

## TRAINING A PUBLIC ACCOMMODATIONS LENS ON VACCINE PASSPORTS

by  
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*The Covid pandemic and the rise of smartphone technology enabled the use of “vaccine passports”—that is, a requirement to show proof of vaccination against Covid—on a scale unmatched before in human history. In the United States, many public accommodations such as restaurants, coffee shops, stadiums, and movie theaters required patrons to show proof of vaccination in order to enter or consume food and drink on the premises. In approximately two dozen local jurisdictions as well as the District of Columbia and Puerto Rico, the government mandated that public accommodations do this, with varied carveouts for religious objections and medical or age-based inability to vaccinate. In requiring proof of vaccination, these businesses, entities, and municipalities acted in an area of law with a centuries-old lineage. Legal scholars like Harvard professor Joseph Singer have forcefully argued that businesses and venues open to the public should be required to take all comers under the common law, unless the particular patron would disrupt the business’s operations. This argument reflects a pre-Covid skepticism among left-leaning scholars and policymakers regarding businesses and venues having carte blanche to decide whom to admit and serve. Ironically, this skepticism dissipated among many commentators and policymakers during the Covid emergency, with vaccine passport proponents analogizing such requirements to “no shoes, no shirt, no service” policies. Since Covid, eight states have explicitly banned vaccine status discrimination through legislation; two of these, Alabama and Texas, do not even have general state public accommodations antidiscrimination laws.*

*In addition to the common law, federal and state statutes seek to promote equality of access and individual dignity by limiting public accommodations’ prerogatives to exclude certain customers. The most well-known such antidiscrimination law is Title II of the Civil Rights Act of 1964; state and local legislation often go even further both in terms of the venues and services they*

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*regulate and the classes of persons they protect from discrimination. This Article analyzes vaccine passports amidst both the common law and statutory tableau, demonstrating that the weaker the evidence of the vaccines' preventing the spread of Covid, as opposed to protecting against severe disease and death, the weaker the argument for their use under the vision of the common law promoted by Singer. Unfortunately for the opponents of vaccine passports, that vision has achieved limited purchase doctrinally among state courts.*

*Assessing the legality of both voluntary and municipal vaccine passports under antidiscrimination statutes reveals that there are many unanswered questions decades into their existence. Almost 60 years in, the federal courts still have not decided if Title II protects against disparate impact discrimination, for instance. Reasoning by analogy from Title VII of the Civil Rights Act where appropriate, the Article walks through what a lawsuit based on Title II regarding Covid vaccine passports might look like and why its chances of success would be limited. Specifically, the Article analyzes potential Title II discrimination claims based on religion, race, and national origin. The Article also analyzes vaccine passports and medical exemptions thereto under the Americans with Disabilities Act, as well as age-based discrimination under (some) states' antidiscrimination laws, and finds that some voluntary practices in this area may have been legally suspect.*

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## INTRODUCTION

Digital vaccine passports, once a utopian dream—or dystopian nightmare, depending on one’s perspective—now seem here to stay as a tool in the pandemic toolkit. Beginning in 2021, businesses and other venues in the United States adopted one of the most significant limitations on freedom of entry and movement in places otherwise open to the public in decades. After the vaccines against Covid<sup>1</sup> were initially authorized for emergency use in December 2020 and then gradually distributed to the population more widely, a trickle of businesses and other venues requiring proof of vaccination as a condition of entry into their establishments turned into a flood.<sup>2</sup> By December 2021, with the Omicron variant of Covid spreading exponentially around the United States, approximately two dozen jurisdictions—mostly cities and counties, but also Puerto Rico and the District of Columbia—had put in place local rules, orders, or ordinances requiring publicly and privately owned venues to check for proof of vaccination.<sup>3</sup> The means of offering proof, whether a physical or digital document, is sometimes referred to as a “vaccine passport,” and likewise some have used that term to refer to the requirement to show such proof to enter or the regime that imposes such a requirement.<sup>4</sup> This Article will use the term interchangeably to refer to both the means of showing proof of vaccination, and the requirement that one show such.

Although the receding of Covid cases from its January 2022 peak has led most businesses and jurisdictions that had them to drop their proof of vaccination requirements,<sup>5</sup> the questions raised by these policies remain very important for the near and distant future for several reasons. First, some private businesses and venues retain vaccine passports until the present, going beyond any requirement imposed by state or local law, rule, or order. Second, the cities and other jurisdictions that have dropped their vaccine passport rules have made clear that they will not hesitate

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<sup>1</sup> Note on terminology: I will generally use “Covid” interchangeably to refer to the novel COronaVirus Disease-2019 (COVID-19) and the virus, SARS-CoV-2, that causes it.

<sup>2</sup> Carlie Porterfield, *Here Are the U.S. Cities Where You Need a Covid Vaccine to Dine in a Restaurant*, FORBES (Dec. 22, 2021, 12:49 PM), <https://www.forbes.com/sites/carlieporterfield/2021/12/22/here-are-the-us-cities-where-you-need-a-covid-vaccine-to-dine-in-a-restaurant/>.

<sup>3</sup> *E.g., id.*; Ari Shapiro, Patrick Jarenwattananon & Mia Venkat, *In NYC, Proof of Vaccination Becomes a Key to the City*, NPR (Aug. 3, 2021, 4:45 PM), <https://www.npr.org/2021/08/03/1024338547/in-nyc-proof-of-vaccination-becomes-a-key-to-the-city>; Dánica Coto, *Puerto Rico Requires Vaccinations in Food, Drink Sector*, AP NEWS (Aug. 11, 2021), <https://apnews.com/article/lifestyle-business-health-caribbean-coronavirus-pandemic-04985332beddaeccdee60d1b24d0e48e>.

<sup>4</sup> *Vaccine Passport*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/vaccine%20passport> (last visited May 21, 2023); *see, e.g.*, Ryan Tanner & Colleen M. Flood, *Vaccine Passports Done Equitably*, 2 JAMA HEALTH F., Apr. 21, 2021, at 1.

<sup>5</sup> *See* Corky Siemaszko, *Vaccine Requirements Are Being Lifted Across America as Covid Cases Wane*, NBC (Feb. 17, 2022, 3:57 PM), <https://www.nbcnews.com/news/us-news/vaccine-requirements-lifted-us-covid-cases-wane-rcna16700>.

to bring them back should Covid cases or hospitalizations rise to certain triggering levels.<sup>6</sup> Third, even if vaccine passports fade away as a tool to combat Covid, they could be increasingly relevant in future pandemics, and the associated technology could be used to combat other perceived social ills. Vaccine passports, therefore, are likely here to stay in some way, shape, or form in the future.<sup>7</sup> For that reason, it is essential for lawyers, scholars, judges, and policymakers to grapple with their legal and other implications now.

In adopting vaccine passports, businesses and cities did not write on a clean slate of law. To the contrary, insofar as the passports applied to public accommodations—that is, entities otherwise open to and that serve the public—they intruded on a complex legal regime governed by common law and federal, state, and local civil rights laws.<sup>8</sup> Despite this seeming complexity, proponents of vaccine passports were often surprisingly glib about their legality. Just as a business may post a “no shoes, no shirt, no service” sign, the argument often went, so too may a business ask for proof of a particular vaccination and exclude patrons who cannot or will not present it. As this Article will demonstrate, that analogy may be correct in many jurisdictions, but it is not nearly so clear or easy as many thought at first glance.

Moreover, vaccine passports were part of a larger turn, in the United States, at least, by the “left” of the legal and political spectrum in favor of allowing private entities more discretion in deciding with whom to engage, serve, or employ. For decades earlier, especially in the 1970s, left-leaning legal thinkers and judges were skeptical of the notion that social welfare was maximized through expansive freedom of contract and property rights. Government regulation was needed to protect consumers and employees from the uneven power wielded by corporations and business.<sup>9</sup> With the arrival of Covid, however, the American left had wholeheartedly embraced the notion of a robust freedom of businesses to choose whom to admit; similarly, the left largely embraced employer vaccine mandates, dispensing with

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<sup>6</sup> See *id.*

<sup>7</sup> The White House recently endorsed the Group of Twenty (G20)’s Bali Leaders Declaration that “acknowledge[d] the importance of shared technical standards and verification methods, under the framework of the IHR [International Health Regulations Third Edition] (2005), to facilitate seamless international travel, interoperability, and recognizing digital solutions and non-digital solutions, including proof of vaccinations.” *Bali Leaders’ Declaration*, WHITE HOUSE (Nov. 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/16/g20-bali-leaders-declaration/>.

<sup>8</sup> See *infra* Parts II–III.

<sup>9</sup> Susan E. Dudley, *Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future*, 65 CASE W. RESV. L. REV. 1027, 1030 (2015).

prior concerns about the imbalance inherent in employment at will.<sup>10</sup> In other nations, by contrast, vaccine passports and mandates were met with street and organized resistance by a more diverse array of the political spectrum.<sup>11</sup> In the vaccine passport context, therefore, the turn remarkably has led some of the most “conservative” states to pass significant expansions of public accommodations laws, while “liberal” states either did nothing in response to vaccine passport proliferation or actively encouraged and facilitated its use.<sup>12</sup>

This Article will proceed in three Parts. Part I will introduce the concept of vaccine passports, tracing their brief history and dissemination and the various manners in which they have been implemented during the Covid pandemic, including in their recognition of medical, religious, and other exemptions. Part I will also discuss some of the ideological underpinnings for and against these requirements. Part II will discuss the background common-law principles that apply to public accommodations, and how these principles, which vary among states, might constrain public accommodations’ use of vaccine passports. Part III then dives into civil rights law as it applies to public accommodations. While vaccine passports are undoubtedly neutral policies facially, they inevitably impose a disparate impact on certain classes of people protected by federal, state, and local civil rights laws. This Part explores whether a venue or municipality would be able to adequately explain away any such disparities if sued under a civil rights law, and what it would have to show to do so. Part III also examines how and to what extent civil rights laws require vaccine passports to recognize religious, medical, and age-based exemptions.

## I. BACKGROUND ON VACCINE PASSPORTS

Vaccine passports for businesses, stadiums, and other places otherwise open to the public have no precise precedent in prior public health campaigns, but the con-

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<sup>10</sup> See Ronald Brownstein, *Everybody I Know Is Pissed Off*, ATLANTIC (Aug. 12, 2021), <https://www.theatlantic.com/politics/archive/2021/08/vaccine-mandates-republicans-democrats/619735/> (citing polls showing large majorities of Democrats, particularly vaccinated Democrats, supporting “requiring everyone” to obtain a Covid vaccination).

<sup>11</sup> See, e.g., Kyaw Soe Oo & Brian Gable, *Thousands Protest Vaccine Mandates in Canada, Further Fraying Nerves*, REUTERS (Feb. 5, 2022, 7:22 PM), <https://www.reuters.com/world/americas/canadian-cities-brace-more-anti-vaccine-mandate-protests-2022-02-05/>; *Vaccine Passport Protests in Europe Draw Thousands of People*, U.S. NEWS & WORLD REP. (Jan. 22, 2022, 12:24 PM), <https://www.usnews.com/news/world/articles/2022-01-22/vaccine-passport-protests-in-europe-draw-thousands-of-people>.

<sup>12</sup> Elliott Davis Jr., *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>; see *infra* Section I.C.

cept is not completely new. The practice is to some extent rooted in the use of jurisdictional compulsory vaccination, which traces back centuries.<sup>13</sup> In *Jacobson v. Massachusetts*, the Supreme Court upheld Cambridge's requirement that all adult "inhabitants" be vaccinated or revaccinated against smallpox.<sup>14</sup> Although not accounting for those who visited or just worked in Cambridge, the regulation likely ensured that a high percentage of those visiting public accommodations in the city were vaccinated. In addition to jurisdiction-wide compulsory vaccination laws, ordinances, and rules, certain settings such as universities, schools, and the military have long imposed vaccination requirements.<sup>15</sup> Although some of these settings have exceptions, and did not traditionally apply to all inside the particular venue—for example, there were no requirements that teachers and staff be vaccinated to work in a school, or that professors be vaccinated to work in a university<sup>16</sup>—they nonetheless stood for the proposition that particular settings would be more controlled from the perspective of disease prevention.<sup>17</sup> In the military context, the practice has also been linked to concerns about readiness; in addition to limiting spread, the military wants to ensure that uniformed service members are ready and able to perform their missions.<sup>18</sup>

Aside from the settings discussed above, there is some historical evidence of the use of vaccine passports in transportation, private clubs, and certain types of employment. With respect to smallpox, the vaccines in use in the late 19th and early 20th centuries left a noticeable scar. Hence, showing the scar rather than paperwork was how workers demonstrated their vaccination status to work in certain tight settings like mines, factories, railroads, and some other industrial workplaces, as required by employers and even some states.<sup>19</sup> Similarly, some private and social clubs

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<sup>13</sup> See JAMES COLGROVE, *STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA* 8–10 (2006).

<sup>14</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 27–38 (1905).

<sup>15</sup> See, e.g., John D. Grabenstein, Phillip R. Pittman, John T. Greenwood & Reneta J.M. Engler, *Immunization to Protect the US Armed Forces: Heritage, Current Practice, and Prospects*, 28 *EPIDEMIOLOGIC REVS.* 3, 5 (2006) (stating that the military has engaged in mandatory immunization programs for over 230 years); see also Anya Kamenetz, *What the History of Student Vaccine Mandates Means for School COVID Vaccine Rules*, NPR (Nov. 16, 2021, 4:49 PM), <https://www.npr.org/2021/11/16/1056263655/what-the-history-of-student-vaccination-mandates-means-for-school-covid-vaccine-> ("School vaccine mandates go back 200 years. They've defeated many legal challenges.").

<sup>16</sup> Teri Dobbins Baxter, *Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks*, 2017 *UTAH L. REV.* 885, 915 (2017) ("All states require schoolchildren to be vaccinated before attending school, but no state requires teachers, other school employees, or volunteers to be vaccinated.").

<sup>17</sup> See Kamenetz, *supra* note 15.

<sup>18</sup> Grabenstein et al., *supra* note 15, at 3–4.

<sup>19</sup> Jordan Taylor, *The U.S. Has Had 'Vaccine Passports' Before—And They Worked*, TIME (Apr. 5, 2021, 11:51 AM), <https://time.com/5952532/vaccine-passport-history/>.

asked members to show their scar before admission.<sup>20</sup> Nonetheless, despite these scattered examples, there is no widespread evidence that common carriers and public accommodations generally required proof of vaccination before entry. Indeed, as discussed further below in Part II, there is some question as to whether such a requirement might have violated the common law of the time.

The modest reach of prior vaccine passport regimes is likely due in part to the limited technology available at the time. The scar left by the smallpox vaccine allowed for a low-tech method of verification, but for other vaccinations that left no similar scar, some other form of record would have been necessary. Given the technology at the time, this most likely would have been a piece of paper of some kind, whether card or sheet, which could have been easily forged, not to mention lost or destroyed. Hence, for a restaurant in 1890 to check for vaccination status, it would have potentially lost many customers, and the imposition of such a requirement may have been seen as unfair. To be sure, medical records or inspections were often required for less quotidian activities, like entering a foreign country,<sup>21</sup> but these were often situations that already required the showing of papers like a passport. Over time, the countries of the world, acting through the World Health Organization, would agree to travel protocols that recognized nations' authority to require vaccination for entry, but imposed limits on this power to protect civil liberties and facilitate international travel.<sup>22</sup>

The advance of smartphone technology, and the apps that it enabled for both verifying and showing proof of vaccination, have played a significant role in making vaccine passports more feasible today. In this sense, the development of vaccine passports is linked to the development of other biosecurity tools like preclearance for flying on commercial airlines or for crossing international borders and may be a "foretaste of a new mode of existence."<sup>23</sup>

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

<sup>21</sup> See Elizabeth Yew, *Medical Inspections of Immigrants at Ellis Island, 1891-1924*, 56 BULL. N.Y. ACAD. MED. 488, 488 (1980) ("The medical inspection was the first of various hurdles each immigrant had to pass in the bureaucratic maze that was Ellis Island.").

<sup>22</sup> See generally WORLD HEALTH ORG., INTERNATIONAL HEALTH REGULATIONS 2005 (3d ed. 2016); see also Heidi L. Lambertson, Comment, *Swatting a Bug Without a Flyswatter: Minimizing the Impact of Disease Control on Individual Liberty Under the Revised International Health Regulations*, 25 PENN. ST. INT'L L. REV. 531, 551 (2006) (tracing the revisions of the international health regulations (IHR) from their 1969 to 2005 versions and noting that under IHR 2005, "inoculation against yellow fever is the only vaccination that may be required as a condition of entry, and it is only required if the traveler leaves an area where the risk of yellow fever transmission is present" (footnotes omitted)).

<sup>23</sup> Justin E.H. Smith, *Permanent Pandemic*, HARPER'S MAG., <https://harpers.org/archive/2022/06/permanent-pandemic-will-covid-controls-keep-controlling-us/> (last visited May 21, 2023); see also Thomas Fazi, *The Birth of the Biostate*, UNHERD.COM (Nov. 29, 2022), <https://unherd.com/2022/11/a-biostate-wont-cure-the-west/>.

The onset of Covid in December 2019 and the World Health Organization's declaration of a pandemic in January 2020 soon brought talk of tightening biosecurity systems. Because Covid was a novel disease, there was no vaccine immediately available.<sup>24</sup> Early biosecurity talk, therefore, centered on using tests to control entry into countries or venues.<sup>25</sup> Indeed, "test, trace, and isolate" was an early mantra for many in the public health community advocating for a more aggressive approach to virus control than that put forward by the administration of U.S. President Donald Trump.<sup>26</sup> The United States was comparatively slow to develop and license tests that could be used domestically, thus practically inhibiting any implementation of the "test, trace, and isolate" strategy initially. Other countries, such as China and South Korea, however, aggressively implemented this approach early in the pandemic.<sup>27</sup>

With the development and approval of more widely available tests months into the pandemic, some venues in the United States began requiring proof of negative Covid tests to see sporting events in late 2020 and early 2021.<sup>28</sup> Some of these regimes were implemented with the express permission of the state's governor as exceptions to pre-existing bans on large gatherings that such governors had ordered.<sup>29</sup> Some venues also required temperature checks.<sup>30</sup> Although these regimes were not

<sup>24</sup> Raghuvir Keni, Anila Alexander, Pawan Ganesh Nayak, Jayesh Mudgal & Krishnadas Nandakumar, *COVID-19: Emergence, Spread, Possible Treatments, and Global Burden*, 8 FRONTIERS IN PUB. HEALTH, May 28, 2020, at 1, 2–9 (2020).

<sup>25</sup> Scientific Brief, World Health Organization, COVID-19 Diagnostic Testing in the Context of International Travel (Dec. 16, 2020).

<sup>26</sup> Selena Simmons-Duffin & Allison Aubrey, *What's It Going to Take to End the Shutdown?*, NPR (Apr. 16, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/04/16/83455288/whats-it-going-to-take-to-end-the-shutdown-5-keys-to-containing-coronavirus> ("Among public health leaders, the mantra for stopping coronavirus from surging is 'test, trace and isolate.'").

<sup>27</sup> Dylan Scott & Jun Michael Park, *South Korea's Covid-19 Success Story Started with Failure*, VOX (Apr. 19, 2021, 7:00 AM), <https://www.vox.com/22380161/south-korea-covid-19-coronavirus-pandemic-contact-tracing-testing>; Pei Yuan, Yi Tan, Liu Yang, Elena Aruffo, Nicholas H. Ogden, Guojing Yang, Haixia Lu, Zhigui Lin, Weichuan Lin, Wenjun Ma, Meng Fan, Kaifa Wang, Jianhe Shen, Tianmu Chen & Huaiping Zhu, *Assessing the Mechanism of Citywide Test-Trace-Isolate Zero-COVID Policy and Exit Strategy of COVID-19 Pandemic*, INFECTIOUS DISEASES POVERTY, Oct. 4, 2022, at 1, 2.

<sup>28</sup> See, e.g., *Cuomo: 6,700 Fans Will Be Allowed at Bills Playoff Game*, WGRZ, <https://www.wgrz.com/article/sports/nfl/bills/governor-andrew-cuomo-fans-will-be-allowed-in-buffalo-bills-playoff-game/71-24ee693f-c63a-4a4e-9e60-0aa264f5ffd1> (Dec. 30, 2020, 11:24 PM) (requiring fans "in attendance . . . to provide evidence of a negative test in the previous 72 hours").

<sup>29</sup> *Id.*; Will Feuer, Berkeley Lovelace Jr. & Noah Higgins-Dunn, *New York Gov. Cuomo Bans Gatherings of 500 or More Amid Coronavirus Outbreak*, CNBC, <https://www.cnbc.com/2020/03/12/new-york-gov-cuomo-bans-gatherings-of-500-or-more-amid-coronavirus-outbreak.html> (Mar. 12, 2020, 5:30 PM).

