

COVID-19 VACCINE MANDATES FOR UNIVERSITY STUDENTS

Dorit R. Reiss & John DiPaolo***

Universities and colleges (“universities”) reopening after COVID-19 understandably seek to increase safety on campus and reduce the risk of a COVID-19 outbreak. One approach universities and colleges are considering is requiring vaccines from students. This Article addresses the legal framework behind university vaccine mandates for students. It sets out the general constitutional framework and explains why universities are constitutionally permitted to impose reasonable vaccine mandates. It addresses whether universities need to offer a religious exemption, explaining that under current Supreme Court jurisprudence, universities are likely not required to offer a religious exemption, but that may change, and public universities in states with a religious freedom restoration act may have to offer a religious exemption. The Article discusses how federal disability law will require accommodations under a vaccine mandate in certain cases. The Article asks whether the Emergency Use Authorization (EUA) status of some current COVID-19 vaccines is a barrier to requiring vaccines from students and concludes that it is probably not a limit. Acknowledging the complexity of the issue of vaccine mandates, instead of offering a prescription for all universities, the Article offers a matrix of strategies to consider for increasing vaccine rates, including vaccine mandates, along with considerations for each option.

INTRODUCTION	2
I. UNIVERSITIES, MANDATES, AND COVID-19	4
A. COVID-19 and Universities.....	4
B. Previous Vaccine Mandates	8
II. PUBLIC UNIVERSITIES: CONSTITUTIONAL LIMITS AND LEGAL AUTHORITY	10
A. The General Constitutionality of and Legal Authority for Vaccine Mandates.....	10
B. Religious Freedom as a Limit to Public University Vaccine Mandates	18
C. The Challenges of Implementing Religious Exemptions.....	21

2 *LEGISLATION AND PUBLIC POLICY* Vol. 24:1

III. LIMITS FOR PUBLIC AND PRIVATE UNIVERSITIES: FEDERAL	
DISABILITY LAWS	26
A. The ADA and Section 504: An Overview	26
a. The Basic Obligation	26
b. Reasonable Accommodations.....	27
c. Health and Safety Requirements as Qualification for Participation	29
d. Key Disability Law Procedural Requirements	31
B. Federal Disability Law Applied to Vaccine Mandates	32
a. Does the student’s condition constitute a disability?....	33
b. If There is a Disability, Does it Require (or Reasonably Relate to) an Accommodation from a Vaccine Mandate?	36
c. How Severe Must a Condition be to Merit an Accommodation, and Who Decides?.....	37
d. Can a Psychological Disability Require a Vaccine Mandate Accommodation?	40
e. Final Observations	42
C. Possible Accommodations from University Vaccine Mandates.....	43
D. How University Accommodation Decisions Can Achieve Judicial Deference	48
IV. THE PROBLEM OF EUAS	51
A. Arguments Against Mandates for EUA Vaccines.	51
B. Arguments Against Mandates for EUA Vaccines are Unconvincing.....	53
C. The EUA Issue Could Become Moot Soon	59
V. POLICY RECOMMENDATIONS	60
A. Access	64
B. Education	65
C. Mandate, Incentivize, Recommend?	66
D. Exemptions	67
E. Records and Privacy	68
CONCLUSION.....	68

INTRODUCTION

On March 23, 2021, Rutgers University announced that in fall 2021, it would require students returning to campus to be vaccinated

against COVID-19 or obtain a medical or religious exemption.¹ This brought to the forefront the question of whether universities² should mandate COVID-19 vaccines during the ongoing COVID-19 pandemic. Approaches among universities varied, with some mandating vaccines immediately, some conditioning a mandate on FDA licensure of at least one COVID-19 vaccine, and others not mandating.³ This article examines the dilemma of mandating COVID-19 vaccinations in universities. We argue that universities can, with some limits, require vaccination against COVID-19 for attendance but may have to provide accommodation to certain groups of students. We also point out that whether mandating COVID-19 vaccines is the right choice for a specific institution is a more complex question, and universities should consider a variety of factors in making that decision. At the least, however, universities should mindfully address how to make their campus safe from COVID-19, and proactively design a policy addressing how to increase vaccination rates on campus.

Part I of this article sets out, by way of background, the tremendous impact COVID-19 had on universities and why universities are seeking ways to reduce the risk of future harm from the disease. It also describes university-level vaccine mandates in the time before COVID-19. Part II then addresses the constitutional limits facing public universities mandating vaccines, focusing especially on whether there is a requirement for a religious exemption under the First Amendment—concluding that there is not at present, but that trends suggest the Supreme Court may at some point change that. Part III addresses legal limits set out by federal statutes, examining to what extent people alleging a medical reason not to vaccinate are entitled to accommodations under federal disability law. Part IV examines the question of whether universities can mandate vaccines that are currently

* LLB, Ph.D.; Professor of Law, James Edgar Hervey Chair in Litigation, University of California – Hastings College of the Law. The authors are grateful for the helpful feedback on earlier versions of this manuscript provided by I. Glenn Cohen, Holly Fernandez Lynch, Wendy Parmet, Laura Rothstein, Mark Rothstein, and for the excellent research work by Viridiana Ordonez and Brooke Quesinberry.

** J.D.; General Counsel and Secretary, University of California – Hastings College of the Law.

¹ Elizabeth Redden, *Rutgers Will Require Students to Get Vaccine*, INSIDE HIGHER ED (Mar. 26, 2021), <https://www.insidehighered.com/news/2021/03/26/rutgers-will-require-covid-vaccine-students-fall>.

² This Article will use the term “universities” to signify both colleges and universities.

³ Cierra S. Queen & Jordan Allen, *100 U.S. Colleges Will Require Vaccination to Attend In-Person Classes in the Fall.*, N.Y. TIMES (Apr. 28, 2021), <https://www.nytimes.com/2021/04/29/us/colleges-vaccinations-enrollment.html>.

4 *LEGISLATION AND PUBLIC POLICY* Vol. 24:1

under an Emergency Use Authorization (EUA) rather than a full license from the Food and Drug Administration, and explains why, although EUA status increases the risk of litigation, that alone should not be a legal barrier. Part V provides a framework through which universities can consider whether to mandate vaccines.

I. UNIVERSITIES, MANDATES, AND COVID-19

A. COVID-19 and Universities

A reader thumbing through back issues of the weekly *Chronicle of Higher Education* (“*Chronicle*”) could easily track the havoc wreaked by COVID-19 on the campuses of America’s universities since early 2020. On February 7, 2020, the *Chronicle* reported that the first documented case of the virus at an American university surfaced at Arizona State University on January 28, 2020 and that schools were beginning to limit travel to China.⁴ The next week, it reported on acts of discrimination against Asian and Asian American students arising from fears of the virus.⁵ March 15, 2020 saw the *Chronicle*’s first cover devoted to COVID-19, proclaiming, “Coronavirus Hits Campus,” along with the words, “Deserted campuses. Anxious parents. Virtual classrooms. Looming recession.”⁶

From March 2020 through the next academic year, COVID-19 was the dominant higher education news story, with themes well-summarized by the *Chronicle*’s March 15 cover as universities scrambled to transition to remote learning with little notice. On March 6, 2020, the University of Washington became the first major institution to announce the cancellation of its in-person classes, and an “eerie quiet” descended on the campus, with residence halls and campus open spaces mostly deserted, while professors decided whether to continue courses online or grade students based on the work they had already

⁴ Karin Fischer, *American Colleges Seek to Develop Coronavirus Response, Abroad and at Home*, CHRON. OF HIGHER EDUC. (Jan. 28, 2020), <https://www.chronicle.com/article/american-colleges-seek-to-develop-coronavirus-response-abroad-and-at-home/>.

⁵ Emma Dill, *Coronavirus is Prompting Alarm on American Campuses. Anti-Asian Discrimination Could Do More Harm*, CHRON. OF HIGHER EDUC. (Feb. 5, 2020), <https://www.chronicle.com/article/coronavirus-is-prompting-alarm-on-american-campuses-anti-asian-discrimination-could-do-more-harm/>.

⁶ *Coronavirus Hits Campus*, CHRON. OF HIGHER EDUC., Mar. 15, 2020, at Title Page.

completed.⁷ Stanford University followed suit the same day,⁸ and the numbers grew from there: by April 2020, over 1,300 colleges had transitioned to online education.⁹

Turmoil continued in the 2020–21 school year as universities decided whether or not to attempt a return to in-person classes amid the ongoing pandemic. Some institutions, such as the 23-campus California State University system, had announced months in advance that they would be mostly online in fall 2020.¹⁰ Others attempted a return to in-person instruction in the fall of 2020 but quickly abandoned the effort: at the University of Notre Dame, it took two weeks of classes—and 147 coronavirus cases—to shut down in-person instruction.¹¹ The University of Michigan at Ann Arbor also ran in-person classes in the fall but had to instruct its students to shelter in place for two weeks in October, only leaving their rooms to go to class and for basic necessities, when the campus was put under a county health department emergency order due to spiking case numbers.¹² Some institutions were able to follow an in-person model throughout the fall semester: Purdue University in Indiana, for example, stayed open and, with surveillance testing and a range of preventative measures, showed case rates that mirrored the state’s—though this relative success still entailed 2800 new cases on campus during the fall semester.¹³

⁷ Katherine Mangan, *The First Major Campus to Close Its Classrooms Is Nearly Deserted. Colleges Nationwide May Soon Look the Same.*, CHRON. OF HIGHER EDUC. (Mar. 9, 2020), <https://www.chronicle.com/article/the-first-major-campus-to-close-its-classrooms-is-nearly-deserted-colleges-nationwide-may-soon-look-the-same/>.

⁸ *Id.*

⁹ The College Crisis Initiative @ Davidson College, <https://collegecrisis.shinyapps.io/dashboard/>. Statistics related to colleges and students herein will be given for those in the United States unless otherwise noted.

¹⁰ Eric Kelderman, *The California State System Made a Big Bet for Fall. It Paid Off in Enrollment*, CHRON. OF HIGHER EDUC. (Feb. 26, 2021), <https://www.chronicle.com/article/the-california-state-system-made-a-big-bet-for-fall-it-paid-off-in-enrollment>; Francie Diep, *Chapel Hill and Notre Dame Are Just the Beginning*, CHRON. OF HIGHER EDUC. (Aug. 19, 2020), <https://www.chronicle.com/article/chapel-hill-and-notre-dame-are-just-the-beginning>.

¹¹ *Id.*

¹² Michael Vasquez, *‘It’s Negligence’: U. of Michigan Students Ordered to ‘Stay in Place’ After Covid-19 Cases Surge*, CHRON OF HIGHER EDUC. (Oct. 20, 2020), <https://www.chronicle.com/article/its-negligence-u-of-michigan-students-ordered-to-stay-in-place-as-covid-19-cases-surge>.

¹³ Eric Kelderman, *Purdue Made It Through the Fall. Does That Mean Mitch Daniels Was Right?*, CHRON. OF HIGHER EDUC. (Dec. 10, 2020), <https://www.chronicle.com/article/purdue-made-it-through-the-fall-does-that-mean-mitch-daniels-was-right>.

6 *LEGISLATION AND PUBLIC POLICY* Vol. 24:1

Transitioning to remote education appeared to have been a successful public health strategy. In the aggregate, in-person college instruction correlated with significant increases in COVID-19 cases compared with remote instruction. One study found that in the early weeks of fall 2020, the resumption of in-person instruction led to over 3000 new cases of COVID-19 per day in the United States.¹⁴ Another study, analyzing counties that are home to large colleges, found that in the three weeks after classes began in August 2020, the home counties of those schools relying on an in-person instruction model experienced a 56 percent *increase* in COVID-19 incidence, while those of schools operating through remote instruction experienced a 17.9 percent *decrease*.¹⁵

While there were positive health impacts of closing campus during the pandemic, there were costs as well; namely, in the eyes of many, lower-quality educational experiences and significant hits to universities' finances. Around 60 percent of faculty and administrators surveyed said online courses in spring 2020 had not been as good as in-person courses, although strong majorities of professors also said their experiences with remote teaching had been positive and they felt confident about doing it in the fall.¹⁶ Student reviews of the remote experience tended to the negative as well: 68 percent of students in a survey of North American schools said their online courses were inferior to what they had experienced in person, with 78 percent saying they found online classes unengaging and 50 percent reporting they were spending less time on schoolwork.¹⁷ They did, however, rate their schools' and professors' responses positively by strong majorities.¹⁸ The pandemic ate away at higher education resources as well. A

¹⁴ Martin S. Andersen, Ana I. Bento, Anirban Basu, Chris Marsicano, Kosali Simon, College Openings, Mobility, and the Incidence of COVID-19 5 (Sept. 23, 2020) (unpublished manuscript) (on file with author), <https://www.medrxiv.org/content/10.1101/2020.09.22.20196048v1.full.pdf>.

¹⁵ Andrew J. Leidner, Vaughn Barry, Virginia B. Bowen, Rachel Silver, Trieste Musial, Gloria J. Kang, Matthew D. Ritchey, Kelly Fletcher, Lisa Barrios, Eric Pevzner, *Opening of Large Institutions of Higher Education and County-Level COVID-19 Incidence — United States, July 6–September 17, 2020*, 70 MORBIDITY & MORTALITY WKLY. REPORT 14, 18 (2021).

¹⁶ Audrey Williams June, *Did the Scramble to Remote Learning Work? Here's What Higher Ed Thinks*, CHRON. OF HIGHER EDUC. (June 8, 2020), <https://www.chronicle.com/article/did-the-scramble-to-remote-learning-work-heres-what-higher-ed-thinks>.

¹⁷ *Adrift in a Pandemic: Survey of 3,089 Students Finds Uncertainty About Returning to College*, TOP HAT (May 1, 2020), <https://tophat.com/press-releases/adrift-in-a-pandemic-survey/>.

¹⁸ *Id.*

Chronicle study estimated that colleges saw an average 14 percent drop in revenue from the 2019–20 year to the 2020–21 year; and it opined that “further losses loom as drops in enrollment, tuition freezes, and Covid-related expenses continue.”¹⁹ The total estimated loss to higher education was \$183 billion, the paper concluded.²⁰ The impact of that contraction in human terms is most directly measurable in jobs: based on U.S. Labor Department figures, there were 570,000 fewer higher education workers in April 2021 as compared with March 2020—a drop of more than 10 percent.²¹

Unsurprisingly, spring 2021 saw members of college communities—like people across the world—desperate to move out of pandemic conditions. For colleges, the negative impact of campus closures on their educational missions and their institutional viability made them eager to re-open in fall 2021, but intensified disease transmission on campus during the 2020–21 school year highlighted the critical need to find safety measures to contain that danger.

The emergence of COVID-19 vaccines during this time provided one of the most powerful potential safety measures. At the same time, the availability of vaccines raised a host of challenging policy questions related to how a university should take advantage of the existence of effective COVID-19 vaccines. This Article aims to set forth the legal parameters for those policy questions by describing the legal authority of universities to mandate that students receive a vaccination and the ways in which that authority is limited.²² These are questions of

¹⁹ Paul N. Friga, *How Much Has Covid Cost Colleges? \$183 Billion*, CHRON. OF HIGHER EDUC. (Feb. 5, 2021), <https://www.chronicle.com/article/how-to-fight-covids-financial-crush>.

²⁰ *Id.*

²¹ Dan Bauman, *Here’s Who Was Hit Hardest by Layoffs*, CHRON. OF HIGHER EDUC. (Apr. 30, 2021), <https://www.chronicle.com/article/heres-who-was-hit-hardest-by-higher-eds-pandemic-driven-job-losses>.

²² This Article does not examine the authority of universities or other entities to require employees to receive vaccines. Useful sources on this topic include the following: *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (May 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [<https://perma.cc/TE2B-FMNE>] (Title VII, the Americans with Disabilities Act and other federal employment nondiscrimination laws do not prevent an employer from requiring employees to receive a COVID-19 vaccine if they will be present in the workplace, subject to reasonable accommodation provisions). Mark A. Rothstein, Wendy E. Parmet & Dorit R. Reiss, Editorial, *Employer-Mandated Vaccination for COVID-19*, 111 AM. J. PUB. HEALTH 1061, 1062 (2021). Michael M. Costello, *Employer Mandates for COVID-19 Vaccination*, 3 INT’L. RES. J. PHARM. & MED. SCI. 48 (2020). More generally on vaccine mandates in the

widespread relevance: as of November 2022, over 1000 universities were requiring students to receive a COVID-19 vaccine.²³

B. Previous Vaccine Mandates

Higher education vaccine mandates are not new, although they vary considerably across institutions.²⁴ Different universities require different vaccines (and different numbers of vaccines), ranging from zero to five for the eight vaccines examined in a 2019 study.²⁵ The University of California, for example, added four vaccines—MMR, chickenpox, meningococcus, and Tdap—to its schedule in 2015, following several large outbreaks on college campuses throughout the nation.²⁶ Some states require specific vaccines for university students,²⁷ but this is uncommon, so decisions are mostly made at the institutional level.²⁸ Exemptions also vary across institutions, with some offering none and some offering exemptions for “medical, non-medical, religious, reasons of conscience, personal and philosophical reasons.”²⁹ The timing of providing proof of immunization, and the consequences of failure, also vary.³⁰

Vaccines provide two benefits to a campus community: first, each vaccinated individual becomes relatively immune from the disease and thus less likely to transmit it to others,³¹ and second, if enough members of the community are vaccinated, a disease cannot take hold in the

workplace, see Terri Dobbins Baxter, *Employer-Mandated Vaccination Policies: Different Employers, New Vaccines and Hidden Risks*, 2017 UTAH L. REV. 885, 885 (2017).

²³ Andy Thomason & Brian O’Leary, *Here’s a List of Colleges That Require Students or Employees to Be Vaccinated Against Covid-19*, 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> (Oct. 26, 2021).

²⁴ 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 (2019).

²⁵ *Id.* at 343.

²⁶ Alec Rosenberg, *UC Plans to Require Vaccinations for Incoming Students*, U.C.: NEWS (Feb. 6, 2015), <https://www.universityofcalifornia.edu/news/uc-plans-require-vaccinations-incoming-students>. On campus outbreaks, see *College Campus Outbreaks Require Timely Public Health Response*, HEALIO (Oct. 8, 2015), <https://www.healio.com/news/pediatrics/20151008/college-campus-outbreaks-require-timely-public-health-response>.

²⁷ Barraza et al., *supra* note 23, at 343.

