to employers or employment records since the HIPAA Privacy Rule only applied to HIPAA-covered entities.<sup>33</sup>

Covered entities are defined in HIPAA rules as (1) health plans, (2) health care clearinghouses, and (3) health care providers who electronically transmit any health information in connection with transactions for which HHS has adopted standards.<sup>34</sup>

However, the Department of Health and Human Services Office for Civil Rights did not discuss how these rules apply to students and

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<sup>27</sup> *Federal Government to Expand Vaccination Requirements for Staff in Hospitals, Other Health Care Settings*, AM. HOSP. ASS’N (Sept. 9, 2021), <https://www.aha.org/special-bulletin/2021-09-09-federal-government-expand-vaccination-requirements-staff-hospitals>.

<sup>28</sup> Littler, *supra* note 25.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (“A medical or religious exemption immunization approved by their employer . . .”).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *To Whom Does the Privacy Rule Apply and Whom Will It Affect?*, U.S. DEP’T OF HEALTH & HUM. SERVICES NAT’L INST. OF HEALTH (Feb. 2, 2007), [https://privacyruleandresearch.nih.gov/pr\\_06.asp](https://privacyruleandresearch.nih.gov/pr_06.asp).

educational institution records. The HIPAA Privacy Rule moreover does not apply to elementary or secondary schools because the schools are either: (1) not a HIPAA covered entity or (2) are a HIPAA covered entity but maintains health information only on students in records that are by definition “education records” under FERPA and are therefore, are not subject to the HIPAA Privacy Rule.<sup>35</sup> The HIPAA Privacy Rule gives express authority to a healthcare provider to disclose immunization information to a school.<sup>36</sup>

### III. HISTORY OF VACCINATION MANDATES

As certain pandemic restrictions have eased and the world begins to revert to what is known as the pre-COVID life, new requirements are being mandated. A vaccine mandate imposes a restriction on vaccine refusal.<sup>37</sup> According to the National Conference of State Legislatures, all fifty states have legislation requiring specific vaccines for students.<sup>38</sup> Most educational institutions have required their students and employees to receive a COVID-19 vaccination.<sup>39</sup> In addition, the students and staff have been mandated to upload proof of their vaccination status through a student portal or college website.<sup>40</sup> There

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<sup>35</sup> *Does the HIPAA Privacy Rule Apply to an Elementary or Secondary School?*, OFF. FOR CIV. RTS. (July 26, 2013), <https://www.hhs.gov/hipaa/for-professionals/faq/513/does-hipaa-apply-to-an-elementary-school/index.html>.

<sup>36</sup> *Id.*

<sup>37</sup> Arthur Caplan & Dorit Reiss, *A Solution to the Murky Legal Status of Vaccine Mandates: Rewrite Vaccine EUAs*, STAT (July 27, 2021), <https://www.statnews.com/2021/07/27/rewriting-eua-pave-way-covid-19-vaccine-mandates/> (discussing a vaccine mandate that requires vaccination to participate in certain activities such as working, traveling, or even attending concerts).

<sup>38</sup> *Vaccines for Children: The Development of the Immunization Schedule*, THE COLL. OF PHYSICIANS OF PHILADELPHIA (2022), <https://historyofvaccines.org/getting-vaccinated/vaccines-children/development-immunization-schedule>.

<sup>39</sup> Staff Writer, *What Colleges Require the COVID-19 Vaccine?*, BEST COLL. (Sept. 9, 2022), <https://www.bestcolleges.com/news/2021/10/11/list-of-colleges-that-require-covid-19-vaccine/> (stating that over 1,000 colleges and universities require the COVID-19 vaccine for residential students).

<sup>40</sup> Josh Moody, *Colleges Requiring a Coronavirus Vaccine for Fall*, U.S. NEWS & WORLD REP. (Aug. 12, 2021), <https://www.usnews.com/education/best-colleges/articles/colleges-requiring-a-coronavirus-vaccine-for-fall-what-to-know>.

is currently no universal database to confirm that a person has received a COVID-19 vaccination.<sup>41</sup>

As with much of America's higher education, the way in which colleges navigate the issue of COVID-19 vaccines has varied. For a return to in-person learning during the summer of 2021, more than six-hundred and eighty public and private colleges across the United States required their students to receive a COVID-19 vaccine before attending class in-person.<sup>42</sup> Despite high survival rates for younger generations, some experts stress that student inoculations are key to avoiding a repeat of the spring of 2021, which saw a COVID-19 surge.<sup>43</sup> Out of one-hundred and seventy-six National Universities surveyed, ninety-seven require COVID-19 vaccines of "most undergraduates . . . arriving on campus" in the fall.<sup>44</sup> However, seventy-nine of the universities reported that they did not have a mandate.<sup>45</sup> Despite some students and parents' resistance to coronavirus vaccine mandates and the proof of vaccination requirement, educational institutions forged ahead with the requirement.

It is unclear whether it is permissible for private K-12 schools, universities, and colleges to obtain COVID-19 vaccination information about a student.<sup>46</sup> Furthermore, if they do, these educational institutions should also store the student's COVID-19 vaccination documentation in a confidential manner and limit access to such information to only those employees who have a legitimate need to know.<sup>47</sup> The U.S. DOE Database protects the student's information following the Security Standards for the Protection of Electronic Protected Health

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<sup>41</sup> Julie Wernau, *Covid-19 Vaccination Cards Are the Only Proof of Shots, Soon as Essential*, THE WALL ST. J. (Mar. 30, 2021), <https://www.wsj.com/articles/covid-19-vaccination-cards-are-the-only-proof-of-shots-soon-as-essential-11617105602>.

<sup>42</sup> Moody, *supra* note 40.

<sup>43</sup> *Id.* (Even if a student was likely to survive the student could infect an older relative or friend who might not survive or require extensive medical treatment. Some experts were concerned about the overwhelming of hospitals and, in particular, ICUs.).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Linda K. Adler & Brett A. Overby, *Confidentiality, Use, and Disclosure Requirements When Requesting Proof of COVID-19 Vaccination Information for Private Schools*, LIEBERT CASSIDY WHITMORE (July 9, 2021), <https://www.lcwlegal.com/news/confidentiality-use-and-disclosure-requirements-when-requesting-proof-of-covid-19-vaccination-information-for-private-schools/> (discussing the amended version of the Emergency Temporary Standards and OSHA COVID-19 Regulations).

<sup>47</sup> *Id.*



Information which establishes national standards for protecting certain health information that is held or transferred in electronic form.<sup>48</sup>

Two laws can apply to students' medical information, the Family Educational Rights and Privacy Act ("FERPA") and the Health Information Portability and Accountability Act ("HIPAA"). FERPA, the federal law that protects the privacy of student education records, applies to all educational agencies and institutions that receive funds under any program administered by the Secretary of Education.<sup>49</sup> Whether the student's records are covered under HIPAA or FERPA, or in some cases they are not covered under any law, is a challenging question especially in connection with the privacy of health records.<sup>50</sup> It is important to note that a key exception to the FERPA and HIPAA rules are that these health record privacy rights transfer to the student when he or she reaches the age of eighteen or attends a school beyond the high school level.<sup>51</sup>

The HIPAA Privacy Rule strikes an important balance between protecting the privacy of individuals' protected health information ("PHI") and allowing the disclosure of PHI in a number of circumstances to those responsible for ensuring public health and safety.<sup>52</sup> One circumstance is the disclosure of students' immunization information to schools.<sup>53</sup> The HIPAA Privacy Rule permits a covered health care provider to disclose proof of immunization directly to a school that is required by law to have such proof prior to admitting a

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<sup>48</sup> *Summary of the HIPAA Security Rule*, U.S. DEP'T OF HEALTH & HUM. SERV. (July 26, 2013), <https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/index.html>.

<sup>49</sup> Student Privacy Policy Office FERPA & Coronavirus Disease 2019 (COVID-19), DEP'T OF EDUC. U.S. OF AM. (Mar. 2020), <https://studentprivacy.ed.gov/sites/default/files/resource-document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions.pdf>.