<sup>30</sup> See, e.g., Claire Hoffman, *8 Practical Steps to Create Safe Check-In Areas at Live Events*, BIZBASH (Dec. 14, 2020), <https://www.bizbash.com/production-strategy/registration-ticketing/>

vaccine-based, they laid the foundations for such later policies by using biosecurity tools like cellphone images of health information (for example, negative Covid tests) to control venue entry.<sup>31</sup>

As the first vaccines targeting Covid received at least tentative regulatory clearance in late 2020, governments and venues began to consider vaccine passports more of a possibility for effectively controlling virus spread. Israel was among the first countries to adopt a vaccine passport regime in February 2021.<sup>32</sup> Israel dubbed its program the “Green Pass,” and it allowed those who were (then) “fully vaccinated” to access public accommodations such as gyms, restaurants, hotels, theaters, and music venues that had previously been closed or had more limited entry requirements.<sup>33</sup> Denmark followed in March 2021 with a similar regime, and several other European countries implemented similar policies in the summer of 2021 and beyond. Many of these European nations rolled out their vaccine passport systems in conjunction with the European Union’s (E.U.) Digital COVID Certificate, even though the latter was designed primarily for cross-border movement.<sup>34</sup>

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article/21206355/tips-for-creating-safe-checkin-and-registration-areas-at-live-events-during-covid19 (quoting independent event producer Melissa Park, as stating: “On arrival [to live events she produces], attendees are required to check-in via an event QR code survey and have their temperature checked prior to being allowed inside the event space . . .”).

<sup>31</sup> *BioReference Provides Mandatory Fan Testing for Buffalo Bills’ Playoff Game*, SPORTS BUS. J. (Jan. 5, 2021), <https://www.sportsbusinessjournal.com/Daily/Issues/2021/01/05/Technology/bioreference-provides-mandatory-fan-testing-for-buffalo-bills-playoff-game>.

<sup>32</sup> Anna Rouw, Jennifer Kates & Josh Michaud, *Key Questions About COVID-19 Vaccine Passports and the U.S.*, KFF (Apr. 15, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/key-questions-about-covid-19-vaccine-passports-and-the-u-s/>.

<sup>33</sup> See Talya Porat, Ryan Burnell, Rafael A. Calvo, Elizabeth Ford, Priya Paudyal, Weston L. Baxter & Avi Parush, “Vaccine Passports” May Backfire: Findings from a Cross-Sectional Study in the UK and Israel on Willingness to Get Vaccinated Against COVID-19, 9 VACCINES (SPECIAL ISSUE) 902, 903 (2021) (saying that Israel rolled out its “green passes” in January 2021).

<sup>34</sup> *Id.*; Marcin Piotr Walkowiak, Justyna B. Walkowiak & Dariusz Walkowiak, *COVID-19 Passport as a Factor Determining the Success of National Vaccination Campaigns: Does It Work? The Case of Lithuania vs. Poland*, 9 VACCINES (SPECIAL ISSUE) 1498, 1499–1500 (2021). Italy and France were the first two big movers on vaccine passports on the continent after Denmark. See also Nick Kostov & Eric Sylvers, *France, Italy Require COVID-19 Passes for Restaurants, Bars*, WALL ST. J. (Aug. 10, 2021), <https://www.wsj.com/articles/france-italy-require-health-pass-restaurants-bars-11628587800>. Eventually, the European Union launched the E.U. Digital COVID Certificate for use in crossing E.U. boundaries as well as for countries to use internally for access to venues. See *EU Digital COVID Certificate*, EUR. COMM’N, [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate\\_en](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en) (last visited May 21, 2023); see also Marc Rovira, *Catalan High Court Approves Use of Covid Passport in Bars, Restaurants, and Gyms*, EL PAÍS: SOC’Y (Nov. 25, 2021, 9:09 AM), <https://english.elpais.com/society/2021-11-25/catalan-high-court-approves-use-of-covid-passport-in-bars-restaurants-and-gyms.html> (discussing how several Spanish regions had sought judicial permission to use the E.U. digital certificate as a means of enforcing Covid passports in certain venues); COSTICA DUMBRAVA & DAVID DE GROOT, EUR. PARL. RSCH. SERV., PE 690.618, EU COVID-19

Italy's vaccine passport regime, like that of some other nations, was implemented alongside or in conjunction with a similar scheme for employment, and also applied to long-distance transit.<sup>35</sup> Australia, New Zealand, certain provinces of Canada, and other nations also adopted some version of a Covid vaccine passport regime.<sup>36</sup> Interestingly, in several of these countries, opposition to vaccine passports emerged from both sides of the political spectrum. Unlike in the United States, in which there was very little vocal left-wing opposition to such regimes, but much opposition on the "right,"<sup>37</sup> left-wing parties and political figures in European and other countries forthrightly and vocally opposed vaccine passports. Jean-Luc Melenchon, for instance, a "far left" socialist who finished third in the first round of

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CERTIFICATE 3 (May 2021), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690618/EPRS\\_BRI\(2021\)690618\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690618/EPRS_BRI(2021)690618_EN.pdf) (reviewing the E.U.'s temporary digital health certificate and discussing, *inter alia*, its legal scope and the risk of discrimination). The United Kingdom, no longer part of the European Union, planned to implement a vaccine passport system in England but ultimately canceled those plans after major protests and pushback. Alyssa Lukpat, *Amid Cries of Tyranny, England Cancels Plans to Require Vaccine Passports*, N.Y. TIMES, <https://www.nytimes.com/2021/09/12/world/europe/britain-vaccine-passport-cancelled.html?searchResultPosition=2> (Sept. 15, 2021).

<sup>35</sup> Katie Nadworny, *Italy Implements Mandatory Green Pass for Workers*, SHRM (Oct. 12, 2021), <https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/coronavirus-italy-green-pass.aspx> ("Italy's Green Pass—a domestic COVID-19 passport that indicates if someone is fully vaccinated or has tested negative for the virus in the last 72 hours—has been required at restaurants, entertainment venues and other public places, but will soon be required for any employees who are working onsite."); Kostov & Sylvers, *supra* note 34.

<sup>36</sup> See Antoni Nerestant, *Quebec Expands Vaccine Passports to Liquor, Cannabis Stores, with 3rd Dose Requirement on the Way*, CBC: NEWS (Jan. 6, 2022, 8:45 AM), <https://www.cbc.ca/news/canada/montreal/vaccination-passport-saq-sqdc-covid-hospitalizations-1.6305992>; *Requiring Vaccine Passports to Shop at Big-Box Stores Hurts Those on Quebec's Margins, Critics Warn*, CBC, <https://www.cbc.ca/news/canada/montreal/vaccine-passports-quebec-retail-requirement-1.6316314> (Jan. 18, 2022); Sybilla Gross, *Australian State Unveils Vaccine Passport as Lockdown End Nears*, BLOOMBERG (Sept. 22, 2021), <https://www.bloomberg.com/news/articles/2021-09-22/australian-state-unveils-vaccine-passport-as-lockdown-end-nears> (discussing New South Wales's plan to restrict entry to pubs, restaurants, gyms, and other retail outlets to those who are "fully vaccinated" and the role that a digital app would play in that system); UNITED AGAINST COVID-19, N.Z. GOV'T, COVID-19 PROTECTION FRAMEWORK (2021), [https://www.beehive.govt.nz/sites/default/files/2021-11/291121\\_UAC\\_CPFSummary\\_A3.pdf](https://www.beehive.govt.nz/sites/default/files/2021-11/291121_UAC_CPFSummary_A3.pdf) (requiring the use of a "Vaccine Pass" to access certain venues and activities like cafes, restaurants, bars, and sporting events, in certain situations).

<sup>37</sup> *E.g.*, Mark Scolforo, *Vaccine Passport Efforts Draw Opposition from GOP Lawmakers*, L.A. TIMES (Apr. 4, 2021, 10:22 AM), <https://www.latimes.com/world-nation/story/2021-04-04/vaccine-passport-efforts-draw-opposition-from-gop-lawmakers>.

France's 2022 presidential election with 22% of the vote, decried France's Pass Sanitaire as "absurd, unfair, and authoritarian."<sup>38</sup> Elements of Germany's "left wing" expressed significant concerns, rooted in the nation's Nazi history, of denying privileges generally afforded to others to certain groups of people.<sup>39</sup> Indeed, European vaccine passport systems sparked widespread protests by residents concerned about the privacy, autonomy, and liberty implications of such requirements.<sup>40</sup> Similar protests erupted in Australia, New Zealand, and Canada.<sup>41</sup> While often presented in

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<sup>38</sup> Alex Ledsom, *France Protests—But Vaccine Enforcement Is Working*, FORBES (Aug. 8, 2021, 7:02 AM), <https://www.forbes.com/sites/alexledsom/2021/08/08/france-protests-but-vaccine-passport-enforcement-is-working/?sh=34f60863103a>.

<sup>39</sup> *German Lawmakers Reject Vaccine Mandate for People Over 60*, DEUTSCHE WELLE (Apr. 7, 2022), <https://www.dw.com/en/german-lawmakers-reject-vaccine-mandate-for-people-over-60/a-61387119> (noting that several members of center-left party "vote[d] their conscience" against a vaccine mandate for those over 60); see also Laurenz Gehrke, *German Parliament Rejects Mandatory Coronavirus Vaccination*, POLITICO (Apr. 7, 2022, 2:59 PM), <https://www.politico.eu/article/german-parliament-rejects-mandatory-coronavirus-vaccination/> ("Of the 683 who voted on the bill, 378 rejected it and only 296 supported it . . ."). Several members of the leading left-wing parties in the coalition government—SDP (9) and the Greens (6)—voted against the measure, as did a strong majority (29 of 36) of the opposition party, The Left. Stenografischer Bericht [Stenographic Report], Deutscher Bundestag: Plenarprotokoll [BT] 20/28, at 2367 (Ger.). The measure also drew strong opposition from coalition member, classical-liberal party FDP (79 to 5 against), in addition to opposition center-right party CDU/CSU (175 to 3) and populist right-wing party AfD (all 79 voting against). See *id.* Journalists have described the AfD as "far right" due to its opposition to immigration, Euroscepticism, and embrace of identitarian nationalism. *Germany's AfD: How Right-Wing Is Nationalist Alternative for Germany?*, BBC (Feb. 11, 2020), <https://www.bbc.com/news/world-europe-37274201>. So while most of the opposition to the proposed vaccination mandate in Germany's Bundestag came from members of parties on the right or center-right, more than ten percent of it came from members of parties on the left or center-left.

<sup>40</sup> See Kostov & Sylvers, *supra* note 34; Ledsom, *supra* note 38; *Vaccine Passport Protests in Europe Draw Thousands of People*, AP NEWS (Jan. 22, 2022), <https://apnews.com/article/coronavirus-pandemic-business-health-europe-helsinki-2336e6f56442de7ab676a7618df22342> (reporting on demonstrations by "[t]housands of people" against "vaccine passports and other requirements" in Athens, Helsinki, London, Paris, Stockholm, and other French cities).

<sup>41</sup> See Paul Vieira, *Protesters Rally in Ottawa to Demand End to Canada's Covid-19 Vaccine Mandates*, WALL ST. J. (Jan. 29, 2022, 8:30 PM), <https://www.wsj.com/articles/protesters-rally-in-ottawa-to-demand-end-to-canadas-covid-19-vaccine-mandates-11643506207>; Lucy Craymer & Praveen Menon, *New Zealand's Parliament Protest Ends with Clashes, Arrests*, REUTERS (Mar. 2, 2022, 1:38 AM), <https://www.reuters.com/world/asia-pacific/new-zealand-police-dismantle-tents-tow-vehicles-clear-anti-vaccine-protests-2022-03-01/> (discussing a police crackdown on "an anti-vaccine mandate protest that had disrupted the capital for the past three weeks . . ."); Yan Zhuang, *Thousands Rally Against Coronavirus Restrictions in Australia*, N.Y. TIMES (Nov. 20, 2021), <https://www.nytimes.com/2021/11/18/world/australia/covid-protests-australia.html>.

the mainstream American press as led by “right-wing” parties and groups, the protesters were in actuality often much more diverse.<sup>42</sup>

A. *The Development of Vaccine Passports in the United States*

Meanwhile, in the United States, the FDA first authorized for emergency use the two-shot Pfizer and Moderna mRNA vaccines in December 2020.<sup>43</sup> The FDA authorized the former for use in ages 16 and up, while it authorized the latter only for 18 and over.<sup>44</sup> In late February 2021, the FDA authorized for emergency use what was then billed as a “one-shot” Covid vaccine by Johnson & Johnson, the Janssen vaccine, for use in persons 18 and over.<sup>45</sup> By February 2021, therefore, the United States had three authorized vaccines, and at the time, although supply was increasing, demand greatly outpaced supply.<sup>46</sup> States rationed vaccines, generally prioritizing the elderly, immunocompromised, and certain high-risk occupations.<sup>47</sup>

By the late spring of 2021, however, as vaccine supply began to better meet demand in much of the country, certain organizations and businesses began incorporating vaccines into their plans to reopen more fully. Some baseball teams, such as the Seattle Mariners, looking to allow for more attendance in spring 2021 after Major League Baseball (MLB) banned fans from attending during the 2020 regular

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<sup>42</sup> Compare Madi Day & Bronwyn Carlson, *White Supremacist and Far Right Ideology Underpin Anti-Vax Movements*, CONVERSATION (Nov. 21, 2021, 11:52 PM), <https://theconversation.com/white-supremacist-and-far-right-ideology-underpin-anti-vax-movements-172289>, with Hannah Roberts & Carlo Martuscelli, *Black Flags and Crucifixes: Italy Vaccine Passport Protests Unite Strange Bedfellows*, POLITICO (Oct. 23, 2021, 1:30 AM), <https://www.politico.eu/article/italy-vaccine-passport-protest-neo-fascists-green-pass/>.

<sup>43</sup> Press Release, U.S. Food & Drug Admin., FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>; Press Release, U.S. Food & Drug Admin., FDA Takes Additional Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for Second COVID-19 Vaccine (Dec. 18, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid>.

<sup>44</sup> See *infra* notes 61–62 and accompanying text (concerning emergency use authorization (EUA) for children).

<sup>45</sup> See *Janssen COVID-19 Vaccine*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/janssen-covid-19-vaccine> (May 11, 2022).

<sup>46</sup> See, e.g., Isaac Stanley-Becker, ‘Hoping for a Flood’: How States Are Preparing for a Surge in Vaccine Supply, WASH. POST (Mar. 10, 2021, 4:09 PM), <https://www.washingtonpost.com/health/2021/03/10/vaccine-supply-increase-states/> (discussing how states until that point had been tightly rationing the distribution of Covid vaccines).

<sup>47</sup> *Id.*; see also Lena Sun & Isaac Stanley-Becker, *Vaccine Lotteries and Personal Appeals: The Medically Vulnerable Find Their Priority Status Slipping Away*, WASH. POST (Feb. 26, 2021), <https://www.washingtonpost.com/health/2021/02/26/covid-vaccine-who-should-go-first/>.

season,<sup>48</sup> allowed more compressed seating in certain vaccinated sections, while requiring unvaccinated fans to sit socially distanced.<sup>49</sup> Meanwhile, in Texas, by contrast, as a visible sign of the emerging split among states and regions in how they would respond to the pandemic, the Texas Rangers opened their 2021 season at full capacity and with no vaccination-related restrictions on entry.<sup>50</sup>

Upon the Centers for Disease Control and Prevention's (CDC) May 2021 recommendation that fully vaccinated persons could go maskless indoors,<sup>51</sup> some prominent businesses dropped their universal masking requirements and requested or required only unvaccinated patrons or employees to continue to wear a mask, although they offered few details on how they would police customer compliance with such a policy.<sup>52</sup> Although at least one jurisdiction—Oregon—initially claimed

<sup>48</sup> Regardless of their states' regulatory regime, MLB did not allow any fans in attendance at any of its regular-season 2020 games. J. Furman Daniel, III & Elliott Fullmer, *When the Fans Didn't Go Wild: The 2020 MLB Season as a Natural Experiment on Home Team Performance*, 50 *BASEBALL RSCH. J.* 65, 65 (2021). In the postseason, MLB used neutral sites for the divisional playoff round, the league championships, and the World Series, in California and Texas. See *Complete 2020 MLB Postseason Results*, MLB (Oct. 27, 2020), <https://www.mlb.com/news/mlb-2020-postseason-schedule-announced>. The league championship and World Series games in Texas allowed a limited number of fans (about a quarter of stadium capacity) whereas California did not permit fans to attend beyond a very limited number of player and staff family members. See Tim Tucker, *Fans Will Return to the Ballpark for Braves-Dodgers NLCS*, ATLANTA J.-CONST. (Oct. 9, 2020), <https://www.ajc.com/sports/atlanta-braves/fans-will-return-to-the-ballpark-for-braves-dodgers-nlcs/VLYHGWTAOZCZPEG7MRD24NVLZY/> (noting that the American League Championship Series in San Diego would not have fans in attendance "because MLB couldn't get California governmental approval to sell tickets there amid the pandemic").

<sup>49</sup> *E.g.*, Charles Woodman, *Mariners Offer Exclusive Seating, \$10 Tickets for Vaccinated Fans*, PATCH: SPORTS (May 7, 2021, 11:50 AM), <https://patch.com/washington/seattle/mariners-announce-discounted-tickets-vaccinated-fans> (discussing Seattle Mariners' practice of giving fans who show proof of full vaccination discounts on food, gift shop items, a free t-shirt, and access to "fully vaccinated" seating areas).

<sup>50</sup> Jozelyn Escobedo, *What You Need to Know About the Texas Rangers Monday Home Opener at Globe Life Field*, WFAA (Apr. 4, 2021, 8:00 AM), <https://www.wfaa.com/article/sports/mlb/rangers/what-you-need-to-know-about-texas-rangers-home-opener-at-globe-life-park-2021/287-e7f8dc1b-e460-457a-8108-d626e4ee63e3>. Soon after the season began, the Rangers lifted their mask requirement for fans. Sam Blum, *Texas Rangers Will No Longer Require Masks to Be Worn at Globe Life Field*, DALLAS MORNING NEWS (May 13, 2021, 4:09 PM), <https://www.dallasnews.com/sports/rangers/2021/05/13/texas-rangers-will-no-longer-require-masks-to-be-worn-at-globe-life-field/>.

<sup>51</sup> Rachel Cohrs, *CDC Backtracks, Saying Fully Vaccinated People Can Go Maskless Indoors*, STAT (May 13, 2021), <https://www.statnews.com/2021/05/13/cdc-backtracks-saying-fully-vaccinated-people-can-go-maskless-indoors/>.

<sup>52</sup> Richa Naidu, *Walmart Says Fully Vaccinated Employees Can Go Without Masks Starting Tuesday*, REUTERS (May 14, 2021, 2:20 PM), <https://www.reuters.com/world/us/walmart-says-fully-vaccinated-employees-can-go-without-masks-starting-tuesday-2021-05-14/> (reporting that "[v]accinated customers . . . will be allowed to shop without a mask" but offering no details

that it would require businesses to check for proof of vaccination in order to allow customers to unmask indoors,<sup>53</sup> the vast majority of jurisdictions quickly deemed enforcing such a requirement practically infeasible. The mayor of St. Louis, Tishaura Jones, for instance, hoped businesses would ask about the vaccination status of maskless customers, but argued against compelled checking of proof of vaccination.<sup>54</sup> “We’ll just have to trust what people tell us,” Mayor Jones noted.<sup>55</sup> “[W]e don’t want this to turn into sort of like a show-me-your-papers moment.”<sup>56</sup> Even Oregon ultimately never enforced its show-proof-of-vaccination-to-go-maskless-indoors rule before the state lifted (temporarily, it would turn out) its indoor mask mandate in late June 2021.<sup>57</sup>

Despite these fits and starts, eventually, in the summer of 2021, a handful of businesses required customers to furnish proof of vaccination before entering the establishment.<sup>58</sup> Bruce Springsteen’s Broadway show was one of the first high-profile live performances to require all attendees to show proof of vaccination while still requiring that such attendees remain masked.<sup>59</sup> All the while, some states began fur-

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regarding how stores would determine which customers are vaccinated); Melissa Repko, *Walmart, Costco Drop Store Mask Requirement for Customers, Employees Who Are Fully Vaccinated*, CNBC, <https://www.cnn.com/2021/05/14/walmart-customers-employees-who-are-vaccinated-wont-need-to-wear-masks.html> (May 14, 2021, 8:41 PM).