²⁸ *Id.* at 344.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Vaccines Work*, U.S. DEP’T OF HEALTH & HUM. SERV., <https://www.vaccines.gov/basics/work/prevention> (last visited Oct. 1, 2021).

community.³² Mandates are justified by both benefits but in different ways. Requiring adult students to take measures solely for their own health would be paternalistic, but a student who contracts a transmissible disease becomes a vector who can infect others and thus poses a direct risk to the community.³³ The cumulative effect of vaccination in a community is also important. A small percentage of people vaccinated may not be immune even under a very effective vaccine (for example, two doses of the commonly mandated measles-mumps-rubella vaccine (MMR) protect 99 percent of recipients against measles; that is very, very high, but there is still a small percentage left unprotected).³⁴ But with high rates of vaccination, the community as a whole may achieve herd immunity, where the disease fails to spread to new hosts and disappears, and even if a disease is introduced, an outbreak would not occur because the disease would not reach the rare few who suffer vaccine failure or who cannot be medically vaccinated.³⁵ Thus, the rationale for mandated vaccinations on university campuses is that even if one student becomes a vector, the chances of that student meeting other vulnerable persons decrease; the high rates of vaccinations prevent an outbreak by reducing the chance of susceptible individuals finding each other. Such individuals in a community with high rates should have a protective ring of immune people around them, and one vector would be unlikely to reach them. In both ways, vaccines reduce the risk to others. In that sense, the effects of a choice not to vaccinate are not purely individual, and a mandate is not paternalistic.³⁶

While initial data about COVID-19 vaccines was not strong enough to show that the vaccines prevent the spread of the virus to others, there is now robust and increasing data that the vaccines do, in fact, reduce transmission and reduce rates of infection in others and the community—while they reduce transmission less, and are less

³² Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 J. OF CON. L. 207, 211–12 (2018).

³³ For this kind of transmission in operation, see, for example, Manisha Patel, Adria D. Lee, Nakia S. Clemmons, Susan B. Redd, Sarah Poser, Debra Blog, Jane R. Zucker, Jessica Leung, Ruth Link-Gelles, Huong Pham, Robert J. Arciuolo, Elizabeth Rausch-hung, Bettina Bankamp, Paul A. Rota, Cindy M. Weinbaum, Paul A. Gastañaduy, *National Update on Measles Cases—United States, January 1–October 1, 2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 893, 893 (2019).

³⁴ CENTERS FOR DISEASE CONTROL & PREVENTION, EPIDEMIOLOGY AND PREVENTION OF VACCINE PREVENTABLE DISEASES 200 (Elisha Hall et al. eds., 14th ed. 2021).

³⁵ Dorit Rubinstein Reiss, *Herd Immunity and Immunization Policy: The Importance of Accuracy*, 94 Or. L. Rev. 1, 11 (2015).

³⁶ John C. Hershey, David A. Asch, Thi Thumasathit, Jacqueline Meszaros & Victor V. Waters, *The Roles of Altruism, Free Riding, and Bandwagoning in Vaccination Decisions*, 59 ORG. BEHAV. & HUM. DECISION PROCESS 177, 177–79 (1994).

effective, against the delta variant, they still reduce infection and transmission (though we do not know how the vaccines will fare as new variants emerge).³⁷

II. PUBLIC UNIVERSITIES: CONSTITUTIONAL LIMITS AND LEGAL AUTHORITY

A. The General Constitutionality of and Legal Authority for Vaccine Mandates

Public universities are state actors, and as such, must respect the constitutional rights of students.³⁸ However, constitutional rights are not absolute, and government can constitutionally compel individual actions in the name of public health. The guiding test for public health decisions is still the seminal case of *Jacobson v. Massachusetts*, in which, in 1905, the Supreme Court upheld a vaccine mandate on the grounds that individual rights may have to give way to measures

³⁷ Mark G. Thompson, Jefferey L. Burgess, Allison L. Naleway, Harmony L. Tyner, Sarang K. Yoon, Jennifer Meece, Lauren E.W. Olsho, Alberto J. Caban-Martinez, Ashley Fowlkes, Karen Lutrick, Jennifer L. Kuntz, Kayan Dunnigan, Marilyn J. Odean, Kurt T. Hegmann, Elisha Stefanski Laura J. Edwards, Natasha Schaefer-Solle, Lauren Grant, Katherine Ellingson, Holly C. Groom, Tnelda Zunie Matthew S. Thiese, Lynn Ivacic, Meredith G. Wesley, Julie Mayo Lamberte, Xiaoxiao Sun, Michael E. Smith, Andrew L. Phillips, Kimberly D. Groover, Young M. Yoo, Joe Gerald, Rachel T. Brown, Meghan K. Herring, Gregory Joseph, Shawn Beitel, Tyler C. Morrill, Josephine Mak, Patrick Rivers, Katherine M. Harris, Danielle R. Hunt, Melissa L. Arvay, Preeta Kutty, Alicia M. Fry & Manjusha Gaglani, *Interim Estimates of Vaccines Effectiveness of BNT162b2 and mRNA-1273 COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Health Care Personnel, First Responders, and Other Essential and Frontline Workers—Eight U.S. Locations, December 2020-March 2021*, 70 *MORBIDITY & MORTALITY WKLY.* 495, 496–97 (2021). Eric J. Hass, John M. McLaughlin, Farid Khan, Frederick J. Angulo, Emilia Anis, Marc Lipsitch, Shepherd R. Singer, Gabriel Mircus, Nati Brooks, Meir Smaja, Kaijie Pan, Jo Southern, David L. Swerdlow, Luis Jodar, Yeheskel Levy & Sharon Alroy-Preis, *Impact and Effectiveness of mRNA BNT162b2 Vaccines Against SARS-CoV-2 Infections and COVID-19 Cases, Hospitalisations and Deaths Following a Nationwide Vaccination Campaign in Israel: An Observational Study Using National Surveillance Data*, 397 *THE LANCET* 1819, 1822–26. See also Jennifer Juno & Adam Wheatley, *Mounting Evidence Suggests COVID Vaccines Do Reduce Transmission. How Does This Work?*, GAVI: THE VACCINE ALLIANCE (May 11, 2021), <https://www.gavi.org/vaccineswork/mounting-evidence-suggests-covid-vaccines-do-reduce-transmission-how-does-work>.

³⁸ See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 343 (1938) (“The action of the curators [of the University of Missouri], who are representatives of the State in the management of the state university must be regarded as state action.” (internal citation omitted)) (holding state university violated Equal Protection Clause by providing legal education to White students while requiring Black students to study law out of state); David Fagundes, *State Actors as First Amendment Speakers*, 100 *N.W. U. L. REV.* 1637, 1638–39 (2006).

necessary for public health.³⁹ In *Jacobson*, the Board of Health of Cambridge, implementing a state law and responding to a smallpox outbreak, required that all adults in the city be vaccinated against smallpox or pay a \$5 fine.⁴⁰ Reverend Jacobson refused to be vaccinated but also objected to paying the fine and sued all the way to the Supreme Court, alleging a violation of his constitutional rights.⁴¹ The Court upheld the mandate, using a reasonableness standard, finding that his individual right needed to give way to the state's power to impose reasonable regulations to protect public health.⁴² The Court mentioned that Jacobson did not “offer to prove that, by reasons of his then condition, he was, in fact, not a fit subject of vaccination,” and found that his distress or objection were not enough to undermine a reasonable statute.⁴³

Jacobson forms the basis of much of our constitutional jurisprudence in relation to public health.⁴⁴ While the full interaction between *Jacobson* and constitutional rights is still under debate, with developing questions related to the free exercise clause of the First Amendment,⁴⁵ *Jacobson* unquestionably supports requiring vaccines for attending in-person classes in a university.

Jacobson can be seen as requiring public health interventions to meet four standards: necessity, reasonable means, proportionality, and harm avoidance.⁴⁶ Moreover, under the *Jacobson* standard, authorities

³⁹ *Jacobson v. Massachusetts*, 197 U.S. 11, 25–26 (1905).

⁴⁰ *Jacobson*, 197 U.S. at 12–13.

⁴¹ *Jacobson*, 197 U.S. at 21.

⁴² *Jacobson*, 197 U.S. at 25.

⁴³ *Jacobson*, 197 U.S. at 37 and 28–29.

⁴⁴ Wendy E. Parmet, *Rediscovering Jacobson in the Era of Covid-19*, 100 B. U. L. REV. 117 (2020); Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 113 HARV. L. REV. F. 179, 180–83 (2020). Note that, as these articles set out, the relationship between the case and our more modern rights jurisprudence is still in flux and under debate.

⁴⁵ See *infra* text near footnotes 77–89.

⁴⁶ Lawrence O. Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 576 (2005). This is not the only way to address *Jacobson*, and during COVID-19, some courts have applied it differently, with several reading it to provide strong deference to authorities implementing public health measures. See Wiley & Vladeck, *supra* note 43, at 180–83. We think a more cautious approach – treating *Jacobson* as a balancing test – is more reasonable, and we expect that at least some courts will not provide full deference, as Wiley and Vladeck point out. *Id.* A reasonableness approach was the approach adopted by the federal judge rejecting the preliminary injunction request against Indiana University's mandate, and we expect that approach to be persuasive to others. *Klaassen v. Tr. of Ind. Univ.*, No. 1:21-CV-238 DRL, 2021 U.S. Dist. LEXIS 133300 (N.D. Ind. July 18, 2021).

do not have to wait for an outbreak to act but can act prospectively.⁴⁷ In-person classes are a shared environment, and students living on campus may also be in close quarters in dorms. Past years have seen multiple outbreaks of preventable diseases on college campuses.⁴⁸ There is a good argument that vaccine requirements in many contexts will meet the *Jacobson* standard: they are necessary to limit transmission in shared environments with a demonstrated risk of outbreaks; constitute a reasonable means of preventing disease; are not excessive because they are highly effective and impose minimal burdens;⁴⁹ and avoid harm by reducing the likelihood of significant spread of serious illness.

Although new, COVID-19 vaccines clearly pass the *Jacobson* test. COVID-19 is a dangerous and highly transmissible disease, and measures to limit its spread on college campuses are clearly necessary. The vaccines are a reasonable means of limiting transmission, as they have been tested in clinical trials involving tens of thousands of people, and at the point of writing, have already been given to millions of people in the U.S. with no indication of long-term side effects.⁵⁰ Real life experience shows that they are highly effective in preventing COVID-19.⁵¹ Requiring such a safe and effective vaccine in the context of a close campus environment is likely to be found reasonable, proportional, and harm-avoiding, as long as it is accompanied by a medical exemption. *Jacobson* itself addressed medical exemptions by suggesting that vaccination required of someone for whom it would be a danger due to particular medical conditions would go beyond the government's constitutional authority, in contrast to the case of Mr. Jacobson who was, apparently, "a fit subject" of vaccination.⁵² The logic of medical exemptions also aligns with the logic of vaccination mandates: one justification for vaccine mandates is to protect the minority of people who cannot get vaccinated because of medical conditions that would make vaccination especially risky.⁵³ In the context of COVID-19 vaccines, medical exemptions are likely to be

⁴⁷ Reiss, *supra* note 31, at 233.

⁴⁸ Barraza et al., *supra* note 23, at 342.

⁴⁹ Lois A. Weithorn & Dorit Rubinstein Reiss, *Providing Adolescents with Independent and Confidential Access to Childhood Vaccines: A Proposal to Lower the Age of Consent*, 52 CONN. L. REV. 772, 779–85 (2020).

⁵⁰ *Safety of COVID-19 Vaccines*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Sept. 27, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html> [<https://perma.cc/Y3C4-ZYDJ>].

⁵¹ Thompson et al., *supra* note 36, at 495.

⁵² *Jacobson*, 197 U.S. at 38–39.

⁵³ Reiss, *supra* note 31, at 237 n. 151.

rare since they are limited to people with allergic reactions to the vaccine or vaccine components.⁵⁴ The former are estimated to occur in about two to eleven people per million, an extremely low rate.⁵⁵ There is no indication the latter is common. So, such exemptions will likely be rare enough they should not jeopardize the rate of vaccination on a campus and not undermine herd immunity—and a mandate would help protect those rare individuals who cannot safely receive the vaccine, too. As will be discussed later in the paper, federal disability law will also require accommodations that might include an exemption from getting vaccinated in some cases, but for public institutions, the Constitution—as interpreted in *Jacobson*—likely requires them, and in any case, they are the right policy choice.

Cases about university-level vaccine mandates are few, with none at the Supreme Court level, but such cases as exist also support the constitutionality of mandates and the legal authority of public institutions to enact them.⁵⁶ We found two cases that focused on the constitutionality of university mandates, and both upheld them. In 1925, a federal district court rejected a challenge to a University of California smallpox vaccine mandate.⁵⁷ The court found that the Board of Regents of the University had the power to adopt and enforce health regulations, including requiring vaccination prior to admission.⁵⁸ In part, the court relied on a state constitutional provision raising the state university to a constitutional department with the power to make reasonable rules and

⁵⁴ *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Sept. 27, 2021), <https://www.cdc.gov/vaccines/covid-19/info-by-product/clinical-considerations.html#Contraindications> [https://perma.cc/C8EY-QQ9V].

⁵⁵ CDC COVID-19 Response Team & FDA, *Allergic Reactions Including Anaphylaxis After Receipt of the First Dose of Moderna COVID-19 Vaccine — United States, December 21, 2020–January 10, 2021*, 70 MORBIDITY AND MORTALITY WKLY. REP. 125, 125 (2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7004e1-H.pdf>; CDC COVID-19 Response Team & FDA, *Allergic Reactions Including Anaphylaxis After Receipt of the First Dose of Pfizer-BioNTech COVID-19 Vaccine — United States, December 14–23, 2020*, 70 MORBIDITY AND MORTALITY WKLY. REP. 46, 46 (2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7002e1-H.pdf>.

⁵⁶ As entities created by law, public institutions must act within whatever legal authority they have been granted. The question of legal authority is less pressing for private institutions, whose decisions exist more in realm of contract, where the school can set such requirements on matriculation and employment as students and faculty are willing to agree to.

⁵⁷ *Wallace v. Regents of Univ. of Cal.*, 75 Cal. App. 274, 275–278 (Cal. Dist. Ct. App. 1925).

⁵⁸ *Id.*

regulations to prevent the introduction and spread of contagious diseases among the student body.⁵⁹

Similarly, the federal district court in *George* upheld a vaccine requirement imposed by a hospital at which a community college student had to train as part of a paramedic training program.⁶⁰ The student sued the community college, but the district court found the requirement constitutional, to the extent it could be attributed to the school, rejecting claims that it infringed on the plaintiff's free exercise rights under the First Amendment, the right to due process, and the right to privacy.⁶¹ Regarding substantive due process, the court stated that no fundamental right was implicated by plaintiff's exclusion from the paramedic course so that the law need only be rationally related to a legitimate governmental objective; and the court found that requirement satisfied with reference to *Jacobson*, noting that there the Supreme Court had upheld a municipal vaccine mandate and that the plaintiff had provided no reason a hospital could not impose the same with regard to people training there.⁶²

Another case found in favor of a student seeking an exemption, but it did uphold the mandate. *Kolbeck* was a New Jersey case involving Rutgers University vaccine requirements⁶³—especially relevant given that Rutgers was the first university to require COVID-19 vaccines from its students—and its focus was on whether a specific student deserved a religious exemption, as will be discussed below.⁶⁴ The New Jersey Superior Court said, among other things, that

It is beyond dispute that the State, through the Board of Education, could make the above requirements [including requiring “general vaccination, diphtheria immunization and polio immunization”] mandatory as to all pupils without exemptions based on religious beliefs or principles and such would be valid by constitutional standards as a reasonable exercise of the police power.⁶⁵

⁵⁹ *Id.* at 277–78.

⁶⁰ *George v. Kankakee Cmty. Coll.*, No. 14-CV-2160, 2014 WL 6434152, at *1–2 (C.D. Ill. Nov. 17, 2014).

⁶¹ *George*, 2014 WL 6434152, at *5. The court's rejection of the claim for a religious exemption is discussed *infra* in section III.b.

⁶² *George*, 2014 WL 6434152, at *3–4. The freedom of religion issue raised in the case is discussed *infra* note 78.

⁶³ *Kolbeck v. Kramer*, 202 A.2d 889, 891 (N.J. Super. Ct. Law Div. 1964).

⁶⁴ See *infra* note 95 and accompanying text.

⁶⁵ *Kolbeck*, 202 A.2d at 890.

This, too, reiterated the constitutionality of a university vaccine mandate.

Although it did not focus on vaccines, *Holcomb* provided further support to universities' legal authority—and their duty—to act for the health of the student body as a whole. In *Holcomb*, the Supreme Court of Washington considered whether a university could require students to undergo an X-ray examination of the chest to detect potentially infectious tuberculosis infections. The court affirmed the authority of a state university to act to benefit the health of students, stating:

The protection and improvement of the health and physical condition of the students is as much the responsibility of the regents as is their mental training and development. ... The institution which they govern cannot continue to function effectively if either is not well supervised. ... If any reasonable precautionary measure will keep [a student] at least as free of infection as he was when he came to the institution, its enactment should be well within the proper boundaries of the responsibilities of the respondents.⁶⁶

Although the case did not address vaccines directly, the logic—that the university has a duty to protect the student body and the authority to require students to take measures to support that goal—would support a vaccine requirement just as well.

This jurisprudence received a recent boost in 2020 in a preliminary decision from a California state court. In *Kiel v. Board of Regents*, a superior court judge denied plaintiffs' request to issue a preliminary injunction against the University of California's influenza vaccine mandate, citing *Jacobson* for the proposition that the state can require vaccines to protect health and safety, and finding that that was what the university did here.⁶⁷

Most recently, in a case directly addressing university mandates, a federal district court judge in Indiana upheld a university mandate for COVID-19 vaccines.⁶⁸ The judge reminded readers of the university trustees' authority to act “to protect the academic community from... a serious threat to person or property of the academic community.”⁶⁹ The

⁶⁶ State *ex rel.* *Holcomb v. Armstrong*, 239 P.2d 545, 549 (Wash. 1952).

⁶⁷ *Kiel v. Regents of Univ. of Cal.*, No. HG20-072843, 2020 WL 9396579, at *8 (Cal. Super. Ct. Alameda Cnty. Dec. 4, 2020) (order denying request for preliminary injunction).

⁶⁸ *Klaassen v. Trs. of Ind. Univ.*, No. 1:21-CV-238 DRL, 2021 U.S. Dist. LEXIS 133300 (N.D. Ind. July 18, 2021).

⁶⁹ *Klaassen*, 2021 U.S. Dist. LEXIS 133300, at *8.

judge interpreted *Jacobson* to require rational basis review and found that the university met that test, stating that “Indiana University rationally believes vaccination is the leading prevention strategy to protect individuals from COVID-19 disease.”⁷⁰

The Court concluded:

Overall, the students’ arguments amount to disputes over the most reliable science. But when reasonable minds can differ as to the best course of action—for instance, addressing symptomatic versus asymptomatic virus spread or any number of issues here—the court doesn’t intervene so long as the university’s process is rational in trying to achieve public health. . . . No student, including those not yet exempt, have shown that Indiana University’s vaccine mandate as applied to them violates rational basis review.⁷¹

This general view was echoed, in even stronger language, by a panel of the Seventh Circuit rejecting students’ request to stay Indiana University’s mandate during the appeal. Judge Easterbrook, writing for the panel, ruled as follows:

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

We assume with plaintiffs that they have a right in bodily integrity. They also have a right to hold property. Yet they or their parents must surrender property to attend Indiana University... Other conditions of enrollment are normal and proper. . . . it is hard to see a greater problem with medical conditions that help all students remain safe when learning.⁷²

The jurisprudence on university vaccine mandates, therefore, consistently supports their constitutionality; furthermore, institutional authority to enact such mandates has not been found lacking under state

⁷⁰ *Id.* at *82.