<sup>50</sup> Robert Gellman & Pam Dixon, *Student Privacy 101, Health Privacy in Schools-What Law Applies?*, WORLD PRIV. F. (Feb. 12, 2015), <https://www.worldprivacyforum.org/2015/02/student-privacy-101-health-privacy-in-schools-what-law-applies/>.

<sup>51</sup> *Family Educational Rights and Privacy Act*, U.S. DEP'T OF EDUC. (Aug. 25, 2021), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (the statutes apply to students who are over eighteen or attend a school beyond the high school level).

<sup>52</sup> Student Immunizations, 45 CFR 164.512(b)(1)(vi), U.S. DEP'T OF HEALTH & HUM. SERVICES (Sept. 19, 2013), <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/student-immunizations/index.html>.

<sup>53</sup> *Id.*

student.<sup>54</sup> This is similar to the COVID-19 vaccination status disclosure requirement in an educational institution. Currently, students submit a vaccination card that is notarized by a medical professional validating that they have received a COVID-19 vaccination. However, the method in which the medical document is uploaded onto a school's portal and the proof of vaccination that is displayed while in the building may create privacy concerns. Educational institutions that require their students to upload their vaccination status and publicly expose it on an identification badge may violate Equal Employment Opportunity Commission ("EEOC") guidance that vaccination information is confidential medical information.<sup>55</sup> The disclosure requirement in schools may thus infringe on an individual's fundamental right to privacy.

The government must balance public or global health interests and the individual rights when implementing vaccine mandates. Communicable diseases pose an obvious threat to public health and may outweigh an individual's own interest to choose not to be vaccinated. Therefore, mandating disclosure of vaccination status may be in the best interest of the public. However, there is no formal method like a balancing test to determine the educational institution's authority to mandate vaccine disclosure.

As of August 2, 2021, fourteen states had enacted COVID-19 related laws that bar school vaccine mandates, employer vaccine mandates, or vaccine passports.<sup>56</sup> As of May 2021, forty-four states and the District of Columbia have implemented laws that allow students to claim a religious exemption to immunizations, while fourteen states allow for philosophical exemptions.<sup>57</sup> New York City schools are requiring all students and staff who participate in "high-risk" PSAL sports to be vaccinated against COVID-19.<sup>58</sup> All students involved in

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<sup>54</sup> *Id.*

<sup>55</sup> Allen Smith, *Who Can Know About Employee Vaccination Status?*, SHRM (July 6, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/coronavirus-employee-vaccination-status.aspx> (explaining how vaccination information is confidential medical information and it can be disclosed only on a need-to-know basis according to EEOC guidance).

<sup>56</sup> *Id.*

<sup>57</sup> Aleksandra Sandstorm, *Amid Measles Outbreak, New York Closes Religious Exemption for Vaccinations – But Most States Retain It*, PEW RSCH. GRP. (June 28, 2019), <https://www.pewresearch.org/fact-tank/2019/06/28/nearly-all-states-allow-religious-exemptions-for-vaccinations/>.

<sup>58</sup> *Health and Safety in Our Schools*, NYC DEP'T OF EDUC. (2020) ("[T]he Public Schools Athletic League (PSAL) is the longest running scholastic athletic program

high-risk extracurricular activities are required to be vaccinated to participate in their respective activities.<sup>59</sup> The CDC has recommended that children as young as six months old be vaccinated against COVID-19.<sup>60</sup> All visitors who are twelve years of age and older must show proof of at least one dose of the COVID-19 vaccination to enter a Department of Education (“DOE”) school building.<sup>61</sup> Students have been encouraged to upload their vaccination status in the DOE’s COVID-19 Vaccination Portal.<sup>62</sup> The students are informed that their information will be protected by technical, physical, and administrative safeguards, including encryption.<sup>63</sup> Further, the information must be kept confidential in accordance with federal, state, and local laws.<sup>64</sup> Although the student’s information will be safeguarded, it is unclear what method these institutions determine their authority to request vaccination disclosure.

#### IV. HISTORY OF VACCINATIONS

The practice of immunization dates back hundreds of years. Indeed, precedent already exists for mandatory vaccinations against other infectious diseases.<sup>65</sup> In 1796, Edward Jenner’s innovative use of cowpox to create immunity to smallpox rapidly became a widespread practice.<sup>66</sup> Louis Pasteur’s 1885 rabies vaccine was the next

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in the country (Basketball, Football, Lacrosse, Rugby, Stunt, Volleyball, Wrestling”), <https://www.schools.nyc.gov/school-life/health-and-wellness/covid-information/health-and-safety-in-our-schools>.

<sup>59</sup> *Id.*

<sup>60</sup> *CDC Recommends COVID-19 Vaccine for Young Children*, CTR. FOR DISEASE CONTROL & PREVENTION (June 18, 2022), <https://www.cdc.gov/media/releases/2022/s0618-children-vaccine.html>.

<sup>61</sup> *See supra* note 58.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Karen Milligan & Jeffrey E. Harris, *COVID-19 Vaccination Mandates for School and Work Are Sound Public Policy*, USC (July 7, 2021), <https://healthpolicy.usc.edu/research/covid-19-vaccination-mandates-for-school-and-work-are-sound-public-policy/>; *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>66</sup> Stefan Riedel, *Edward Jenner and the History of Smallpox and Vaccination*, NAT’L LIBR. OF MED. (Jan. 2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1200696/>.

scientific breakthrough to successfully impact a human disease.<sup>67</sup> The middle of the twentieth century was an active time for vaccine research and development, including the creation of the polio vaccines.<sup>68</sup> Despite the evidence of health gains from immunization methods there have always been concerns and even resistance to vaccines and in particular, public vaccine programs.<sup>69</sup>

Intense political opposition to vaccine passports stems uniquely from American notions of liberty.<sup>70</sup> In the face of future health emergencies similar to the COVID-19 pandemic, a precedential Supreme Court decision about the government's power to protect citizens by quarantine and forced vaccinations could gain new interest.<sup>71</sup> In 1905, the Court upheld the authority of states to enforce compulsory vaccination laws.<sup>72</sup> The Court reasoned that individual liberty is not absolute and subject to the police power of the state.<sup>73</sup>

This pandemic has prompted the ultimate question: does the government have the right to impose mandatory proof of vaccination under these circumstances? Although the Supreme Court holds that no one has a constitutional right to refuse a vaccine,<sup>74</sup> it has never specifically ruled on vaccine disclosures. The Court considers that true liberty would not exist for all if individuals had an absolute right to control their person or property, thereby disregarding any injury that may be done to others as a consequence of the right to refuse a vaccine.<sup>75</sup>

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<sup>67</sup> *Vaccine Timeline*, NAT'L CTR. FOR IMMUNIZATION & RESPIRATORY DISEASES, <https://www.immunize.org/timeline/>.

<sup>68</sup> *Id.*

<sup>69</sup> *A Brief History of Vaccination*, THE IMMUNISATION ADVISORY CENTRE (2017), <https://www.immune.org.nz/vaccines/vaccine-development/brief-history-vaccination> (last visited Jan. 2020).

<sup>70</sup> Nicol Lee et al., *Vaccine Passports Underscore the Necessity of U.S. Privacy Legislation*, TECHTANK (June 28, 2021), <https://www.brookings.edu/blog/techtank/2021/06/28/vaccine-passports-underscore-the-necessity-of-u-s-privacy-legislation/> (“The author writes that a passport is issued by a government and certifies personal data . . .”).

<sup>71</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); Nicholas Mosvick, *On This Day, the Supreme Court Rules on Vaccines and Public Health*, NAT'L CONST. CTR. (Feb. 20, 2021), <https://constitutioncenter.org/interactive-constitution/blog/on-this-day-the-supreme-court-rules-on-vaccines-and-public-health>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Efthimios Parasidis, *COVID-19 Vaccine Mandates At The Supreme Court: Scope And Limits Of Federal Authority*, HEALTH AFFAIRS FOREFRONT (Mar. 8, 2022), <https://www.healthaffairs.org/doi/10.1377/forefront.20220303.102051/>.