<sup>53</sup> Press Release, Oregon Health Auth., Oregon Adjusts Guidelines for Wearing Masks and Physical Distancing Indoors and Outdoors (May 18, 2021), <https://content.govdelivery.com/accounts/ORDHS/bulletins/2d9d11d>; Zack Demars, *OHA: Businesses Must See Proof of Vaccination to Forgo Mask Rules*, TILLAMOOK HEADLIGHT HERALD, [https://www.tillamookheadlightherald.com/news\\_free/oha-businesses-must-see-proof-of-vaccination-to-forgo-mask-rules/article\\_017a14ee-b8bd-11eb-968d-1797268ea6d2.html](https://www.tillamookheadlightherald.com/news_free/oha-businesses-must-see-proof-of-vaccination-to-forgo-mask-rules/article_017a14ee-b8bd-11eb-968d-1797268ea6d2.html) (May 31, 2021).

<sup>54</sup> Edgar Sandoval, Kate Taylor & Mitch Smith, *Federal Mask Retreat Sets Off Confusing Scramble for States and Cities*, N.Y. TIMES (May 14, 2021), <https://www.nytimes.com/2021/05/14/us/no-masks-cdc.html>.

<sup>55</sup> *Id.*

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

<sup>57</sup> Rachel Monahan, *Oregon Tried to Innovate a Policy for Determining Who Still Has to Wear a Mask. It Bombed*, WILLAMETTE WEEK (May 25, 2021), <https://www.wweek.com/news/state/2021/05/25/oregon-tried-to-innovate-a-policy-for-determining-who-still-has-to-wear-a-mask-it-bombed/>.

<sup>58</sup> David A. Lieb, *Businesses, States Reluctant to Require Customers to Show Proof of Vaccine*, INS. J. (June 28, 2021), <https://www.insurancejournal.com/news/national/2021/06/28/620399.htm> (discussing a wine bar in New York City that required proof of vaccination for customers to enter).

<sup>59</sup> Nick Corasiniti, *Bruce Springsteen Reopens Broadway, Ushering in Theater’s Return*, N.Y. TIMES (June 27, 2021), <https://www.nytimes.com/2021/06/27/theater/bruce-springsteen-broadway.html> (noting that the performance required that all attendees demonstrate proof of vaccination, and that this practice followed the same requirement for a Foo Fighters concert at Madison Square Garden a week earlier).

nishing the digital infrastructure for such private vaccine passport schemes by creating state-run electronic vaccine verification systems.<sup>60</sup>

Even as vaccination mandates began to proliferate in certain settings in the spring of 2021, certain segments of the population remained unable to be vaccinated. A particular large segment was children; those under 16 were not eligible for any of the authorized vaccines initially, and 16- and 17-year-olds had only one choice (Pfizer) as opposed to the three available for adults. On May 10, 2021, the FDA expanded its EUA for Pfizer to include children as young as 12.<sup>61</sup> It was not until October 2021, however, that the EUA would reach children as young as 5.<sup>62</sup> Hence, some venues using vaccine passports, such as the Broadway theater featuring Bruce Springsteen's show, allowed children under 12 to attend so long as they demonstrated proof of a negative Covid test.<sup>63</sup> In a preview of difficult issues to come in the implementation of vaccine passports, the theater also allowed persons with medical or religious reasons for declining vaccination to use a negative Covid test as an alternative means of entry.<sup>64</sup>

### B. *Municipal Vaccine Passport Regimes in the United States*

Soon after the final states had lifted their masking rules in late June and early

<sup>60</sup> Lieb, *supra* note 58 (discussing the digital COVID vaccination passes created by the state governments of California, Hawaii, Louisiana, and New York).

<sup>61</sup> Press Release, U.S. Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Authorizes Pfizer-BioNTech COVID-19 Vaccine for Emergency Use in Adolescents in Another Important Action in Fight Against Pandemic (May 10, 2021), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-pfizer-biontech-covid-19-vaccine-emergency-use>.

<sup>62</sup> See Press Release, U.S. Food & Drug Admin., FDA Authorizes Pfizer-BioNTech COVID-19 Vaccine for Emergency Use in Children 5 through 11 Years of Age (Oct. 29, 2021), <https://www.fda.gov/news-events/press-announcements/fda-authorizes-pfizer-biontech-covid-19-vaccine-emergency-use-children-5-through-11-years-age>. Moreover, it was not until mid-June 2022 that the FDA would authorize, for emergency use, a COVID vaccine regimen for children between six months and five years of age. Press Release, U.S. Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Authorizes Moderna and Pfizer-BioNTech COVID-19 Vaccines for Children Down to 6 Months of Age (June 17, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-moderna-and-pfizer-biontech-covid-19-vaccines-children> [hereinafter Press Release, Vaccine Booster 6 Months of Age].

<sup>63</sup> *Broadway Shows Will Reopen but Only if You're Vaccinated and Masked*, NPR (July 30, 2021, 6:33 PM), <https://www.npr.org/2021/07/30/1022966184/broadway-shows-reopen-only-vaccinated-masked> ("There will be exceptions to the vaccine rule for children under 12 . . . and for people with a medical condition or religious belief that prevents vaccination . . . [; they] will need to show proof of a negative COVID-19 test.").

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

July of 2021 and seemingly fully reopened,<sup>65</sup> new concerns emerged that would derail the return to pre-2020 “normal” that many had anticipated for summer 2021. First, the Delta variant of Covid, which originated in India, began to spread rapidly in the West, including in the United States.<sup>66</sup> Second, an outbreak of “break-through” Covid infections among vaccinated revelers over July 4 weekend in Provincetown, Massachusetts, provided the first hints that the vaccines were not nearly as effective at preventing infection as initially thought and advertised.<sup>67</sup> All of a sudden, cases began to spike again, and jurisdictions split widely in their responses. Generally speaking, the more “blue”—that is, Democratic-leaning—jurisdictions reimposed mask mandates, often at the statewide level, whereas more “red”—or Republican-leaning—jurisdictions did not.<sup>68</sup> A similar patchwork emerged as compared to that which existed before the mask mandates expired in late spring and early summer of 2021, although this time around far fewer jurisdictions overall required masks. Oregon, Illinois, and Louisiana, for instance, reimposed mask mandates in summer 2021 that had expired just weeks earlier.<sup>69</sup> Of the 39 states that

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<sup>65</sup> See, e.g., Luis Ferré-Sadurní & Shawn Hubler, ‘A Momentous Day’: New York and California Lift Most Virus Restrictions, N.Y. TIMES, <https://www.nytimes.com/2021/06/15/nyregion/coronavirus-restrictions.html>; (June 23, 2021); Fedor Zarkhin, *Oregon Celebrates Official Pandemic Reopening, but More Work to Be Done on Equity, Governor Says*, OREGONLIVE, (June 30, 2021, 6:47 PM), <https://www.oregonlive.com/coronavirus/2021/07/oregon-celebrates-official-pandemic-reopening-but-more-work-to-be-done-on-equity-governor-says.html>; Jennifer Jacobs & Sophia Cai, *Biden Declares Success in Beating Pandemic in July 4 Speech*, BLOOMBERG, (July 4, 2021), <https://www.bloomberg.com/news/articles/2021-07-04/biden-to-appeal-for-vaccinations-after-u-s-missed-july-4-target>.

<sup>66</sup> See Alexander Tin, *What to Know About COVID-19, the Delta Variant and Vaccines as Fall Approaches*, CBS NEWS, <https://www.cbsnews.com/live-updates/covid-19-fall-2021-delta-variant-faq/> (Aug. 26, 2021, 12:51 PM).

<sup>67</sup> Anne Flaherty & Arielle Mitropoulos, *CDC Mask Decision Followed Stunning Findings from Cape Cod Beach Outbreak*, ABC News (July 29, 2021), <https://abcnews.go.com/Politics/cdc-mask-decision-stunning-findings-cape-cod-beach/story?id=79148102>; *Part 1: CNN Presidential Town Hall with Joe Biden*, CNN, at 9:15–9:38 (July 21, 2021), <https://www.cnn.com/2021/07/21/politics/full-president-joe-biden-cnn-town-hall-july-21/index.html> (“You’re not going to get COVID if you have these vaccinations.”) (“If you’re vaccinated, you’re not going to be hospitalized, you’re not going to be in an ICU unit, and you’re not going to die.”); MSNBC, *I Just Can’t Face Another Surge: Premature Reopenings Threaten Vaccine Successes* / Rachel Maddow, YOUTUBE, at 1:29–1:37 (29, 2021), <https://www.youtube.com/watch?v=Ngv07ekWS4w> (CDC Director Rochelle Walensky asserted that “vaccinated people do not carry the virus, don’t get sick . . .”).

<sup>68</sup> Robert Towey, *Local Officials Across U.S. Are Starting to Reimpose Covid Mask Rules as Delta Variant Takes Hold*, CNBC (July 21, 2021, 2:15 PM), <https://www.cnbc.com/2021/07/21/covid-local-officials-across-us-are-starting-to-reimpose-mask-rules-as-delta-variant-takes-hold.html>; Patricia Mazzei, *Wearing Masks Indoors Again? Some States Are a Vehement No*, N.Y. TIMES (Aug. 17, 2021), <https://www.nytimes.com/2021/07/28/us/coronavirus-cdc-mask-mandate.html>.

<sup>69</sup> Several other states relied on mask mandates that had technically never expired, even if they had not been enforced as of summer 2021 or previously had not applied to vaccinated

had mask mandates from some point in 2020 until spring or summer of 2021, however, 27 did not bring the mandates back for Delta or later for Omicron.<sup>70</sup>

Just as mask mandates were returning in certain jurisdictions in summer 2021, some municipalities decided to go further and mandate vaccine passports for the first time. New York City was the first to do so, with Mayor Bill de Blasio rolling out the “Key to NYC” initiative in early August 2021 as a mayoral executive order.<sup>71</sup> This regime would apply to both customers and employees of indoor venues like dining, entertainment, and fitness.<sup>72</sup> De Blasio justified his regime quite explicitly as less about safety within such environments and more as a means of pushing people to get vaccinated; de Blasio asserted that if more New Yorkers would get vaccinated, New York City could “stop the Delta variant.”<sup>73</sup>

Several cities emulated New York City in the following weeks and announced their own vaccine passport regimes, with some soon after and others several weeks later.<sup>74</sup> With the arrival of the Omicron variant of Covid in the United States in December 2021, several more cities adopted vaccine passports.<sup>75</sup> In all, my recent study counted 24 city or county vaccine passport regimes that were promulgated in

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persons. *State-Level Mask Requirements in Response to the Coronavirus (COVID-19) Pandemic, 2020-2022*, BALLOTPEdia, [https://ballotpedia.org/State-level\\_mask\\_requirements\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020-2022](https://ballotpedia.org/State-level_mask_requirements_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2022) (Apr. 30, 2022).

<sup>70</sup> *Id.*

<sup>71</sup> *New York City Launches Vaccine Passport Program*, FOX 5 N.Y. (Aug. 4, 2021, 9:56 AM), <https://www.fox5ny.com/news/new-york-city-launches-vaccine-passport>. De Blasio announced the program on August 3, to take effect on August 16, with enforcement to begin September 13. *Id.*

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

<sup>73</sup> *Transcript: Mayor de Blasio Holds Media Availability*, NYC (Aug. 5, 2021), <https://www.nyc.gov/office-of-the-mayor/news/549-21/transcript-mayor-de-blasio-holds-media-availability>.

<sup>74</sup> See Paul Diller, *Municipal Vaccine Passport Regimes in the United States: A European Import Spreads Widely*, 45 *FORDHAM INT’L L.J.* 639, 652–56 (2022) (noting that San Francisco, New Orleans, Oahu, and Berkeley adopted vaccine passports within a month of New York City). Puerto Rico’s governor also promulgated a version of a vaccine passport in early August, requiring vaccination for government contractors, hotel guests and employees, and all health facility workers. See, e.g., Dánica Coto, *Puerto Rico Widens Vaccine Requirements Amid COVID-19 Spike*, AP NEWS (Aug. 5, 2021), <https://apnews.com/article/lifestyle-health-business-caribbean-coronavirus-pandemic-1d83c3535da6759734fd5dada6fea8>. On August 12, Puerto Rico’s governor announced that he would expand the regime to include restaurants, theaters, and other establishments. See, e.g., Coto, *supra* note 3.

<sup>75</sup> See Diller, *supra* note 74, at 652–56; Nate Rattner, *U.S. Covid Cases Rise to Pandemic High as Delta and Omicron Circulate at Same Time*, CNBC, <https://www.cnbc.com/2021/12/29/us-covid-cases-rise-to-pandemic-high-as-delta-and-omicron-circulate.html> (Dec. 29, 2021, 5:46 PM), (noting that “the emergence of omicron . . . is contributing to a near-vertical rise in daily new cases”).

2021 or early 2022.<sup>76</sup> While all of these cities have abandoned the enforcement of these regimes at the time of this writing, several have kept the underlying structure on the books, thereby allowing either a mayor or health commissioner to re-implement the regime at any moment.<sup>77</sup> Indeed, as my study demonstrated, the vast majority of the 24 jurisdictions with vaccine passport regimes implemented them by mayoral executive order or health commissioner order; only a handful of jurisdictions adopted vaccine passport regimes by ordinance.<sup>78</sup> As discussed later, this manner of adoption is potentially legally relevant insofar as a vaccine passport ordinance might override a previously passed public accommodations ordinance, whereas an executive or health commissioner order might not.<sup>79</sup>

The municipal vaccine passport regimes, like business- and venue-specific vaccine passport policies, varied considerably in how they regulated entry. A few permitted proof of a negative Covid test to substitute for proof of vaccination.<sup>80</sup> With respect to children, the phased rollout of the FDA's emergency use authorizations in June and then October 2021 resulted in some policies exempting or requiring only one of two mRNA shots for children of a certain age.<sup>81</sup> Most policies exempted children under 5, for whom no vaccine would be authorized until June 2022, entirely, although some required a negative test of such children instead.<sup>82</sup> On religious and medical exemptions, there was significant variation among the various passport regimes. All of the municipal regimes recognized medical exemptions, though they

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<sup>76</sup> Diller, *supra* note 74, at 652–56. Puerto Rico, a U.S. territory, also adopted a vaccine passport regime. *See supra* note 74.

<sup>77</sup> For example, Philadelphia briefly reinstated its mask mandate in the spring of 2022, but only as applied to places not checking for vaccination. *Philadelphia Reinstating Indoor Mask Mandate After Moving Into 2 of 4-Tiered COVID-19 Response System*, CBS NEWS PHILA. (Apr. 11, 2022, 11:06 PM), <https://philadelphia.cbslocal.com/2022/04/11/philadelphia-indoor-mask-mandate-reinstated-covid/>.

<sup>78</sup> Diller, *supra* note 74, at 652–56.

<sup>79</sup> *See infra* Part III.

<sup>80</sup> In New Orleans the test had to be within 72 hours prior whereas in Honolulu, Oahu, it had to be within 48. *Compare* CITY OF NEW ORLEANS HEALTH DEP'T, GUIDELINES FOR COVID-19 REOPENING 4 (2021), <https://nola.gov/NOLAReady/media/Documents/Coronavirus/NOHD-Guidelines-for-reopening-October-29-2021-FINAL.pdf>, *with Safe Access Oahu*, CITY & CNTY OF HONOLULU, <https://www.oneoahu.org/safe-access-oahu>.

<sup>81</sup> *See, e.g.*, Press Release, NYC, *Mayor de Blasio Announces Vaccine Mandate for Private Sector Workers, and Major Expansions to Nation-Leading "Key to NYC" Program* (Dec. 6, 2021), <https://www1.nyc.gov/office-of-the-mayor/news/807-21/mayor-de-blasio-vaccine-mandate-private-sector-workers-major-expansions-to> (requiring children ages 5 to 11 to show proof of one dose of the vaccine as of December 14, and requiring children 12 and over to show proof of two vaccine doses as of December 27 in order to access the covered venues and activities).

<sup>82</sup> *E.g.*, Minneapolis, Minn., Emergency Regul. No. 2022-4 (2022) (requiring all persons over age two entering places of public accommodations to show proof of Covid vaccination or a negative PCR Covid test)

varied in what level of proof would qualify for receiving them.<sup>83</sup> Most regimes recognized religious exemptions, although among them there was significant variation with respect to what proof would be required and whether a person claiming such an exemption could instead secure admission through a negative test.<sup>84</sup> There is no systematic data available regarding the practices of the private venues and businesses that used vaccine passports on their own accord with respect to how they treated children and those claiming religious or medical exemptions.

Even as the vaccination campaign against Covid continued to roll out in the spring and summer of 2021, evidence emerged that the vaccinations' efficacy waned against not just infection, but also against severe disease and death.<sup>85</sup> For this reason, public health officials and the Biden administration began pressing for the release of a third mRNA—or “booster”—dose (or second shot of Janssen) in the fall of 2021.<sup>86</sup> In September and October 2021, the FDA authorized on an emergency use

<sup>83</sup> Diller, *supra* note 74, at 644.

<sup>84</sup> Evanston, Illinois, for instance, had the strictest requirements for obtaining religious exemptions from its vaccine passport regime; the city required anyone claiming an exemption to show “strong[ly] held beliefs with proof of a signed attestation from a religious leader or institution including a COVID-19 test administered by a medical professional within the last 24 hours prior to entering a business covered by the Order.” IKE C. OGBO, DEP'T HEALTH & HUM. SERVS., CITY OF EVANSTON, ILL., PUBLIC HEALTH ORDER OF JANUARY 14, 2022, <https://www.cityofevanston.org/home/showpublisheddocument/69423/637789730160500000>. Oak Park, Illinois, went even further and did not allow religious exemptions at all from its municipal vaccine passport regime. THERESA CHAPPLE-MCGRUDER, DEP'T PUB. HEALTH, VILLAGE OF OAK PARK, ILL., PUBLIC HEALTH ORDER REGARDING PROOF OF VACCINATION IN PUBLIC PLACES (2021), [https://www.oak-park.us/sites/default/files/health/covid-19-packets/orders/2021-12-30-vaccine\\_order.pdf](https://www.oak-park.us/sites/default/files/health/covid-19-packets/orders/2021-12-30-vaccine_order.pdf); *see also infra* Section III.B.

<sup>85</sup> *See* Erin Banco, *Biden Covid Team Sees Vaccine Efficacy Waning in Unpublished Data from Israel*, POLITICO, <https://www.politico.com/news/2021/09/14/covid-israel-data-vaccine-efficacy-511777> (Sept. 14, 2021, 1:44 PM).

<sup>86</sup> Jonathan Ponciano, *Biden Administration Plans to Begin Providing Covid-19 Vaccine Booster Shots September 20*, FORBES (Aug. 18, 2021, 11:57 AM), <https://www.forbes.com/sites/jonathanponciano/2021/08/18/biden-administration-plans-to-begin-providing-covid-19-vaccine-booster-shots-sept-20/>. For the Janssen (or Johnson & Johnson vaccine), the Biden administration pressed for a second shot, or “booster” despite the vaccine having been advertised as a “one-shot” vaccine unlike the mRNA vaccines. Ultimately, the FDA and CDC concluded that those who had received the Janssen vaccine should get a “booster,” or second shot, a mere two months after their first shot. Press Release, U.S. Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Takes Additional Actions on the Use of a Booster Dose for COVID-19 Vaccines (Oct. 20, 2021), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-takes-additional-actions-use-booster-dose-covid-19-vaccines>.

More recently, the FDA has advised against taking the Janssen vaccine entirely, except in circumstances in which no other vaccine will work for a person. U.S. FOOD & DRUG ADMIN., FACT SHEET FOR HEALTHCARE PROVIDERS ADMINISTERING VACCINE: EMERGENCY USE AUTHORIZATION (EUA) OF THE JANSSEN COVID-19 VACCINE TO PREVENT CORONAVIRUS DISEASE 2019 (COVID-19) 1 (2022).

basis booster doses for the three previously authorized vaccines.<sup>87</sup> The authorization was initially for older persons and those at higher risk of severe Covid, and for a dose to be administered, in the case of the mRNA vaccines, at least six months after the last of the initial two-shot series.<sup>88</sup> In November 2021, the CDC expanded its booster recommendation to *all* adults 18 years and older.<sup>89</sup> In early January 2022, the FDA expanded its booster recommendation down to 12 years of age (for Pfizer) and reduced the time increment before the booster to five months for the mRNA vaccines.<sup>90</sup> In March 2022, the FDA authorized for emergency use a second booster dose for persons 50 and older; unlike the prior booster, the CDC did not initially recommend the uptake of this booster but merely suggested patients consider it as part of their overall risk and health calculus.<sup>91</sup> Moreover, the FDA authorized an increment for the fourth mRNA shot—second booster—a mere four months after the third shot/first booster.<sup>92</sup> Soon after, the CDC recommended that those over 65 receive a fourth shot while still suggesting it as just an option for those 50 years and older; several weeks later, in May 2022, the CDC recommended that all persons 50

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<sup>87</sup> Press Release, U.S. Food & Drug Admin., FDA Authorizes Booster Dose of Pfizer-BioNTech COVID-19 Vaccine for Certain Populations (Sept. 22, 2021), <https://www.fda.gov/news-events/press-announcements/fda-authorizes-booster-dose-pfizer-biontech-covid-19-vaccine-certain-populations>; Press Release, U.S. Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Takes Additional Actions on the Use of a Booster Dose for COVID-19 Vaccines (Oct. 20, 2021), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-takes-additional-actions-use-booster-dose-covid-19-vaccines>.