⁷¹ *Id.* at *83.

⁷² *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593–94 (7th Cir. 2021).

law (though some states are acting to change that⁷³). Bolstering this is the fact that an extensive jurisprudence exists in the K–12 school context, and so far, no court has found a school immunization mandate unconstitutional (though courts have struck down state attempts to, for example, limit religious exemptions).⁷⁴ The context is not the same since K–12 school vaccine mandates invoke the state’s role in protecting children who cannot protect themselves and thus stand on a particularly strong constitutional footing.⁷⁵

In sum, protecting the community is an important constitutional interest by itself, and, as indicated by *Holcomb* and the other cases, the public university is generally understood to have a duty to protect its student body. This duty, along with the solid evidence of the safety and efficacy of medically recommended vaccines, have, so far, been enough to uphold vaccine mandates.⁷⁶

⁷³ University legal authority with respect to COVID vaccine mandates is being curtailed in some states. During 2021, several states have passed bills aimed at limiting vaccine passports, or Governors have issued executive orders. Elliott Davis, *These States Have Banned Vaccine Passports*, U.S. NEWS (June 1, 2021, 3:13 PM), <https://www.usnews.com/news/best-states/articles/which-states-have-banned-vaccine-passports>. The content varies, and some of these bills and orders do not expressly mention universities, so their application in this context is unclear. For example, Idaho’s governor’s executive order applies to any “departments, agencies, boards, commissions, and other executive branch entities of the State of Idaho.” Idaho Exec. Order No. 2021-04 (Apr. 7, 2021). Kansas’ limit applies to any “state agency” that receives money from the state, which may include state universities. S.B. 159, 2021 Leg., Reg. Sess. (Kan. 2021). It is a question of state law, not examined here, whether this language encompasses public universities. (In contrast, Arizona’s governor issued an executive order explicitly prohibiting state universities from mandating that their students get COVID vaccinations. Ariz. Exec. Order No. 2021-15 (June 15, 2021)). Clearly, universities need to examine such laws or executive orders, if passed by their states, for two reasons. First, they may prohibit considering vaccine status in providing services, and sometimes even asking for it, so they can limit universities’ options in this area. Second, the passage of such a law, even if not applicable to a university, can suggest a political environment hostile to vaccine requirements, which can affect universities’ choices.

⁷⁴ Reiss, *supra* note 31, at 219.

⁷⁵ *Id.* at 227–29. As an additional distinction, in the K-12 context, cases challenging vaccine mandates have also raised claims that the mandates violate a state right to education. However, the constitutional provisions supporting that claim in the K-12 context do not, generally, apply to universities, and there is no current legal basis known to us to allege a constitutional right to higher education. Heidi R. Gilchrist, *Higher Education as a Human Right*, 17 WASH. U. GLOB. STUD. L. REV. 645, 652 (2018) (acknowledging there is no constitutional right to higher education in the United States, though arguing for seeing higher education as a human right).

⁷⁶ *Holcomb*, 239 P.2d at 865–66.

B. Religious Freedom as a Limit to Public University Vaccine Mandates

One potential challenge to the ability of public universities to impose a vaccine mandate may be a claim that such a mandate would violate the First Amendment's free exercise clause unless it provided a religious exemption. Under existing jurisprudence, universities do not have to provide a religious exemption from a general student vaccine mandate, because, under the leading case of *Employment Division v. Smith*, a generally applicable, facially neutral rule that does not target religion does not require a religious exemption.⁷⁷ The Central District of Illinois in *George v. Kankakee Community College*, discussed above, followed *Smith* in holding that the First Amendment did not require the community college or its partner hospital to grant an exemption from its vaccination requirements to a student with religious objections. The court reasoned, "[T]he Hospital's policy is a generally applicable, neutral policy. There is no allegation in the pleadings that the policy is religiously motivated or applies only to those who hold certain religious beliefs."⁷⁸

However, the current Supreme Court has recently signaled that it values protecting freedom of religion more than previous courts. Significantly, the Court struck down certain COVID-19 restrictions on houses of worship, finding that the restrictions were more stringent than those imposed on certain secular entities and therefore non-neutral and subject to strict scrutiny.⁷⁹ Most recently, in *Fulton v. City of Philadelphia*, a case in which a Catholic adoption agency challenged the City of Philadelphia's decision not to work with it because it refused to certify same-sex couples, the Supreme Court declined to overturn *Smith*. The Court concluded that reevaluating *Smith* was unnecessary in this case because the city's rule did not meet the *Smith* standard of general applicability.⁸⁰ The Court stated, "where the State has in place

⁷⁷ *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 87–879 (1990) (rejecting claim of free exercise exemption from state anti-drug law for use of drug in religious practice). Like school mandates, university mandates are generally enacted to protect the public health and cannot reasonably be said to be targeting any religion. Reiss, *supra* note 31, at 240.

⁷⁸ *George*, 2014 WL 6434152, at *1–2. The state court reviewing the same matter with respect to Illinois's Free Exercise Clause also followed *Smith* to reach the same conclusion after noting that that provision of the state constitution was interpreted in "lockstep" with the Federal clause. *George v. Kankakee Cmty. Coll.*, 2016 IL App (3d) 160116-U, 2016 WL 7404588, *27.

⁷⁹ *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–67 (2020).

⁸⁰ *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021); *see also id.* at 1876 (Barrett, J., concurring).

a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason.”⁸¹ Here, the city’s rule provided that a city officer could grant a discretionary exception but made clear that it “had no intention” of granting one to the plaintiff agencies.⁸² The decision made it clear that there is a majority that is inclined to overturn *Smith*, with at least three Justices—Justice Alito, Justice Gorsuch, and Justice Thomas—openly calling for it.⁸³ But Justices Barrett and Kavanaugh expressed hesitation since they could not identify a valid substitute to *Smith*.⁸⁴ At this point, therefore, *Smith* still stands, though *Fulton* and the decisions leading up to it suggest that it stands on shaky grounds (something public health law scholars are concerned about).⁸⁵ It is unclear, as of yet, whether the Supreme Court will, at any point, require a religious exemption from all neutral laws.⁸⁶ The concurrence by Justice Barrett suggests that there is a reasonable chance that *Smith* will not be completely overturned, but the existence of any secular exemption—like the constitutionally required medical exemption—may require strict scrutiny if a religious exemption is not also given.⁸⁷ Given the uncertainty, universities may choose to provide a religious exemption simply to avoid the risk of a mandate being struck down for the lack of one.

This issue may come before the Supreme Court reasonably soon, since lower courts have already diverged on whether a religious exemption to a vaccine mandate is required. In New York, a district court—in one out of three cases on the same facts—granted a preliminary injunction against a vaccine mandate for healthcare workers, finding that it likely violated the First Amendment because the state first intended to offer a religious exemption, but later reversed its

⁸¹ *Id.* at 1877 (internal quotation marks omitted).

⁸² *Id.* at 1878.

⁸³ *Id.* at 1883 (Alito, J., concurring in the judgment); *id.* at 1926 (Gorsuch, J., concurring in the judgment).

⁸⁴ *Id.* at 1882 (Barrett, J., concurring).

⁸⁵ See Wendy E. Parmet, *Roman Catholic Diocese of Brooklyn v. Cuomo — The Supreme Court and Pandemic Controls*, 384 NEW ENG. J. MED. 199, 199 (2021); Lawrence O. Gostin, *The Supreme Court’s New Majority Threatens 115 Years of Deference to Public Officials Handling Health Emergencies*, FORBES (Dec. 11, 2020, 11:00 AM), <https://www.forbes.com/sites/coronavirusfrontlines/2020/12/11/the-supreme-courts-new-majority-threatens-115-years-of-deference-to-public-officials-handling-health-emergencies> [<https://perma.cc/4HKQ-MNHH>].

⁸⁶ Wendy E. Parmet, *From the Shadows: The Public Health Implications of the Supreme Court’s COVID-Free Exercise Cases*, 49 J.L. MED. & ETHICS (forthcoming Dec. 2021).

⁸⁷ *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring). Dorit R. Reiss, *Vaccines Mandates and Religion: Where are we Headed with the Current Supreme Court?*, 49 J.L. MED. & ETHICS (forthcoming Dec. 2021).

decision and removed the religious exemption.⁸⁸ The district court saw that as reflecting hostility to religion, and hence requiring strict scrutiny, which it did not think the mandate met. In contrast, the First Circuit upheld a Maine healthcare worker mandate without a religious exemption as a neutral law that does not require strict scrutiny under *Smith*.⁸⁹ The Maine case is on appeal to the Supreme Court, with briefs due October 25, 2021.

Universities may also choose to provide a religious exemption in their student policies to create parity with their employee policies. Title VII of the Civil Rights Act of 1964 protects employees from a number of kinds of discrimination, including religious.⁹⁰ It requires that employers with 15 or more employees accommodate employees' sincerely held religious beliefs or practices, except where this would impose an undue hardship on the employer, interpreted, in this case, as higher than a "minimal burden on the operations of the business."⁹¹ As is the case under federal disability law, discussed *infra* at Part III(C), evaluating a Title VII accommodation request requires considering a number of factors, including the health risks posed by having an unvaccinated person in the workplace and, in some cases, the feasibility of lessening that risk through special arrangements.⁹² Thus, university vaccine mandates that apply to employees will likely have to include religious exemptions, and universities may decide they cannot justify providing such exemptions to employees but not to students.

The last wrinkle on the religious freedom issue is that a significant minority of states have adopted religious freedom restoration acts (RFRAs), which require that laws that substantially burden religion only be enacted for a compelling purpose and be narrowly tailored to minimize the impact on religious freedom.⁹³ The authors are not aware

⁸⁸ *A., Dr. C., Nurse D., Dr. F., Dr. G., Therapist I., Dr. J., Nurse J., Dr. M., A. v. Hochul*, No. 1:21-CV-1009, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021).

⁸⁹ *Does 1-6 v. Mills*, No. 21-1826, 2021 WL 4860328 (1st Cir. Oct. 19, 2021).

⁹⁰ 42 U.S.C. §§ 2000e(b), 2000e-2(a).

⁹¹ U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-0000-20, WHAT YOU SHOULD KNOW: WORKPLACE RELIGIOUS ACCOMMODATION (2014).

⁹² *See, e.g., Horvath v. City of Leander*, 946 F.3d 787, 789–94 (5th Cir. 2020) (holding that the City did not violate Title VII in firing firefighter who objected to vaccine requirement on religious grounds; City had offered as accommodations transferring the firefighter to a desk job or allowing him to continue as firefighter if he would wear a respirator when on duty, submit to health examinations, and keep a log of his temperature, but the firefighter refused to accept either.).

⁹³ *See State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 4, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/UMJ2-RPHZ>]. *See also* Christopher C. Lund, *RFRAs, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 165–71 (2016).

of any case law that sheds light on whether RFRA would limit university vaccine mandates. The effect of these RFRA would vary, depending, for example, on whether they cover state universities, but they may require that universities provide a religious exemption or meet the high bar of strict scrutiny.⁹⁴

C. The Challenges of Implementing Religious Exemptions.

Universities should be aware that providing a religious exemption will not necessarily shield them from litigation and that implementing a religious exemption is very challenging. Difficult steps in implementation include verifying the sincerity of the religious claim and determining whether an objection is, in fact, religious.

At the outset, universities must consider the extent to which they can even inquire beyond the facial assertions of a student's request for a religious exemption. In *Kolbeck*, mentioned above, Rutgers University lost its case for the way it examined a religious exemption request.⁹⁵ Citing *Jacobson*, the New Jersey Superior Court stated that the school need not have granted any religious objection.⁹⁶ However, having decided it would grant religious exemptions, the University could not require an applicant for the exemption to produce a certification from the leader of an organized religion as to his beliefs, given that the student claimed to be a member of neither that nor any other recognized religion.⁹⁷ The court explained that under the First Amendment, "[t]he State or any instrumentality thereof cannot, under any circumstances, show a preference of one religion over another."⁹⁸

More generally, extensive jurisprudence in the school vaccine mandate context shows the challenges of implementing religious exemptions.⁹⁹ Beyond barring states from requiring supportive documentation from a religious official in cases where a claimant states he or she is not a member of an organized religion, as occurred in *Kolbeck*, courts also do not allow states to reject claims based on the

⁹⁴ For a discussion of RFRA on educational vaccine mandates in the K-12 context, see Dina Nathanson, *Herd Protection v. Vaccine Abstention: Potential Conflict Between School Vaccine Requirements and State Religious Freedom Restoration Acts*, 42 AM. J.L. & MED. 621, 622–31 (2016).

⁹⁵ *Kolbeck*, 202 A.2d 889.

⁹⁶ *Id.* at 889.

⁹⁷ *Id.* at 893.

⁹⁸ *Id.*

⁹⁹ Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HAST. L.J. 1551, 1568–70 (2014).

fact that a claimant’s religion supports vaccines, since the role of the state is not to enforce the rules of the religion but to provide an exemption, neutrally, to people with sincere religious beliefs.¹⁰⁰

That does not mean that universities have no way to verify exemptions; they can and should since evidence clearly indicates that many people falsely claim religious objections in order to avoid vaccination.¹⁰¹ In the Title VII context, courts have approved employers’ evaluating the sincerity of the basis for requested religious exemptions. For example, in some cases, it may be appropriate to seek some kind of outside corroboration for an individual’s nontraditional religious beliefs. In *Bushouse v. Local Union 209*, a court rejected a Title VII lawsuit against a union that had asked a member for “independent corroboration” of his religious belief that he should not pay union dues.¹⁰² The union had first asked Bushouse, the plaintiff, for a certificate signed by a pastor or church elder, but when Bushouse refused, the union said it simply needed corroboration of his beliefs from some person other than him.¹⁰³ Bushouse brought suit under Title VII.¹⁰⁴ Although Bushouse had produced an affidavit that the union accepted by the time the court ruled,¹⁰⁵ the court addressed Bushouse’s claim that the union’s initial refusal to accommodate him without independent corroboration constituted religious discrimination.¹⁰⁶ Noting that the union had “questioned whether his beliefs were truly held and religious rather than political,”¹⁰⁷ the court held that,

the burden remained with Bushouse to submit some evidence, aside from his general assertions, to support his contention that he sincerely held religious beliefs that conflicted with his union obligation to pay dues. ... the Union asked him to provide acceptable “independent corroboration” that his beliefs were truly held. ... Under these circumstances, this court cannot find fault with the Union especially since Bushouse made no offer of any proof to them in any other form to establish the sincerity and religious nature of his beliefs.¹⁰⁸

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1553–56.

¹⁰² *Bushouse v. Local Union 2209*, 164 F. Supp. 2d 1066, 1069 (N.D. Ind. 2001).

¹⁰³ *Id.* at 1071.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1072.

¹⁰⁶ *Id.* at 1076.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Other cases similarly indicate that some examination or inquiry into the basis for a claimed religious exemption is acceptable.¹⁰⁹

In contrast to the cases and guidance discussed above, in a recent decision granting a Temporary Restraining Order to students whose religious exemption had been rejected by their university, a federal judge appeared to suggest that any denial of religious exemption after an individual examination is subject to strict scrutiny and that the university's review, in this case, would fail that test.¹¹⁰ This decision should be treated with caution since it is a preliminary measure imposed without a response from the defendant university. But it is also a decision relating to a Temporary Restraining Order, an unusual remedy, and it sets a bar that would make religious exemptions impossible to police, and ironically, may make not adding a religious exemption the better policy for universities.

The order may be based upon a misunderstanding of *Smith, Fulton*, and other relevant law. As discussed above, *Fulton* reiterated the holding from *Smith* that if the government provides “a system of individualized exemptions” from a rule, it “may not refuse to extend that exemption system to cases of ‘religious hardship’ without compelling reason.”¹¹¹ The district court in Michigan appears to have

¹⁰⁹ See, e.g., *Dockery v. Maryville Acad.*, 379 F. Supp. 3d 704, 716–17 (N.D. Ill. 2019) (where defendant employer was aware that employee requesting religious exemption had acted inconsistently with asserted religious beliefs in the past and had non-religious reasons for requesting exemption, it “was justified in questioning the sincerity of Plaintiff’s religious objection.”). See also *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49, 56 (1st Cir. 2002) (“The requirement that the employee have a bona fide religious belief is an essential element of a religious accommodation claim. Title VII does not mandate an employer or labor organization to accommodate what amounts to a purely personal preference. In order to satisfy this element, the plaintiff must demonstrate both that the belief or practice is religious and that it is sincerely held.”) (internal quotations and citations omitted). Similarly, the EEOC acknowledges in a non-binding guidance document that employers may question employees’ claims regarding religious exemptions, though the agency appears to seek to discourage this: “Because the definition of religion is broad and protects beliefs, observances, and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, observance, or practice, the employer would be justified in seeking additional supporting information.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC No. 915.063, SECTION 12: RELIGIOUS DISCRIMINATION (2021).

¹¹⁰ *Dahl v. Bd. of Trs. of W. Mich. Univ.*, No. 1:21-cv-757, 2021 WL 3891620, at *4 (W.D. Mich. Aug. 31, 2021).

¹¹¹ *Fulton*, 141 S. Ct. at 1878 (internal brackets omitted).

gone beyond the terms of that holding by ruling that in a case where an institution *does* have a system for granting religious exemptions, it must justify its *decisions* under that system with a compelling reason, stating, “Courts review denials of individualized requests for a religious exemption to determine if the government entity had a compelling reason.”¹¹² Were this the rule, the entire jurisprudence relating to religious exemptions under laws such as Title VII (at least with regard to public employees), discussed above, would look very different; in fact, however, that case law does not apply strict scrutiny in the consideration of requests for religious accommodations.¹¹³ There is thus an argument that the order misapplies relevant law. However, universities should be aware that this decision exists, suggesting that some judges may interpret Supreme Court guidance this extremely.

Even where an exemption request is motivated by a sincere belief, a school should consider whether the belief is religious. This issue has been addressed in detail in federal jurisprudence outside the vaccine context.¹¹⁴ That jurisprudence follows the concurrence of Judge Adams in *Malnak v. Yogi*, who articulated three criteria to determine whether a belief qualified as religious.¹¹⁵ First, and most importantly, what is the nature of the beliefs in question—does their subject matter fit what is usually a religion, by addressing “ultimate” concerns and ideas, that is, “the deeper and more imponderable questions [such as] the meaning of life and death, man’s role in the Universe, the proper moral code of right and wrong?”¹¹⁶ Second, are the beliefs comprehensive—are they more

¹¹² *Dahl*, 2021 WL 3891620, at *4. The court attributes this view, to, among other sources, a Sixth Circuit case that actually reiterated the rule from *Smith* that later appeared in *Fulton*, that if there is a system of individualized exemptions, that *system* must extend to cases of religious hardship absent compelling reason. *See id.* *See also* Meriwether v. Hartop, 992 F.3d 492, 515 (6th Cir. 2021).