<sup>75</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

This notion is similar to the theory of COVID-19 vaccination mandates.<sup>76</sup>

As noted earlier, there is currently no universal database for COVID-19 vaccinations, but some states have created them by allowing individuals to verify their vaccination status.<sup>77</sup> The Vaccine Administration Management System (VAMS) is an online tool to manage vaccine administration from the time the vaccine arrives at a clinic until it is administered to a recipient.<sup>78</sup> Indeed, the New York State Legislature passed the Immunization Registry Law which, as of January 1, 2008, required health care providers to report all immunizations administered to a person less than nineteen years of age, along with the person's immunization histories, to New York State Department of Health using the NYSIIS.<sup>79</sup>

During the pandemic, colleges and universities required their students and staff to upload their vaccination records to an online school specific portal. In addition, some educational institutions required vaccinated individuals to publicly display their status on their personal identification badge so that students can be verified upon building entry. The online portals are usually only accessible to government agencies in charge of health administration. Therefore, this presented no real privacy issue. However, disclosing vaccination status to the public by donning a mandatory personal identification badge can be a risk to an individual's privacy.

## V. THE FUNDAMENTAL RIGHT TO PRIVACY

Although the right to privacy is not specifically mentioned in the United States Constitution, the United States Supreme Court has found, through precedent, that several Amendments imply the right exists. Beginning as early as 1923 and continuing through its recent decisions, the Supreme Court has broadly read the "liberty" guarantee of

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<sup>76</sup> *Id.*

<sup>77</sup> *The History of Vaccines*, THE COLL. OF PHYSICIANS OF PHILADELPHIA (2021), <https://www.historyofvaccines.org/timeline/all>.

<sup>78</sup> National Center for Immunization and Respiratory Diseases, *Vaccine Administration Management System (VAMS) Program Information*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/covid-19/reporting/vams/program-information.html> (last visited Aug. 11, 2021).

<sup>79</sup> New York State Immunization Information System (NYSIIS), N.Y. ST. DEP'T OF HEALTH (Aug. 2013), [https://www.health.ny.gov/prevention/immunization/information\\_system/](https://www.health.ny.gov/prevention/immunization/information_system/).

the Fourteenth Amendment to guarantee a fairly broad right to privacy surrounding child rearing, procreation, marriage, and termination of medical treatment.<sup>80</sup> In *Meyer v. Nebraska*,<sup>81</sup> the Supreme Court interpreted the Fourteenth Amendment's liberty clause to prohibit states from interfering with the private decisions of educators and parents to shape the education of children.<sup>82</sup> The privacy doctrine of the 1920s was applied in *Griswold v. Connecticut*,<sup>83</sup> in determining that a zone of privacy emerged from several fundamental constitutional guarantees.<sup>84</sup> The Supreme Court held that any law where its purpose is to control or prevent activities that are constitutionally subject to state regulation, may not be achieved by invading protected freedoms through unnecessarily broad means.<sup>85</sup> There has been a debate in the Court about the strength of the interest that a state must demonstrate to survive claims of a protected liberty violation.<sup>86</sup>

Although the right to privacy was not recognized as a constitutional principle until 1961 and did not form the basis of a Supreme Court ruling until 1965, it is, in some respects, the oldest constitutional right.<sup>87</sup> The Court has found the right to privacy in the "penumbras of the Bill of Rights" and can be found in the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution.<sup>88</sup> Individuals have a right to privacy to their medical records under certain laws and the United States Constitution.<sup>89</sup> These rights are not unlimited, but an individual can restrict access to his or her health information.<sup>90</sup> The federal

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<sup>80</sup> *The Right of Privacy*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html>.

<sup>81</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>82</sup> *Id.*

<sup>83</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Benjamin D. Novak, *Freeing Jane: The Right to Privacy and The World's Oldest Profession*, 66 NATIONAL LAWYERS GUILD REV. 137 (2009) (affirming that the Court has affirmed this "right to privacy" in numerous cases, and has found the right implicit in multiple sections of the Constitution); Tom Head, *Where Did the Right to Privacy Come From?*, DOTDASH (Oct. 28, 2019), <https://www.thoughtco.com/right-to-privacy-history-721174>.

<sup>88</sup> *Griswold*, 381 U.S. 479 (1965).

<sup>89</sup> *Your Rights Under HIPAA*, U.S. DEP'T OF HEALTH & HUM. SERV. (Nov. 2, 2020), <https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html>.

<sup>90</sup> *Id.*

government remains a major player in national public health matters.<sup>91</sup> An individual's constitutional right to privacy protects against invasions of privacy by nongovernmental and governmental actors.<sup>92</sup> A person's medical history falls within the zone of informational privacy protected by the Constitution.<sup>93</sup> Medical information is protected and mandating the disclosure of this information goes against these protective efforts and rules.<sup>94</sup> There are almost a dozen states that have a statute related to the protection of a person's medical and other confidential information.<sup>95</sup> The right to privacy is a legitimate right and cannot be disregarded from the ultimate conversation and decision-making that goes into implementing a policy like mandating vaccination disclosure. The vaccine exceptions to HIPAA and FERPA further protect one's health record privacy rights.<sup>96</sup>

In previous situations, government interests have sometimes outweighed privacy concerns. Thus, an individual's privacy interest can be subsumed when necessary for the public health or safety.<sup>97</sup> The

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<sup>91</sup> Wendy K. Mariner et al., *Jacobson v Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law*, U.S. NAT'L LIBR. OF MED. NAT'L INST. OF HEALTH 581-90 (Apr. 2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449224/>.

<sup>92</sup> Judith Haydel, *Privacy*, THE FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1141/privacy>.

<sup>93</sup> West's Ann. Cal. Const. Art. 1, § 1.

<sup>94</sup> *Id.*

<sup>95</sup> West's Cal. Civ. Code § 1798 146 (Collection of confidential medical information; protected health information; covered entity or business governed by federal law) (2020).

<sup>96</sup> *Family Educational Rights and Privacy Act*, *supra* note 51.

<sup>97</sup> Dan Bischof, *Public Concern Outweighs Privacy*, THE NEWS MEDIA & THE L. (2001), <https://www.rcfp.org/journals/the-news-media-and-the-law-summer-2001/public-concern-outweighs-pr/>; Tim Sharp, *Right to Privacy: Constitutional Rights & Privacy Laws*, LIVESCIENCE (June 12, 2013), <https://www.livescience.com/37398-right-to-privacy.html> ("The right to privacy often must be balanced against the state's compelling interests, including the promotion of public safety and improving the quality of life.").

Not long after the Revolutionary War, Philadelphia imposed a quarantine to stop the spread of yellow fever. In 1799, Congress, by statute, recognized the power of states to impose quarantines. In 1926, the Supreme Court ruled that 'a state, in the exercise of its police power, may establish quarantines against human beings, or animals, or plants.

Erwin Chemerinsky, *Op-Ed: Yes, the Government Can Restrict Your Liberty to Protect Public Health*, L.A. TIMES (Apr. 2020).

Supreme Court has recognized the need to give greater weight to issues of public interest and that the need for public debate on public interest matters outweighed personal privacy.<sup>98</sup>

The recent trajectory of Supreme Court decisions has demonstrated the Court's intention to take on a more originalist approach when dealing with unenumerated rights.<sup>99</sup> The Supreme Court overturned *Roe v. Wade* in the *Dobbs v. Jackson Women's Health Organization* decision.<sup>100</sup> The Court held that there is no constitutional right to an abortion because the right was never mentioned in the Constitution.<sup>101</sup> The *Dobbs* opinion leaves the power to States to decide on how to deal with the polarizing nature of abortion issues.<sup>102</sup> The *Dobbs* decision followed the Court's opinion in *New York State Rifle Association v. Bruen*, which struck down a New York State gun law requiring applicants for a license to carry a gun outside of their homes to have a "proper cause" in doing so.<sup>103</sup> These opinions set the stage for future cases before the Supreme Court. In taking a more originalist approach, the Court's recent decisions have called into question unenumerated rights, such as contraception, marriage, travel, and the right to privacy.<sup>104</sup> These decisions set the precedent for future cases involving the right to privacy, specifically as it pertains to vaccination disclosure, for the reason that this "right" is not enumerated in the Constitution.