<sup>88</sup> *Id.* For the Janssen vaccine, the increment for the booster, when authorized in fall 2021, was a mere two months, *Janssen COVID-19 Vaccine (Johnson & Johnson): Standing Orders for Administering Vaccine to Persons 18 Years of Age and Older*, CDC (May 24, 2022), <https://www.cdc.gov/vaccines/covid-19/info-by-product/janssen/downloads/janssen-standing-orders.pdf>, thereby raising the question of whether it really was a “one-shot” vaccine in the first place.

<sup>89</sup> Press Release, Ctrs. Disease Control & Prevention, CDC Expands Eligibility for COVID-19 Booster Shots to All Adults, Center for Disease Control and Prevention (Nov. 19, 2021), <https://www.cdc.gov/media/releases/2021/s1119-booster-shots.html>.

<sup>90</sup> Press Release, U.S. Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Shortens Interval for Booster Dose of Moderna COVID-19 Vaccine to Five Months (Jan. 7, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-shortens-interval-booster-dose-moderna-covid-19-vaccine-five-months>.

<sup>91</sup> Press Release, U.S. Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Authorizes Second Booster Dose of Two COVID-19 Vaccines for Older and Immunocompromised Individuals (Mar. 29, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-second-booster-dose-two-covid-19-vaccines-older-and>; Brenda Goodman, *Second Booster Shots Authorized for Adults 50 and Older*, CNN (Mar. 29, 2022, 4:34 PM), <https://www.cnn.com/2022/03/29/health/covid-second-booster/index.html> (“The CDC’s update is what’s known as a permissive recommendation, a statement that the shots may be used in this age group for those who want them . . . . [b]ut it’s not an official recommendation.”).

<sup>92</sup> Press Release, U.S. Food and Drug Admin., *supra* note 91.

and above get a fourth mRNA shot if their previous (third) shot was at least four months earlier.<sup>93</sup>

In May 2022, the FDA authorized and the CDC recommended a booster dose for children ages 5 to 11 at least five months after the last of the first two doses.<sup>94</sup> In June 2022, the FDA authorized and the CDC recommended the Moderna and Pfizer vaccines for ages six months through 5 years,<sup>95</sup> and in the same process, predicted that boosters would be likely further down the pike for this cohort, just like for all other age groups.<sup>96</sup> By the time of this writing, the FDA has also authorized for emergency use and the CDC recommended a reformulated “bivalent” booster, aimed at the original strain of Covid and two Omicron subvariants that were widely circulating in summer 2022, for ages 5 and up.<sup>97</sup>

While only one municipal vaccine passport regime—Maui’s—required boosters for public accommodations,<sup>98</sup> others incorporated boosters into their regime

<sup>93</sup> Sharon LaFraniere, *C.D.C. Urges Adults 50 and Older to Get Second Booster Shot*, N.Y. TIMES (May 20, 2022), <https://www.nytimes.com/2022/05/20/us/politics/cdc-second-booster.html>.

<sup>94</sup> Press Release, U.S. Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Expands Eligibility for Pfizer-BioNTech COVID-19 Vaccine Booster Dose to Children 5 through 11 Years (May 17, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-expands-eligibility-pfizer-biontech-covid-19-vaccine-booster-dose>.

<sup>95</sup> Press Release, Vaccine Booster 6 Months of Age, *supra* note 62.

<sup>96</sup> Carrie Macmillan, *COVID-19 Vaccines for Kids Under 5: What Parents Need to Know*, YALE MED. (Dec. 19, 2022), <https://www.yalemedicine.org/news/covid-19-vaccines-kids-under-5>.

<sup>97</sup> The FDA initially authorized the Pfizer booster for ages 12 and up and the Moderna booster for ages 18 and up in late August 2022. Press Release, U.S. Food & Drug Admin., Coronavirus (Covid-19) Update: FDA Authorizes Moderna, Pfizer-BioNTech Bivalent COVID-19 Vaccines for Use as a Booster Dose (Aug. 31, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-moderna-pfizer-biontech-bivalent-covid-19-vaccines-use>. In October, the FDA expanded the authorization to include children as young as 5 (Pfizer), or 6 for Moderna. Press Release, U.S. Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Authorizes Moderna and Pfizer-BioNTech Bivalent COVID-19 Vaccines for Use as a Booster Dose in Younger Age Groups (Oct. 12, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-moderna-and-pfizer-biontech-bivalent-covid-19-vaccines>. Everyone age-eligible for a bivalent booster could receive it a mere two months after either his or her last booster or completing a primary series of vaccination. *See id.*

<sup>98</sup> Wendy Osher, *Booster Required on Maui to Be Considered Fully Vaccinated, Effective Monday, Jan. 24*, MAUI NOW, <https://mauiNOW.com/2022/01/21/booster-required-on-maui-to-be-considered-fully-vaccinated-effective-monday-jan-24/> (Jan. 23, 2022, 11:30 AM) (“Proof of a booster will be required to confirm patrons are ‘up to date’ with their vaccination, if they want to dine indoors at a restaurant or bar, or exercise inside of a gym.”).

with respect to employees of such establishments.<sup>99</sup> Several accommodations, however, announced on their own that they would require boosters for admission. These included prominent performing arts organizations, such as the Metropolitan Opera in New York City,<sup>100</sup> as well as many restaurants.<sup>101</sup> Moreover, dozens of universities required booster doses of faculty, staff, students, and in some cases even visitors;<sup>102</sup> in at least one instance, a college required the second booster from those eligible over 50 after it was authorized in spring 2022.<sup>103</sup> A few dozen universities also instituted requirements for faculty, staff, and students to receive the bivalent boosters in fall 2022.<sup>104</sup> However, while there are reports of small numbers of restaurants implementing a booster requirement for dining indoors in late 2021 and early 2022, these reports were few and far between indicating that most restaurants that screened for proof of vaccination asked only for the “primary series.”<sup>105</sup>

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<sup>99</sup> Berkeley, California, for instance, required “public and private childcare facilities, dental offices, pharmacies, adult care facilities, adult day care programs, and home health care workers and entities employing home healthcare workers” to “require and obtain proof of up-to-date vaccination from all workers. Employees in these workplaces are required to get boosters when eligible or test weekly once fully vaccinated with limited exception . . . .” *COVID-19 Restrictions: California’s Economy Has Reopened with Some Local and Statewide Restrictions*, CITY OF BERKELEY, <https://berkeleyca.gov/safety-health/covid-19/covid-19-restrictions> (Apr. 27, 2022) [<https://web.archive.org/web/20220517074348/https://berkeleyca.gov/safety-health/covid-19/covid-19-restrictions>].

<sup>100</sup> *The Met Announces Covid-19 Booster Mandate Beginning January 17*, METRO. OPERA (Dec. 15, 2021), <https://www.metopera.org/about/press-releases/the-met-announces-covid-19-booster-mandate—beginning-january-17/>.

<sup>101</sup> Jaya Saxena, *Three Shots or Bust*, EATER (Jan. 5, 2022, 9:21 AM), <https://www.eater.com/22867365/restaurant-booster-mandates-proof-of-vaccination> (“Across the country, restaurants are beginning to mandate booster shots for eligible diners.”).

<sup>102</sup> See Andy Thomason & Brian O’Leary, *Here’s a List of Colleges that Require Students or Employees to Be Vaccinated Against Covid-19*, CHRON. HIGHER EDUC., <https://www.chronicle.com/blogs/live-coronavirus-updates/heres-a-list-of-colleges-that-will-require-students-to-be-vaccinated-against-covid-19> (Jan. 26, 2022); Peggy Bresnick, *Colleges and Universities Boost Their COVID Requirements*, FIERCE EDUC. (Jan. 5, 2022, 9:37 AM), <https://www.fierceducation.com/leadership/colleges-and-universities-boost-their-covid-booster-requirements> (reporting 61 universities or colleges as requiring boosters).

<sup>103</sup> See, e.g., *Jurist in Residence: Judge Bernice Donald, U.S. Court of Appeals for the Sixth Circuit*, FORDHAM UNIV., <https://go.activecalendar.com/FordhamUniversity/site/law/event/jurist-in-residence-judge-bernice-donald-us-court-of-appeals-for-the-sixth-circuit/> (last visited May 21, 2023) (noting that all attendees 50 or over “are required to have a second booster shot, if eligible”).

<sup>104</sup> Jennifer Henderson, *Some Universities Require Bivalent COVID Booster*, MEDPAGE TODAY (Nov. 2, 2022), <https://www.medpagetoday.com/special-reports/features/101549>; Evan Castilla & Chloe Appleby, *These Are the Colleges Requiring Vaccine Boosters Now*, BESTCOLLEGES (Sept. 15, 2022), <https://www.bestcolleges.com/news/2021/12/14/what-colleges-require-covid-vaccine-booster-omicron/> (listing a handful of colleges with bivalent booster requirements).

<sup>105</sup> See, e.g., Kasia Pawlowska, *San Francisco Bay Area Restaurants Requiring Booster Shot for Indoor Dining*, LOCAL GETAWAYS CAL., <https://localgetaways.com/california/san-francisco-bay->

Despite the variation in substantive scope and coverage among the municipal vaccine passport regimes within the United States, none of them permitted proof of recent prior infection—so-called “natural immunity”—to serve as an alternative means to entry to regulated venues. In Europe, by contrast, the E.U. Covid Digital Passport allowed proof of recent infection back to 180 days as a potentially valid means of entry, and several countries or subnational jurisdictions recognized this natural-immunity exception to their vaccine passport regimes.<sup>106</sup> Just how much natural, infection-based—as opposed to vaccine-generated—immunity should be recognized as conferring protection has been a source of much dispute in the scientific and political spheres during the pandemic.<sup>107</sup>

### C. *Political and Ideological Support for and Opposition to Vaccine Passports*

As noted above, different sides of the political spectrum opposed vaccine mandates in Europe and elsewhere, whereas in the United States, political opposition emerged almost exclusively from the “right” in American politics—i.e., many Republican officials and politicians. Arguing that the choice to be vaccinated or not against Covid was a matter of medical freedom and privacy, several Republican legislators at the state level proposed bills that banned vaccine passports in various forms, often following or supplementing vaccine passport bans put into place earlier by governors using emergency powers.<sup>108</sup> Several of these bills became law, but there was significant variation among them. Some prohibited state agencies and entities—including, in some cases, universities—from requiring Covid vaccines as a condition

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area-restaurants-requiring-booster-shot-for-indoor-dining/ (last visited May 21, 2023) (listing six restaurants or cafes in San Francisco requiring proof of booster and three establishments in Oakland).

<sup>106</sup> *EU Digital COVID Certificate*, *supra* note 34; see also Jonathan Pugh, Julian Savulescu, Rebecca C. H. Brown & Dominic Wilkinson, *The Unnaturalistic Fallacy: COVID-19 Vaccine Mandates Should Not Discriminate Against Natural Immunity*, 48 J. MED. ETHICS 371, 371 (2022) (“Some vaccine passport schemes (such the [sic] Israeli scheme) have also granted passes to unvaccinated individuals who provide either (1) a recent negative test result from stipulated viral detection tests (such as PCR and lateral flow antigen tests) or (2) proof of recent recovery from COVID-19.” (footnote omitted)).

<sup>107</sup> *E.g.*, Pugh et al., *supra* note 106, at 371–73; Marty Makary, Opinion, *The High Cost of Disparaging Natural Immunity to COVID*, WALL ST. J. (Jan. 26, 2022, 11:52 AM), <https://www.wsj.com/articles/the-high-cost-of-disparaging-natural-immunity-to-covid-vaccine-mandates-protests-fire-rehire-employment-11643214336> (criticizing the CDC for downplaying the effectiveness of natural immunity at preventing infection as compared to vaccination).

<sup>108</sup> *See, e.g.*, GREG ABBOTT, EXEC. ORDER NO. GA-35: RELATING TO COVID-19 VACCINES AND THE PROTECTION OF TEXANS’ PRIVATE HEALTH INFORMATION (2021) (prohibiting, among other things, “any public or private entity that is receiving or will receive public funds” from adopting a vaccine passport requirement). This order was followed by the Texas legislative vaccine passport ban discussed below.

of employment, enrollment, or access.<sup>109</sup> Some bans applied further to the property or facilities of local agencies and entities.<sup>110</sup> Some bans also or instead applied to private entities that received public funding.<sup>111</sup>

Most relevant to this Article, eight states—Alabama, Florida, Iowa, Montana, North Dakota, South Carolina, and Texas—passed laws that banned “public accommodations” or “businesses” from requiring proof of vaccination in order to enter or patronize.<sup>112</sup> These laws also included many of the other types of provisions common in other states, such as prohibiting any level of government from issuing a vaccine passport, and limiting educational institutions’ use of vaccine requirements.<sup>113</sup> Montana, South Carolina, and Utah use the term “public accommodations” in describing the entities to which the laws apply.<sup>114</sup> The relevant, selected text from each of these eight states’ laws is copied in to the chart below:

TABLE 1.

State	Vaccine Passport Law Text
Alabama	“An entity or individual doing business in this state may not refuse to provide any goods or services, or refuse to allow admission, to a customer based on the customer’s immunization status or lack of documentation that the customer has received an immunization.” Act of May 24, 2021, No. 493, § 1(d), 2021 Ala. Laws (codified as amended at ALA. CODE § 22-11B-5(d) (2023)).
Florida	“A business entity, as defined in s. 768.38 to include any business operating in this state, may not require patrons or customers to provide any documentation certifying COVID-19 vaccination . . . to gain access to, entry upon, or service from the business operations in this state.” Act of May 3, 2021, § 18(1), 2021 Fla. Laws ch. 8 (codified as amended at FLA. STAT. § 381.00316(1) (2021)). <sup>115</sup>

<sup>109</sup> *E.g.*, State Government Vaccination Policies About Vaccine Requirements (Vaccine Passports), BALLOTPEdia, [https://ballotpedia.org/State\\_government\\_policies\\_about\\_vaccine\\_requirements\\_\(vaccine\\_passports\)](https://ballotpedia.org/State_government_policies_about_vaccine_requirements_(vaccine_passports)) (Jan. 18, 2023).

<sup>110</sup> See, for example, North Dakota House Bill 1465, which bans local governments and most businesses adopting a vaccine passport requirement. H.B. 1465, 67th Leg., Reg. Sess. (N.D. 2021).

<sup>111</sup> *E.g.*, GREG GIANFORTE, EXEC. ORDER NO. 7-2021: PROHIBITING VACCINE PASSPORTS (2021); GOVERNOR GREG ABBOTT, EXEC. ORDER NO. GA-40: RELATING TO PROHIBITING VACCINE MANDATES, SUBJECT TO LEGISLATIVE ACTION (2021).

<sup>112</sup> See *infra* tbl.1.

<sup>113</sup> See, *e.g.*, Act of May 24, 2021, No. 493, § 1(d), 2021 Ala. Laws (codified as amended at ALA. CODE § 22-11B-5(d) (2023)).

<sup>114</sup> See *infra* tbl.1.

<sup>115</sup> See *Norwegian Cruise Line Holdings Ltd. v. State Surgeon Gen.*, 50 F.4th 1126 (11th Cir. 2022) (upholding the statute as constitutional).

Iowa	“[A] business . . . shall not require a customer, patron, client, patient, or other person who is invited onto the premises of the business . . . to furnish proof of having received a vaccination for COVID-19 . . . prior to entering onto the premises of the business . . . .” Act of May 20, 2021, § 2(1), 2021 Iowa Acts ch. 141 (codified as amended at IOWA CODE § 27C.2(1) (2023)). <sup>116</sup>
Montana	“[I]t is an unlawful discriminatory practice for . . . a public accommodation to exclude, limit, segregate, refuse to serve, or otherwise discriminate against a person based on the person’s vaccination status or whether the person has an immunity passport.” Act of May 7, 2021, § 1(1)(c), 2021 Mont. Laws ch. 418 (codified as amended at MONT. CODE ANN. § 49-2-312(1)(c) (2021)). <sup>117</sup>
North Dakota	“A private business located in this state may not require a patron or customer to provide any documentation certifying vaccination or post-transmission recovery to gain access to, entry upon, or services from the business. This subsection does not apply to . . . a health care provider including a long-term care provider . . . .” Act of May 7, 2021, § 1(2), 2021 N.D. Laws ch. 204 (codified as amended at N.D. CENT. CODE § 23-12-20(3) (2023)). <sup>118</sup>
South Carolina	“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination or segregation on the basis of the person’s vaccination status.” Act of Apr. 25, 2022, § 9(A), 2022 S.C. Acts 1552, 1556. <sup>119</sup>

<sup>116</sup> The Iowa statute defines “business” as:

[A] retailer required to obtain a sales tax permit . . . a nonprofit or not-for-profit organization, or an establishment which is open to the public at large or where entrance is limited by a cover charge or member requirement, but does not include a health care facility as defined [under state law].

IOWA CODE § 27C.2(3)(a) (2023).

<sup>117</sup> The Montana legislation includes limited exceptions for health care facilities. MONT. CODE ANN. § 49-2-312(3)(a) (2021). In December 2022, a U.S. district court held that the statute was unconstitutional, at least as applied to health care providers. Appeals to the Ninth Circuit are pending. *Mont. Med. Ass’n v. Knudsen*, No. CV 21-108-M, 2022 WL 17551162 (D. Mont. Dec. 9, 2022), *appeal docketed*, No. 23-35014 (9th Cir. Jan. 9, 2023); *see also* H.B. 645, 68th Leg., 2023 Sess. § 3 (Mont. 2023) (creating an exemption from the prohibition on discrimination based on vaccine status for certain medical procedures).

<sup>118</sup> *See also* N.D. CENT. CODE § 23-12-20(3) (2023) (exempting various health care providers). The North Dakota legislature amended the statute in November 2021 to include COVID-19-specific language. Act of Nov. 12, 2021, § 2(3), 2021 N.D. Laws ch. 558; *see also* S.B. 2274, 68th Leg., 2023 Reg. Sess. § 1(3) (N.D. 2023) (broadening the vaccine passport provision to prohibit businesses from requiring documentation of any “vaccination authorized by the federal food and drug administration under emergency use authorization”).

<sup>119</sup> In its vaccine passport ban, South Carolina defines a “place of public accommodation” to include all sorts of venues such as inns, hotels, motels, restaurants, movie theaters, retail or wholesale establishments, concert halls, sports arenas and stadiums, golf courses, and even

Texas	“A business in this state may not require a customer to provide any documentation certifying the customer’s COVID-19 vaccination or post-transmission recovery on entry to, to gain access to, or to receive service from the business. A business that fails to comply with this subsection is not eligible to receive a grant or enter into a contract payable with state funds.” Act of June 16, 2021, § 14(c), 2021 Tex. Sess. Law Serv. ch. 863 (West) (codified as amended at TEX. HEALTH & SAFETY CODE ANN. § 161.0085(c) (West 2023)).
Utah	“All persons . . . are entitled to full and equal accommodations, advantages, facilities, privileges, goods, and services in all business establishments and in all places of public accommodation, and by all enterprises regulated by the state of every kind whatsoever, without discrimination on the basis of immunity status.” Act of Mar. 15, 2023, § 1(2), 2023 Utah Laws ch. 275 (codified as amended at UTAH CODE ANN. § 13-7-5(2) (LexisNexis 2023)).