¹¹³ *See* cases cited *supra* notes 100, 107. It also appears that the Michigan district court, in a paradoxical move, may have decided that the university’s policy was not a law of general applicability because it *provided* for religious exemptions. These are the only types of exemptions the court mentions in the university policy, yet the court quotes *Fulton*’s statement that a law is not generally applicable if it grants individualized exemptions. *Dahl*, 2021 WL 3891620, at *4. As discussed above, the rule from *Fulton* and *Smith* is that a law is not generally applicable if it grants exemptions but does *not* extend its system of exemptions to religious hardship. It would be perverse if, by providing a system of religious exemptions, a law subjected itself to strict scrutiny with regard to burdening religion, while a law with no exemptions at all was spared such scrutiny.

¹¹⁴ This case law is well-summarized in *Friedman v. S. Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663, 665, 677 (Ct. App. 2002) (affirming rejection of claim of religious discrimination under state law; finding plaintiff’s veganism was not a religious creed).

¹¹⁵ *Malnak v. Yogi*, 592 F.2d 197, 207–08 (3d Cir. 1979) (Adams, J., concurring).

¹¹⁶ *Id.* at 208.

than just “isolated answers to ‘ultimate’ questions,” but part of an “ultimate and comprehensive ‘truth’” that is broad in scope?¹¹⁷ Third, are the beliefs demonstrated by any formal, external, or surface signs, such as ritual observances?¹¹⁸ This rubric was adopted by a Third Circuit majority two years later,¹¹⁹ and it was more recently applied in the vaccine mandate for employment context by that court.¹²⁰ It has also been accepted by many other federal courts.¹²¹ This standard may help keep out some claims, but it would not solve the problems in assessing the sincerity of, for example, someone quoting specific biblical phrases found on an anti-vaccine site (there are sites created to support those seeking to claim a medical exemption),¹²² or the problem of people using religions created especially with a goal of avoiding vaccines.¹²³ And no matter what the standard, judicial determinations of what counts as religious will involve nuanced, qualitative judgments that will often make those determinations impossible to predict.¹²⁴

Probably as a result of these challenges of implementation, in the employment context, most litigation on vaccine mandates has targeted employers who did provide a religious exemption but did not carefully apply it.¹²⁵ In other words, there is no easy answer for public universities on how to address religious objections to vaccines. Whether or not they provide a religious exemption, they may face litigation.

¹¹⁷ *Id.* at 208–09.

¹¹⁸ *Id.* at 209. Judge Adams stated that a religion could exist without such outward signs, “so they are not determinative, at least by their absence, in resolving a question of definition. But they can be helpful in supporting a conclusion of religious status given the important role such ceremonies play in religious life.” *Id.*

¹¹⁹ *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981).

¹²⁰ *Fallon v. Mercy Cath. Med. Ctr. of Se. Pa.*, 877 F.3d 487, 491 (3d Cir. 2017).

¹²¹ *See, e.g., Wiggins v. Sargent*, 753 F.2d 663, 666 (8th Cir. 1985); *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996); *United States v. Meyers*, 95 F.3d 1475, 1483 (10th Cir. 1996); *Friedman*, 125 Cal. Rptr. 2d at 678.

¹²² MY KIDS, MY CHOICE, <http://mykidsmychoice.com/index.html> (last visited Sept. 27, 2021).

¹²³ *See* Donald G. McNeil Jr., *Worship Optional: Joining a Church to Avoid Vaccines*, N.Y. TIMES (Jan. 14, 2003), <https://www.nytimes.com/2003/01/14/science/worship-optional-joining-a-church-to-avoid-vaccines.html>. *See also* CONGREGATION OF UNIVERSAL WISDOM, <https://www.cuwisdom.org> (last visited Oct. 02, 2021).

¹²⁴ *Compare Friedman*, 125 Cal. Rptr. 2d at 665 (plaintiff’s veganism was not a religion under California Fair Employment and Housing Act, analyzed under the *Malnak* standard described above) *with* *Chenzira v. Cincinnati Children’s Hosp. Med. Ctr.*, No. 1:11-CV-00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012) (plaintiff’s claim that her veganism was a religion under Title VII was a plausible claim and survived motion to dismiss).

¹²⁵ Douglas J. Opel, James A. Sonne & Michelle M. Mello, *Vaccination Without Litigation — Addressing Religious Objections to Hospital Influenza-Vaccination Mandates*, 378 NEW ENG. J. MED. 785, 786, 788 (2018).

III. LIMITS FOR PUBLIC AND PRIVATE UNIVERSITIES: FEDERAL DISABILITY LAWS

Federal law may require modification of campus vaccine requirements for certain students with disabilities, as determined on a case-by-case basis. A highly abbreviated synopsis of relevant law is provided below, followed by a discussion of threshold issues when this law is applied to vaccine mandates and, finally, an examination of possible accommodations for those who merit them.¹²⁶

A. The ADA and Section 504: An Overview

a. The Basic Obligation

Universities are prohibited from denying access to their programs on the basis of a student's disability by multiple federal laws, and these laws should also cover students who, medically, cannot be vaccinated. A disability under these laws means "a physical or mental impairment that substantially limits one or more major life activities"; a "record of such an impairment"; or "being regarded as having such an impairment."¹²⁷

Any university that participates in federal student aid programs or federal grants or contracts (essentially, any public or private university) is subject to Section 504, which "provides comprehensive coverage of most issues of discrimination that would arise in a higher education

¹²⁶ In some cases, state disability laws may offer greater protection than Federal laws. For example, the New York State Human Rights Law (NYSHR) covers a broader range of conditions as disabilities than Federal law. While the Americans with Disabilities Act defines a disability as, in part, "a physical or mental impairment that substantially limits one or more major life activities," 42 U.S.C. § 12102(1), the NYSHR defines disability in comparable part as "a physical, mental or *medical* impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function *or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.*" N.Y. EXEC. LAW § 292(21) (Consol. 2021) (emphasis added). Courts have observed that terms such as those emphasized here sweep conditions into the New York definition that would not be included in the Federal definition. *See, e.g.,* State Div. of Hum. Rts. v. Xerox Corp., 65 N.Y.2d 213, 218–19 (N.Y. 1985) (holding an individual's obesity could be a disability under NYSHR despite the fact that there was no evidence that it limited her physical or mental abilities because it "was clinically diagnosed and found to render her medically unsuitable [for employment] by [a] physician [and] constituted an impairment"). Where the law of a university's state provides rights to accommodations that go beyond what Federal law provides, university counsel needs to analyze its obligations to modify vaccine requirements in terms of that state law as well as Federal law.

¹²⁷ 42 U.S.C. § 12102(1) (for the ADA); *see also* 29 U.S.C. § 705(20)(A) (incorporating ADA standard into Section 504).

setting.”¹²⁸ Section 504 of the Rehabilitation Act of 1973 (Section 504) provides as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....¹²⁹

Section 504 overlaps substantially with the Americans with Disabilities Act (ADA).¹³⁰ As one court has stated, “Congress intended Title II to be consistent with section 504 of the Rehabilitation Act. This desire for consistency is evident from the ADA statutory scheme itself. Enforcement remedies, procedures, and rights under Title II are the same as under section 504.”¹³¹ Title II of the ADA applies to public institutions¹³² and mandates that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹³³ Title III imposes a similar requirement on private institutions.¹³⁴

b. Reasonable Accommodations

Universities (and other entities) provide equal access to individuals with disabilities by providing them with accommodations, though these

¹²⁸ LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES & THE LAW* § 3:1 (4th ed. 2021), Westlaw (database updated April 2021).

¹²⁹ 29 U.S.C. § 794(a).

¹³⁰ 42 U.S.C. §§ 12101–12213.

¹³¹ *Pottgen v. Mo. State High Sch. Activities Ass’n*, 40 F.3d 926, 930 (8th Cir. 1994). *Accord* *Everett v. Cobb Cnty. Sch. Dist.*, 138 F.3d 1407, 1409 (11th Cir. 1998) (“[C]auses of action brought under Title II of the ADA and the Rehabilitation Act are essentially identical.”).

¹³² ADA Title II applies to public entities, including “any department, agency, special purpose district, or other instrumentality of a State or States or local government,” 42 U.S.C. § 12131(1)(B).

¹³³ *Id.* at § 12132.

¹³⁴ ADA Title III applies to public accommodations, including an “undergraduate, or postgraduate private school, or other place of education” *Id.* at § 12181(7)(J). It states: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” *Id.* at § 12182.

accommodations need not go beyond what the law defines as reasonable. The Supreme Court has stated that “Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.”¹³⁵ But the Court later clarified that it was necessary to strike “a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make ‘fundamental’ or ‘substantial’ modifications to accommodate the handicapped, it may be required to make ‘reasonable’ ones.”¹³⁶ The Court further stated, “to assure meaningful access, reasonable accommodations in the grantee’s program or benefit may have to be made.”¹³⁷

The ADA regulations impose a similar requirement, with a similar limitation for fundamental alterations. For example, the Title II regulations state as follows: “A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”¹³⁸

Beyond the fundamental alteration standard, at a certain point, “[a]ccommodation is not reasonable if it...imposes undue financial and administrative burdens on a grantee.”¹³⁹ There is little case law on the topic of what constitutes an undue burden in terms of student accommodations. One scholar observed in a 2014 article that the undue financial or administrative burden had not been applied in a judicial opinion since 1990, “perhaps because defendant higher education

¹³⁵ *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 413 (1979). The term “handicap” has now been changed in most federal legislation to “disability.”

¹³⁶ *Alexander v. Choate*, 469 U.S. 287, 300 (1985).

¹³⁷ *Id.* at 301.

¹³⁸ 28 C.F.R. § 35.130(b)(7)(i). Similarly, the Title III regulations state, “A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.” 28 C.F.R. § 36.302(a).

¹³⁹ *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 287 n. 17 (1987). *See also* 42 U.S.C. § 12182(b)(2)(A)(iii) (ADA Title III) (discrimination does not include a failure to take steps that “would result in an undue burden.”).

institutions choose not to open their budgets to judicial scrutiny.”¹⁴⁰ Another reason may be that the standard for such a defense is high. As one court has stated, “the plain language of the ADA’s Title II regulations, as well as the legislative history indicate that Congress intended to permit a cost defense only in the most limited circumstances when an accommodation would fundamentally alter the nature of the service, program or activity.”¹⁴¹ In the 1990 case referred to above, the Eleventh Circuit held that an annual expenditure of \$15,000 to provide transportation services accessible to people in wheelchairs that would be equivalent to services provided to others, out of an annual transportation budget of \$1.2 million, was “not likely to cause an undue financial burden” on the university.¹⁴² Examples from other contexts suggest that the burden may need to threaten the operating viability of an enterprise to be undue.¹⁴³

c. Health and Safety Requirements as Qualification for Participation

As noted above, Section 504 and the ADA extend their protections to *qualified* individuals with disabilities; reasonable accommodation is not required unless a student meets this threshold requirement. The Section 504 regulations of the U.S. Department of Education define a “[q]ualified handicapped person” as, *inter alia*, one “who meets the academic and technical standards requisite to admission or participation

¹⁴⁰ Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues*, 22 Am. U.J. Gender Soc. Pol’y & L. 519, 538 (2014).

¹⁴¹ *Rodriguez v. DeBuono*, 44 F. Supp. 2d 601, 621 (S.D.N.Y. 1999), *rev’d on other grounds*, 197 F.3d 611 (2d Cir. 1999) (holding defendants had failed to show that costs of providing home care rather than institutional care to Medicaid patients with dementia or Alzheimer’s disease constituted an undue burden).

¹⁴² *United States v. Bd. of Trustees for the Univ. of Alabama*, 908 F.2d 740, 751 (11th Cir. 1990).

¹⁴³ *See* *Roberts v. Kindercare Learning Ctrs., Inc.*, 896 F. Supp. 921, 927 (D. Minn. 1995) (finding an undue burden for a daycare center to provide a full-time one-on-one attendant for a child with a disability, where center operated on a shoe-string budget and cost of attendant would exceed amount of child’s tuition); *Emery v. Caravan of Dreams, Inc.*, 879 F. Supp. 640, 644 (N.D. Tex. 1995) (finding an undue burden for a theater to change its policy to prohibit smoking in order to allow plaintiffs with cystic fibrosis to attend concerts, where evidence indicated the venue would not be able to book major bands, thus endangering the viability of the business). *See also* *Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1275 (11th Cir. 2006) (finding that a request that a historic theater increase and improve access for patrons in wheelchairs by steps that would include lowering a portion of the floor, changing the historic seating arrangement in the theater, closing the theater for a period, and eliminating seats in the theater was not readily achievable).

in the recipient’s education program or activity.”¹⁴⁴ Thus, universities may set academic and technical standards that need not be waived as part of an accommodation.

One qualification that a covered entity may establish for any participant in its program is that an individual not pose a significant health or safety risk to others. In a relatively early Section 504 case, *School Board of Nassau County, Florida v. Arline*, the Supreme Court upheld the authority of a school district to discharge a teacher with tuberculosis *if* an individualized inquiry supported the conclusion that her presence would create “significant health and safety risks” for others.¹⁴⁵ The Court explained, “A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.”¹⁴⁶ This principle has been codified in the ADA regulations.¹⁴⁷

¹⁴⁴ 34 C.F.R. § 104.3. The Supreme Court approved this regulatory interpretation in holding that a nursing school could reject as unqualified an applicant based on her severe hearing disability. *Se. Cmty. Coll.*, 442 U.S. at 406, 414. The Court also stated, “An otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his handicap.” *Id.* at 406.

Similarly, the ADA Title II regulations define a “qualified individual with a disability” as one who “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 28 C.F.R. § 35.104. An appendix to an earlier version of the regulations stated, “The term ‘technical standards’ refers to all nonacademic admissions criteria that are essential to participation in the program in question.” 45 C.F.R. § pt. 84, app. A.

¹⁴⁵ *Arline*, 480 U.S. at 287. The ADA Title II regulations address this concept as well, stating, “This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.” 28 C.F.R. § 35.139(a). Those regulations define “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.” *Id.* at § 35.104.

¹⁴⁶ *Arline*, 480 U.S. at 288 n.16. Consideration of direct threat is not limited to cases of communicable diseases. *See, e.g., Theriault v. Flynn*, 162 F.3d 46, 47 (1st Cir. 1998) (holding that state motor vehicle administration did not violate ADA by requiring driver with cerebral palsy who appeared to have difficulty controlling movement of his arms to take a special driving test when applying for renewal due to threat to public safety he might have posed).

¹⁴⁷ 28 C.F.R. § 35.139(a) (ADA Title II) (“This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.”); 28 C.F.R. § 36.208(a) (ADA Title III) (“This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public

The *Arline* court set forth an analytic framework for determining whether a health risk to others legitimately disqualified an individual from employment. It stated that there must be an inquiry, “based on reasonable medical judgments given the state of medical knowledge,” that addresses the following factors:

- (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.¹⁴⁸

The Court also stated that a court reviewing such a matter “normally should defer to the reasonable medical judgments of public health officials.”¹⁴⁹ Finally, there must be a determination, “in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry.”¹⁵⁰

d. Key Disability Law Procedural Requirements

In addition to the substantive requirements for accommodating individuals with disabilities, the ADA and Section 504 impose significant procedural requirements on universities. Perhaps most importantly, when a student notifies an institution that the student has a disability and seeks an accommodation, the institution must engage in an “interactive process”—“a series of informal meetings and discussions to identify the precise limitations resulting from the disability and potential reasonable accommodations that could

accommodation when that individual poses a direct threat to the health or safety of others.”).

¹⁴⁸ *Arline*, 480 U.S. at 288.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* This framework has been reiterated in the ADA Title II regulations: “In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.” 28 C.F.R. § 35.139(b).

overcome those limitations.”¹⁵¹ A leading disability nonprofit describes the interactive process as follows:

The disability resource professional [at the university] should engage in a structured exchange with the student to explore previous educational experiences, past use of accommodations, and what has been effective and ineffective in providing access. The weight given to the individual’s description will be influenced by its clarity, internal consistency, and congruency with the professional’s observations and available external documentation.¹⁵²

While it is generally accepted that an entity does not violate the ADA by failing to engage in the interactive process if there is, in fact, no reasonable accommodation available,¹⁵³ a student has a cause of action if the student can show that “1) the school knew about the student’s disability, 2) the student requested accommodations, 3) the school did not show good faith in seeking appropriate accommodations, and 4) appropriate accommodations could have been provided but for the school’s lack of good faith.”¹⁵⁴

B. Federal Disability Law Applied to Vaccine Mandates

As described above, under federal disability law, a university cannot exclude an otherwise qualified student based on the student’s

¹⁵¹ *Newell v. Cent. Mich. Univ. Bd. of Trs.*, No. 19-11988, 2020 WL 4584050, at *9 (E.D. Mich. Aug. 10, 2020). *Accord* *Forbes v. St. Thomas Univ., Inc.*, 768 F. Supp. 2d 1222, 1231 (S.D. Fla. 2010) (“In the academic setting, ‘reasonable accommodations’ jurisprudence contemplates an interactive process between the student and school, under which both sides have a responsibility to bring the issue of reasonable accommodations front and center. The initial burden is on the student, who must identify her disability and make a case for specific accommodations. Then the school is required to consider the request and make a reasoned decision to grant or deny it.”) (internal citation omitted).

¹⁵² *Supporting Accommodation Requests: Guidance on Documentation Practices*, ASS’N ON HIGHER EDUC. & DISABILITY, <https://www.ahead.org/professional-resources/accommodations/documentation> (last visited Sept. 27, 2021).

¹⁵³ *See* *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 100–01 (2d Cir. 2009) (collecting cases from multiple circuits).

¹⁵⁴ *Newell*, 2020 WL 4584050, at *9. *Accord* *Schneider v. Shah*, 507 F. App’x 132, 138 (3d Cir. 2012). Another area of obligation that the federal disability laws impose on universities relates to privacy of medical information. *See, e.g.*, 42 U.S.C. § 12112(d)(3). The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, also imposes significant privacy protections regarding student education records; and university hospitals and similar facilities are subject to HIPAA privacy protections. *See generally* 45 C.F.R. Parts 160 & 164.

disability, where a reasonable modification would allow that student to meet the requirements for participation. This section will discuss how this legal framework would apply in the case of requests for accommodations from a university vaccine mandate.

Procedurally, a student could initiate the interactive process with his or her university by notifying the school that the student had a disability that precluded him or her from taking the vaccine and requesting an accommodation. The school would likely require the student to provide documentation from a licensed medical provider indicating the student's diagnosis and how the disability affects a major life activity.

The remainder of this subsection will discuss several questions a university may face when evaluating a request for a disability accommodation from a vaccine mandate.

a. Does the student's condition constitute a disability?