## VI. CURRENT STATUS OF THE LAW

### A. Federal Law

In *Jacobson v. Massachusetts*,<sup>105</sup> the Supreme Court ruled that under a state law, local health authorities could compel adults to receive the smallpox vaccine.<sup>106</sup> The challenges to compelled

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<sup>98</sup> *Id.*

<sup>99</sup> See generally *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2228 (2022); *But see New York State Rifle Assoc. v. Bruen*, 142 S. Ct. 2111 (2022) (distinguishing a living Constitution from a more originalist approach).

<sup>100</sup> *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2228 (2022).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *New York State Rifle Assoc. v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>104</sup> *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2228 (2022) (Thomas, J., concurring).

<sup>105</sup> *Jacobson*, 197 U.S. 11 (1905).

<sup>106</sup> *Id.*



vaccinations in *Jacobson* were rejected by the majority, holding that the Constitution's guarantee of liberty did not include an absolute right to individual freedom from restraint, and that the collective interest in health and safety outweighed the petitioner's interest.<sup>107</sup> Courts that have considered the issue in recent years have suggested that the unvaccinated population is not a protected class that enjoys a fundamental constitutional right to remain unvaccinated.<sup>108</sup> Individuals and property are often regulated with various restraints and burdens to further broader state interests.<sup>109</sup> Although these restraints are considered in line with liberty interests, the restraints must ensure equal enjoyment of those same rights by all others as well.<sup>110</sup>

These restraints are similar to the argument about privacy rights. While an individual has a right to privacy, it is outweighed by the government's interest in preserving health and safety.<sup>111</sup> The individual is actually channeling an unenumerated, illegitimate right to exercise restraint and not a right to privacy in regard to immunization disclosure.<sup>112</sup> It is unclear whether the same government interest outweighs privacy rights when schools are mandating the disclosure of the student's vaccination status, some even to the public on their identification badges.

The legality of a vaccine requirement for particular diseases depends on several factors. "While vaccine mandates are not always permissible, it is uncommon that civil liberties are at risk when they involve highly infectious and devastating diseases like COVID-19."<sup>113</sup> Employee medical records fell within one of the privacy zones entitled

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<sup>107</sup> *Id.*

<sup>108</sup> *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 553 F. Supp. 3d 1143 (S.D. Fla. 2021),

<sup>109</sup> James Beck, *Not Breaking News: Mandatory Vaccination Has Been Constitutional for Over a Century*, AM. BAR ASS'N (Oct. 28, 2021), <https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2021/winter2022-not-breaking-news-mandatory-vaccination-has-been-constitutional-for-over-a-century/>.

<sup>110</sup> *Id.*

<sup>111</sup> *Jacobson*, 197 U.S. 11 (1905).

<sup>112</sup> *Id.* (discussing that an individual's privacy right claim relating to a state's vaccine mandate fails).

<sup>113</sup> David Cole & Daniel Mach, *We work at the A.C.L.U. Here's What We Think About Vaccine Mandate.*, N.Y. TIMES (Sept. 2, 2021), <https://www.nytimes.com/2021/09/02/opinion/covid-vaccine-mandates-civil-liberties.html?smid=fb-ny-times&smtyp=cur&fbclid=IwAR3fCSXFJmKx5k8TN9Kup53Y52upFVRCfS-j5xp4ggYS2vidpkqWqcZjEck>.

to protection, but even protected material could be required to be produced or disclosed upon a showing of proper governmental interest.<sup>114</sup> It is significant to note that although there are factors to determine the permissibility of requiring vaccines, there is no explicit method to determine the permissibility of disclosing vaccination status.

The California Court of Appeal stated that the statutory repeal of the personal belief exemption to immunization requirements for students as a condition of enrollment did not violate the state constitutional right to privacy.<sup>115</sup> Long after *Jacobson*, the California Court of Appeal, in *Love v. State Department of Education*,<sup>116</sup> held that the statute promoted a compelling governmental interest of ensuring health and safety by preventing the spread of contagious diseases and was narrowly circumscribed.<sup>117</sup> The Court of Appeal held that imposing a mandatory vaccine requirement on school children as a condition of enrollment does not violate substantive due process, the right to privacy and the right to attend school.<sup>118</sup>

A complaining party alleging a violation of the constitutional right to privacy must meet three threshold elements utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision.<sup>119</sup> The party must demonstrate: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.<sup>120</sup> Under the balancing test for invasion of privacy, evidence of less intrusive alternatives is relevant in balancing the government's interests against the privacy intrusion at issue.<sup>121</sup>

As previously outlined, more than a hundred years ago, the Court in *Jacobson* held that a state may mandate vaccinations without

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<sup>114</sup> U.S. v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980); Laura Beltz, *Where Does the Government's Right to Require Vaccinations Come From?*, CONST. DAILY (Feb. 2015), <https://constitutioncenter.org/blog/where-does-the-governments-right-to-require-vaccinations-come-from> (discussing factors such as the failure to achieve sufficiently high levels of vaccination based on voluntary efforts, potential harm to the public, known efficacy and safety of available vaccines).

<sup>115</sup> *Love v. State Dept. of Educ.*, 29 Cal. App. 5th 980 (Cal. Ct. App. 2018).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Lewis v. Superior Ct.*, 3 Cal. 5th 561 (Cal. Sup. Ct. 2017).

<sup>120</sup> *Id.*

<sup>121</sup> U.S. v. Nenner, 351 F.3d 340 (8th Cir. 2003).

violating the liberty secured by the Fourteenth Amendment of the United States Constitution.<sup>122</sup> The police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and safety.<sup>123</sup> The Court expressed that a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.<sup>124</sup> Chief Justice Roberts recently supported the continued vitality of *Jacobson* by stating, “[o]ur Constitution principally entrusts the safety and health of the people to the politically accountable officials of the States to guard and protect.”<sup>125</sup> However, the Chief Justice noted that when officials act in areas with medical and scientific uncertainties, their latitude must be especially broad.<sup>126</sup>

The Supreme Court reaffirmed its decision in *Jacobson* in *Zucht v. King*,<sup>127</sup> which held that a school system could refuse admission to a student who failed to receive a required vaccination.<sup>128</sup> Students who were not vaccinated for smallpox were excluded from public and private schools.<sup>129</sup> Officials excluded Zucht from public and private school because she did not have the required certificate and refused to submit to vaccination.<sup>130</sup> Zucht challenged the officials in state court, claiming its decision deprived her of her liberty without due process of law by making vaccination compulsory and by leaving enforcement to the Board of Health’s discretion without sufficient guidance.<sup>131</sup> The Supreme Court denied Zucht’s claim that the ordinances violated the due process and equal protection clauses of the Fourteenth Amendment.<sup>132</sup> The ordinances conferred nonarbitrary power to the administering officials, but only the broad discretion required for the protection of the public health.<sup>133</sup>

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<sup>122</sup> *Jacobson*, 197 U.S. 11 (1905).

<sup>123</sup> *Id.* at 25.

<sup>124</sup> *Id.*

<sup>125</sup> *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020).