With some exceptions, therefore, these eight states treated vaccination status—in three of the eight states, just Covid vaccination status—as a protected class akin to race, sex, religion, etc., under public accommodations law. Other states did not ban private entities from vaccine passports outright, but specifically preempted local authority to implement such a regime.<sup>120</sup>

Interestingly, all eight states to ban vaccine passports in public accommodations had Republican “trifectas”—that is, state legislatures in which both houses are Republican-controlled, as well as a Republican governor. Most of the other states, such as Arizona, Georgia, and Idaho, that implemented other restrictions on vaccine passports also had such trifectas. The cities that adopted mandatory vaccine passport regimes, by contrast, were all strongly Democratic leaning, some with Democratic mayors and city councils and others with nominally nonpartisan chief executives and other elected officials.<sup>121</sup> Interestingly, in some Republican-controlled state legislatures, there was a significant divide between those who wanted to ban vaccine

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hospitals, although the law also requires the presence of “state action” in the form of governmental licensing or permitting. Act of Apr. 25, 2022, § 9(C), 2022 S.C. Acts 1552, 1556–57.

<sup>120</sup> See, e.g., BRIAN KEMP, EXEC. ORDER: PROHIBITION OF COVID-19 VACCINE PASSPORTS (2021); ARIZ. REV. STAT. ANN. § 36-681 (2021), *invalidated by* Ariz. Sch. Bd. Ass’n v. State, 501 P.3d 731 (Ariz. 2022) (current version at ARIZ. REV. STAT. ANN. § 36-681 (2022)).

<sup>121</sup> See Diller, *supra* note 74 at 652–56 (listing cities). New York City, Chicago, Philadelphia, and San Francisco, for instance, all had Democratic mayors at the time of their adoption of vaccine passports. Minneapolis and St. Paul, by contrast, elect city officers on a nonpartisan basis, though the cities’ voters overwhelmingly prefer Democrats in partisan elections. See André Munro, *Bill de Blasio*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Bill-de-Blasio> (Mar. 1, 2023) (New York); *Lori Lightfoot*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Lori-Lightfoot> (Oct. 7, 2022) (Chicago); *James Kenney*, BALLOTPEdia, [https://ballotpedia.org/James\\_Kenney](https://ballotpedia.org/James_Kenney) (last visited May 21, 2023) (Philadelphia); *London Breed*, BALLOTPEdia, [https://ballotpedia.org/London\\_Breed](https://ballotpedia.org/London_Breed) (last visited May 21, 2023) (San Francisco);

passports in public accommodations and those who agreed with the sentiment but thought it was more important to protect private business's prerogative to run their operations as they see fit.<sup>122</sup>

Despite the potential for vaccine passports to exclude disproportionately on the basis of race, Democrats and leftist groups generally supported, or at least did not actively oppose, vaccine passport regimes in the United States. While no state imposed a vaccine passport at the state level, in states with Democratic trifectas—such as Oregon, Washington, and New York—the legislatures stymied Republican proposals to ban vaccine passports.<sup>123</sup> Moreover, some of these states, including some with a Democratic governor (but a Republican legislature), such as Louisiana, readily provided the technological infrastructure upon which cities built to implement their vaccine passport systems.<sup>124</sup> In supporting vaccine passports and other pandemic interventions such as mandatory masking, Democratic officials often spoke of the need to protect “Black, Indigenous, people of color, and immigrant community members” from suffering disproportionate harms from Covid.<sup>125</sup> Thus, implicit in the left-wing acceptance of vaccine passports was a tradeoff: any potential discrimination in public accommodations could be worth more expected protection from a disease that had imposed uneven harm on minority populations.

There was some scattered skepticism of and opposition to vaccine passports among left-wing officials and groups. As noted above, St. Louis's self-described “progressive” Mayor Jones decried the coming of a “show us your papers moment” in which proof of vaccine would be required for indoor masklessness.<sup>126</sup> In New

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*Primary Election*, MINN. SEC'Y OF STATE, <https://www.sos.state.mn.us/elections-voting/how-elections-work/primary-election/> (last visited May 21, 2023).

<sup>122</sup> Kathryn Watson, *GOP Governors' Split on Private COVID Vaccine Mandates Highlights Changing Republican Base*, CBS NEWS (Jan. 11, 2022, 1:03 PM), <https://www.cbsnews.com/news/covid-vaccine-mandate-republican-governors-private-businesses/> (discussing Indiana, Oklahoma, and New Hampshire); see Paul A. Diller, *Idaho Rejects “Vaccine Passport” Ban Amid National Debate*, 59 IDAHO L. REV. (forthcoming 2023) (draft on file with author).

<sup>123</sup> E.g., H.B. 3407, 81st Leg. Assemb., Reg. Sess. (Or. 2021); H.R. 1570, 67th Leg., Sess. (Wash. 2021).

<sup>124</sup> *Louisiana Expands LA Wallet to Include an Individual's COVID-19 Vaccine Verification Information for Those Who Opt-In*, LA. OFF. OF THE GOVERNOR (May 5, 2021), <https://gov.louisiana.gov/index.cfm/newsroom/detail/3103>; the others include Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Virginia, Minnesota, Colorado, Nevada, Oregon, Washington, California, and Hawaii. *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, NASHP, <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/> (Dec. 27, 2022).

<sup>125</sup> E.g., Emergency Reg. No. 2020-12, City of Minneapolis (May 21, 2020).

<sup>126</sup> Kevin Killeen, *St. Louis Mayor Signals Openness to Vaccine Passports*, KMOX (Aug. 17, 2021, 5:03 AM), <https://www.audacy.com/kmox/news/local/st-louis-mayor-signals-openness-to-vaccine-passports>. Later, St. Louis would explore the option of implementing a municipal vaccine passport regime, but ultimately chose not to.

York City, a melee between customers and staff that grew out of enforcement of the city's vaccine passport requirement at a popular Italian restaurant on the Upper West Side (Carmine's) led to the arrests of three African-American tourists from Texas.<sup>127</sup> In response to this incident, Black Lives Matter protested both the restaurant and New York City's vaccine passport policy itself, calling the latter discriminatory and likely to lead to police brutality in enforcement.<sup>128</sup> Boston's interim mayor, Kim Janey, analogized New York City's vaccine passport system to requirements "[d]uring slavery, post slavery, as recent as you know what immigrant population has to go through here" to "show their papers,"<sup>129</sup> before later apologizing though remaining opposed to the policy.<sup>130</sup> Her elected successor as mayor, Michelle Wu, would later implement a mandatory municipal vaccine passport.<sup>131</sup> Despite these incidents or comments and a handful of others, however, opposition to vaccine passports never took hold more widely among established leftist groups in the United States as it did, to some degree, in Europe.<sup>132</sup>

Examining closely the vaccine passport regimes in the United States, however, one could see limits to the various officials' desire to use such tools to coerce vaccine compliance. Whereas other countries required proof of vaccination to ride public transportation and enter grocery stores,<sup>133</sup> no official in the United States seriously

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<sup>127</sup> Jon Brown, *Black Lives Matter Holds 'Cancel Carmine's' Protest in New York City*, FOX NEWS (Sept. 20, 2021, 10:05 AM), <https://www.foxnews.com/politics/blm-holds-cancel-carmines-protest-in-nyc>.

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

<sup>129</sup> *Boston Mayor Compares Vaccine Passports to Slave Papers, Birtherism*, WCVB (Aug. 3, 2021, 4:47 PM), <https://www.wcvb.com/article/boston-mayor-janey-compares-vaccine-passports-to-slave-papers-birtherism/37213542#>.

<sup>130</sup> See Nik DeCosta-Klipa, *Kim Janey Expresses Regret Over Vaccine Passport Comments, but Remains Opposed to the Idea*, BOSTON.COM (Aug. 5, 2022), <https://www.boston.com/news/politics/2021/08/05/kim-janey-regrets-vaccine-passport-comments/>.

<sup>131</sup> *Boston Mayor Announces 'Vaccine Requirement for Select Indoor Spaces'*, WCVB, <https://www.wcvb.com/article/boston-covid-vaccine-passport-id-requirement-mayor-wu-announcement-dec-20-2021/38568210#> (Dec. 21, 2021, 10:58 PM); *Introducing B Together*, CITY OF BOSTON, <https://www.boston.gov/departments/mayors-office/introducing-b-together> (Jan. 1, 2022) [<http://web.archive.org/web/20220201134302/https://www.boston.gov/departments/mayors-office/introducing-b-together>].

<sup>132</sup> See *supra* notes 38–40 and accompanying text.

<sup>133</sup> E.g., Charlette Trattner, *Unvaccinated Italians Now Barred from Public Transport Unless Recently Recovered from COVID*, NEWSWEEK (Jan. 10, 2022, 11:36 AM), <https://www.newsweek.com/unvaccinated-italians-now-barred-public-transport-unless-recently-recovered-covid-1667461> (Italy).

proposed going so far, even though such venues could be as crowded as the restaurants and theaters to which vaccine passport regimes applied.<sup>134</sup> Moreover, the executive branch of the federal government flirted with requiring vaccination for air travel but ultimately never required it, unlike other countries including Canada.<sup>135</sup> In addition, no official credibly suggested requiring proof of vaccination for the receipt of public benefits like Social Security, Medicare, Medicaid, Housing Choice Vouchers, or public housing, the latter of which, at least in dense, multi-unit dwellings, might have been justified on the basis of communal spread. Similarly, aside from Puerto Rico, an island with a uniquely tourism-dependent economy, no vaccine passport regime applied to hotels and motels.<sup>136</sup> No jurisdiction required proof of vaccination for in-person voting either.

Hence, the public vaccine passport regimes were overwhelmingly limited to venues and activities that might be seen as more “optional” than necessary—movies, gyms, eating in a restaurant (but not takeout or delivery), concerts, theaters, stadiums—a limitation that may have revealed an underlying unease, even among supporters, with extending the coercion of such regimes too far. What vaccine passport regimes and their defenders failed to acknowledge, however, was that the common-law distinction between “optional” and “necessary” public accommodations was murky, and had been questioned for decades by judges and legal commentators.

## II. THE COMMON-LAW REGIME AS APPLIED TO PUBLIC ACCOMMODATIONS

In the 42 states in which vaccine passports were not banned, the proprietors of shops, restaurants, concert venues, and the like have *some* right to exclude patrons whom they prefer not to serve. In one state, Mississippi, the legislature in 1956, in reaction to *Brown v. Board of Education* and in an effort to head off the emerging

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<sup>134</sup> See *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting) (“[S]hops and liquor stores generally do not feature customers gathering inside to . . . speak together for an hour or more at a time.”).

<sup>135</sup> Sarah O’Brien, *Fauci Says U.S. Should Consider Vaccine Mandate for Domestic Air Travel, but Doesn’t Expect It for Now*, CNBC (Dec. 27, 2021), <https://www.cnn.com/2021/12/27/fauci-says-us-should-consider-vaccine-mandate-for-domestic-air-travel.html>; e.g., *Mandatory COVID-19 Vaccination Requirements for Federally Regulated Transportation Employees and Travelers*, TRANSPORT CANADA (October 6, 2021), <https://www.canada.ca/en/transport-canada/news/2021/10/mandatory-covid-19-vaccination-requirements-for-federally-regulated-transportation-employees-and-travellers.html> (Canada).

<sup>136</sup> Derek Norman, *Some Hotels Are Mandating Vaccines. Will Others Follow?*, N.Y. TIMES, (Aug. 30, 2021), <https://www.nytimes.com/2021/08/27/travel/hotels-vaccine-mandate.html>.

civil rights movement, codified the right of all private venue owners to limit customers as they preferred, a statute which remains in effect.<sup>137</sup> Defenders of vaccine passports often recite the ubiquitous “no shoes, no shirt, no service” signs as precedent for the idea that a business can choose its customers, and can therefore screen for proof of vaccination. Notwithstanding efforts like Mississippi’s, however, the Anglo-American legal system has long limited the ability of certain businesses open to the public to decline service to willing customers.<sup>138</sup>

The law of public accommodations has reflected the tension between compelling norms on either side. Those who prioritize the right to exclude emphasize the values of personal and corporate autonomy, security, the ability to shape a business or venue as one wishes, and relatedly, the freedom to choose with whom and what messages to associate, even in a primarily commercial setting.<sup>139</sup> On the other side of the debate is society’s interest in allowing all individuals access to the marketplace and other venues and services, for both utilitarian and dignitary reasons.<sup>140</sup> As evidenced throughout U.S. history, limiting access to public accommodations, even if done “freely” by private actors, can be a powerful means of subjugating certain populations and reinforcing pre-existing hierarchies that the public, acting through its political and legal systems, may think necessary and just to attempt to dismantle.<sup>141</sup>

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<sup>137</sup> See Joseph William Singer, *We Don’t Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 933–34 (2015) (citing MISS. CODE ANN. § 97-23-17 (2011)).

<sup>138</sup> Indeed, “businesses are private and can do what they want with their property” was a common argument against expanding civil rights laws in the 1960s. See Richard R.B. Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135, 139 (1963) (“[H]e who owns, may do as he pleases with what he owns.”).

<sup>139</sup> See, e.g., Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PENN. L. REV. 1095, 1117 (2007) (discussing “southern whites” opposing lunch counter sit-in protests of the 1960s as “lawless violators of private property rights”); *id.* at 1131–32 (noting that control over private property “permits us to communicate . . . autonomy to our fellow citizens”); Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1291 (2014) (arguing that “the right to associate, or not to associate, with people of one’s own choosing” is “one of the most fundamental of human rights”).

<sup>140</sup> See Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 627 (2015) (noting that “[a]ntidiscrimination law[s] multiple purposes [including in the public accommodations context, are] the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination”).

<sup>141</sup> *Id.* at 620; see also Peñalver & Katyal, *supra* note 139, at 1114–15 (noting that segregation at restaurants in the South before the 1960s “was not accomplished by mandate of state or local law” but rather due to private property owners choosing to comply with “local custom”). In some Southern jurisdictions, however, state or local laws mandating segregation in public accommodations persisted even after many were repealed out of fear of being struck down as unconstitutional state action. See, e.g., *Robinson v. Florida*, 378 U.S. 153, 156 (1964) (discussing

A. *Duty to Serve Under the Common Law and Its Limits*

Under the old English and early American common law, “common carriers”—that is, providers of transportation, whether publicly or privately owned<sup>142</sup>—and innkeepers were required to take all customers unless they had a good reason not to do so.<sup>143</sup> The duty of an innkeeper was not absolute, according to some sources; it extended only to travelers.<sup>144</sup> Moreover, the innkeeper could refuse to serve a traveler for reasons such as the customer’s inability to pay, the threat he posed to other customers, or the potential disruption of the good working order of the business.<sup>145</sup>

Some commentators, such as Harvard Law professor Joseph Singer, read the historical record expansively and argue that the “duty to serve” under the antebellum common law applied to *any* business that held itself out as open to the public, not just to common carriers and innkeepers.<sup>146</sup> There is also some postbellum case law to that effect.<sup>147</sup> Singer argues that the original rationale for the duty to serve under

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state regulation that required separate lavatories for races in restaurants); *Peterson v. City of Greenville*, 373 U.S. 244, 246 (1963) (reviewing a Greenville, South Carolina, ordinance “requiring separation of the races in restaurants”); David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 658 n.69 (1995) (citing a Birmingham, Alabama, city ordinance that prohibited restaurants from serving both black and white customers at the same time). *But see* Marion A. Wright, *The Sit-in Movement: Progress Report and Prognosis*, 9 WAYNE L. REV. 445, 445 (1963) (noting that legislatures and city councils in “the late Confederacy” have “for somewhat sinister reasons . . . repealed constitutional provisions, statutes, and ordinances requiring racial segregation” due to the “fairly obvious” “taint of state action”).

<sup>142</sup> *Gisbourn v. Hurst* (1710) 91 Eng. Rep. 220, 220 (“[A]ny man undertaking for hire to carry the goods of all persons indifferently [is] a common carrier.”).

<sup>143</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 164 (U. Chicago reprint 1979) (1768) (“[I]f an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler.”); *Jencks v. Coleman*, 13 F. Cas. 442, 443 (D. R.I. 1835) (No. 7,258) (noting that a common-carrier steamship with suitable accommodations was bound to take a passenger on board so long as “there was no reasonable objection to the character or conduct of the plaintiff”); JOSEPH HENRY BEALE, JR., THE LAW OF INNKEEPERS AND HOTELS INCLUDING OTHER PUBLIC HOUSES, THEATERS, SLEEPING CARS § 61, at 42 (1906) (“The fundamental duty of the innkeeper to the public, as a person engaged in public employment, is to receive for entertainment in his inn all travellers [sic] who properly apply to be admitted as guests.”); JOHN E. H. SHERRY, THE LAWS OF INNKEEPERS § 3:1, at 38 (3d ed. 1993) (“The duty placed upon one exercising a public calling is primarily a duty to serve every person as a member of the public.”).

<sup>144</sup> BEALE, *supra* note 143 at § 62, at 42.

<sup>145</sup> *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1322, 1337 (1996).

<sup>146</sup> *Id.* at 1303–04, 1331; *see also* Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 515–16 (1911).

<sup>147</sup> *E.g.*, *Ferguson v. Gies*, 46 N.W. 718, 720–21 (Mich. 1890).

the common law was that it was a condition imposed upon any business holding itself out as open to the public.<sup>148</sup> Unlike commentators of what he calls the classical period (late 1800s and early 1900s), Singer reads the historical record as rejecting the notion that the duty to serve was rooted in a rationale of necessity.<sup>149</sup> Hence, according to Singer, the duty to serve should not be limited just to common carriers and innkeepers, and also should apply to all willing customers of an enterprise, not just those who are traveling.<sup>150</sup> Further, there is evidence that among the original goals of the Fourteenth Amendment was securing equal access to public accommodations, which was considered a civil right under the common law of the time,<sup>151</sup> even if this goal was later frustrated by narrow readings of the Amendment in the *Slaughter-House* and *Civil Rights Cases*.<sup>152</sup> Indeed, Singer sees the narrowing of the duty to serve in the late 19th century as largely rooted in racial prejudice as Southern states sought to impose Jim Crow after the Civil War.<sup>153</sup>

Resolving the debate about the extent of the historical duty to serve is beyond the scope of this Article. Suffice it to say that by the mid-20th century, just as the civil rights movement began to gain steam with the passage of state and local level public accommodations antidiscrimination laws,<sup>154</sup> most state courts that weighed

<sup>148</sup> See Singer, *supra* note 145, at 1347–48 (“[Antebellum] cases . . . asserted, over and over again, that the duty [to serve] was based primarily on the fact that these businesses voluntarily made themselves servants of the public by holding themselves out as ready to provide important services to whomever sought them . . .”).

<sup>149</sup> *Id.* at 1408 n.571.

<sup>150</sup> *Id.* at 1448–49 (“Why the Right of Access Should Be Extended to All Places Open to the Public”); *id.* at 1445–46 (rejecting “monopoly” and “right to travel” justifications for, and limitations on, the duty to serve).

<sup>151</sup> *E.g.*, *Bell v. Maryland*, 378 U.S. 226, 290 (1964) (Goldberg, J., concurring) (“[I]t appears that the contemporary understanding of the general public was that freedom from discrimination in places of public accommodation was part of the Fourteenth Amendment’s promise of equal protection.”); see also *id.* at 303–04 (“In granting Negroes citizenship and the equal protection of the laws [through the Fourteenth Amendment], it was never thought that the States could permit the proprietors of inns and public places to restrict their general invitation to the public and to citizens in order to exclude the Negro public and Negro citizens.”).

<sup>152</sup> *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *The Civil Rights Cases*, 109 U.S. 3 (1883); Indeed, in his dissent in *The Civil Rights Cases*, Justice John Marshall Harlan observed that “the right of a colored person to use an improved public highway,” like any other common carrier, “upon the terms accorded to freemen of other races, is as fundamental, in the state of freedom established in this country, as are any of the rights which my brethren concede to be so far fundamental as to be deemed the essence of civil freedom.” *Id.* at 39.

<sup>153</sup> Singer, *supra* note 145, at 1351–90 (tracing the development of the law in this area from 1865 to 1896).

<sup>154</sup> *Bell*, 378 U.S. 226 at 284 app. V (Douglas, J., concurring) (State Antidiscrimination Laws) (demonstrating that many states had adopted laws prohibiting discrimination in public accommodations before the Civil Rights Act of 1964 and showing that many were adopted in the

in on the matter had moved firmly to the camp that the common law gave places of amusement and resort “an absolute power to serve whom they pleased.”<sup>155</sup> While a high percentage of the litigation centered around racetracks, the logic of the doctrine extended to concert halls, theaters, swimming pools, ice rinks, and even retail stores and restaurants.<sup>156</sup>

At least one state high court, however—the New Jersey Supreme Court—appeared to reject this view in 1982, holding in a well-known case involving a casino that *every* place that is open to the public—common carrier, innkeeper, or otherwise—could not exclude customers “unreasonably.”<sup>157</sup> Although some commentators, like Singer, make much of this decision,<sup>158</sup> the New Jersey Supreme Court limited *Uston*’s application just a year later,<sup>159</sup> and other courts have unanimously declined to follow the broader implications of the decision.<sup>160</sup>

The common law in the vast majority of, if not all, states and U.S. jurisdictions, therefore, likely only imposes a general duty to serve on common carriers and innkeepers. A small number of mainland U.S. hotels required proof of vaccination and they therefore would have needed to show an exception to the duty to serve if sued.<sup>161</sup> No common carriers like buses and trains imposed a vaccine passport during the Covid emergency, however, unlike in some other countries.<sup>162</sup> If a court

mid-20th century) (also listing the antidiscrimination ordinances of cities in states that had no such antidiscrimination laws).