The first critical question in analyzing such a request is whether a student indeed has a disability under the relevant law. Significantly, it is possible for a person to have a medical condition that would weigh against taking a vaccine and yet for that medical condition not to qualify as a disability. To review, a disability is “a physical or mental impairment that substantially limits one or more major life activities”; a “record of such an impairment”; or “being regarded as having such an impairment.”¹⁵⁵

As a general rule, an allergy or other condition that could be anticipated to trigger a severe reaction to a vaccine would likely qualify as a disability under federal disability law. In the related area of food allergies, the U.S. Food and Nutrition Service has stated with regard to school meal programs:

Generally, children with food allergies or intolerances do not have a disability as defined under either Section 504 of the Rehabilitation Act or Part B of [Individuals with Disabilities in Education Act], and the school food service may, but is not required to, make food substitutions for them. However, *when in the licensed physician's assessment, food allergies may result in severe, life-threatening (anaphylactic) reactions, the child's condition would meet the*

¹⁵⁵ 42 U.S.C. § 12102(1) (for the ADA); *see also* 29 U.S.C. § 705(20)(A) (incorporating ADA standard into Section 504).

definition of “disability,” and the substitutions prescribed by the licensed physician must be made.¹⁵⁶

The U.S. Department of Justice has provided similar guidance.¹⁵⁷

Just as with a food allergy, an allergy to a vaccine component that could trigger a “significant or severe response[.]”¹⁵⁸ that would constitute a “mental or physical impairment that substantially limits a major life activity”¹⁵⁹ would qualify as a disability. A student demonstrating such a disability would be entitled to an accommodation from a vaccine requirement, subject to the general limitations discussed above.

As indicated by the federal guidance quoted above, not all allergies will constitute disabilities. More generally, if the condition that gives rise to a person’s determination to decline a vaccine does not qualify as a disability, then the person is not entitled to an accommodation under the ADA and Section 504.¹⁶⁰ *Hustvet v. Allina Health Systems*¹⁶¹ illustrates this principle in the employment context in a manner that could equally apply in the student context. In *Hustvet*, the Eighth Circuit concluded that a plaintiff’s allergies and sensitivities that led her to request an exemption from an employer’s measles-mumps-rubella (MMR) vaccine mandate did not qualify as a disability and that she,

¹⁵⁶ Food and Nutrition Service, U.S. Dept. of Agriculture, *Accommodating Children with Special Dietary Needs in the School Nutrition Programs 5* (Fall 2001) (emphasis added), https://fns-prod.azureedge.net/sites/default/files/special_dietary_needs.pdf.

¹⁵⁷ In a guidance document, the Department addressed the question, “Is a food allergy considered a disability under the ADA?” as follows:

It depends. A disability as defined by the ADA is a mental or physical impairment that substantially limits a major life activity, such as eating. Major life activities also include major bodily functions, such as the functions of the gastrointestinal system. Some individuals with food allergies have a disability as defined by the ADA - particularly those with more significant or severe responses to certain foods.

CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, QUESTIONS & ANSWERS ABOUT THE LESLEY UNIV. AGREEMENT AND POTENTIAL IMPLICATIONS FOR INDIVIDUALS WITH FOOD ALLERGIES 1 (Jan. 2013), https://www.ada.gov/q&a_lesley_university.htm (Question #1).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* It is worth noting that “major life activity” is defined broadly under the ADA, and includes “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working”. 42 U.S.C. 12102(2)(A).

¹⁶⁰ See *supra*, Sections III.A.a, III.A.b.

¹⁶¹ *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018).

therefore, did not have a right to an accommodation. The plaintiff, Hustvet, had told her employer “that she had many allergies and chemical sensitivities, and so she needed to limit her ‘exposure.’”¹⁶² The employer was granted summary judgment at the trial court, and the appellate court affirmed. Although Hustvet claimed that “her chemical sensitivities and allergies derive[d] from an immune system disability and she suffer[ed] from a seizure disorder,” the court held that there was “insufficient evidence in the record to support the conclusion that Hustvet’s chemical sensitivities or allergies substantially or materially limit her ability to perform major life activities.”¹⁶³ The court explained as follows:

[The plaintiff] has never been hospitalized due to an allergic or chemical reaction, never seen an allergy specialist, and never been prescribed an EpiPen. Nor has she ever sought any significant medical attention when experiencing a chemical sensitivity, taken prescription medication because of a serious reaction, or had to leave work early because of a reaction. Instead, the record reveals that Hustvet has garden-variety allergies to various items that moderately impact her daily living. This is not enough for a reasonable fact-finder to conclude she is disabled.¹⁶⁴

Thus, “garden variety allergies” and general claims of sensitivities do not create rights under federal disability law for an accommodation from a vaccine mandate. Note that *Hustvet* did not have, for example, a documented allergic reaction to MMR or evidence that made such an allergic reaction (which happens at a rate of around 1.8-14.4 per one million MMR doses) likely.¹⁶⁵

Schools will want to make thoughtful determinations as to whether a student requesting an accommodation has a disability in light of scant evidence about the incidence of allergic or other adverse reactions to the current COVID-19 vaccines. Current evidence indicates that the number of valid medical exemptions to those vaccines is likely to be very low. Both Moderna and Pfizer-BioNTech have had low levels of severe allergic reactions – a few per million – and although those who

¹⁶² *Id.* at 405.

¹⁶³ *Id.* at 411.

¹⁶⁴ *Id.*

¹⁶⁵ *Measles: Contraindications and Precautions to Vaccination*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/pubs/pinkbook/meas.html#contraindications> (last accessed Oct. 03, 2021).

do suffer allergic reactions should not receive another dose of Moderna or Pfizer-BioNTech, they can receive the J&J vaccine.¹⁶⁶ J&J vaccines may be associated with very rare blood clots, but at this point, there is no clear medical contraindication for a specific population based on it.¹⁶⁷ At the time of publication, there are no other acknowledged contraindications.¹⁶⁸ Doctors may recommend against vaccination for people with rare and unusual conditions, but almost by definition, those should be few.

b. If There is a Disability, Does it Require (or Reasonably Relate to) an Accommodation from a Vaccine Mandate?

A second question a university will consider is whether, even if a person has a disability, the accommodation requested is reasonably related to the disability. For example, a particular disability may not give rise to risks or dangers related to receiving a vaccine.¹⁶⁹

The *Hustvet* court referred to this criterion in rejecting the plaintiff's alternative claim that she should be exempted from the vaccine mandate because she had a seizure disorder. In considering *Hustvet*'s alleged seizure disorder, the court assumed that it could be a disability, but noted, among other things, that although "the MMR vaccine presents a very small, but possible risk, of having a seizure, the CDC does not consider past seizures to be a contraindication or even a precaution for the vaccine."¹⁷⁰ Therefore, the court was "unconvinced the accommodation sought related to her purported disability in a meaningful way."¹⁷¹ This shows that even if a person has a genuine

¹⁶⁶ Tom T. Shimabukuro, Matthew Cole & John R. Su, *Reports of Anaphylaxis After Receipt of mRNA COVID-19 Vaccines in the U.S.—December 14, 2020–January 18, 2021*, 325 JAMA 1101 (2021), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2772943>; *Management of Anaphylaxis at COVID-19 Vaccination*, CTNS. FOR DISEASE CONTROL AND PREVENTION (Mar. 3, 2021), <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/managing-anaphylaxis.html> [<https://perma.cc/SLC2-PYL7>].

¹⁶⁷ David K. Shay, Julianne Gee, John R. Su, Tanya R. Myers, Paige Marquez, Ruiling Liu, Bicheng Zhang, Charles Licata, Thomas A. Clark & Tom T. Shimabukuro, *Safety Monitoring of the Janssen (Johnson & Johnson) COVID-19 Vaccine — United States, March–April 2021*, 70 MORBIDITY & MORTALITY WKLY. REPORT 680, 682 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7018e2.htm?s_cid=mm7018e2.

¹⁶⁸ This Article is not written to provide medical advice, of course. Individuals should consult with health care professionals for current information and guidance regarding the COVID-19 vaccine and any other medical issue.

¹⁶⁹ *Hustvet*, 910 F.3d at 410 ("[I]n order for [an] accommodation to be reasonable, the request must relate to the individual's disability.").

¹⁷⁰ *Id.* at 411 (internal quotation marks omitted).

¹⁷¹ *Id.*

disability, there will have to be a reason that this disability precludes receiving a vaccination for an accommodation to be required.

c. How Severe Must a Condition be to Merit an Accommodation, and Who Decides?

It is not enough for a treating physician to opine that a person should not receive a vaccination; rather, a university must engage in a legal analysis as to whether the identified condition is serious enough to be considered a disability. In *Norman v. NYU Langone Health Systems*, an employee of a hospital system stated that she had an allergy to the flu vaccine and requested that she be allowed to wear a mask rather than receive the mandated vaccine.¹⁷² The employee explained that she had been told that she had reacted adversely to a flu vaccine in her childhood, though she did not remember this, and that in 2001, she experienced shortness of breath and chest palpitations shortly after receiving the flu vaccine, which lasted 10 to 20 minutes.¹⁷³ Based on this episode, her primary care physician had advised her not to receive the flu vaccine in the future and had signed a form stating she “had had an anaphylactic or severe allergic reaction after a previous influenza vaccination.”¹⁷⁴

The employer required the employee to undergo a skin test for a newer, hypo-allergenic form of the flu vaccine, with the understanding that she would need to receive the vaccine as a condition of employment if the test came back negative.¹⁷⁵ She received the vaccine after a negative skin test, and forty minutes later, she “began experiencing shortness of breath and palpitations.”¹⁷⁶ The doctor gave her albuterol, administered an EpiPen, and sent her to the emergency department.¹⁷⁷ She was found to be experiencing shortness of breath but exhibiting no difficulty swallowing, itching, rash, swelling, or wheezing. According to her discharge notes, she left “tearful/anxious but otherwise asymptomatic,” and the cause was “less likely allergic reaction, possible panic attack.”¹⁷⁸

¹⁷² *Norman v. NYU Langone Health Sys.*, No. 19 Civ. 67 (AT), 2020 WL 5819504, at *4 (S.D.N.Y. Sept. 30, 2020).

¹⁷³ *Id.* at *2.

¹⁷⁴ *Id.* (internal quotation marks omitted).

¹⁷⁵ *Id.* at *2–*3

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

The employee sued the hospital system, arguing that her allergy to the flu vaccine was a disability and that her employer “failed to reasonably accommodate her disability by not allowing her to wear a face mask during the 2017 flu season in lieu of receiving a flu vaccine.”¹⁷⁹ The court granted summary judgment to the employer, finding that the employee had not established that she suffered from a disability under the ADA in the first place and thus was not entitled to an accommodation.¹⁸⁰

In explaining its reasoning, the court acknowledged that breathing was a major life activity under the ADA and that some reactions to a vaccine could constitute a disability.¹⁸¹ However, the court held that the plaintiff failed to demonstrate that her purported allergy to the flu vaccine *substantially limited* her breathing at the time she sought the accommodation, and thus she did not present a disability that required accommodation.¹⁸² The court noted that other cases found a substantial limitation on the activity of breathing where plaintiffs had had “episodes requiring medical interventions or chronic breathing problems.”¹⁸³ In contrast, in the only episode prior to receiving the vaccine with this employer that the plaintiff could remember, her shortness of breath and palpitations had only lasted 10 to 20 minutes and did not require further medical attention. Furthermore, the plaintiff had indicated on health forms an absence of “serious problems with shortness of breath, wheezing, or chest pain,” and had also stated she had “no known allergies.”¹⁸⁴ Thus, the court concluded, “no reasonable factfinder could conclude that Plaintiff’s reactions to the flu vaccine, at the time she requested an accommodation, meet the definition of a disability.”¹⁸⁵

¹⁷⁹ *Id.* at *4.

¹⁸⁰ *Id.* at *8.

¹⁸¹ *Id.* at *5–*7.

¹⁸² *Id.* at *6.

¹⁸³ *Id.* at *6.

¹⁸⁴ *Id.* (internal quotation marks omitted).

¹⁸⁶ Notably, the ADA specifies that the mere fact that a condition may be susceptible to medical treatment does not mean that it is not a qualifying impairment: “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies...” 42 U.S.C. §12102(4)(E)(i)(I). Thus, the mere fact that an Epi-Pen could resolve a severe respiratory reaction to a vaccine would not mean that the underlying condition was not a disability.

Some of the reasoning for this decision could have been more fully articulated. We read *Norman* as rejecting the plaintiff's claim based on the emergency department's conclusion that the plaintiff did not suffer a severe allergic reaction, but a panic attack, with an emphasis on her lack of severe symptoms and her stated lack of existing allergies. If the emergency department had concluded that the plaintiff's reaction was a severe allergic reaction, even if the use of an Epi-Pen had prevented escalation, we would expect the court – and likely the employer – would conclude otherwise.¹⁸⁶

Norman thus illustrates that a person seeking an accommodation to a vaccine mandate must show a medical need for that accommodation at a level of severity that makes it a disability. Such a showing is not necessarily a given merely because a physician advises, based on a previous reaction, that the person not receive the vaccine if the condition at issue is not serious enough to qualify as a disability.¹⁸⁷ In

¹⁸⁶ Notably, the ADA specifies that the mere fact that a condition may be susceptible to medical treatment does not mean that it is not a qualifying impairment: “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies. . . .” 42 U.S.C. §12102(4)(E)(i)(I). Thus, the mere fact that an Epi-Pen could resolve a severe respiratory reaction to a vaccine would not mean that the underlying condition was not a disability.

¹⁸⁷ Another condition that does not meet the definition of a disability under Federal law is pregnancy. *See, e.g.*, 29 C.F.R. § Pt. 1630, App. at Section 1630.2(h) (“[C]onditions . . . such as pregnancy . . . that are not the result of a physiological disorder are also not impairments” and thus do not meet the “physical or mental impairment” element of the definition of a disability under the ADA.); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 553 (7th Cir. 2011), *abrogated on other grounds*, *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015). On the other hand, a pregnancy that results in an impairment that substantially limits a major life activity can be considered a disability. *See, e.g.*, *Border v. Nat’l Real Estate Advisors, LLC*, 453 F. Supp. 3d 249, 256 (D.D.C. 2020). Were a student’s pregnancy to so constitute a disability and the student asked for an accommodation with regard to a vaccine requirement, that would be analyzed under the framework described above. Additionally, the regulations for Title IX of the Civil Rights Amendments of 1972, which requires that education programs supported by Federal funds not discriminate on the basis of sex, prohibit discrimination on the basis of pregnancy. *See* 28 U.S.C. §1681; 34 C.F.R. §106.40(b)(1). The U.S. Department of Education has interpreted this requirement to mean that “a school must make adjustments to the regular program that are reasonable and responsive to the student’s temporary pregnancy status.” U.S. DEP’T OF EDUC., SUPPORTING THE ACADEMIC SUCCESS OF PREGNANT AND PARENTING STUDENTS UNDER TITLE IX OF THE EDUC. AMENDS. OF 1972, 9 n. 27 (2013). The regulations also require that programs receiving Federal funds treat pregnancy and recovery from pregnancy the same as they

contrast, a serious contraindication – a medical condition that would put the plaintiff at heightened risk of death or serious harm if given a vaccine – likely would qualify as a disability.

d. Can a Psychological Disability Require a Vaccine Mandate Accommodation?

In some contrast to *Hustvet* and *Norman*, the Third Circuit found that a psychological disability may entitle a person to an accommodation from a vaccine mandate in *Ruggiero v. Mount Nittany Medical Center*, which was issued as a non-precedential opinion.¹⁸⁸ As background, it is worth recalling that the definition of a disability includes “a physical *or* mental impairment,”¹⁸⁹ so it is appropriate that a court would consider whether a psychological disability would require an accommodation related to a vaccine mandate. Ruggiero, the plaintiff, was a nurse with the Mount Nittany Medical Center.¹⁹⁰ She suffered from “severe anxiety and eosinophilic esophagitis, which limit[ed] her ability to perform certain life activities, such as eating, sleeping, and engaging in social interactions.”¹⁹¹ Ruggiero requested an exemption from receiving the tetanus, diphtheria, and pertussis (TDAP) vaccine mandated by her employer. She produced a note from her doctor stating that she was “medically exempt from receiving tdap immunization for medical concerns.”¹⁹² In response to a request from the employer for further explanation, Ruggiero’s doctor wrote as follows:

Aleka Ruggiero is medically exempt from receiving the Tdap immunization due to severe anxiety with some side effects she read with this injection, especially with her history of having many food allergies, environmental allergy and eosinophilic esophagitis. Patient being terrified, I feel the risk of this Tdap injection outweighs the benefits. [Plaintiff] understands the risks of not getting this immunization.¹⁹³

treat other temporary disabilities. 34 C.F.R. §106.40(b)(4). Thus, exemptions from vaccine requirements based on other kinds of temporary disabilities would also have to be allowed in the same way on the basis of pregnancy in general. Likely, this would mean applying the same standard to a request for an exemption based on pregnancy as would be applied to a request for an exemption based on some other temporary disability.

¹⁸⁸ *Ruggiero v. Mount Nittany Med. Ctr.*, 736 Fed. App’x 35 (3d Cir. 2018).

¹⁸⁹ 42 U.S.C. § 12102(1) (emphasis added).

¹⁹⁰ *Ruggiero*, 736 Fed. App’x at 37.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 37–38 (alteration in original).

Ruggiero suggested that she be exempted from the vaccine requirement altogether or be allowed to wear a mask instead, but her employer rejected her request, stating that her doctor’s explanation did “not meet the definition of medical contraindication as detailed in the manufacturer’s vaccine literature and thus Tdap immunization is required.”¹⁹⁴

While the trial court had granted the employer’s motion to dismiss, the appellate court reversed. It found, among other things, that Ruggiero had “raise[d] the plausible inference that [the defendant medical center] had failed to properly engage in the interactive process” when it rejected her requested accommodations and failed to propose an alternative.¹⁹⁵ The appellate court also refuted the defendant’s argument that Ruggiero had “failed to plausibly allege an actual disability.”¹⁹⁶ The court reviewed Ruggiero’s impairments, severe anxiety, and eosinophilic esophagitis, and the limits these imposed on certain major life activities.¹⁹⁷ “This was sufficient,” the court stated, “to permit a plausible inference that she was a qualified person with a disability within the meaning of the ADA.”¹⁹⁸ It noted in support of this conclusion that the ADA regulations state that “[t]he term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.”¹⁹⁹

Notably, the court was merely reversing the dismissal of Ruggiero’s case on the pleadings—it found she had “identified her specific impairments (severe anxiety and eosinophilic esophagitis) and further alleged that those impairments limited certain life activities such as sleeping, eating, and engaging in social interaction. This was sufficient to permit a plausible inference that she was a qualified person with a disability within the meaning of the ADA.”²⁰⁰ The remand thus opened the next stage of the proceedings, where the plaintiff would have to substantiate these allegations. *Ruggiero* holds that a plaintiff adequately alleged that a psychological disability *can* require an accommodation to a vaccine mandate under federal disability law, but it does not serve as proof that such a case can actually be proven.

¹⁹⁴ *Id.* at 38.

¹⁹⁵ *Id.* at 40.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (citing 29 C.F.R. § 1630.2(j)(1)(iii)).

²⁰⁰ *Id.*

e. Final Observations

Ruggiero provides instructive contrasts with *Norman* and *Hustvet*. Among other things, *Ruggiero* shows that a disability that creates the right to an accommodation from a vaccine mandate need not have anything to do with the listed contraindications to the vaccine and that the disability may be psychological, in contrast to both of the disabilities claimed in the other two cases.