<sup>126</sup> *Id.*

<sup>127</sup> *Zucht v. King*, 260 U.S. 174 (1922).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

*Jacobson v. Massachusetts* in 1905 and *Zucht v. King* in 1922 form the basis for modern state and local officials' vaccine mandate policies, even though the Court's interpretation of the Fourteenth Amendment has clearly changed since 1922. Over time, the Supreme Court has interpreted the third clause of this Amendment to guarantee a broad array of rights against infringement by the states, including the right to privacy and other fundamental rights not mentioned elsewhere in the Constitution.<sup>134</sup> While the Supreme Court's constitutional jurisprudence has evolved substantially since *Jacobson* and *Zucht*, modern courts have continued to rely on these cases to reject Due Process and Equal Protection claims against vaccination mandates, giving considerable deference to the states' use of their police power to require immunizations to protect public health.<sup>135</sup> However, vaccine mandates that conflict with one's fundamental right to privacy must be considered in the light of our whole experience and not merely on decisions rendered one hundred or more years ago.<sup>136</sup> The powers of the state government to protect the public's health and the Constitution's protection of personal liberty in later cases have expanded to better protect both health and human rights.<sup>137</sup> Programs essential to today's maintenance of public health, such as those that regulate hazardous industries and those that provide medical care, which would have been struck down in 1905, are routinely upheld today because they serve a legitimate public purpose and do not interfere with personal liberty.<sup>138</sup> The regulations for healthcare and hazardous waste industries would be struck down if the regulation was an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual.<sup>139</sup> On the other hand, deprivations of liberty that might have been upheld in 1905 would be denied today given that public health has improved tools, advanced science, engineering, drugs and vaccines, information, and communication mechanisms for educating the public.<sup>140</sup> *Jacobson* and *Zucht* thus serve as the legal support beam for an educational institution vaccination requirement, but not on proof of vaccination.

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<sup>134</sup> 14<sup>th</sup> Amendment, HISTORY (Jan. 12, 2021), <https://www.history.com/topics/black-history/fourteenth-amendment>.

<sup>135</sup> State and Federal Authority to Mandate COVID-19 Vaccination, CONGRESSIONAL RESEARCH SERVICE at 6 (Feb. 7, 2022).

<sup>136</sup> Mariner, *supra* note 91.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

New regulations requiring disclosure of vaccination status extend beyond the scope of the Supreme Court precedent.

It is well-settled by the Supreme Court that it is within the police power of a state to provide for compulsory vaccination, but the Court is silent on the disclosure of vaccination mandates.<sup>141</sup> As previously described, the United States Constitution does not directly contain a right to privacy, and the Supreme Court has not specifically recognized the existence of a general right to privacy.<sup>142</sup> With few exceptions, there are no laws that allow the federal government to issue a vaccine mandate to the general population.<sup>143</sup> Justice John Marshall Harlan, writing for the Court's majority in *Jacobson*, concluded that states under their general police powers have the ability to enact vaccine laws to protect citizens.<sup>144</sup> Therefore, states may have the ability to implicate vaccine disclosure mandates to protect their citizens. Although the Constitution does not expressly grant the right to privacy, the right is embedded in case law and the value of precedent surrounding this right is essential to modern American jurisprudence.

The Project BioShield Act of 2004 allowed the Secretary of Health and Human Services to give Emergency Use Authorization for drugs and vaccines for the three COVID-19 vaccines.<sup>145</sup> Although states have the broad power to control vaccine policies and block vaccine mandates, they are unable to override Emergency Use Authorization.<sup>146</sup> Section 564 of the Food, Drug, and Cosmetic Act creates uncertainty about vaccination requirements. The Act provides that the Health and Human Services ("HSS") Secretary must offer the vaccine

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<sup>141</sup> *Jacobson*, 197 U.S. 11 (1905).

<sup>142</sup> *J.P. v. DeSanti*, 653 F.2d 1080, 1087 (6th Cir. 1981).

<sup>143</sup> *Id.*

<sup>144</sup> *Jacobson*, 197 U.S. 11 (1905).

<sup>145</sup> *See supra* note 37.

<sup>146</sup> Scott Bomboy, *Current Constitutional Issues Related to Vaccine Mandates*, NAT'L CONST. CTR. (Aug. 6, 2021), <https://constitutioncenter.org/blog/current-constitutional-issues-related-to-vaccine-mandates>; Daniel Funke, *Fact Check: Federal Law Does Not Prevent States, Businesses, Employers from Requiring COVID-19 Vaccines*, USA TODAY (May 26, 2021), <https://www.usatoday.com/story/news/factcheck/2021/05/25/fact-check-federal-law-doesnt-prohibit-covid-19-vaccine-mandates/5062104001/>; Jacqueline LaPointe, *Courts Block COVID-19 Vaccine Mandate for Healthcare Workers*, REVCYCLE INTELLIGENCE (Dec. 1, 2021), <https://revcycleintelligence.com/news/vaccine-mandate-for-healthcare-workers-blocked-in-10-states> (discussing that a federal court blocked the COVID-19 vaccine mandate for healthcare workers in ten states until the legality of the mandate is determined by a full judicial review).

recipients the “option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product.”<sup>147</sup> This language may suggest prohibiting mandates or that the provision applies only to the HHS secretary, not to states, employers, universities and others that may choose to mandate.<sup>148</sup> The HHS secretary of the FDA commissioner should revise the current provision issued pursuant to the Emergency Use Authorization enacted by Congress to clarify the current language provided by the FDA in the regulation.<sup>149</sup> Without regulations to guard against the improper use and sale of personal information, vaccine passports may carry strong privacy risks.<sup>150</sup> If vaccine verification becomes mandatory to participate in everyday life, people will have little choice in whether to hand over sensitive data to private companies.<sup>151</sup>

Higher education institutions and the healthcare industry are leading the way in imposing vaccine mandates, while other sectors are beginning to follow their lead. Digital health certificates, or vaccine passports, are part of these efforts.<sup>152</sup> A number of organizations have since begun requiring proof of vaccination, including commercial airlines, employers, colleges and universities, and retail establishments.<sup>153</sup> The imposition of differing standards and methods for vaccine disclosure creates inconsistencies that may leave privacy rights susceptible. As Congress continues to debate the need for federal privacy legislation, now is the time to implement a national standard on personal vaccination disclosure.<sup>154</sup> Federal privacy legislation should be imperative as digital health certificates become more commonplace to ensure short and long-term data protections, especially as more private companies are either collecting or requiring vaccination data.<sup>155</sup> Perhaps implementing limitations on who can examine one’s

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<sup>147</sup> Dawn Johnsen, *Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization*, (July 2021), <https://www.justice.gov/olc/file/1415446/download>.

<sup>148</sup> *Id.* (discussing how earlier-introduced versions of section 564 in 2003 referred to “any option” to accept or refuse

“administration of the product” as opposed to “the option”).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See *supra* note 41.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

vaccination status under disclosure mandates would protect privacy rights, while avoiding the infringement on the public's health and safety. Indeed, as Ceylan Yeginsu, a New York Times reporter, has suggested, the term "vaccine passport" can be polarizing and misleading.<sup>156</sup> Yeginsu asserted, "a passport is issued by a government and certifies personal data, [so] many people fear that if they are required to have one related to the coronavirus, they will be handing over personal and sensitive health data" that may be abused by data controllers.<sup>157</sup>

Many government agencies, private businesses and educational institutions have denied access to education and work without proof of vaccination.<sup>158</sup> Laws that restrict non-fundamental liberty rights need only be "rationally related" to any "legitimate state interest," and the Supreme Court continues to accept almost any plausible reason as justification.<sup>159</sup> In this area, the Court applies a rational relationship test.<sup>160</sup> Some judges and scholars have opposed the easy justification because it is not sensitive to the importance of some aspects of personal liberty that do not qualify as fundamental.<sup>161</sup>

Back-to-school forms generally require a physical that discloses a student's allergies, medication, diseases, and up-to-date immunizations. Schools have had long-standing mandatory vaccination requirements, so what is different about the current vaccination mandate? Most school requirements follow the Center for Disease Control and Prevention vaccine schedule for children. The CDC sets the adult and childhood immunization schedules based on recommendations from its Advisory Committee of Immunization Practices.<sup>162</sup> State lawmakers around the country have faced controversy when they have attempted to narrow or eliminate broad, philosophical, or religious vaccine exemptions that have led to a rise

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<sup>156</sup> See Nicol Lee et. al., *supra* note 70.

<sup>157</sup> *Id.*

<sup>158</sup> Milligan & Harris, *supra* note 65.