<sup>155</sup> *Madden v. Queens Cnty. Jockey Club*, 72 N.E.2d 697, 698 (N.Y. 1947); *see also Brooks v. Chicago Downs Ass’n*, 791 F.2d 512, 514, 516 (7th Cir. 1986) (applying Illinois common law and citing cases upholding the right to exclude).

<sup>156</sup> *E.g., Alpaugh v. Wolverton*, 36 S.E.2d 906, 908 (Va. 1946) (holding that restaurants and shops can serve whomever they please while innkeepers must serve everyone who applies for service).

<sup>157</sup> *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 375 (N.J. 1982).

<sup>158</sup> *See, e.g., JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 23–24 (8th ed. 2022) (including *Uston* as a feature case); Singer, *supra* note 145, at 1442–43.

<sup>159</sup> *Marzocca v. Ferrone*, 461 A.2d 1133, 1137 (N.J. 1983) (declining to agree with the lower appellate court’s “expansive interpretation of *Uston*”).

<sup>160</sup> *See Singer, supra* note 145, at 1442 (describing *Uston* as “[t]he only exception to this uniform pattern of cases” recognizing an absolute right to exclude in public accommodations that are not innkeepers or common carriers); *see, e.g., Silbert v. Ramsey*, 482 A.2d 147, 151 (Md. 1984); *Brooks*, 791 F.2d at 517–18 (7th Cir. 1986) (describing *Uston* as an “arguable—but not clear—abandonment of the common law rule” allowing places of entertainment an absolute right to exclude and holding that “it is clear that New Jersey has not *per se* abandoned the common law rule but has adapted it, in a limited fashion, to the particular needs of its casino industry.”).

<sup>161</sup> *See Norman, supra* note 136 (citing hotels in New York City; Big Indian, New York; and Provincetown, Massachusetts, as requiring proof of vaccination of guests).

<sup>162</sup> *See, e.g., Meena Thiruvengadam, Canada Sets Vaccine Requirement Date for Travelers*, TRAVEL & LEISURE (Oct. 7, 2021), <https://www.travelandleisure.com/travel-news/canada-oct-30->

were to accept Singer's view of the common law, however, and find a duty to serve applicable to all or most institutions open to the public, then there would be significantly more opportunity to challenge vaccine passports under the common law.

Sticking with the widely used doctrinal (non-Singer) approach to public accommodations, the only possible common-law constraint on their right to exclude would be if a court believed that a venue's vaccine passport violated public policy.<sup>163</sup> In this sense, a business's prerogative to serve whom it chooses is similar to employment at will, which allows employers to discharge employees for any reason that is not prohibited.<sup>164</sup> The courts that considered public policy objections to Covid vaccination requirements for employees not protected by union agreements or civil service rules have so far rejected them.<sup>165</sup> It is likely that courts in most states would reach a similar decision with respect to businesses and venues requiring proof of vaccination, especially in those states where the state legislature has supported such schemes indirectly such as by funding the underlying technological infrastructure.<sup>166</sup> It is not out of the question, however, that in states where the legislature has passed legislation to discourage—but not ban—vaccine passports, a court could find that voluntary, private vaccine passports now violate the public policy of the state.<sup>167</sup> Ironically enough, this might include Mississippi but for its 1956 statute discussed above.<sup>168</sup>

all-travelers-need-proof-of-covid-vaccine (noting that all passengers 12 and over on VIA Rail and Rocky Mountaineer trains would need to show proof of vaccination against Covid).

<sup>163</sup> Marzocca, 461 A.2d at 1137 (holding “[w]e now limit the common law [right to exclude of public places of amusement] by proscribing exclusions that violate public policy”).

<sup>164</sup> *Id.* (“point[ing] to our precedent in the area of employment at will” in invoking public policy limits on the right to exclude).

<sup>165</sup> *E.g.*, *Bridges v. Methodist Hosp.*, No. 21-20311, 2022 WL 2116213, at \*2 (5th Cir. June 13, 2022) (rejecting plaintiffs' claims that “firing an employee for her refusal to receive an experimental COVID-19 vaccine violates public policy and merits an exception to Texas's general rule of at-will employment”). *See generally* Michael A. Katz, *Still Crazy After All These Years: The Employment-At-Will Doctrine and Public Policy Exceptions*, 10 ATLANTIC L.J. 1 (2007).

<sup>166</sup> *See, e.g.*, LA. OFF. OF THE GOVERNOR, *supra* note 124; *see also State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, NAT'L ACAD. FOR STATE HEALTH POL'Y, <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/> (Dec. 27, 2022).

<sup>167</sup> *E.g.*, *Davidson Bros. v. D. Katz & Sons*, 643 A.2d 642, 647 (N.J. Super. Ct. App. Div. 1994) (divining the public policy of the state from, *inter alia*, state legislation); *cf.* Katz, *supra* note 165, at 4–5 (stating “[t]here must . . . be a clear statute . . . for the court to find a public policy exception [to employment at will].”).

<sup>168</sup> Mississippi's legislature, while not banning vaccine passports in public accommodations, imposed wide-ranging prohibitions on vaccine passports. *See* MISS. CODE ANN. § 41-23-49 (2022) (prohibiting state agencies, public colleges, municipal or other public subdivisions from refusing services on the basis of COVID-19 vaccination status or possession of an immunity passport and making an exception only for health-care facilities).

One ambiguous—and important—category in between places of entertainment (near-absolute right to exclude) and common carriers and innkeepers (duty to serve) is restaurants. The precedent as to whether they qualify as “inns” is murky.<sup>169</sup> Insofar as the old common-law rules were based on the necessity of the services offered to travelers by innkeepers, it might make sense for a restaurant to be subject to such rules, particularly for travelers.<sup>170</sup> On the other hand, Joseph Henry Beale, in his early 20th century treatise on innkeepers, limited the duty to serve only to places that supplied *all* the needs of travelers, thus exempting saloons, restaurants, eating houses, and coffee shops.<sup>171</sup> As noted above, Singer has forcefully argued for a much broader view of the duty to serve, applying to any place that opens itself up to the public, regardless of the necessity of what it offers and its connection to travel.<sup>172</sup> Obviously, if a state were to rule that a restaurant were more like an “inn” and subject to a duty to serve, that would be quite important in the vaccine passport context given the large number of restaurants (and bars and coffee shops and similar businesses) that used such a scheme in jurisdictions where permitted.<sup>173</sup>

Even if restaurants were subject to the duty to serve, however, the common law allows for exceptions to the duty.<sup>174</sup> As articulated by the New Jersey Supreme Court

<sup>169</sup> See SHERRY, *supra* note 143, § 4:2, at 48 (“Whether a restaurant keeper, as distinguished from an innkeeper, is legally required to admit members of the general public has not been conclusively decided.”); Singer, *supra* note 145, at 1323 n.149 (discussing “the question of what businesses fit into the category of inns” and noting that “case law distinguishing restaurants from inns is nonexistent before 1850 since, in fact, no distinction existed”); BEALE, *supra* note 143, § 15, at 17 (noting that because they do not supply all the needs of travelers, restaurants, eating houses, saloons, and coffee houses do not qualify as inns).

<sup>170</sup> Singer, *supra* note 145, at 1323–24 (quoting *Hall v. Delaware*, 4 Del. (4 Harr.) 132, 140–41 (1844)); BEALE, *supra* note 143, § 62, at 42 (discussing the “public duty” of innkeepers to “protect” travelers).

<sup>171</sup> BEALE, *supra* note 143, § 15, at 17.

<sup>172</sup> Singer, *supra* note 145, at 1444–46.

<sup>173</sup> See, e.g., Brooke Jackson-Glidden, *A Running List of Portland Restaurants and Bars Checking Proof of Vaccination*, EATER PORTLAND, <https://pdx.eater.com/2021/8/6/22612213/restaurants-bars-proof-of-vaccine-carding-portland-covid> (Feb. 16, 2022, 10:32 AM) (listing dozens of restaurants, bars, and coffee shops requiring proof of vaccination despite no state or local requirement to do so). Bars and coffee shops fall into an area as murky as restaurants with respect to whether the innkeeper’s duties apply. See Beale, “a coffee house or a drinking saloon is not an inn.” BEALE, *supra* note 143, § 15, at 17.

<sup>174</sup> Some restaurants even employ a “jacket required” dress code, which is presumably legal so long as the dress code is enforced in a non-discriminatory fashion. See, e.g., Jaya Saxena, *Restaurant Dress Codes Frequently Target Black Customers. It’s Past Time for Them to Go*, EATER (Nov. 3, 2020, 11:15 AM), <https://www.eater.com/21546024/restaurant-dress-code-discrimination-prejudice-history>; see also *Renteria v. Dirty Dan’s, Inc.*, 244 Cal. Rptr. 423, 425 (Cal. Ct. App. 1988) (holding that denial of entry to a patron wearing motorcycle club insignia violated California’s public accommodations statute, the Unruh Act, by amounting to “arbitrary discrimination”).

in *Uston*, public accommodations may exclude from their premises “those whose actions disrupt the regular and essential operations of the [premises] or threaten the security of the premises and its occupants.”<sup>175</sup> This would include “the disorderly, the intoxicated, and the repetitive petty offender.”<sup>176</sup> Presumably, a business could exclude those without a shirt or shoes for this reason: they disrupt the regular and essential operations of the business. But this analysis is not as clear-cut in some cases (e.g., a very casual restaurant) as is commonly thought.

*B. Does Proof of Vaccination Qualify for an Exception to the Duty to Serve?*

Excluding patrons for being unvaccinated, therefore, would need to be related to the “security of the premises” in order to meet the exception to the duty to serve. Proponents of vaccine passports argue that they ensure the safety of the business’s employees and patrons.<sup>177</sup> A business owner may even say that requiring customers to be vaccinated protects it from liability should an unvaccinated customer acquire Covid in the establishment.<sup>178</sup> Were a customer to challenge access, the legality of the vaccine restriction would rest on a question of empirical proof: does mandating proof of vaccination of customers actually promote safety in the setting? Is it sufficient if the proprietor of the venue merely *believes* this to be the case or followed the advice of leading scientific authorities, or must it be proven that the vaccine passport is effective for this purpose? If it must be proven, who bears and what is the burden of proof? Despite the ancient provenance of the duty to serve, the legal process for proving an exception thereto is somewhat unclear. Nonetheless, I assess briefly how this inquiry might play out.

If vaccinated persons spread Covid as easily as unvaccinated—everything being equal, whether masked or not—then unvaccinated persons pose no more of a risk to other customers than the vaccinated and an exception from the duty to serve would be unwarranted. If, however, the vaccinated spread the infection at lower rates than the unvaccinated, the passport might fit under a valid exception to the duty to serve. The empirical data on this point is mixed and ever-changing. Initial studies suggested that fully vaccinated persons did not spread the original variant or two of Covid, but that changed with the arrival of the Delta variant, which eroded

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<sup>175</sup> *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 375 (N.J. 1982) (citations omitted).

<sup>176</sup> *Id.*

<sup>177</sup> Julie Harans, *Should Restaurants Require Proof of Vaccination?*, WINE SPECTATOR, (Aug. 6, 2021), <https://www.winespectator.com/articles/should-restaurants-require-proof-of-vaccination>.

<sup>178</sup> Such cases, in actuality, have been rare and largely unsuccessful, outside of some very specific contexts, due to the difficulty of showing causation. See Robert Iafolla & Jake Holland, *Cruise Ship Covid Suits Show High Bar for Pinpointing Covid Exposure*, BLOOMBERG LAW (Aug. 26, 2021, 2:30 AM), <https://news.bloomberglaw.com/health-law-and-business/cruise-ship-covid-suits-show-high-bar-for-pinpointing-exposure> (noting “[t]he limited success of cruise line Covid-19 lawsuits . . . for alleged virus exposure”).

significantly the transmission-blocking effectiveness of the vaccines.<sup>179</sup> With the arrival of the Omicron variant and its subvariants, the vaccines' effectiveness at preventing transmission reduced even more.<sup>180</sup> It may also be the case that some vaccines work better than others at preventing transmission.<sup>181</sup> If so, then a vaccine passport could only be legitimate under the duty to serve if it required the effective vaccine(s). The very ambiguity of the data at the moment would seem to point against allowing an exception to the duty to serve; if the duty is to be robust, the burden of proof would seem to rest with the business or venue that seeks to carve out an exception to it.

The vaccinated customers may be at a lower risk of getting severe Covid symptoms themselves, and therefore a vaccine passport may protect the establishment against some hypothetical liability for sickness incurred on the premises. If that is the case, then a vaccine passport is largely about ensuring customers are not a risk to themselves rather than a risk to others. Historically, the common law has not countenanced paternalism as a valid exception to the duty to serve. Protecting a venue owner from liability is a more reasonable concern, but likely a stretch in this context given the widespread failure of such suits so far.<sup>182</sup>

Even if there is no solid empirical evidence showing that vaccine mandates in public settings reduce the chance of infection, perhaps a business can exclude the unvaccinated because that makes the vaccinated feel safer. As Singer demonstrates in his discussion of racial segregation in public accommodations, older common-

<sup>179</sup> David W. Eyre, Donald Taylor, Mark Purver, David Chapman, Tom Fowler, Koen B. Pouwels, A. Sarah Walker & Tim E.A. Peto, *Effect of Covid-19 Vaccination on Transmission of Alpha and Delta Variants*, 386 NEW ENG. J. MED. 744, 753 (2022) (stating “the delta variant eroded vaccine-associated protection against transmission both by making infection more common and by increasing transmission from infected vaccinated persons”); Irina Kislaya, Eduardo Freire Rodrigues, Vitor Borges, João P. Gomes, Carlos Sousa, José P. Almeida, André Peralta-Santos & Baltazar Nunes, *Comparative Effectiveness of Coronavirus Vaccine in Preventing Breakthrough Infections Among Vaccinated Persons Infected with Delta and Alpha Variants*, 28 EMERGING INFECTIOUS DISEASES 331, 337 (2022) (stating “[o]verall, we found significantly higher odds of vaccination in Delta case-patients than in Alpha case-patients, suggesting possible lower effectiveness of the mRNA vaccines in preventing infection with the Delta VOC”).

<sup>180</sup> See Sumit Malhotra et al., *COVID-19 Infection, and Reinfection, and Vaccine Effectiveness Against Symptomatic Infection Among Health Care Workers in the Setting of Omicron Variant Transmission in New Delhi, India*, 3 LANCET REG. HEALTH – SE ASIA 1, 8–9 (2022), <https://www.sciencedirect.com/science/article/pii/S2772368222000282> (“Multiple studies worldwide have pointed out reduced or no effect of different COVID-19 vaccines against the omicron variant.”).

<sup>181</sup> See Barbra A. Dickerman, Hanna Gerlovin, Arin L. Madenci, Katherine E. Kurgansky, Brian R. Ferolito, Michael J. Figueroa Muñoz, David R. Gagnon, J. Michael Gaziano, Kelly Cho, Juan P. Casas & Miguel A. Hernán, *Comparative Effectiveness of BNT162b2 and mRNA-1273 Vaccines in U.S. Veterans*, 386 NEW ENG. J. MED. 105, 109, 114 (2022) (finding that recipients of the Pfizer vaccine have a 27% higher chance of infection than recipients of the Moderna vaccine).

<sup>182</sup> See *supra* note 178.

law cases did not countenance customers' "feelings" or "prejudices" as a valid reason to depart from the duty to serve.<sup>183</sup> To the extent that the law in some places evolved to recognize this exemption, it was expressly rooted in a discriminatory motive.<sup>184</sup> In sum, there is weak support for allowing a business not to serve a customer in order to protect the feelings of its other customers, and to the extent that such support exists, it is highly tainted by its association with Jim Crow and other forms of racial segregation.

### C. *Layering the Municipal Requirements on to the Common-Law Regime*

Assuming the applicability of a common-law duty to serve to any of the entities or businesses requiring proof of vaccination, the question arises whether a municipal vaccine passport requirement would trump any such duty. In other words, perhaps restaurants in Minnesota, for instance, are obliged to serve all comers under the common law, but Minneapolis requires proof of vaccination. Would the municipal requirement absolve any restaurant in Minneapolis from needing to demonstrate that it meets the exception to the common-law duty to serve?

The answer to this question depends in part on whether a state has municipal home rule and how that system works. In a state with strong municipal home rule, whether statutory or constitutional, the municipal power would likely trump any preexisting common-law regime.<sup>185</sup> The potential exception to this outcome would be in a state with a private law exception. In such a regime, it is possible that a court would consider the ancient common-law action against a restaurant for violating the duty to serve as a common-law right that a municipality is powerless to take away.<sup>186</sup> While I have argued previously that this is the wrong view of the private law exception to municipal home rule,<sup>187</sup> there are likely state courts that still hew to it.<sup>188</sup>

<sup>183</sup> Singer, *supra* note 145, at 1366 ("This ruling clarified that a passenger could not be excluded simply because her presence made other passengers uncomfortable. The source of the discomfort had to be reasonable.") (discussing *Brown v. Memphis & C. R. Co.*, 7 F. 51, 56–57, 60–62 (W.D. Tenn. 1881)).

<sup>184</sup> *Id.* at 1337–44.

<sup>185</sup> See Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1122–24 (2012) (arguing that city ordinances should trump the common law in most home-rule jurisdictions). *But see* Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 752–53 (1973) (arguing against municipal power in cases of "undue burden" or "extreme inefficiency").

<sup>186</sup> See Diller, *supra* note 185, at 1112–29 (defining and discussing states' private law exceptions).

<sup>187</sup> *Id.* at 1121 (arguing that this view of the private law exception is "untenable").

<sup>188</sup> See, e.g., *id.* at 1127 (reviewing Massachusetts case law).

## III. CIVIL RIGHTS LAWS

Layering on top of the preexisting common-law regime, many states outside the former Confederacy enacted laws prohibiting discrimination in public accommodations in the decades after the Civil War, although enforcement of these was inconsistent.<sup>189</sup> With a renewed commitment to civil rights after World War II, many states and cities in the middle of the 20th century passed laws banning discrimination in public accommodations.<sup>190</sup> These laws, which have been amended over the years to include more protected classes, require businesses that serve the public—broadly defined to include not just common carriers and inns but any place of public enjoyment or amusement—not to discriminate on the basis of race, sex, religion, and other categories.<sup>191</sup> These statutes and ordinances, therefore, directly limit the racetracks and other establishments that so many state courts found had a near-absolute right to exclude under the common law. In many states and localities, these laws apply to businesses, entities, services, and even private organizations like the Boy Scouts and universities.<sup>192</sup> Moreover, in at least one state (California), the

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<sup>189</sup> See *Bell*, 378 U.S. 226 at 284 (1964) (Douglas, J., concurring); Singer, *supra* note 145, at 1374 (discussing several late 1800s and one early 1900s statutes that “affirmed the rights of African-Americans to be served in places of public accommodation”). Singer reviews the case law and the academic debate about whether the public accommodations laws of this era “result[ed] in a significant amount of racial integration in common carriers, inns, and places of entertainment.” *Id.* at 1379–80. Congress passed its own ambitious civil rights bill as applied to public accommodations in 1875, but the Supreme Court declared it unconstitutional in 1883. *The Civil Rights Cases*, 109 U.S. 3, 24–25 (1883).

<sup>190</sup> See *Bell*, 378 U.S. 226 at 284 (listing 13 state public accommodations antidiscrimination laws passed between 1953 and 1963) (noting that the District of Columbia and seven other cities in states without statewide public accommodations antidiscrimination laws had adopted ordinances that accomplished as much); Singer, *supra* note 145, at 1478–90 (listing all state public accommodations antidiscrimination laws); Pamela H. Rice & Milton Greenberg, *Municipal Protection of Human Rights*, 1952 WIS. L. REV. 679, 681–82 (1952) (noting that 18 states had civil rights laws that applied to public accommodations and discussing a handful of city ordinances that, while less comprehensive, aimed to limit discrimination in public accommodations somewhat); see also Brian Alnutt, “Another Victory for the Forces of Democracy”: *The 1949 New Jersey Civil Rights Act*, 85 PA. HIST. 362, 362 (2018).