Ruggiero also demonstrates the level of deference afforded to a physician's determination about whether a plaintiff should receive a vaccine—an issue that arose in *Norman* as well. Like the plaintiff in *Norman*, *Ruggiero* had documentation from her physician stating that she should be medically excused from the vaccine requirement. The failure of the claim in *Norman* thus suggests that the judgment of a physician that an individual should not receive a vaccine is not dispositive as to whether that person need be exempted from a vaccine mandate as a disability accommodation; rather, it would appear to require a legal determination (building on a medical judgment) whether a condition is, in fact, a disability. *Ruggiero* supports this notion, as the court did its own analysis, based on a medical attestation, as to whether the plaintiff had plausibly alleged a disability—even though it came to the opposite conclusion (albeit at the pleadings stage).

Finally, *Ruggiero* provides insight on when a condition is “substantially related” to vaccination. Like the plaintiff in *Hustvet*, *Ruggiero* sought an exemption from a vaccine mandate based on a condition that was not a contraindication to the vaccine—*Hustvet*'s basis was a seizure disorder, and *Ruggiero*'s was anxiety. For *Hustvet*, denial arose in part from the court's finding of no reasonable relation between her disorder and a need to avoid the vaccine, as the vaccine did not pose a medical risk to people with such a disorder. The *Ruggiero* court did not discuss whether *Ruggiero*'s requested accommodation was reasonably related to her disability. Its ruling, however, implies that the court saw a reasonable relation between her severe anxiety and the terror she felt at the prospect of getting the vaccine, on the one hand, and her request for an accommodation to excuse her from receiving it, on the other hand. The different results make sense; *Hustvet* was not likely to avoid a potential problem with her seizure disorder by being excused from the vaccine requirement; *Ruggiero*, in contrast, might avoid her problem with terror if she were excused.

C. Possible Accommodations from University Vaccine Mandates

If a student has a disability and an accommodation from a vaccine mandate reasonably relates to the disability, the university will need to consider what accommodation may be appropriate. With a number of pre-COVID-19 diseases, universities have provided full medical exemptions for students with actual contraindications with no additional safety measures required of students, on the theory that the spread of a disease was highly unlikely. This was the norm, for example, at the University of California for vaccines required pre-COVID-19.

However, these historical situations are very different from the COVID-19 pandemic. With common vaccines such as polio and measles, most people have been vaccinated in childhood or young adulthood (for example, 92.6% of children born in 2015 were vaccinated against polio by the time they reached age two²⁰¹), so there are very few people left who might seek exemptions. With COVID-19, the entire population was unvaccinated as of December 2020, and as of late July 2021, less than half of the U.S. population was vaccinated.²⁰² Furthermore, especially with current levels of vaccine hesitancy, there may be a higher level of exemption seekers and of unvaccinated individuals in the general community. Finally, as *Ruggiero* suggests, accommodations may increase substantially beyond people with medical contraindications.

Even if a university is granting few exemptions, COVID-19 poses a different challenge from the diseases that are the subject of long-standing vaccine mandates. The high vaccination rates we mentioned for other diseases—not merely in any given university community but in the nation as a whole—reduce the risk of outbreaks. In contrast, with significant portions of national and local populations unvaccinated against COVID-19, the disease continues to surge through many communities. Furthermore, new variants of the disease continue to

²⁰¹ CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH, TREND TABLES, VACCINATION COVERAGE FOR SELECTED DISEASES BY AGE 24 MONTHS, BY RACE & HISP. ORIGIN, POVERTY LEVEL, AND LOCATION OF RESIDENCE: U.S., BIRTH YEARS 2010–2015 2 (2019), <https://www.cdc.gov/nchs/data/hus/2019/031-508.pdf>.

²⁰² CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH, COVID-19: OUR SHOT TO END THE PANDEMIC, INTERPRETIVE SUMMARY FOR JULY 23, 2021 3–4 (2021) (stating that 48.8 percent of Americans had been fully vaccinated against COVID-19 as of July 22, 2021).

emerge that may be more contagious or pose greater health risks.²⁰³ And students, of course, interact with people from their broader communities extensively, meaning that unvaccinated students are more likely to encounter and contract the disease and to expose others at the university as well. Another difference with COVID-19 is that the vaccine is very new, so it may have significant limitations that are not yet known. For all these reasons, a student who is unvaccinated against COVID-19 may pose a greater risk to others at a university, both the vaccinated and the unvaccinated, than a student who is unvaccinated against diseases such as polio and measles.

Facing such a threat, a university may need to take additional steps to maintain safety. Three obvious possible accommodations are as follows: 1) the student participates fully in campus life, except that the student wears a mask and maintains social distancing protocols, along with frequent testing; 2) the student participates in essential campus activities while masked and socially distanced (perhaps just attending classes), and is otherwise quarantined in a residence hall room, along with frequent testing;²⁰⁴ and 3) the student does not return to campus but participates remotely instead.²⁰⁵

For accommodations in categories one or two, in which the student would remain on campus without being vaccinated, the university would have to determine whether the student would pose a substantial threat to the health or safety of others. As discussed earlier, the logic of a vaccine mandate is that, particularly given that no vaccine is fully protective, the community needs high rates of vaccination – sometimes

²⁰³ As we are currently seeing with the delta variant. See Rachel Herlihy, Wendy Bamberg, Alexis Burakoff, Nisha Alden, Rachel Severson, Eric Bush, Breanna Kawasaki, Brynn Berger, Elizabeth Austin, Meghan Shea, Eduardo Gabrieloff, Shannon Matzinger, April Burdorf, Janell Nichols, Kim Goode, Alana Cilwick, Chelsea Stacy, Erin Staples & Ginger Stringer, *Rapid Increase in Circulation of the SARS-CoV-2 B.1.617.2 Delta Variant — Mesa County, Colorado, April–June 2021*, 70 MORBIDITY & MORTALITY WKLY. REPORT 1084, 1085 (2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7032e2.htm>.

²⁰⁴ This appears to have been the status of the entire University of Michigan undergraduate population after the campus experienced an outbreak in fall 2020, as discussed *supra* at text accompanying note 12.

²⁰⁵ There are many other conceivable variations. An even less restrictive accommodation than number 1 would be for the student not to be required to mask or socially distance. This might be chosen at a point when there was little concern of disease transmission, as discussed in the preceding paragraphs. There is also a variation that sits between numbers 2 and 3 above, where the student is on campus but more fully quarantined, not attending any activities with others and instead participating remotely. Such an approach would require a threat analysis using the *Arline* framework as well as a determination as to whether remote access was a reasonable accommodation.

a very high rate – to prevent disease.²⁰⁶ An unvaccinated person has a substantially higher likelihood of contracting the disease and thus increases the risk of spreading it to others in the community, especially other unvaccinated persons.²⁰⁷ That said, communities should be able to safely absorb low levels of unvaccinated students. In fact, one justification for a mandate is to provide the protection of herd immunity to the few who cannot be safely vaccinated. But to do that, rates generally need to be high enough. The question of the level of risk would be determined by considering the factors set forth in the *Arline* framework:

- (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.²⁰⁸

For COVID-19 or any other contagious disease, such an analysis would require expert medical and public health judgment, which is of course beyond the scope of this Article.²⁰⁹ If the judgment finds that presence on campus generally, or even accommodation under categories one or two, would create a substantial risk to the health and safety of others, then the university would not be required to allow either accommodation: a student under such an accommodation would not be qualified for the school because of that risk.²¹⁰

An accommodation in category three (remote, off-campus learning) would obviate concerns about disease transmission. At the same time, it could raise significant questions as to whether it would fundamentally alter an academic program, lower academic standards, or create an undue burden. Universities would need to consider a range

²⁰⁶ See *supra* Section I.B first paragraph.

²⁰⁷ Another principle behind a vaccine mandate could be that some people cannot take a vaccine due to disability, so requiring the vaccination of anyone who can safely receive it protects those who cannot. If this were a university's rationale, it would follow that the school had already determined that students who could not safely take the vaccine would be allowed back into the community.

²⁰⁸ *Arline*, 480 U.S. at 288.

²⁰⁹ Indeed, such an analysis may be beyond the reasonable capacity of many institutions; rather, it often will be necessary for universities to rely on public health guidance from local, state and federal authorities.

²¹⁰ *Id.* at 288 n.16 (“A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.”).

of factors in answering these questions. Some types of classes may be particularly ill-suited to remote access, such as clinical programs involving hand-on activities, as it may be impossible to teach and assess certain skills remotely.²¹¹ Classes that rely on discussion among participants may also be ineffective for a student participating remotely, as it could be difficult for a student present only through a screen to actively discuss with the physically present students and instructor.²¹² Furthermore, some universities may consider residential living to be fundamental to their visions of education for reasons that go beyond presence in class and relate to broader interactions within their communities, such as building relationships and learning together outside of the classroom.²¹³ Schools that take this view would have to

²¹¹ As Justice Powell said regarding medical school, “[C]ompetence in clinical courses is as much of a prerequisite to graduation as satisfactory grades in other courses.” *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 95 (1978) (Powell, J., concurring in the opinion) (holding that dismissal for poor performance in clinical courses was an academic judgment and therefore did not require a hearing under the Due Process Clause).

²¹² In one case, admittedly predating the internet era and involving a request for participation by telephone, a court accepted a college’s argument “that the residency program is designed to provide the students with intensive academic interaction with each other and with the faculty through which they are to develop their critical thinking and communication skills” so that “allowing an individual to participate over the phone would not only interfere with that individual’s educational experience, it would also interfere with the educational experience of the students in the classroom.” *Maczaczj v. New York*, 956 F. Supp. 403, 409 (W.D.N.Y. 1997).

²¹³ For example, the University of North Dakota requires first-year students to live on campus, explaining that, “[b]y living on campus, students learn and reinforce skills which foster citizenship, generate a sense of belonging and build community.” *First-Year Campus Housing Requirement*, UNIV. OF N.D., <https://und.edu/student-life/housing/apply/on-campus-living-requirement.html> (last accessed Oct. 3, 2021). Stanford University states, “The physical plan of the Stanford campus recognizes that a true college experience can only exist with students and faculty living and learning in the same areas, a belief that has been preserved since the University first opened in 1891. Stanford’s residential system guarantees campus housing to entering freshmen for all four years, and all first-year students are required to live on campus.” *Housing*, STANFORD UNIV. OFFICE OF UNDERGRADUATE ADMISSION, <https://admission.stanford.edu/student/housing/index.html> (last accessed Oct. 3, 2021). And the University of Oregon explains its first-year residency requirement as follows: “Living on campus for at least your first year is a significant advantage that contributes to your success at the University of Oregon. You will be part of a community and make connections with other students, faculty, and staff. Living on campus also connects you to services that support you as you transition to college life. Studies show that first-year full-time students living on campus have higher GPAs, stay in school in higher numbers, and graduate faster.” *Live-On Requirement*, UNIV. OF OR., <https://housing.uoregon.edu/first-year/live-on> (last accessed Oct. 3, 2021). These statements are not presented as indicating that these schools do not make exceptions to these policies to accommodate students with disabilities; the authors have not researched that question.

consider whether allowing a student to enroll but not be physically present constituted a fundamental alteration of their program.

Universities may, in fact, determine that by modifying their normal expectations regarding in-person attendance, they can extend opportunities to deserving students while maintaining the character and standards of their programs. Some students with disabilities, such as a power-chair using veteran who had difficulty fitting his chair into lecture halls and who sometimes suffered from anxiety attacks in class, have reported that when all courses were forced online by the pandemic, they were able to learn better.²¹⁴ A school might determine that, at least on a temporary basis, an individual participating remotely would receive the fundamental benefits of the program. In fact, one of the lessons of the pandemic may be that providing remote access can make programs more inclusive, and not only for students who cannot be safely vaccinated.

All these questions appear different as universities emerge from fully remote operations during the COVID-19 pandemic. The notion that significant aspects of post-secondary programs cannot effectively be provided remotely is weakened. The technology to allow such access has dramatically improved from, say, 1997, when a student's best option for remote participation in a graduate program was by telephone,²¹⁵ to include a host of platforms that allow live conversation, breakout rooms, and written chat, and professors and students have been using these technologies for the last year.

At the same time, the fact that higher education has survived remotely does not mean that, post-pandemic, remote learning would not be a fundamental alteration to the higher education model. In the employment context, the Equal Employment Opportunity Commission has stated that the fact that an employer has “grant[ed] telework to employees for the purpose of slowing or stopping the spread of COVID-19” does not mean that it has to grant telework as a disability accommodation if that would require “continuing to excuse an employee from performing an essential function.”²¹⁶ Similarly, a university might view its remote operations as having represented an unwanted but necessary alteration of a fundamental aspect of its program; if so, the university should not be required to make that

²¹⁴ Lilah Burke, ‘*Proof of Concept*’, INSIDE HIGHER ED (Mar. 5, 2021), <https://www.insidehighered.com/news/2021/03/05/will-colleges-maintain-flexibility-disabled-students>.

²¹⁵ See *Maczaczj*, 956 F. Supp. at 409.

²¹⁶ EEOC, *What You Should Know About COVID-19* *supra* note 22, at D15.

alteration permanent. Additionally, there is a difference between conducting an entire class online and having one student online during an otherwise in-person class—as noted above, remote participation in the latter, hybrid context may be far more difficult.

Finally, schools will also need to consider accreditation and licensing requirements, which may limit distance learning. For example, the American Bar Association, which accredits law schools, sets a maximum for credit hours via distance learning during the first year of law school. It lifted the cap during the pandemic, but that is likely to be reinstated as the pandemic subsides.²¹⁷ And at least one court has held that an accommodation that would jeopardize a school's accreditation is per se unreasonable.²¹⁸ Furthermore, the Section 504 regulations provide that academic requirements essential to meeting licensing standards do not violate the law.²¹⁹

D. How University Accommodation Decisions Can Achieve Judicial Deference

Any decisions by a university on such matters should be made thoughtfully and deliberately through an interactive process that includes robust communication between school and student. Executed properly, such decisions by university officials receive significant deference from courts. A leading case from the First Circuit, *Wynne v. Tufts University School of Medicine*,²²⁰ provides a roadmap for what a court might require in order to grant deference. The case involved a Tufts University medical student with a learning disability who failed to successfully complete his first year and requested to be provided with an alternative to multiple-choice exams based on recommendations from a neuropsychological examination. Tufts denied him that

²¹⁷ See STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–21 STANDARD 3.11(E) (AM. BAR ASS'N 2020) (no more than 10 credit hours of distance education allowed during the first third of a student's legal education); *Council Moves to Expand Flexibility for Fall Academic Year*, AM. BAR ASS'N (June 11, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/council-moves-to-expand-flexibility>.

²¹⁸ *Harnett v. Fielding Graduate Inst.*, 400 F. Supp. 2d 570, 580 (S.D.N.Y. 2005) (student's request to be allowed to participate in classes by video connection as an accommodation not reasonable because accreditor American Psychological Association required students to be face-to-face with instructors during those times).

²¹⁹ 34 C.F.R. § 104.44 (“Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.”).

²²⁰ *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19 (1st Cir. 1991); *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791 (1st Cir. 1992).

accommodation, although it granted him other accommodations and allowed him to attempt the first-year program a second time. Ultimately, he still failed a required course, and the school dismissed him. The student sued, claiming that this violated his rights under Section 504.²²¹

The case reached the U.S. Court of Appeals for the First Circuit after summary judgment was granted to the university by the district court. In considering whether the university had properly determined that modifying its exam requirements as requested by the student would constitute a fundamental alteration, the appellate court stated that “[w]hen judges are asked to review the substance of a genuinely academic decision, they should show great respect for the faculty’s professional judgment.”²²² Yet the court said it could not defer to Tufts’ decision because there was not enough information in the record on this topic, which was encompassed by a single affidavit from the medical school’s dean indicating that medical educators at Tufts had determined that multiple-choice examinations best tested a set of cognitive skills necessary for medical doctors.²²³ The court described the affidavit’s shortcomings as follows:

There is no mention of any consideration of possible alternatives, nor reference to any discussion of the unique qualities of multiple choice examinations. There is no indication of who took part in the decision or when it was made. Were the simple conclusory averment of the head of an institution to suffice, there would be no way of ascertaining whether the institution had made a professional effort to evaluate possible ways of accommodating a handicapped student or had simply embraced what was most convenient for faculty and administration.²²⁴

The court set aside the summary judgment and remanded the case for further proceedings.²²⁵

On remand, Tufts filed a set of six additional affidavits explaining its decision. The district court again granted summary judgment to the university, and on a second appeal, the circuit court affirmed. The court explained it was able to defer to the university’s judgment because of its fuller explanation that demonstrated “in considerable detail, that

²²¹ *Wynne*, 932 F.2d at 21–22.

²²² *Id.* at 25 (internal ellipses omitted).

²²³ *Id.* at 27.

²²⁴ *Id.* at 28.

²²⁵ *Id.*

Tufts' hierarchy considered alternative means and came to a rationally justifiable conclusion regarding the adverse effects of such putative accommodations."²²⁶ The court noted that it did not view Tufts' conclusion as inevitable, but that "the point [was] not whether a medical school [was] 'right' or 'wrong.'"²²⁷ Rather, the point was that Tufts had made "a diligent assessment of available options" and reached "a professional, academic judgment that a reasonable accommodation was simply not available."²²⁸ This would appear to be the nature of deference: a reasonable decision made through a proper process will be accepted by a court, and the court will not substitute its own judgment as to whether it is correct for the university's.

The two *Wynne* opinions made clear that schools should not deny accommodations requests lightly. Rather, they should do so only after thoughtful, well-documented consideration by appropriately trained and knowledgeable persons that consider the full range of possible options. Furthermore, if the view is that granting a particular accommodation would effect a fundamental alteration or a lowering of the standards of the program at issue, this must be thoroughly analyzed and explained.

²²⁶ *Wynne*, 976 F.2d at 794 (internal quotation marks omitted). The court's additional description of the record provides useful detail of Tufts' model submission:

Tufts not only documented the importance of biochemistry in a medical school curriculum, but explained why, in the departmental chair's words, "the multiple choice format provides the fairest way to test the students' mastery of the subject matter of biochemistry." Tufts likewise explained what thought it had given to different methods of testing proficiency in biochemistry and why it eschewed alternatives to multiple-choice testing, particularly with respect to make-up examinations. In so doing, Tufts elaborated upon the unique qualities of multiple-choice examinations as they apply to biochemistry and offered an exposition of the historical record to show the background against which such tests were administered to *Wynne*. In short, Tufts demythologized the institutional thought processes leading to its determination that it could not deviate from its wonted format to accommodate *Wynne*'s professed disability. It concluded that to do so would require substantial program alterations, result in lowering academic standards, and devalue Tufts' end product—highly trained physicians carrying the prized credential of a Tufts degree.

Id. at 794–95.

²²⁷ *Id.* at 795.

²²⁸ *Id.* (brackets omitted).