<sup>159</sup> Mariner, *supra* note 91.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> National Center for Immunization and Respiratory Diseases, *Who Sets the Immunization Schedule?*, CTR. FOR DISEASE CONTROL & PREVENTION <https://www.cdc.gov/vaccines/parents/schedules/sets-schedule.html> (last visited Feb. 10, 2021).

in opt-outs.<sup>163</sup> Colleges are carving out medical or religious exemptions for unvaccinated students. Students who are engaging in fully remote-learning may also be exempt from vaccine requirements at some colleges.<sup>164</sup> Very few colleges and universities are granting students the ability to attend school completely online before granting them an exemption.<sup>165</sup> The Supreme Court held that the state's interest in mandating vaccines to protect the public at large from communicable disease can override a personal liberty interest but cannot supersede the right to a medical exemption if the person is at risk of harm from the vaccine.<sup>166</sup> Although some of these schools are allowing exemptions like religious exemptions, it impacts an individual's right to privacy to provide proof of vaccine status.

## B. State Law

From a public health perspective, a vaccination mandate would be beneficial, and it is clear that states have an obligation to protect the lives of those within their jurisdictions.<sup>167</sup> It is common for state public health agencies to regulate “immunization, infectious disease control and reporting, health education, and health statistics.”<sup>168</sup> Public health is population-based.<sup>169</sup> State and federal interests prioritize public health over individual interests.<sup>170</sup> However, consideration should be given to whether forcing individuals to show proof of vaccination

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<sup>163</sup> Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353 (2004), <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1137&context=faculty-articles>.

<sup>164</sup> Moody, *supra* note 40.

<sup>165</sup> Staff Writers, *What Colleges Require the COVID-19 Vaccine?*, BEST COLL. (Oct. 11, 2021), <https://www.bestcolleges.com/blog/list-of-colleges-that-require-covid-19-vaccine/#new-york>.

<sup>166</sup> Mariner, *supra* note 91.

<sup>167</sup> Aaron Chia, *Student Essay: Is Compulsory COVID-19 Vaccination a Violation of Human Rights?*, HEALTH & HUM. RTS. J. (July 13, 2021), <https://www.hhrjournal.org/2021/07/student-essay-is-compulsory-covid-19-vaccination-a-violation-of-human-rights/>.

<sup>168</sup> *The Future of The Public's Health in the 21<sup>st</sup> Century*, INST. OF MED. OF THE NAT'L ACADEMIES (2002), [HTTPS://WWW.NCBI.NLM.NIH.GOV/BOOKS/NBK221239/](https://www.ncbi.nlm.nih.gov/books/NBK221239/).

<sup>169</sup> *Government's Responsibility for Public Health*, DEP'T OF HEALTH <https://www.health.state.mn.us/communities/practice/resources/chsadmin/mnsys-tem-responsibility.html>.

<sup>170</sup> *Id.*



would interfere with any of their rights.<sup>171</sup> It can be difficult to enforce a vaccine mandate without requiring proof of vaccination. However, an educational institution should determine whether the student has been vaccinated using an alternate method that does not include displaying it to the public on a personal identification badge. More importantly, there should be a formal balancing test to determine the legality of the institutional method.

Recently, state governments have enacted various rules on the use of proof of vaccination requirements in their states, such as banning proof of vaccination requirements in some circumstances or implementing policies that allow vaccinated people to bypass COVID-19 restrictions or engage in activities unavailable to unvaccinated people.<sup>172</sup> U.S. citizens who have traveled to certain locations internationally have also had to provide proof of vaccination.<sup>173</sup> The only place in the United States that extended proof of vaccination requirement for entry was Hawaii, which uses an online portal to upload proof of vaccination.<sup>174</sup> Most individuals traveling internationally require proof of vaccination for entry, but U.S. citizens do not need to show proof when traveling from abroad.<sup>175</sup>

Several states are taking action to prevent public schools from requiring COVID-19 vaccination or proof of vaccination.<sup>176</sup> At least twenty states including Alabama, Arkansas, Florida, Indiana, Montana, Oklahoma, and Utah have taken steps to enact legislation to prohibit proof of vaccination in public schools.<sup>177</sup> In eleven states, governors banned proof of vaccination requirements through executive

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<sup>171</sup> *Id.*

<sup>172</sup> *State Policies About Vaccine Requirements (vaccine passports)*, BALLOTPEDIA (Sept. 22, 2021), [https://ballotpedia.org/State\\_government\\_policies\\_about\\_vaccine\\_requirements\\_\(vaccine\\_passports\)](https://ballotpedia.org/State_government_policies_about_vaccine_requirements_(vaccine_passports)).

<sup>173</sup> Barndollar, *supra* note 2.

<sup>174</sup> Brian Mastroianni, *Will You Need Proof of Vaccination to Travel for the Holidays?*, HEALTH NEWS (Nov. 11, 2021), <https://www.healthline.com/health-news/will-you-need-proof-of-vaccination-to-travel-for-the-holidays>.

<sup>175</sup> *Id.*

<sup>176</sup> Ernie Mundell & Robin Foster, *Many States Move to Ban Vaccine Mandates, Passports in Public Schools*, U.S. NEWS & WORLD REP. (July 15, 2021), <https://www.usnews.com/news/health-news/articles/2021-07-15/many-states-move-to-ban-vaccine-mandates-passports-in-public-schools>.

<sup>177</sup> *Id.*

orders.<sup>178</sup> In nine states, legislators passed laws banning proof of vaccination requirements in public schools.<sup>179</sup> These state laws provide that schools cannot mandate COVID-19 vaccines or proof of vaccination.<sup>180</sup> Alabama recently passed a law that states that it is illegal and discriminatory for the government to deny students education based on their vaccination status.<sup>181</sup> Further, the Colorado governor reasoned that, “[t]here is no comprehensive way to have a state vaccination passport. It violate[s] people’s privacy. There’s no practical way to implement it.”<sup>182</sup> The Georgia Governor insisted that “vaccination is a personal decision between each citizen and a medical professional—not state government.”<sup>183</sup> Florida’s Governor resisted proof of vaccination, further stating that it is unacceptable to infringe on an individual’s medical privacy because of personal health decisions.<sup>184</sup>

More recently in *Doe v. Zucker*,<sup>185</sup> the Northern District Court of New York granted the respondents’ motion to dismiss that argued the Children’s Health Defense did not have standing.<sup>186</sup> The claims were whether families have a fundamental right to a medical exemption from a vaccine requirement that would likely place their child at risk of harm or death and does the challenged DOH regulation and implementing policies unconstitutionally infringe on the right to a medical exemption, facially or as applied.<sup>187</sup> The courts have repeatedly found that it is for the legislature to make decisions about immunization requirements and that the courts will oftentimes defer to such

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<sup>178</sup> Elliott Davis Jr., *These States Have Banned Vaccine Passports*, U.S. NEWS & WORLD REPORT, (June 1, 2021), <https://www.usnews.com/news/best-states/articles/which-states-have-banned-vaccine-passports>.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Kim Chandler, *Alabama Governor Signs ‘Vaccine Passport’ Ban*, AP NEWS (May 24, 2021), <https://apnews.com/article/al-state-wire-alabama-coronavirus-pandemic-business-health-aa34e75ca887513d6bb09525cdd6d627>.

<sup>182</sup> Davis, *supra* note 178.

<sup>183</sup> *Id.*

<sup>184</sup> Dartunorro Clark, *Florida Fines County \$3.5 million for Requiring Proof of Vaccination*, NBC UNIVERSAL (Oct. 12, 2012), <https://www.nbcnews.com/politics/politics-news/florida-fines-county-3-5-million-requiring-proof-vaccination-n1281390>.