<sup>191</sup> Singer, *supra* note 145, at 1478–91; Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws Project*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 261–67 (1978). See generally Chad A. Readler, Note, *Local Government Anti-Discrimination Laws: Do They Make A Difference?*, 31 U. MICH. J. L. REFORM 777 (1998).

<sup>192</sup> *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1230 (N.J. 1999), *rev'd on other grounds*, *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000) (overruling in part on First Amendment grounds); N.J. STAT. ANN. § 10:5-5(l) (West 2022) (noting that “[a] place of public accommodation shall include, but not be limited to: any . . . college and university”); *State ex rel. Wash. Univ. v. Richardson*, 396 S.W.3d 387, 391, 396 (Mo. App. 2013) (holding that a private

courts have broadly construed the state's public accommodations statute as prohibiting "arbitrary" discrimination of any kind, whether or not set forth expressly in the statute."<sup>193</sup>

In 1964, in response to pressure from the Civil Rights movement, including the famous sit-ins at segregated lunch counters in the South, the U.S. Congress enacted the Civil Rights Act (CRA), which, *inter alia*, banned racial and other forms of discrimination in employment and public accommodations.<sup>194</sup> Title II of the CRA ("Title II"), which applied to hotels, motels, restaurants, and other businesses, prohibited discrimination in these establishments on the basis of race, color, religion, or national origin. Subsequently, several more states and city governments passed their own public accommodations laws and statutes on top of those that had been previously enacted.<sup>195</sup> As before, many of these applied both to more entities and protected more classes than the federal CRA.

In a similar vein, Congress in 1990 passed the Americans with Disabilities Act (ADA) to ensure that persons with disabilities had access to public accommodations,<sup>196</sup> and many states and cities have followed suit with (or preceded in passing) similar laws.<sup>197</sup>

Hence, even aside from a property owner or lessee's property rights, to know whether a particular business owner's act of exclusion is legal, one must assess (1) whether the venue in question qualifies as a "public accommodation" under federal, state, or municipal civil rights law and (2) whether the person claiming discrimination is a member of a "protected class" under that law.

Vaccination status was not previously a protected class under any public accommodations law until several legislatures recently made it so, as discussed above.<sup>198</sup> Even though not a protected class under federal law or in the vast majority of states, vaccination status may correlate with several other protected classes, such as disability, religion, race, and ethnicity. These correlations may create potential legal liability for vaccine passports.

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university open to the public was subject to Missouri's law prohibiting discrimination in places of public accommodation).

<sup>193</sup> *Isbister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212, 221 (Cal. 1985) (quoting *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 117 (Cal. 1982)).

<sup>194</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (codified as amended at 42 U.S.C. §§ 2000a-2000a-6); see also CHRISTINE J. BACK, CONG. RSCH. SERV., R46534, *THE CIVIL RIGHTS ACT OF 1964: AN OVERVIEW 1-2* (2020); *Civil Rights Act of 1964*, HISTORY, <https://www.history.com/topics/black-history/civil-rights-act> (Jan. 10, 2023).

<sup>195</sup> See Lerman & Sanderson, *supra* note 191, at 262-72.

<sup>196</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12102-13s.

<sup>197</sup> *E.g.*, Act of June 24, 2009, ch. 508, 2009 Or. Laws 1300 (relating to individuals with disabilities) (codified as amended at OR. REV. STAT. § 659A.103-45 (2021)); see also CAL. CODE REGS. tit 2, § 11064 (2022).

<sup>198</sup> See *supra* Section I.C.

### A. *Medical and Disability Discrimination*

It is well known that certain persons cannot receive the Covid vaccination due to health conditions, such as severe allergic reaction to components of the vaccine. The ADA prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” of any business subject to the act.<sup>199</sup> Potential for anaphylaxis may qualify as such a disability for purposes of the Act.<sup>200</sup> If businesses prohibit entry from persons who are unvaccinated due to a disability and provide no exemption therefor, it is possible that they violate the ADA.

The ADA does not require that public accommodations covered by it accommodate all disabilities, however. Rather, Title III of the ADA, which applies to privately owned public accommodations, requires “reasonable modification” of “policies, practices, or procedures” necessary to afford access to individuals with disabilities “unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.”<sup>201</sup> The regulations adopted to effectuate Title II of the ADA, as applied to publicly owned facilities (e.g., city halls, libraries, etc.) contain somewhat similar language, although they also exempt public entities from having to take any action that would result in “undue financial and administrative burdens.”<sup>202</sup> The ADA, therefore, would not require the modification of a vaccine mandate—such as by requiring masking of patrons instead—if it “fundamentally alter[ed] the nature of” the goods and services provided. This would obviously be the case at a restaurant if customers were required to remain masked, but it might not be the case at a performing arts venue, at least as applied to patrons. Title II of the ADA might also exempt a city with a vaccine passport requirement to visit city hall, for instance, from having to administer exemptions if the city could show that doing so was an “undue administrative burden.” The limited case law interpreting

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<sup>199</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(a).

<sup>200</sup> “Disability” means “(A) a physical or mental impairment that substantially limits one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” *Id.* § 12102(1); *see also* Megan Cerullo, *Want a Medical Exemption for the COVID-19 Vaccine? Good Luck With That.*, CBS NEWS (Sept. 23, 2021, 6:00 AM), <https://www.cbsnews.com/news/covid-vaccine-mandate-medical-exemption/> (“[T]he only people who shouldn’t get vaccinated [for medical reasons] are those who had a severe allergic reaction, called anaphylaxis, immediately after a first vaccine dose or to a component of the COVID-19 vaccine.”) (quoting an infectious disease physician at the University of California San Francisco as saying that the chances of such a reaction to the Pfizer or Moderna vaccines is “one in a million”).

<sup>201</sup> 42 U.S.C. § 12182(b)(2)(A)(ii).

<sup>202</sup> 28 C.F.R. § 35.150(a)(3) (2021).

this language, however, has read it strictly as requiring the city to show a very significant burden.<sup>203</sup>

Title III also prohibits:

[T]he imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.<sup>204</sup>

Making vaccination status required could be seen as an “eligibility criterion” for admission to a restaurant. The ADA would prohibit such a requirement unless it could be “shown to be necessary” for the provision of the restaurant’s services. The analysis would likely look similar to the above. The regulations promulgated pursuant to the ADA make clear that places of public accommodation may impose eligibility criteria that “impose legitimate safety requirements that are necessary for safe operation.”<sup>205</sup> These requirements “must be based on actual risks and not on mere speculation.”<sup>206</sup> Hence, a plaintiff invoking the ADA could force a court to examine the “actual risks” of unvaccinated customers in a venue with such requirements.

As a backstop defense that works in conjunction with “reasonable modification,” the ADA does not require a public accommodation to provide service to a customer who presents a “direct threat” to the “health and safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”<sup>207</sup> If unvaccinated persons—regardless of their reason for not being vaccinated—pose a “direct threat” to the health and safety of other vaccinated customers, the ADA would, therefore, permit their exclusion if the threat cannot be eliminated. “Direct threat” under the ADA is a high standard, defined by the Equal Employment Opportunity Commission (EEOC) in the workplace context as “a significant risk of substantial harm.”<sup>208</sup>

Determining whether an individual poses a direct threat requires:

<sup>203</sup> See generally *Am. Council of Blind of N.Y., Inc. v. City of New York*, 579 F. Supp. 3d 539 (S.D.N.Y. 2021) (rejecting city’s assertion of “undue financial and administrative burden” in defense to ADA suit seeking audible “walk” and “don’t walk” signals for blind and low-vision pedestrians).

<sup>204</sup> 42 U.S.C. § 12182(b)(2)(A)(i).

<sup>205</sup> 28 C.F.R. § 36.301(b) (2021).

<sup>206</sup> *Id.*

<sup>207</sup> 42 U.S.C. § 12182(b)(3); see also 28 C.F.R. § 36.208 (providing additional guidance regarding a public accommodation’s determination of whether an individual poses a “direct threat”).

<sup>208</sup> 29 C.F.R. § 1630.2(r) (2021).

[A]n 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.<sup>209</sup>

As substantial data show that the vaccinated can spread Covid easily—perhaps as easily as the unvaccinated<sup>210</sup>—it is extremely difficult to argue that the medically unvaccinated constitute a “direct threat” to other patrons. While such an argument may have held water early in the pandemic when many health authorities asserted that the vaccines stopped the spread of Covid,<sup>211</sup> “current medical knowledge” clearly points in the other direction.<sup>212</sup> Moreover, since the other patrons should be vaccinated and therefore protected to some extent against Covid’s effects if infected, it is even more difficult to assert that a medically unvaccinated patron poses a direct threat to those protected against that threat by vaccination.

In the employment context, the EEOC notes that assessment of the direct threat in the workplace from an unvaccinated person should consider:

[T]he type of work environment . . . the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.<sup>213</sup>

Presumably, a similar analysis would apply in the public accommodations setting. The “frequency” and “duration” of interaction with a business’s employees and other customers might be a key factor, with some public accommodations offering just fleeting encounters and others involving longer periods of interaction. The case law on “direct threats” in the context of the Covid vaccine is limited. One federal court has upheld a hospital’s vaccine mandate for employees against an ADA challenge, concluding that unvaccinated workers would pose a “direct threat” to patients

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<sup>209</sup> 28 C.F.R. § 36.208(b) (2022).

<sup>210</sup> See *supra* notes 179–80 and accompanying text.

<sup>211</sup> See, e.g., Paola Rosa-Aquino, *CDC Data Suggests Vaccinated Don’t Carry, Can’t Spread Virus*, N.Y. MAG.: INTELLIGENCER, <https://nymag.com/intelligencer/2021/04/cdc-data-suggests-vaccinated-dont-carry-cant-spread-virus.html> (Apr. 1, 2021) (quoting CDC Director Rochelle Walensky as saying “[v]accinated people do not carry the virus—they don’t get sick”).

<sup>212</sup> Eyre et al., *supra* note 179, at 744.

<sup>213</sup> U.S. EEOC, *What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, § K.5, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (July 12, 2022).

and co-workers.<sup>214</sup> The applicability of this holding to public accommodations other than hospitals may be limited, however, due to the unique nature of hospitals. Moreover, the decision was from November 2021, before the release of more data demonstrating that vaccinated persons spread and catch Covid quite commonly.<sup>215</sup>

Early in the period after the vaccines' release, some businesses allowed unvaccinated persons to enter the establishment, but required them and them alone to wear masks.<sup>216</sup> Indeed, some venues even required a special bracelet or indicator to distinguish each group.<sup>217</sup> In discriminating on the terms of conditions of entry, such businesses could potentially violate the ADA since masklessness amounts to a "privilege" of entry and enjoyment of the premises afforded to other patrons. On the other hand, requiring a mask might be considered the kind of "modification of policies, practices, or procedures" that aims to eliminate the "direct threat" presented by the unvaccinated; at least one court has indicated approval of as much in the employment context.<sup>218</sup>

Due to the fact that other vaccinated patrons are protected to some extent, depending on the vaccines' efficacy and the amount of time since their last shot, however, it seems reasonable to expect that the limits of the "direct threat" exception are vague and could be subject to litigation. It is also possible that a business would claim that a maskless, unvaccinated person poses a special danger to those who medically cannot be vaccinated *and* medically cannot mask. Resolving the questions presented by this scenario would involve assessing the efficacy of masking as a means of preventing the spread of Covid, necessitating a deep dive into the weeds of the relative abilities of cloth, surgical, and respirator masks to stop transmission of the virus.<sup>219</sup>

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<sup>214</sup> *Together Employees v. Mass. Gen. Brigham Inc.*, 573 F. Supp. 3d 412, 433 (D. Mass. 2021) ("Under the circumstances, it was reasonable for [the hospital] to conclude that unvaccinated employees—who are more likely to become infected—pose a direct threat to patients and others.").

<sup>215</sup> See *supra* note 179 and accompanying text.

<sup>216</sup> Sareen Habeshian, *L.A. County Gives Businesses Option to Let Vaccinated People Remove Face Masks Indoors*, KTLA (Feb. 23, 2022, 2:28 PM), <https://ktla.com/news/local-news/l-a-county-gives-businesses-option-to-let-vaccinated-people-remove-face-masks-indoors/>.

<sup>217</sup> See, e.g., Don Cazentre, *Inside the Honor System and Other CNY Bar/Restaurant Strategies for the New Mask Rules*, SYRACUSE.COM, <https://www.syracuse.com/restaurants/2021/05/inside-the-honor-system-and-other-cny-barrestaurant-strategies-for-the-new-mask-rules.html> (May 21, 2021, 6:00 AM) (noting that at Syracuse Mets ballpark, vaccinated and unvaccinated had to wear different color wristbands so staff could tell them apart).

<sup>218</sup> See *Aukamp-Corcoran v. Lancaster Gen. Hosp.*, No. 19-5734, 2022 WL 507479, at \*8 (E.D. Pa. Feb. 17, 2022) ("[E]mployees are justifiably excused from the vaccination requirement and permitted to wear a mask instead, as the direct threat to their health outweighs the benefit to overall patient safety that could result from them undergoing vaccination.").

<sup>219</sup> See, e.g., Ian T. Liu, Vinay Prasad & Jonathan J. Darrow, *How Effective Are Cloth Face Masks?*, REGULATION, Winter 2020/2021, at 32, 36 ("[T]here is little consensus that masking—

While the ADA, therefore, may require medical exemptions for vaccine passports, at least in certain settings, state and local laws may supplement this baseline and further restrict the manner in which vaccine passports can be used. The ADA is clear that it does not preempt stricter state and local laws.<sup>220</sup> Many state disability laws are modeled on, and were passed after, the ADA.<sup>221</sup> Some go further than the ADA in covering more locations or providing more generous damages.<sup>222</sup>

### 1. *Municipal Overlay*<sup>223</sup>

The municipal vaccine passport regimes varied widely in how they treated medical exemptions. In Los Angeles, a claimed medical exemption did not necessarily allow for the person to get equal access to the covered public accommodation. Rather, a person with a medical exemption could eat outdoors and only have access to the indoor premises if he provided proof of a negative Covid test.<sup>224</sup> Los Angeles's neighbor, West Hollywood, required that for those claiming a medical exemption, covered businesses “engage . . . in a cooperative dialogue, or a good faith discussion, to see if a reasonable accommodation is possible.”<sup>225</sup> According to its ordinance, reasonable accommodations could include purchasing food to consume at home or outdoors or joining a virtual exercise class, but no accommodation was required if it would impose an “undue hardship” on the business.<sup>226</sup> New York City’s “Key to NYC” vaccine passport regime accommodated medical exemptions in a similar way.<sup>227</sup> In Philadelphia, by contrast, a documented medical exemption allowed one to dine indoors unvaccinated; only in venues with seating of more than 1,000 was

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at least as commonly practiced in the United States, using cloth masks—is effective at suppressing various types of respiratory infection.”).

<sup>220</sup> See 42 U.S.C. § 12201(b) (“Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.”).

<sup>221</sup> See Jeffrey D. Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 694 (2010).

<sup>222</sup> Stephen A. Rosenbaum, *Disability Rights and Public Accommodations: State-by-State*, SE. ADA CTR. (Feb. 2011), <http://www.travelready.org/PDF%20Files/ADA%20Disability%20Rights%20and%20Public%20Accommodations%20-%20State%20by%20State.pdf>.

<sup>223</sup> By municipal overlay, this and other subsections refer to the overlay of the mandatory municipal vaccine passport regimes in the jurisdictions that had them.

<sup>224</sup> Los Angeles, Cal., Ordinance No. 187219, § 200.122(2) (Oct. 6, 2021).

<sup>225</sup> West Hollywood, Cal., Resolution No. 21-5444, § C(ii)(8) (Sept. 17, 2021).

<sup>226</sup> *Id.*

<sup>227</sup> See *Guidance for Public Accommodations on Equitable Implementation of COVID-19 Vaccination Requirements*, N.Y.C. COMM’N ON HUM. RTS. (Mar. 8, 2022), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Vax-Public-Accommodations-Guidance.pdf> (describing reasonable accommodations but noting limitations thereon in cases of “direct threat” or “undue hardship”).

a recent Covid test also required.<sup>228</sup>

While they are now defunct, it is interesting to speculate whether municipal vaccine passport regimes like Los Angeles's and New York City's, in not requiring the serving of those with medical exemptions on equal terms, violated the ADA. It is possible that they did. A business, therefore, may have been put in the impossible position of violating the ADA or the city's rules. While federal law can preempt local rules, it is difficult for a businessperson to assert this outside of seeking a declaratory judgment action against the city, which none did. Hence, to the extent that there may have been a conflict, it went unresolved. Moreover, if the city requirements violated the ADA, the cities themselves may have been liable under the ADA.<sup>229</sup>

### B. Religious Discrimination

Persons claiming religious exemptions to vaccine mandates may point to the Civil Rights Act of 1964 Title II, which prohibits discrimination on the basis of religion in places of public accommodation as defined by that statute.<sup>230</sup> While most organized religions do not object to vaccines, a handful of smaller Christian sects, as well as individual practitioners, object to some or all vaccines on religious grounds.<sup>231</sup> The EEOC has interpreted the employment provision of the CRA (Title VII), which may be applicable to Title II by analogy, as allowing for individualized religious belief claims, even if not held by any organized religious group,<sup>232</sup> and courts interpreting Title VII have endorsed this view.<sup>233</sup>

Since the rollout of the Covid vaccines and ensuing mandates, many individuals have cited their religious opposition to abortion as a reason for declining the vaccines, noting that the Pfizer and Moderna vaccines used cells from a fetal cell line in the development and testing of the vaccines.<sup>234</sup> While some employers and other

<sup>228</sup> Philadelphia, Pa., Emergency Regulation Governing the Control and Prevention of COVID-19 Mandating Vaccines for Individuals Working and Dining at Indoor Dining Locations § 2(B)(ii)(C) (Dec. 14, 2021).

<sup>229</sup> See 28 C.F.R. § 35.130(b)(1) (2021) (prohibiting public entities from discriminating on the basis of disability "through . . . licensing, or other arrangements").

<sup>230</sup> See § 201, 78 Stat. 241, 243.

<sup>231</sup> *Immunizations and Religion*, VAND. U. MED. CTR., <https://www.vumc.org/health-wellness/news-resource-articles/immunizations-and-religion> (last visited May 21, 2023) (listing Christian denominations that "have a theological objection to vaccination").

<sup>232</sup> See 29 C.F.R. § 1605.1 (2022) ("The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.").

<sup>233</sup> See, e.g., *EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 142 (4th Cir. 2017) (noting that the claimant's "religious beliefs are protected whether or not his pastor agrees with them").

<sup>234</sup> Diane Juffras, *An In-Depth Look at Religious Exemptions from COVID-19 Vaccine Mandates*, COATES' CANONS NC LOCAL GOV'T L. (Oct. 8, 2021), <https://canons.sog.unc.edu/>

entities may have accepted some of these claims for exemptions, in other instances, exemptions have not been offered or granted, and those claiming them have achieved only limited success in challenging their denial under the First Amendment's Free Exercise Clause, Title VII of the 1964 Civil Rights Act, and, in the case of federal employees and military members, the Religious Freedom Restoration Act.<sup>235</sup>

In excluding a person with sincere religious objections to vaccination with no alternative for entry, a covered business may violate Title II, which guarantees each person "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation."<sup>236</sup> Title II expressly includes religion as a protected class.<sup>237</sup>

There is scant case law on Title II religious discrimination. The very small number of reported decisions have held that Title II applies only in instances of *intentional* discrimination—i.e., not disparate impact.<sup>238</sup> Assuming that these decisions are correct in rejecting disparate impact's viability under Title II (the Supreme

2021/10/an-in-depth-look-at-religious-exemptions-from-covid-19-vaccine-mandates/. See, e.g., *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610 (5th Cir. Feb. 17, 2022) (plaintiffs alleging such).

<sup>235</sup> Compare *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021) (denying claim that governor's executive order requiring vaccination of certain healthcare workers with no religious exemptions violated the First Amendment's Free Exercise Clause), and *Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021) (same), with *Sambrano*, No. 1159, 2022 WL 486610 (granting a preliminary injunction on Title VII religious discrimination claim to employees discharged for not taking vaccine and whose religious exemption requests were denied). For an example of a case raising Religious Freedom Restoration Act (RFRA) claims in the federal context, see generally *Church v. Biden*, 573 F. Supp. 3d 118 (D.D.C. 2021) (denying injunction sought by federal employees and military members subject to vaccine mandate alleging violation of RFRA, *inter alia*). Although the federal RFRA applies only to the federal government, 21 states have their own versions of RFRA, including some (e.g., Illinois, New Mexico) in which public-sector Covid vaccination mandates were commonplace. Sophia Martin Schechner, *Religion's Power Over Reproductive Care: State Religious Freedom Restoration Laws and Abortion*, 22 *CARDOZO J.L. & GENDER* 395, 397 (2016) (citing the 21 state RFRA's or equivalent); *50-State Update on Legislation Pertaining to Employer-Mandated Vaccinations*, HUSCH BLACKWELL (Mar. 5, 2021), <https://www.huschblackwell.com/newsandinsights/50-state-update-on-pending-legislation-pertaining-to-employer-mandated-vaccinations#linktojump32>.