IV. THE PROBLEM OF EUAS.

As of early September 2021, most of the available COVID-19 vaccines²²⁹ are not licensed vaccines but approved under an emergency use authorization (EUA).²³⁰ These are the first vaccines authorized for general population use under an emergency use authorization.²³¹ The only vaccine previously authorized under an EUA was an anthrax vaccine directed at protecting military personnel from attacks, and therefore, addressing a specialized, narrower context.²³² The question of whether it is legal to mandate a vaccine under an EUA has only, therefore, come up in the specialized, narrow context of the military, and there is no general precedent on it.

A. Arguments Against Mandates for EUA Vaccines.

Opponents of vaccine mandates argue that neither public nor private entities may mandate a vaccine under an EUA.²³³ The strongest legal arguments against the legality of a vaccine mandate under an EUA are three. First, the statute includes, under a section titled “required conditions,” a directive to the secretary of health and human services to “ensure that individuals to whom the product is administered are informed... (III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.”²³⁴ (We will refer to this as the option

²²⁹ The FDA announced full approval of the first COVID-19 vaccine in August 2021. News Release, FDA, FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>.

²³⁰ News Release, FDA, FDA Issues Emergency Use Authorization for Third COVID-19 Vaccine: Action Advances Fight Against COVID-19, Follows Comprehensive Evaluation of Available Safety, Effectiveness & Manufacturing Quality Info by FDA Career Scientists, Input from External Experts (Feb. 27, 2021), <https://www.fda.gov/news-events/press-announcements/fda-issues-emergency-use-authorization-third-covid-19-vaccine>.

²³¹ I. Glenn Cohen & Dorit Rubinstein Reiss, *Can Colleges & 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>.

²³² Authorization of Emergency Use of Anthrax Vaccine Adsorbed for Prevention of Inhalation Anthrax by Individuals at Heightened Risk of Exposure Due to Attack with Anthrax; Availability, 70 Fed. Reg. 5452 (Feb. 2, 2005).

²³³ Efthimios Parasidis & Aaron S. Kesselheim, *Assessing the Legality of Mandates for Vaccines Authorized Via an Emergency Use Authorization*, HEALTH AFFS. BLOG (Feb. 16, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210212.410237>.

²³⁴ 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III).

provision). The best argument against a mandate for an EUA vaccine, then, is to interpret this language to mean that an individual has unlimited freedom to “accept or refuse” a vaccine under an EUA, and hence, nobody can mandate it.

This interpretation of the option provision is supported by a second argument. A different legal provision allows the President of the United States to waive the requirement of telling recipients that they can accept or refuse the product for members of the armed forces, but only if “...the President determines, in writing, that complying with such requirement is not in the interests of national security.”²³⁵ By providing a specific waiver in this case, goes the argument, the legislature implied that this is the only exception. The President can, in limited circumstances, waive the prohibition on mandates for the armed forces—where such an exception may be crucial for national security—but neither the President nor anyone else can do so with respect to people outside the armed forces. Anyone not in military service, the argument goes, has an unqualified right to accept or refuse the product.

The third legal argument of those seeing the EUA as prohibiting mandates is that the act says in multiple places that the product is “unapproved” (e.g., §360-bbb-3(e)(1)(A)), and that should be interpreted as experimental, and experimental products should not be mandated, legally or ethically.²³⁶

Bolstering these arguments is the fact that the EUA documents to be given to recipients mention that the product is “an unapproved vaccine” and tell recipients that “[i]t is your choice to receive the [relevant] COVID-19 Vaccine.”²³⁷ Further, in the lead-up to the

²³⁵ 10 U.S.C. § 1107a.

²³⁶ For an example of this argument, see this press release from an anti-vaccine organization challenging an employment mandate in Los Angeles: Press Release, Health Freedom Defense Fund, *Employees Sue LAUSD for Mandating Experimental COVID-19 Vaccine* (Mar. 18, 2021 4:49 PM), https://www.einnews.com/pr_news/537112007/employees-sue-laUSD-for-mandating-experimental-covid-19-vaccine.

²³⁷ This language is identical across EUAs. See U.S. FOOD & DRUG ADMIN., FACT SHEET FOR RECIPIENTS & CAREGIVERS ABOUT COMIRNATY (COVID-19 VACCINE, mRNA) AND PFIZER-BIONTECH COVID-19 VACCINE TO PREVENT CORONAVIRUS DISEASE 2019 (COVID-19) (Sept. 22, 2021), <https://www.fda.gov/media/144414/download> (Pfizer); U.S. FOOD & DRUG ADMIN., FACT SHEET FOR RECIPIENTS & CAREGIVERS, EMERGENCY USE AUTHORIZATION (EUA) OF THE MODERNA COVID-19 VACCINE TO PREVENT CORONAVIRUS DISEASE 2019 (COVID-19) IN INDIVIDUALS 18 YEARS OF AGE & OLDER (Aug. 27, 2021), <https://www.fda.gov/media/144638/download> (Moderna); U.S. FOOD & DRUG ADMIN., FACT SHEET FOR RECIPIENTS & CAREGIVERS, EMERGENCY USE AUTHORIZATION (EUA) OF THE JANSSEN COVID-19 VACCINE TO PREVENT

vaccines' emergency use authorization, representatives of the CDC and FDA consistently stated that EUA vaccines could not be mandated²³⁸—although, as discussed below, these agencies later reversed themselves on this position.

B. Arguments Against Mandates for EUA Vaccines are Unconvincing

Arguments against university or similar vaccine mandates based on the option provision weaken substantially, however, when the text of that provision is given more than cursory consideration. To say that a person has “the option to accept or refuse administration of the [vaccine]” should mean that a person will not be forced to accept the vaccine, either physically or by compulsion of law. That is a far cry from saying that no one can condition a benefit on a person's acceptance of the vaccine. Put another way, when a university says a student must get the COVID-19 vaccine in order to come on campus, it is not depriving a person of the option to refuse the vaccine; rather, it is conditioning a benefit on the person's choice to get vaccinated.²³⁹ And, indeed, the next words of this section support the notion that there may be consequences to not getting the vaccine—they literally direct that a potential vaccine recipient be informed of “the consequences, if any, of refusing administration of the [vaccine].”²⁴⁰ That said, all of these

CORONAVIRUS DISEASE 2019 (COVID-19) IN INDIVIDUALS 18 YEARS OF AGE AND OLDER (Aug. 27, 2021), <https://www.janssenlabels.com/emergency-use-authorization/Janssen+COVID-19+Vaccine-Recipient-fact-sheet.pdf> (Janssen).

²³⁸ See Aaron Siri, *Federal Law Prohibits Employers and Others from Requiring Vaccination with a Covid-19 Vaccine Distributed Under an EUA*, STAT (Feb. 23, 2021), <https://www.statnews.com/2021/02/23/federal-law-prohibits-employers-and-others-from-requiring-vaccination-with-a-covid-19-vaccine-distributed-under-an-eua> (quoting Dr. Amanda Cohn from the CDC). Dorit Reiss also emailed Dr. Cohn after hearing similar statements from her in October 2020, and Dr. Cohn reiterated her position. Email from Dr. Amanda Cohn, U.S. Ctrs. for Disease Control, to Dorit Reiss (October 22, 2020) (on file with author).

²³⁹ The reasoning was adopted by the court in the recent opinion upholding the University of Indiana's vaccine mandate: “The university is presenting the students with a difficult choice—get the vaccine or else apply for an exemption or deferral, transfer to a different school, or forego school for the semester or altogether. But this hard choice doesn't amount to coercion.” *Klaassen*, 2021 U.S. Dist. LEXIS 133300, at *53.

²⁴⁰ 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). Some have interpreted “consequences” to refer to health consequences only. See Efthimios Parasidis & Aaron S. Kesselheim, *Assessing the Legality of Mandates for Vaccines Authorized Via an Emergency Use Authorization*, HEALTHAFFAIRS: HEALTH AFFS. BLOG (Feb. 16, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210212.410237/full>. But such an interpretation seems to us unconvincing: refusing a vaccine or treatment in the circumstances in which an EUA is approved – a serious disease with no adequate

disclosure requirements are directed solely to the Secretary of Health and Human Services, and it would be impractical for the Secretary to identify the myriad consequences state or private actors may impose on someone who refuses the vaccine. On consideration, the authors' view is that this language leaves untouched the capacity of parties outside the federal government to mandate – that is, to condition benefits on – individuals' acceptance of the vaccine. In rejecting a recent challenge to a hospital's vaccine mandate for its employees, a federal district court agreed with this interpretation, stating that the option provision's language applies to the Secretary of Health and Human Services and that it “neither expands nor restricts the responsibilities of private employers; in fact, it does not apply at all to private employers like the hospital in this case.”²⁴¹

The alternative reading—that because the federal government states that a person has the option not to get the vaccine, third parties cannot condition benefits on the person's choice—suggests that “an option” means a choice where no third party may impose consequences. This would appear to inflate the concept of an option rather significantly. Is the argument that *any* benefit a third-party might condition on acceptance of the vaccine illegally deprives a person of this option? Or will there be a host of knotty line drawing problems because the potential benefit must be of some degree of magnitude, like a job or a university education? What if the mandate merely requires a person to double-mask and socially distance if they do not get vaccinated—would that deprive the person of their option? What if the benefit – say, matriculation – is merely delayed for a year? And if the optionality requirement extends to parties beyond the federal government, there is nothing in the statutory language that would limit that to business and government entities. Thus, can a person refuse guests to her home on the basis that they have not been vaccinated? Can a family refuse the services of a plumber or doctor who is not vaccinated? While rules to govern such situations could be designed, they have not been, and the statute gives no guidance for them. In short, it requires a truly heroic understanding of this option provision—which

alternative - would generally come with a risk, so why would consequences only occur sometimes, as implied by the “if any” language? And why add the consequences here, when any health impacts should be covered by the disclosure of benefits and risks required in section II? At any rate, the point that the language only speaks to the secretary of health and human services, not others, stands.

²⁴¹ Order on Dismissal, *Bridges v. Hous. Methodist Hosp.*, Case 4:21-cv-01774 (S.D. Tex. Jun. 12, 2021), <https://www.skepticalraptor.com/blog/wp-content/uploads/2021/06/Bridges-v-Houston-Methodist-Dismissal.pdf>.

merely states that the Secretary will make a pronouncement about the “option” to receive the vaccine—to imagine that it, on its own, imposes this massive federalization of privately-ordered relationships and curtails the rights of third parties to respond to individual vaccination choices as they deem best for their own safety.

Further, at this point, the federal government is not reading the statute to prohibit vaccine mandates by third parties. Although that was the CDC’s reading early in the pandemic and before, it was mostly stated orally—and without the benefit of context.²⁴² In contrast, the Office of Legal Counsel (OLC) at the Department of Justice, which “provide[s] controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government,”²⁴³ issued an opinion that the “option to accept or refuse” provision “specifies only that certain information be provided to potential vaccine recipients and does not prohibit entities from imposing vaccination requirements.”²⁴⁴ OLC actually mentioned university mandates specifically, commenting that “[a]lthough many entities’ vaccination requirements preserve an individual’s ultimate ‘option’ to refuse an EUA vaccine, they nevertheless impose sometimes-severe adverse consequences for exercising that option (such as not being able to enroll at a university).” OLC went on to state that the FDA could “theoretically” decide to supplement the fact sheets that must be provided to vaccine recipients to note “the possibility of such consequences.”²⁴⁵ However, the “FDA would not be required to change the Fact Sheets in order to allow [such entities] to impose such requirements.”²⁴⁶

²⁴² Notably, the statements by Dr. Amanda Cohn referred to *supra*, n. 238, were drawn from summaries of oral presentations. See CTRS. FOR DISEASE CONTROL & PREVENTION, DEP’T OF HEALTH & HUMAN SERVS., ADVISORY COMMITTEE ON IMMUNIZATION PRACTICES SUMMARY REPORT (Aug. 26, 2020), <https://www.cdc.gov/vaccines/acip/meetings/downloads/min-archive/min-2020-08-508.pdf>; CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., TRANSCRIPT OF THE 161ST VACCINES & RELATED BIOLOGICAL PRODS. ADVISORY COMM. (VRBPAC) MTG. (Oct. 22, 2020), <https://www.fda.gov/media/143982/download>.

²⁴³ OFF. OF LEGAL COUNS., U.S. DEP’T OF JUSTICE, MEMORANDUM FOR ATTORNEYS OF THE OFFICE RE: BEST PRACTICES FOR OLC LEGAL ADVICE AND WRITTEN OPINIONS, at 1 (Jul. 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>.

²⁴⁴ OFF. OF LEGAL COUNS., U.S. DEP’T OF JUSTICE, MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT ON 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, 45 Op. O.L.C. (Jul. 6, 2021) <https://www.justice.gov/olc/file/1415446/download> [hereinafter “OLC Opinion”].

²⁴⁵ *Id.* at 12.

²⁴⁶ *Id.* at 13.

Furthermore, the CDC has drawn the same distinction between federal mandates and mandates by third parties that we have argued for above:

COVID-19 vaccines are not mandated under Emergency Use Authorizations (EUAs)

The Food and Drug Administration (FDA) does **not** mandate vaccination. However, whether a state, local government, or employer, for example, may require or mandate COVID-19 vaccination is a matter of state or other applicable law.

Employer Vaccine Mandates and Proof of Vaccination

Whether an employer may require or mandate COVID-19 vaccination is a matter of state or other applicable law. If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own healthcare provider, the employer cannot mandate that the employee provide any medical information as part of the proof.²⁴⁷

As this makes clear, the position of the federal government at present is that the question of a mandate is a state law question and is not settled by the EUA provisions. In another interpretive document from another federal agency, the Equal Employment Opportunity Commission also suggested that these vaccines are not different than others, though without directly opining on the EUA status.²⁴⁸ Neither interpretation by a federal agency is determinative; both represent guidance and commentary rather than binding rules; both are new (so not longstanding); and both would likely get limited deference under current (confusing) jurisprudence.²⁴⁹ But they add some weight to other readings.

Section 1107—the provision giving the President the power to waive the requirement of consent for the armed forces—also does not support the legal argument against university (or other third-party)

²⁴⁷ *Workplace Vaccination Program*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Mar. 25, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html>.

²⁴⁸ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 22.

²⁴⁹ Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 *GEO. WASH. L. REV.* 347, 349–52 (2003).

vaccine mandates, in the authors' view. The armed forces are directly under the control of the federal government; that is not in doubt. The EUA act can be fairly seen to apply to the federal government, and the EUA act itself was passed during a struggle around giving anthrax vaccines to the military, in part motivated by the struggles around anthrax attacks and the need to protect the armed forces, so that specific issue was part of the passage of the act.²⁵⁰ Reading into it a more general statement about employment mandates misses this context. A plausible counter-argument is that if military members, who have less freedom, usually, than civilians, are allowed to refuse except for the limited exception in Section 1107, civilians certainly have a right to refuse, with no such waiver. But this misses the point made above, that civilians *do* have a legal right to refuse a vaccine mandate of, say, the university they attend or of any other third party; but this need not mean that the university may not impose consequences for such refusal. It also glosses over the fact that the federal government has special powers over the armed forces, and an exception might be needed to allow them to refuse even if the law did not prohibit schools, employers, and others from enforcing mandates.²⁵¹

Furthermore, proponents of the argument that requiring the Secretary to inform recipients of the option to accept or refuse the vaccine means mandates are prohibited, need to contend that this provision of federal law, as they have interpreted it, preempts state and local law permitting—or even requiring—mandates in some contexts. Such a claim is problematic in several ways. The first and most fundamental problem is that the option provision does not address universities, or employers, or for that matter, states – at all. The section tells the Secretary which information needs to be in the EUA sheet given to recipients, and that is it. On the background of a long-standing reality in which third parties, including employers and universities, have had the ability to mandate vaccines, this omission is glaring. Generally, the act tells the FDA how to regulate manufacturers and providers, but it does not give the FDA absolute and continuing

²⁵⁰ Stuart L. Nightingale, Joanna M. Prasher & Stewart Simonson, *Emergency Use Authorization (EUA) to Enable Use of Needed Products in Civilian and Military Emergencies*, *United States*, 13 EMERGING INFECTIOUS DISEASES 1046, at 1050 (2007), https://wwwnc.cdc.gov/eid/article/13/7/06-1188_article.

²⁵¹ The OLC, while maintaining its view that the option provision is merely an informational requirement, ultimately concludes that the Department of Defense “should seek a presidential waiver before it imposes a vaccination requirement” so that members of the military are not incorrectly told they have an option to accept or refuse the vaccine. OLC Opinion, *supra* note 244, at 3.

authority over everyone interacting with the product after approval. Finding in the act a global prohibition for universities across the nation in particular to do something they have long been allowed to do is a big step.

Further, the EUA provisions do not include a preemption clause, yet the argument that they preclude state institutions from requiring students to get vaccinated is, essentially, an argument that they preempt state regulation on this issue. The Food, Drug and Cosmetics Act has several express preemption provisions; on that background, the omission of such a provision here is glaring. This argument is thus in direct tension with the general principle that preemption “of the historic police powers of the States” requires clear and manifest purpose to do so by Congress.²⁵² Requiring the secretary to inform people they have the option not to get a vaccine hardly makes an intention to preempt clear or manifest. Further, the federal preemption jurisprudence cannot be described as clear-cut, and the cases are very fact-dependent.²⁵³ The preemption cases addressing FDA are also mostly in the product liability context and relate to the regulatory provisions about licensing and labeling products—likely a tricky fit with the mandates discussed here.²⁵⁴ Reading preemption into an act that does not directly address it, in a context it has not been found, applied to all employers, states, and colleges in the United States, is a tall order—and the reasons to read the statute that way are not strong.

As to the ethical critique that the COVID-19 vaccines are experimental and therefore should not be mandated, we believe that is a highly problematic view. While formally COVID-19 vaccines have not gone through the BLA process, the vaccines went through a process described by the FDA as “EUA-plus.”²⁵⁵ The EUA was issued on the basis of clinical trials including tens of thousands of people, at the

²⁵² *Medtronic, Inc. v. Lohr et vir*, 518 U.S. 470, 485 (1996).

²⁵³ Catherine M. Sharkey, *Field Preemption: Opening the ‘Gates of Escape’ From Tort Law*, J.L. STUD. (forthcoming 2020), at 18–23, available at: <https://ssrn.com/abstract=3159537>. Note that under Prof. Sharkey’s approach – which is specific to the product liability context – claims that are the precise risks weighed by FDA are preempted, but not others. *Id.* at 13. It is hard to assess what the equivalent will be in the EUA context, where the focus is not on tort claims.

²⁵⁴ *Id.* On that jurisprudence, see also Douglas G. Smith, *A Shift in the Preemption Landscape?*, 87 TENN. L. REV. 213, 215–25 (2019).