<sup>185</sup> *Doe v. Zucker*, 520 F. Supp. 3d 217 (N.D.N.Y. 2021) (discussing that there is no fundamental right to education, and thus the deprivation of a right to pursue an education, by itself, does not trigger strict scrutiny on a constitutional challenge).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

decisions.<sup>188</sup> The applicants consisted of seven families who challenged the Commissioner of Health for the State of New York Department of Health (“DOH”) for misinterpreting *Jacobson*. The families disputed that the DOH ignored the unconstitutional doctrine by stating that there is no “fundamental right” to an education.<sup>189</sup> However, any condition on access to school is subject only to rational basis review.<sup>190</sup> The applicants argued that strict scrutiny review applies to the well-established fundamental right attached to receiving a vaccine that could harm a child.<sup>191</sup> The DOH announced that it was adopting new regulations and aggressive policies to impose burdens on the ability to secure a medical exemption so that drastically fewer children could get one.<sup>192</sup> The applicants challenged these policies as impermissibly infringing on the physician’s independent medical judgment.<sup>193</sup> The applicants claimed that even if the State had provided evidence that the burdensome measures implemented are necessary and narrowly tailored to support compelling state interests, it is doubtful that such interests could override the students’ interest in protecting their life and health.<sup>194</sup> The respondents argued that the applicants must show that the regulations lack a “real or substantial relation” to the public health and public safety or are arbitrary and oppressive.<sup>195</sup> The district court found that applicants’ claims involving their liberty rights to informed consent and refusal of unwanted medical treatment were not fundamental rights in the context of the New York state mandatory vaccination laws.<sup>196</sup> The district court determined that courts have repeatedly established that the legislature should make decisions about

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<sup>188</sup> *Id.*; Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. L. REV. 97 (1989) (“The doctrine of unconstitutional conditions posits that if the government is prohibited from directly limiting the exercise of constitutional rights in a given situation, the government may not achieve the same result indirectly by offering benefits subject to the condition that the recipients waive their constitutional rights.”).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Bond Schoeneck & King PLLC, *Judge Dismisses Case Challenging NY Regulations Reducing the Number of Medical Exemptions for Vaccinations*, JDSUPRA (Feb. 25, 2021), <https://www.jdsupra.com/legalnews/judge-dismisses-case-challenging-ny-7924942/>.

immunization requirements and the courts will oftentimes defer to such decisions.<sup>197</sup> It is important to note that the court in *Doe v. Zucker* may have decided the case differently if it explicitly reviewed vaccine disclosure.

The Northern District Court of New York disclosed that applicants' claims involving their liberty rights to informed consent and refusal of unwanted medical treatment were not fundamental rights in the context of the New York State mandatory vaccination laws.<sup>198</sup> This court recognized the longstanding constitutionality of the legislature's ability to vest state agencies and local officials with enforcement authority over the New York state vaccination laws and regulations.<sup>199</sup> The facts in *Doe v. Zucker* did not discuss vaccine disclosure specifically.

Private companies began to face issues of mandates and disclosures. In *Norwegian Cruise Line Holdings v. Rivkees*,<sup>200</sup> the plaintiff initiated an action against the Surgeon General of Florida and the head of the Florida Department of Health.<sup>201</sup> After over a year of suspended operations, cruise companies from Florida resumed while requiring all passengers on their vessels to be fully vaccinated against COVID-19 and to provide documentation confirming their vaccination status before boarding.<sup>202</sup> At the same time, Florida's Governor Ron DeSantis issued an executive order that prohibited businesses from requiring patrons to provide COVID-19 vaccination documentation for entry or service.<sup>203</sup> While businesses are prohibited from requiring customers to produce COVID-19 vaccination documentation, they are free to demand other categories of documents to provide services.<sup>204</sup> For example, businesses may require identification to verify the ages of customers in order to provide them services in a restaurant that serves alcohol.<sup>205</sup> The defendant in *Norwegian Cruise Lines* argued that the statute allows businesses and patrons to exchange COVID-19

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> 553 F. Supp. 3d 1143 (S.D. Fla. 2021), *vacated*, 50 F.4th 1126 (11th Cir. 2022).

<sup>201</sup> *Id.* at 1147-48.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 1154.

<sup>204</sup> *Id.* at 1156-57.

<sup>205</sup> *Liquor Authority: What You Need to Know if You're a Licensed Retailer*, NEW YORK STATE, <https://sla.ny.gov/what-you-need-know-if-youre-licensed-retailer>

vaccination documents on a voluntary basis.<sup>206</sup> There are multiple ways of communicating the same information regarding an individual's vaccination status.<sup>207</sup> Oral verification is favored while others like COVID-19 vaccination documents are disfavored.<sup>208</sup>

This case reiterates *Jacobson's* holding that the unvaccinated population is not a protected class that enjoys a fundamental constitutional right to remain unvaccinated.<sup>209</sup> An examination of *Jacobson's* continued viability casts doubt that the referenced objectives constitute the type of substantial government interest that could justify this law.<sup>210</sup> The court in *Norwegian Cruise Line* held that by restricting only the exchange of COVID-19 vaccination documentation, the law does not safeguard against any hypothetical violation of medical privacy caused by exchanging other medical or health-related documentation.<sup>211</sup> The defendant in *Norwegian Cruise Line* failed to demonstrate why COVID-19 vaccination documents are more medically sensitive and require more protection than other documents.<sup>212</sup>

The California Court of Appeal, in *Love v. State Department of Education*,<sup>213</sup> held that a person's medical history and information, and the right to retain personal control over the integrity of one's body are protected under the right to privacy.<sup>214</sup> Although the right is important, it is not absolute, it must be balanced against other important interests and may be outweighed by supervening public concerns.<sup>215</sup> This court's decision to uphold mandatory vaccination requirements was motivated by the recently introduced Senate Bill No. 277 that requires students to reveal personal medical information to attend public school.<sup>216</sup> Where the state infringes on a fundamental constitutional right, strict scrutiny applies to determine whether substantive due process has been violated; otherwise, the rational basis test applies.<sup>217</sup> The

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<sup>206</sup> 553 F. Supp. 3d 1143, 1158 (S.D. Fla. 2021).

<sup>207</sup> *Id.* at 1159.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 1160.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1162-63.

<sup>212</sup> *Id.*

<sup>213</sup> *Love*, 29 Cal. App. 5th 980 (Cal. Ct. App. 2018).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Cal. Const. art 1, § 7.

state was well within its powers to condition school enrollment on mandatory vaccination requirements.<sup>218</sup>

## VII. PROPOSED SOLUTION

Vaccine mandates have been lawful for decades. The current COVID-19 pandemic is not drastically different from the smallpox outbreak in the nineteenth century and the polio epidemic in the 1940s and 1950s. However, a vaccination mandate analysis is distinct from a disclosure mandate. Case precedent has established that an educational institution can mandate a vaccination, but gaps remain in the law as to whether the institutions can mandate disclosure of vaccination. It is necessary to clearly propose a test to diminish the current ambiguous standards on disclosure mandates. In *Norwegian Cruise Line Holding*,<sup>219</sup> the majority opinion held that courts should articulate the basis for requiring a mandate and the standard of review used is required to explain why COVID-19 vaccinations are more medically sensitive or need more protection.<sup>220</sup> The Court has since vacated the initial order and denied the requested stay.<sup>221</sup> Although the conditional sailing order and later instructions are now non-binding guidelines, all cruise lines operating in Florida have voluntarily complied.<sup>222</sup>

In light of recent signals from the Supreme Court, government defendants and lower court judges would be wise to more fully develop their reasoning in support of mandatory vaccination without breezily relying on *Jacobson* or *Smith* to side-step deeper analysis, including the proper standard of judicial review, of the fundamental rights allegedly infringed by compulsory vaccination.<sup>223</sup>

Further, it may no longer be sufficient for a court to simply state that substantive due process challenges to any vaccination mandates,

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<sup>218</sup> Cal. Const. art 1, § 7; Cal. Health & Safety Code §§ 120325(a), 120335(b).

<sup>219</sup> 553 F. Supp. 3d 1143 (S.D. Fla. 2021).

<sup>220</sup> *Id.* at 1179-80.

<sup>221</sup> 50 F.4th 1126, 1131 (11th Cir. 2022).