²⁵⁵ Sarah Owerhohle, *Marks: Prepare for ‘EUA-plus’ for Covid Vaccines*, POLITICO: PRESCRIPTION PULSE (Sept. 11, 2020 12:06 PM), <https://www.politico.com/newsletters/prescription-pulse/2020/09/11/marks-prepare-for-eua-plus-for-covid-vaccines-790343>.

demand of the FDA, with extremely strong results.²⁵⁶ Since then, the vaccines have been given to tens of millions of people in the United States alone, with an outstanding safety profile.²⁵⁷ Large studies show high levels of effectiveness.²⁵⁸ Describing vaccines with strong safety and effectiveness data from tens of millions of people as “experimental” empties the term of content. The vaccines may currently be under an EUA, but they are not experimental by any reasonable meaning of the word. This can raise real questions: when does a vaccine under an EUA stop being experimental? While we want to be cautious—it would be problematic to allow mandates for a vaccine without strong data behind it—at the very least, we can likely very comfortably argue that once a vaccine given to hundreds of millions of people shows high levels of safety, it should no longer be considered “experimental,” even if it is still under an EUA.

In our view, the interpretation that COVID-19 vaccines under an EUA can be mandated is a stronger one. But we acknowledge there are credible counter-arguments. At the very least, universities should know that if the COVID-19 vaccines are still under an EUA, some schools mandating their use will likely face litigation on this question.

C. The EUA Issue Could Become Moot Soon

Recent developments in the FDA approval process may render the EUA issue moot. Pfizer-BioNTech applied for a Biologics License Application (BLA) on May 7, 2021.²⁵⁹ Moderna followed suit.²⁶⁰ The median timeline for past BLA approvals was twelve months.²⁶¹ As

²⁵⁶ Joshua M. Sharfstein, Jesse L. Goodman & Luciana Borio, *The US Regulatory System and COVID-19 Vaccines: The Importance of a Strong and Capable FDA*, 325 JAMA 1153 (2021), <https://jamanetwork.com/journals/jama/fullarticle/2776658>.

²⁵⁷ *Safety of COVID-19 Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 27, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html>.

²⁵⁸ Thompson, *supra* note 36.

²⁵⁹ Karen Weintraub, *Pfizer-BioNTech Seeks Full FDA Approval for COVID-19 Vaccine*, USA TODAY (May 7, 2021, 7:05 AM), <https://www.usatoday.com/story/news/health/2021/05/07/pfizer-biontech-covid-vaccine-files-fda-full-approval/4973966001>.

²⁶⁰ Berkeley Lovelace Jr., *Moderna Applies for Full FDA Approval of its COVID Vaccine*, CNBC (Jun. 1, 2021, 8:34 AM), <https://www.cnbc.com/2021/06/01/covid-vaccine-moderna-applies-for-full-fda-approval.html>.

²⁶¹ Jeremy Puthumana, Alexander C. Egilman & Audrey D. Zhang, *Speed, Evidence, and Safety Characteristics of Vaccine Approvals by the US Food and Drug Administration*, 181 JAMA INTERNAL MED. 559 (2021), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2772943>.

noted above, on August 23, 2021, FDA approved the Pfizer vaccine.²⁶² This appears to have made the EUA issue moot, but anti-vaccine groups have immediately pivoted to allege that that is not the case. First, they (incorrectly) argue that the license does not apply to the vaccine available in the United States because the licensed vaccine has a trade name.²⁶³ Second, they emphasize the fact that there are still two vaccines under an EUA, and some students may have to choose those.²⁶⁴ These claims, however weak, are likely to be directed at universities and included in court challenges. Under these circumstances, universities have to be ready to address the issue. And if only one vaccine is approved, with not enough supply for all United States students, the challenges based on EUA may still be relevant. Additionally, we hope this Article will provide guidance not just for this pandemic, but for future pandemics, and potentially future EUA vaccines.

V. POLICY RECOMMENDATIONS

Universities have a range of ways to increase their vaccine rates. The extensive experience of healthcare institutions in this can be instructive, though we need to make such comparisons with caution. Healthcare providers have worked for years to increase vaccine rates, using tools such as educational efforts to provide accurate information about vaccines; opt-out statements that individuals sign stating they refuse the intervention in order to be excused from it; programs to

²⁶² U.S. FOOD & DRUG ADMIN., FDA NEWS RELEASE, FDA APPROVES FIRST COVID-19 VACCINE (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>.

²⁶³ Robert F. Kennedy, Jr. & Meryl Nass, *2 Things Mainstream Media Didn't Tell You About FDA's Approval of Pfizer Vaccine*, DEFENDER (Aug. 24, 2021), <https://childrenshealthdefense.org/defender/mainstream-media-fda-approval-pfizer-vaccine>. Although there are no academic sources directly addressing this, several media sources fact checked it. See, e.g., Aaron Blake, *Vaccine Conspiracy Theorists Become Even More Desperate After Full FDA Authorization*, WASH. POST (Aug. 26, 2021, 2:00 PM), <https://www.washingtonpost.com/politics/2021/08/26/vaccine-conspiracy-theorists-become-even-more-desperate-after-full-fda-authorization>. In a blog post, debunker David Gorski, under the pseudo name "ORAC", explained that the vaccines are identical. David Gorski ("Orac"), *After FDA Approval of Comirnaty, Antivaxxers Claim It's Still "Experimental"*, RESPECTFUL INSOLENCES (Aug. 25, 2021), <https://respectfulinsolence.com/2021/08/25/after-fda-approval-of-comirnaty-antivaxxers-claim-its-still-experimental>. Dorit Reiss wrote addressing the claim that licensure hides a different framework for liability. Dorit Rubinstein Reiss, *COVID-19 Vaccine Liability – New Information After FDA Approval*, SKEPTICAL RAPTOR (Aug. 29, 2021), <https://www.skepticalraptor.com/skepticalraptorblog.php/covid-19-vaccine-liability-new-information-after-fda-approval>.

²⁶⁴ Kennedy & Nass, *supra* note 262.

improve access such as providing vaccines free to employees on-site; and mandates, including relatively soft mandates such as vaccinate or wear a mask, and strong mandates, such as vaccinate or lose your job/be reassigned.²⁶⁵ While all these approaches have some effect on vaccine rates, in the employment context, only mandates—soft or strong—have led to vaccine rates of over 90 percent.²⁶⁶

Not all these approaches would translate easily to the university context, but some would. For example, universities can facilitate access to vaccines by having on-site vaccination clinics and providing vaccines for students free of charge.²⁶⁷ Universities can also create education campaigns, for example, holding panels that can address vaccine concerns and provide information. Universities can require students who do not want to vaccinate to file a statement declining the vaccine, and they can impose a mandate conditioning registration on vaccinating or filing an exemption.

Our discussion suggests that there is not one policy choice that would fit every university. We believe that all universities should have a policy designed to increase vaccine rates on campus. High vaccine rates can prevent outbreaks, reduce the risk that the campus would have to cease on-site instruction and increase the safety of students, staff, and faculty. Those are good reasons to strive for high rates. But the best way to achieve those rates may vary across universities. Further, we want to emphasize that even if a university chooses a strong or soft mandate, that approach should be accompanied by other tools, including education and improving access. It is critical to provide those with concerns about vaccines with information addressing those concerns, and ideally, an opportunity to raise questions, be heard, and receive answers. Further, any mandate should be accompanied by provisions to provide access to students who have not had a chance to be vaccinated. This should include both students who have had access problems in the United States and students from abroad who may not have access in their home countries.

Rather than recommend one policy, we are setting out the issues universities should consider, a set of options under each, and factors that should help universities choose among the options. We realize that

²⁶⁵ Tiffany L. Wang, Ling Jing & Joseph A. Bocchini Jr., *Mandatory Influenza Vaccination for All Healthcare Personnel: A Review on Justification, Implementation and Effectiveness*, 29 CURRENT OP. IN PEDIATRICS 606, 610–13 (2017).

²⁶⁶ *Id.* at 4–5.

²⁶⁷ This is less of an issue for COVID-19 vaccines, which are already free, but even free vaccines may carry an administration fee; a mass university clinic can remove that barrier and also increase the convenience of receiving the vaccine.

62 *LEGISLATION AND PUBLIC POLICY* Vol. 24:1

no such table can be comprehensive, and universities can come up with additional creative options, but we think that this table, and the discussion that follows, can be helpful as guidance to start the discussion.

Table 1: Issues, Options, and Factors

<u>Issue</u>	<u>Options</u>	<u>Factors</u>
Access	<ul style="list-style-type: none"> - Vaccine clinics on campus. - Vaccine supply via university health services. - Help accessing vaccine sites. 	<ul style="list-style-type: none"> - Access in the community. - Existing rates among students. - Capacity of existing health services on campus, if any. - Ease of access from campus to other vaccine sites. - Ability to coordinate with others to provide vaccines.
Education	<ul style="list-style-type: none"> - Informational materials. - Panels on vaccines. - Individual consultations. - Small group meetings. 	<ul style="list-style-type: none"> - Capacity. - Availability of appropriate people to counsel/speak at a panel. - Efficiency. There are a lot of materials – written and videos – already available.
Recommend/ Incentivize/ Require	<ul style="list-style-type: none"> - Require vaccines for registration. - Require vaccines for presence on campus. - Require vaccines or limit access. - Require vaccines as an alternative to testing/masking. - Encourage vaccines by providing positive incentives to those who vaccinate. - Recommend vaccines to students. - Do nothing. 	<ul style="list-style-type: none"> - Previous policy on vaccines - Rates of COVID-19 in the community. - Rates of vaccination in the student body before policy – expected or known. - Political environment in state. - Implementation capacity. - Legal environment - Student body - Values

Exemptions	<ul style="list-style-type: none"> - Medical. - Religious. - Personal beliefs. 	<ul style="list-style-type: none"> - Legal requirements. - Values. - Implementation capacity. - Accommodation feasibility/ability. - Litigation capacity. - Reducing vaccination saturation.
Privacy and records	<ul style="list-style-type: none"> - If the university requires vaccines, with or without exemptions, the university needs to consider record keeping, including obligations to protect students' medical privacy. 	<ul style="list-style-type: none"> - Legal privacy protections. - Capacity. - Cybersecurity.

A. Access

It is both unethical and more than a little impractical to require vaccines if students do not have access to them. At the point of writing—fall 2021—most people in the United States should have potential access to a vaccine since access across states has been opened to all those age 12 and higher.²⁶⁸ But potential access is not always actual access. COVID-19 vaccines are free, but people still need to get to the vaccine: a highly rural state, for example, may not have reached all its population, and in urban areas, neighborhoods with less access to the type of facilities in which COVID-19 vaccine clinics are held may not have easy access.²⁶⁹ Further, less well-off students may not have

²⁶⁸ Erin Schumaker, *All US Adults Now Eligible for COVID-19 Vaccines*, ABC News (Apr. 19, 2021) available at: <https://abcnews.go.com/Health/adults-now-eligible-covid-19-vaccines/story?id=77163212>.

²⁶⁹ Bhavini Patel Murthy, Natalie Sterrett, Daniel Weller, Elizabeth Zell, Laura Reynolds, Robin L. Toblin, Neil Murthy, Jennifer Kriss, Charles Rose, Betsy Cadwell, Alice Wang, Matthew D. Ritchey, Lynn Gibbs-Scharf, Judith R. Qualters, Lauren Shaw, Kathryn A. Brookmeyer, Heather Clayton, Paul Eke, Laura Adams, Julie Zajac, Anita Patel, Kimberley Fox, Charnetta Williams, Shannon Stokley, Stephen Flores,

had the ability to take time off work to get the vaccine, and students dependent on working parents for mobility may lack opportunity, too. Finally, vaccine availability in low- and middle-income countries is still very limited, in spite of global efforts to increase vaccine distribution.²⁷⁰ Students coming from such countries may be unable to get the vaccine before arrival in the United States. Universities also may decline to accept some vaccines not authorized in the United States, in which case students from countries in which those are the only vaccines available may have to be revaccinated. To address these access issues, universities need to find a way to bring vaccines to students or students to vaccines—through on-campus options²⁷¹ or by helping students access other vaccine clinics off-campus.

B. Education

Whether or not a university or college mandates a vaccine, it should provide students information about COVID-19 vaccines—including their benefits, risks, and availability—and offer responses to common questions and myths. This is, first and foremost, the right thing to do to empower informed decisions and counter vaccine hesitancy based on misinformation. Universities can choose to do so by providing information publicly, through written materials, or live or recorded presentations. Individual consultations may be more effective, but they are also more labor intensive, and a university may not have the capacity to offer them on the scale needed. Schools need not create such programs from scratch; there are ample publicly available materials, including community-specific materials. For example, in response to hesitancy among people of color, Black and Latinx community leaders and doctors created a series of videos addressing concerns and

Kamil E. Barbour & LaTrece Q. Harris, *Disparities in COVID-19 Vaccination Coverage Between Urban and Rural Counties — United States, December 14, 2020–April 10, 2021*, 70 MORBIDITY AND MORTALITY WKLY. REP. 759, 760 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8136424>.

²⁷⁰ Anna Rouw, Adam Wexler, Jennifer Kates & Josh Michaud, *Global COVID-19 Vaccine Access: A Snapshot of Inequality*, KAISER FAM. FOUND. (Mar. 17, 2021), <https://www.kff.org/policy-watch/global-covid-19-vaccine-access-snapshot-of-inequality>.

²⁷¹ Rutgers, for example, is offering a vaccine clinic on its campus as part of its mandate, but a university could also allow students to be vaccinated in its health services, if it has them, without a clinic. *COVID-19 Vaccine*, RUTGERS (last visited Jul. 24, 2021), <https://coronavirus.rutgers.edu/covid-19-vaccine>.

responding to questions.²⁷² The Ad Council also provided many resources aimed at different communities.²⁷³

C. Mandate, Incentivize, Recommend?

Universities would have to decide whether to require the vaccine and what consequences to attach to non-vaccinating if they do require vaccination. A mandate can range in form: universities can require students to be vaccinated to enroll; allow students to enroll but require vaccination for on-campus presence, providing only remote education to unvaccinated students; or require students to vaccinate but allow students to opt-out on the condition that they agree to consistent testing and masking as an alternative.

If a university chooses to require the vaccine, it will need to consider whether to limit the requirements to students or to apply it to staff and faculty. This article focuses on students, and the legal framework for staff and faculty is somewhat different.²⁷⁴ But a university seeking to make its campus safer may consider policies for faculty and staff as well. Among other things, requiring vaccines for students but not staff can look bad, be fundamentally unfair, and leave the campus less safe than it could be. One challenge is that collective bargaining agreements or other realities may prevent requiring vaccines for staff and faculty, and universities and colleges may find themselves having to choose between incomplete requirements—requirements for students only (or students and unrepresented staff)—or none.

As an alternative to requiring vaccines, a university may choose to provide incentives, such as access to additional services, free meals, or other perks to students who vaccinate.²⁷⁵ Finally, the university may

²⁷² *The Conversation #BetweenUsAboutUs*, GREATER THAN COVID (last visited Jul. 23, 2021),

<https://www.greatherthancovid.org/theconversation> [<https://perma.cc/SJ5P-49AW>].

²⁷³ *Community Education Toolkit: Shareable Resources*, AD COUNCIL (last visited Jul. 23, 2021), <https://adcouncilvaccinetoolkit.org/resources> [<https://perma.cc/8J8L-UMA9>].

²⁷⁴ Teri Dobbins Baxter, *Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks*, 2017 UTAH L. REV. 885, 893–99; 909–10 (2017).

²⁷⁵ An institution implementing incentives for vaccinated students should consider whether students with a right to a disability accommodation need to be awarded the same benefits as a matter of equal access. The EEOC provided some guidance on vaccine incentives and the ADA and the Genetic Information Nondiscrimination Act. See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 22.

choose to simply recommend vaccination without any practical consequences for students who do not vaccinate.

A host of factors can affect the right choice for a university. This will include the University's characteristics and whether it already has the implementation capacity and policies in place for mandatory vaccination. Other questions attach to the characteristics of the student body: is it likely to have high rates without a mandate, and if not, what are the students' reasons for not vaccinating? If the issue is access, the solution may be providing access. Does the school have many high-risk students? What are the students' values? For example, students with a libertarian bent may be more resistant to a mandate.²⁷⁶ The state's political environment also matters. Some states have already passed laws prohibiting mandates, and other states may respond to mandates with countering legislation, so universities and colleges in those states may seek other options.²⁷⁷

Mandates are likely to lead to litigation, and universities seeking to avoid legal risks may choose other options because of that.

D. Exemptions

Historically, vaccine exemptions come in three varieties: medical, religious, and personal beliefs.²⁷⁸ Which exemptions universities give depend on a balance of the legal realities, as interpreted by the university, its preferences, and its capacity. We have discussed the legal framework above, and will not repeat it, but we want to point out that broader exemptions would likely decrease litigation, though they may increase the risk of outbreaks. Policing exemptions also requires capacity, so universities may end up choosing to provide broad exemptions out of lack of capacity to closely police them. If a university

²⁷⁶ On the link between vaccine hesitancy and values, and the connection between that and the response to hesitancy, see Avnika B. Amin, Robert A. Bednarczyk, Cara E. Ray, Kala J. Melchiori, Jesse Graham, Jeffrey R. Huntsinger & Saad B. Omer, *Association of Moral Values with Vaccine Hesitancy*, 1 NATURE HUM. BEHAV. 873, 873–75 (2017).

²⁷⁷ Elizabeth Redden, *Vaccine Politics*, INSIDE HIGHER ED (Apr. 30, 2021), <https://www.insidehighered.com/news/2021/04/30/among-colleges-announcing-vaccine-requirements-public-colleges-republican-states-are>; Rukmini Callimachi, *For Colleges, Vaccine Mandates Often Depend on Which Party Is in Power*, N.Y. TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/us/college-vaccine-universities.html>.

²⁷⁸ Romain Garnier, Emma R. Nedell, Saad B. Omer & Shweta Bansal, *Getting Personal: How Childhood Vaccination Policies Shape the Landscape of Vaccine Exemptions*, 7 OPEN F. INFECTIOUS DISEASES, at 1 (2020), <https://academic.oup.com/ofid/article/7/3/ofaa088/5805242?login=true>.

is providing a religious exemption, the university needs to consider whether and how to examine such exemptions to identify whether the student's objection to vaccines is, in fact, religious—an area that, as discussed in part II, may involve several pitfalls.

Finally, universities choosing to provide incentives may also need to provide an alternative route to receiving the incentive to students who qualify for accommodation under the disability laws or who qualify for a religious exemption, so that students will not be denied the incentive based on being in a protected category.

E. Records and Privacy

Any university mandating COVID-19 vaccines will need to keep records of students' vaccination status and exemptions. This is likely less of a challenge for most universities and colleges since they already collect and keep some medical records and have systems in place to handle records of students with disabilities that require accommodation. But this, too, is something universities need to prepare for and manage.

CONCLUSION

Pandemics challenge all of us. Universities have been as severely impacted by the COVID-19 pandemic as other sectors and are now faced with the task of providing a safe environment for returning students. Vaccine policies are one of the things universities need to consider if schools are going to operate in person while a serious infectious disease is circulating. In this paper, we have tried to provide guidance on the legal issues universities may have to deal with in structuring these policies and options available.

We hope that this discussion helps universities return to campus safely as the pandemic enters what we hope is a final stage. We also hope that this discussion will provide useful guidance to the higher education community in future pandemics.