<sup>222</sup> *Id.*

<sup>223</sup> Steve Vladeck & Lindsay Wiley, *Why Carefully Designed Public Vaccination Mandates Can- and Should- withstand Constitutional Challenge*, LAWFARE HARD NAT'L SEC. CHOICES (Aug. 12, 2021), <https://www.lawfareblog.com/Designed-Public-Vaccination-Mandates>.

including the proof of vaccine requirement, are foreclosed by *Jacobson*.<sup>224</sup> The Court should apply strict scrutiny when a challenger proposes that COVID-19 vaccination requirements “violate purported rights to privacy, to bodily integrity, to freedom from unwanted touching, and to refuse unwanted medical care.”<sup>225</sup>

Case law precedent does not give a clear resolution about whether to apply the same test on vaccination mandates to vaccination disclosure or whether privacy concerns should be weighed more heavily on vaccine mandates when it comes to disclosure because it involves protecting medical records from the public. Courts should apply the strict scrutiny test to all vaccinations. If the court encounters an issue arising from an individual’s refusal to disclose their vaccination status, the court should adopt a balancing test to review the claim. In the same way that there is a balancing test between public health interest and individual liberties for vaccine mandates, there should be a test to weigh those same interests for disclosure mandates. Businesses and educational institutions that collect this private health information are creating an inherent discrimination within their organizations against those who do not comply with the disclosure requirements. Mandatory disclosure creates a harmful stigma for the individuals that do not submit their status information because failure to disclose vaccination status can lead to the assumption that an individual chose not to receive the vaccine regardless of whether individuals choose not to report their status due to personal reasons.

In the interest of privacy, an individual may be mandated to receive a vaccination, but not mandated to share that information without restraint. The right to privacy is not absolute; it may be outweighed by supervening public concerns. Not every vaccination has a disclosure mandate or attached restrictions. Vaccinations without disclosure requirements can make it challenging to protect against diseases that have public health concerns. Nonetheless, the state courts should adopt explicit guidance as to whether a COVID-19 vaccination disclosure is in that same classification as a vaccination mandate. The COVID-19 pandemic has created a stigma about individuals who choose to remain unvaccinated that may disrupt that person’s right to privacy. The court may analyze the disclosure mandate issue on a case-by-case basis depending on the circumstances. For example,

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<sup>224</sup> *Id.* (discussing how the Supreme Court could determine that the minimal standard of review applied in *Jacobson* should be replaced by something more modern).

<sup>225</sup> *Id.*

when balancing public health interests and an individual's liberty interest regarding vaccination disclosures, courts may consider whether the school is permitting exemptions or online classes for their students. Approved exemptions and available online classes provide less restrictive alternatives to students that do not disclose their vaccination status. In addition, current disclosure methods have proven not to be thorough enough to prevent people from lying and uploading fraudulent proof of vaccination. Educational institutions may require more robust proof of vaccination forms to avoid the concern of fraud. For example, some establishments opted to use an app for vaccine verification, which independently confirms vaccine records.<sup>226</sup> The app verifies the individual's identity and utilizes image capture technology, Optimal Character Recognition (OCR), and machine learning to identify the physical traits of the card.<sup>227</sup> An increase of false vaccination cards can risk the safety of the educational community and therefore outweigh a vaccination disclosure mandate.

The Ninth Circuit discussed a multifactor balancing test when determining whether the government's interest in obtaining information outweighs the individual's privacy interest.<sup>228</sup> This test is known as the "balancing test" or "informational privacy balancing test."<sup>229</sup> The five factors include: (1) the type of information requested; (2) the potential for harm in any subsequent non-consensual disclosure; (3) the adequacy of safeguards to prevent unauthorized disclosure; (4) the degree of need for access; and (5) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest justifying access.<sup>230</sup>

Adopting this balancing test will eliminate any ambiguity when a court is faced with a COVID-19 vaccination disclosure dispute and an individual's fundamental right to privacy. The balancing test that the states adopt should be within the Supreme Court's standards and should not be unnecessarily broad and ultimately invade the area of protected freedoms.<sup>231</sup> The balancing test should be narrowly tailored

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<sup>226</sup> Jennifer N. Dienst, *Can Organizers Guard Against Fake Vaccination Cards?*, PCMA (Aug. 2021) (discussing Clear Health Pass for vaccination verification for right to entry, which independently confirms vaccine records – if the user has the option and chooses that option).

<sup>227</sup> *Id.*

<sup>228</sup> *Seaton v. Mayberg*, 610 F.3d 530, 538 (9th Cir. 2010).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Griswold*, 381 U.S. 479 (1965).



for the reasons Chief Justice Roberts noted about the uncertainties that the COVID-19 vaccine presents.<sup>232</sup>

In Pennsylvania, once the constitutional right to informational privacy is triggered, courts no longer review a records-request matter under the Right-to-Know Law, but rather review the matter under the Pennsylvania Constitution.<sup>233</sup> If the right to privacy is outweighed by a public interest favoring disclosure, then and only then may the matter proceed under the Right-to-Know Law.<sup>234</sup> State courts should apply the same analysis to the COVID-19 vaccination disclosure.

### VIII. CONCLUSION

The current mandates requiring the disclosure of an individual's vaccination status have raised concerns regarding an individual's fundamental right to privacy. Historically, educational institutions have implemented policies requiring proof of vaccinations. The courts apply a balancing test to weigh the public's health over an individual's fundamental right or privacy in regard to the right to mandate a vaccination. However, there is no balancing test to evaluate whether educational institutions may request COVID-19 vaccination disclosure from their students and employees or mandate the physical presentation of their vaccination status on identification cards. The state courts must adopt a balancing test to evaluate whether an educational institution has the authority to request vaccine disclosure. Lastly, the state courts can utilize the proposed balancing test when they are faced with a vaccine disclosure mandate challenge.

In 1905, the nation's highest court acknowledged that individual liberty is not an absolute right "wholly free from restraint" and that some limitations on individual liberty are necessary for the common

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<sup>232</sup> *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (suggesting that this test should not apply to vaccinations in general but to Covid-19 vaccines and perhaps other new vaccines that may be developed in the future).

<sup>233</sup> *Governor's Off. of Admin. v. Campbell*, 202 A.3d 890 (Pa. Commw. Ct. 2019) (applied a group of rules and regulations at the state and national levels that mandate all employers to inform employees of health effects and hazards of toxic substances at the workplace).

<sup>234</sup> *Pennsylvania State Educ. Ass'n v. Dep't of Cmty & Economic Dev.*, 637 Pa. 337, 148 A.3d 142 (2016).

good.<sup>235</sup> However, the Court recognized that the states did not have the power to vaccinate individuals by physical force and that any vaccination-related law promoting the common good had to be reasonable.<sup>236</sup> If the Supreme Court of the United States standard is that vaccine-related law needs to be reasonable, mandating that students disclose vaccination status is unreasonable. It is important to determine whether the disclosure serves a public health policy. This further supports the urge to adopt a balancing test, while educational institutions are blindly executing these critical policies.

Privacy expectations have provoked debate since the beginning of the pandemic. Requiring disclosure of a COVID-19 vaccine would not violate HIPAA.<sup>237</sup> Although many Americans have volunteered their personal vaccination cards on social media, the reasonable person now expects less privacy with respect to COVID-related information. To combat inequality and privacy concerns, any vaccination requirement should be evaluated by a balancing test.

It can be argued that “any proof of COVID-19 vaccination requirement is likely a reasonable and temporary measure.”<sup>238</sup> While some Americans believe proof of vaccination is a step in the right direction to restore normalcy, other groups are dissatisfied with the loss of privacy and questions of accessibility.<sup>239</sup> Therefore, a formal method adopted by state courts can bridge the gap that remains in the law about whether the institutions may mandate disclosure of vaccination. Each state’s officials may evaluate different factors within the balancing test, but the policy decisions could still originate from a recognized analysis. In addition, the state courts should propose less restrictive alternatives for the individuals whose privacy rights are outweighed after a case-by-case review. The test can provide further guidance on the requirements regarding disclosure if necessary. The pandemic has created a rapidly changing environment and the legal system must establish laws and guidelines that educational institutions can follow, instead of creating them *ad seriatim* and *ad hoc*.

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<sup>235</sup> Stephanie Deskins, *Proof of Vaccination and Vaccine Passports—Reasonable Requirement or Invasion of Privacy?*, ARIZONA STATE L.J. (May 21, 2020), <https://arizonastatelawjournal.org/2021/05/21/proof-of-vaccination-and-vaccine-passports-reasonable-requirement-or-invasion-of-privacy/>.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*