<sup>236</sup> 42 U.S.C. § 2000a(a).

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

<sup>238</sup> See generally *Akiyama v. U.S. Judo, Inc.*, 181 F. Supp. 2d 1179 (W.D. Wash. 2002) (rejecting claim that mandatory bowing before judo tournaments amounted to religious discrimination because such a practice was facially neutral and there was no evidence that it was adopted with a discriminatory intent); see, e.g., *Boyle v. Jerome Country Club*, 883 F. Supp. 1422 (D. Idaho 1995) (rejecting claim by a golfer that the club discriminated against him as a member of the Church of Jesus Christ of Latter-day Saints by hosting tournaments on Sundays); *Jalal v. Lucille Roberts Health Clubs Inc.*, 254 F. Supp. 3d 602 (S.D.N.Y.), *appeal filed, withdrawn, vacated*, No. 17-1936 (2d Cir. Aug. 29, 2017) (rejecting religious discrimination claim by

Court having never decided the issue<sup>239</sup>), then businesses would not violate Title II if they adopted vaccination proof requirements for neutral, nondiscriminatory reasons like intending to protect the health of staff and other customers. In order to trigger something like the burden-shifting analysis of *McDonnell Douglas*, drawn from the Title VII framework, a Title II religious discrimination plaintiff would need to allege facts “plausibly supporting a minimal inference of discriminatory motivation.”<sup>240</sup> Unlike in the employment context, where Title VII makes clear that an employee’s mere request for a religious exemption imposes upon the employer a duty to accommodate, Title II contains no such language.<sup>241</sup> Hence, a customer’s mere request for a religious accommodation on its own would not necessarily impose a duty on the venue to accommodate.<sup>242</sup>

Assuming a plaintiff can plausibly claim discriminatory intent by the public accommodation, the burden then shifts to the defendant business “to articulate some legitimate, nondiscriminatory reason” for the exclusion.<sup>243</sup> Presumably, protecting fellow patrons and employees from discrimination would qualify, although the weaker the evidence in support of the vaccine’s ability to limit spread, the less weight a judge or jury is likely to give such a defense.<sup>244</sup> The burden would then

Orthodox Jewish woman who was told to leave gym for wearing a long dress that staff considered improper gym attire).

<sup>239</sup> See RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 7.2, (3d ed., 2022) (Nov. 2022) (“There is no consensus on whether disparate impact claims may be brought under Title II.”).

<sup>240</sup> *Jalal*, 254 F. Supp. 3d at 606 (citing Second Circuit precedent).

<sup>241</sup> See generally § 201, 78 Stat. 241. Congress added this special language to Title VII requiring accommodation of religious beliefs in the workplace in 1972. See John H. Bernstein, Case Note, *Title VII—Religious Discrimination—Employer’s Duty to “Reasonably Accommodate” Employee’s Religious Practices*—Hardison v. Trans World Airlines, Inc., 527 F.2d 33 (8th Cir. 1975), 9 CREIGHTON L. REV. 795, 796–800 (1976) (discussing the history behind the 1972 amendment, including earlier EEOC guidance on the issue).

<sup>242</sup> To be clear, the duty in the employment context is fairly easily evaded; the employer only has to show that the accommodation results in more than a “de minimis” cost. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986). The Supreme Court, however, recently granted certiorari in a case that challenges that minimal standard. See *Groff v. DeJoy*, 35 F.4th 162 (3d Cir. 2022), cert. granted 143 S. Ct. 646 (Jan. 13, 2023) (No. 22-174).

<sup>243</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>244</sup> See *supra* notes 179–80 and accompanying text (discussing empirical evidence). Under the *McDonnell Douglas* framework, a defendant need only show that it has a good faith, reasonable belief in the matter asserted as a legitimate nondiscriminatory reason, even if the matter is not actually true. See *Bauer v. Albemarle Corp.*, 169 F.3d 962, 967 (5th Cir. 1999) (employer’s belief that plaintiff was “disloyal” because involved in ventures with entities that defendant mistakenly believed were competitors still qualified as “a legitimate, non-discriminatory reason” under Title VII (and ADEA) framework so long as “reasonable, not arbitrary”). Hence, given the widespread use of vaccine mandates by many institutions, including the government, and the consistent pro-vaccine messaging from the federal and many state governments, it may take a long and steady

shift back to the plaintiff to prove that the reason proffered by the public accommodation was actually just a pretext for discrimination.<sup>245</sup> In order to do this, a plaintiff might show that the public accommodation permitted unvaccinated people to enter who did *not* have religious objections.<sup>246</sup> This seems unlikely to occur.

In addition to Title II, potential plaintiffs can look to the antidiscrimination laws of 45 states plus those of dozens of cities and counties.<sup>247</sup> The vast majority of these laws and ordinances are either silent regarding disparate impact discrimination or prohibit such claims outright.<sup>248</sup> In a handful of states and cities, however, there is some authority, of varying levels of persuasion, indicating that disparate impact claims are or might be permissible under the jurisdiction's civil rights law.<sup>249</sup> In New

flow of contradictory empirical information in order for a court to find that a business's desire for a Covid vaccine mandate was not in good faith.

<sup>245</sup> *McDonnell Douglas*, 411 U.S. at 804.

<sup>246</sup> *Id.*

<sup>247</sup> Only five states—Alabama, Georgia, Mississippi, North Carolina, and Texas—do not have public accommodation laws for nondisabled individuals. See *State Public Accommodation Laws*, NAT'L CONF. STATE LEGISLATURES (June 25, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>; see also Singer, *supra* note 145, at 1478–90 (listing and citing state public accommodations laws).

<sup>248</sup> See *State Public Accommodation Laws*, *supra* note 247.

<sup>249</sup> Such states include Colorado, Louisiana, and New Jersey. In Colorado, the state antidiscrimination law is written in a way that could be interpreted to cover disparate impact discrimination. See COLO. REV. STAT. § 24-34-601(2)(a) (2022) (making it unlawful for a public accommodation to “directly or indirectly” refuse or deny service to a long list of protected classes, including religion). While there is no published case law directly on point, the Colorado Department of Regulatory Agencies, Civil Rights Division, states clearly on its web site that it handles disparate impact cases involving public accommodations. See *Discrimination, Types of Discrimination Complaints that We Can Handle* COLO. DEP'T REGUL. AGENCIES, <https://ccrd.colorado.gov/discrimination> (last visited May 21, 2023) (click on Public Accommodations). New Jersey has a similarly worded law. See N.J. STAT. ANN. § 10:5-12(11)(f)(1) (West 2022) (prohibiting “direct[] or indirect[]” discrimination in public accommodations), and there is case law interpreting the statute to cover disparate impact discrimination in employment and banking; see, e.g., *Assocs. Home Equity Servs., Inc. v. Troup*, 778 A.2d 529, 537 (N.J. Super. Ct. App. Div. 2001) (recognizing a disparate impact claim in mortgage lending under New Jersey's Law Against Discrimination); see also *About the NJ Law Against Discrimination*, N.J. OFF. ATT'Y GEN. (click on Discrimination), <https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/know-the-law/> (“The LAD prohibits ... policies and practices that disproportionately affect those in a protected class, even when the policies and practices are neutral on their face and are not intended to discriminate (disparate impact).”). Louisiana too has case law, albeit from an unpublished federal court decision, that interprets its statute's prohibition on “direct” or “indirect” discrimination in public accommodations specifically. See LA. STAT. ANN. § 51:2232 (2022) (“Discriminatory practice in connection with public accommodations” means any *direct or indirect* act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons because of race, creed, color,

York City, the city's human rights ordinance expressly includes disparate impact discrimination within its ambit for public accommodations and defines in some detail how it can be proved.<sup>250</sup> A covered entity there may successfully defend against a claim of disparate impact discrimination if the challenged policy "bears a significant relationship to a significant business objective of the covered entity."<sup>251</sup> Part of the analysis is whether "an alternative policy or practice with less disparate impact is available to the covered entity and the covered entity fails to prove that such alternative policy or practice would not serve the covered entity as well."<sup>252</sup> In the Covid vaccine passport context, an alternative policy might be requiring all patrons to be masked. In some settings, such as restaurants and perhaps gyms, this is obviously less feasible. In other settings, like the performing arts, this is more feasible and the parties could litigate, as a matter of fact, whether masking is just as effective as a vaccine passport with no exceptions for religion.<sup>253</sup>

### 1. *Municipal Overlay*

Given the above analysis, it may be difficult, but not impossible, for a plaintiff to make out an antidiscrimination claim against a business that imposes a vaccine mandate with no or too stringent of a religious exemption. In cities that required vaccine passports, however, businesses and venues are likely to raise compliance with that city order as a defense. Nonetheless, a customer seeking religious accommodation could claim that Title II impliedly preempts the city's proof of vaccination scheme if the municipal scheme required actions that were facially discriminatory under federal law.

Most cities with proof of vaccination requirements included religious exemptions in their schemes, although they varied tremendously in their stringency. In Evanston, Illinois, for instance, those claiming a religious exemption from the city's

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religion, sex, age, disability, national origin, or natural, protective, or cultural hairstyle."). This means that a plaintiff need not show intentional discrimination to be successful. *See Smith v. France*, 850 F. App'x 243, 249 (5th Cir. 2021) ("[T]he Louisiana Human Rights Act does not require a plaintiff alleging discrimination by a place of public accommodation to show intentional discrimination.").

<sup>250</sup> NEW YORK CITY, N.Y., ADMIN. CODE § 8-102(17)(a)(1) (2022) (noting that disparate impact applies to chapters 4 and 5, which are housing and public accommodations).

<sup>251</sup> *Id.* § 8-102(17)(a)(2).

<sup>252</sup> *Id.*

<sup>253</sup> This assumes that the mere exclusion of some persons with religious objections meets the requirements for a prima facie case under New York City's ordinance, the details of which are complex. *See id.* § 8-107(17)(b) ("The mere existence of a statistical imbalance between a covered entity's challenged demographic composition and the general population is not alone sufficient to establish a prima facie case of disparate impact violation unless the general population is shown to be the relevant pool for comparison, the imbalance is shown to be statistically significant and there is an identifiable policy or practice or group of policies or practices that allegedly causes the imbalance.").

vaccine passport regime needed both “a signed attestation from a religious leader or institution” and a Covid test “administered by a medical professional within the last 24 hours” in order to go out to eat or see a movie.<sup>254</sup> In Philadelphia, those seeking a religious exemption merely needed to complete and sign a form prepared by the city, although the city was clear that businesses need not permit those claiming an exemption to eat indoors.<sup>255</sup> In Newark, N.J., there was no religious exemption at all.<sup>256</sup> In New Orleans, by contrast, anyone could provide proof of a test within 72 hours before eating as an alternative to proof of vaccination.<sup>257</sup> Of these schemes, Evanston’s and Newark’s clearly raise the most prominent red flags. By permitting no religious exemptions at all, Newark’s may violate Title II, although that is not entirely clear because unlike Title VII, Title II does not require that religion be reasonably accommodated. Similarly, by requiring a signed attestation from a religious leader to claim a religious accommodation, thereby impliedly rejecting individuated religious claims, Evanston’s regime conflicts with how the federal courts have viewed individuated religious claims under Title VII,<sup>258</sup> but again Title II does not require reasonable accommodation like Title VII. With its requirement of a signed attestation from a religious leader, Evanston’s regime may also raise questions under the First Amendment’s Establishment Clause.<sup>259</sup>

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<sup>254</sup> IKE C. OGBO, DEP’T HEALTH & HUM. SERVS., CITY OF EVANSTON, ILL., PUBLIC HEALTH ORDER OF JANUARY 14, 2022, <https://www.cityofevanston.org/home/showpublisheddocument/69423/637789730160500000>.

<sup>255</sup> CITY OF PHILA., INDOOR DINING LOCATION CUSTOMER COVID-19 VACCINATION RELIGIOUS EXEMPTION REQUEST, [https://www.phila.gov/media/20211231095805/Indoor-Dining-Customer-Religious-Exemption-from-Covid-Vaccine-FINAL\\_12302021-002.pdf](https://www.phila.gov/media/20211231095805/Indoor-Dining-Customer-Religious-Exemption-from-Covid-Vaccine-FINAL_12302021-002.pdf).

<sup>256</sup> RAS BARAKA, EXEC. ORDER NO. MEO-22-0001: EXTENDING THE WEARING OF FACE MASKS WHILE INDOORS WITHIN THE CITY OF NEWARK (2022). It is unclear whether Newark ever enforced its vaccine passport regime at all. See Michael Tracey, *Newark, NJ Ditched Its “Vaccine Passport” After I Told the Mayor Nobody Was Enforcing It*, SUBSTACK (Feb. 18, 2022), <https://mtracey.substack.com/p/newark-nj-ditched-its-vaccine-passport> (reporting that “coffee shops, bakeries, pizza places, fast food joints, diners, bars—not one I visited was checking vax status, and just a single person I spoke to exhibited the vaguest awareness that checking vax status was obligated by city law”).

<sup>257</sup> See CITY OF NEW ORLEANS HEALTH DEP’T, *supra* note 80, at 4.

<sup>258</sup> See *supra* notes 232–33 and accompanying text (discussing the EEOC and courts’ interpretation of religious claims in the Title VII context).

<sup>259</sup> See *Boone v. Boozman*, 217 F. Supp. 2d 938, 950 (E.D. Ark. 2017) (holding that state religious exemption from school vaccination requirement violated the Establishment Clause because it only applied to “recognized church[es],” thereby excessively entangling the state with religion). In holding such, *Boone* relied on the Supreme Court’s test for Establishment Clause violations in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Boone*, 217 F. Supp. 2d at 946 (citing *Lemon*). The Supreme Court recently overturned *Lemon*, however, so it is not clear how the *Boone* court’s analysis would fare under the Court’s new approach to the Establishment Clause. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (stating that the Court “long ago abandoned

Could the city itself be liable for discrimination in creating and enforcing a system that discriminates on the basis of religion? The structure of Title II and of state civil rights acts do not seem to contemplate such liability. Unlike the Fair Housing Act, under which municipalities have long been held liable for enacting policies that worsen housing segregation, there is no similar record for Title II (or even Title VII), or under state antidiscrimination laws.<sup>260</sup> Nonetheless, as discussed above, a plaintiff might have a preemption—i.e., Supremacy Clause—claim to enjoin a local order that facially conflicted with the CRA. In a strange way, by allowing only religious exemptions that are backed up by a religious leader, Evanston’s municipal vaccine passport may have conflicted more with Title II than Newark’s, which had no religious exception at all. Focusing only on the local level, if a city’s antidiscrimination (or “human rights”) ordinance could be read to apply to a municipal decision affecting private entities, the mayoral and public health commissioner executive orders that created the vaccination requirements may by their own terms override such laws.<sup>261</sup>

### C. *Racial and Ethnic Discrimination*

Another argument rooted in civil rights law that might be leveled against vaccine passports sounds in racial and ethnic discrimination. Although the vaccine passport requirement was facially neutral, and some jurisdictions even specifically required its nondiscriminatory enforcement in the language of their orders, the application of the policy nonetheless did not affect all races and ethnicities equally due to uneven vaccination rates. For the first several months after the Covid vaccines’ authorization, vaccination rates in Black and Hispanic communities generally trailed those of White and Asian populations.<sup>262</sup> Indeed, White and Asian vaccination rates were approximately equal through mid-April of 2021, beyond which

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*Lemon*”); *id.* at 2434 (Sotomayor, J., concurring) (observing that the Court “overrules *Lemon*” in this decision).

<sup>260</sup> For municipal liability under the Fair Housing Act, see *Metro. Hous. Dev. Co. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); see also Brian W. Blaesser & Andrew C. Stansell, *Mun. Liability Under the Fair Housing Act: An Update*, 40:10 LAND USE L. & ZONING DIG. 3, 8 (1988) (“[A] municipality is ... subject to having its actions overturned if a court determines that the same results could be achieved through less discriminatory means.”).

<sup>261</sup> *E.g.*, Chicago, Ill., Order No. 2021-2, Proof of Vaccination in Public Places § 2 (Jan. 3, 2022) (noting that covered entities were required to screen for proof of vaccination “[n]otwithstanding any other provision of law”).

<sup>262</sup> Nambi Ndugga, Latoya Hill, Samantha Artiga & Sweta Haldar, *Latest Data on COVID-19 Vaccinations by Race/Ethnicity*, KFF (July 14, 2022), <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-by-race-ethnicity/>. I have capitalized “black” and “white” as racial groups consistent with the style of the data source upon which I rely, although I recognize that there are valid arguments for and against capitalizing one or both. See,

Asian rates proceeded to exceed White and other rates until the present.<sup>263</sup>

Public health experts generally attributed the initially lower vaccination rates among Hispanic and Black communities to several factors, including pre-existing disparities in wealth and privilege that enabled White and Asian populations, at least in certain areas, to have greater access to the time and resources necessary to secure scarce vaccine appointments.<sup>264</sup> Moreover, the legacy of medical discrimination and unethical experimentation that knowingly harmed Black Americans, such as the notorious Tuskegee syphilis study, may have loomed large in the minds of many persons who were initially hesitant about a vaccine that had received only emergency use authorization and not approval from the FDA.<sup>265</sup>

When the supply of vaccines gradually exceeded demand sometime in the summer of 2021, in combination with aggressive and well-funded government outreach, the first factor mentioned above began to reduce as a barrier to vaccination.<sup>266</sup> Vaccines were widely available and did not require the same gamesmanship or effort to obtain as they did in the early days of distribution in winter or spring of 2021. Moreover, the American Rescue Plan Act of 2021 offered private employers tax incentives to provide paid sick and family leave to their employees to get vaccinated,<sup>267</sup> and also offered paid leave to federal employees to get vaccinated.<sup>268</sup> Several state

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*e.g.*, David Bauder, *AP Says It Will Capitalize Black but Not White*, AP NEWS (July 20, 2020), <https://apnews.com/article/entertainment-cultures-race-and-ethnicity-us-news-ap-top-news-7e36c00c5af0436abc09e051261fff1f> (“Some proponents believe that keeping white lowercase [while capitalizing black] is actually anti-Black, saying it perpetuates the idea that whites are the default race.”). KFF also uses Hispanic as opposed to Latino or Latinx and uses Asian as opposed to Asian-American or AAPI. *See also infra* note 275 (discussing differences among states in how they classify and group Asians and Pacific Islanders).

<sup>263</sup> Ndugga et al., *supra* note 262.

<sup>264</sup> *See, e.g.*, Olivia Goldhill, *In Palm Beach, Covid-19 Vaccines Intended for Rural Black Communities Are Instead Going to Wealthy White Floridians*, STAT NEWS (Mar. 4, 2021), <https://www.statnews.com/2021/03/04/covid19-vaccines-for-rural-black-communities-going-to-wealthy-white-floridians/>.

<sup>265</sup> Wilson Majee, Adaobi Anakwe, Kelechi Onyeaka & Iderhia S. Harvey, *The Past Is So Present: Understanding COVID-19 Vaccine Hesitancy Among African American Adults Using Qualitative Data*, 10 J. RACIAL & ETHNIC HEALTH DISPARITIES 462, 466–67 (2022) (discussing distrust of government health policies within the African-American community).

<sup>266</sup> *See* Will Wright & Giulia McDonnell Nieto del Rio, *A New Covid Dilemma: What to Do When Vaccine Supply Exceeds Demand?*, N.Y. TIMES (Nov. 17, 2021), <https://www.nytimes.com/2021/05/09/us/covid-vaccine-surplus.html>.

<sup>267</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9641, 135 Stat. 4, 161–62 (“Payroll Credits”) (codified in scattered sections of 5 & 26 U.S.C.).

<sup>268</sup> *Id.* § 4001; Vaccination-Related Leave, SAFER FED. WORKFORCE TASK FORCE, <https://www.saferfederalworkforce.gov/faq/leave/> (last visited May 21, 2023) (“Employees who seek any non-required dose of FDA-authorized COVID-19 vaccine during work hours should be granted administrative leave (consistent with Safer Federal Workforce Task Force and OPM guidance) and not use duty time.”).

and local government employers offered similar incentives.<sup>269</sup> Finally, beginning in the summer of 2021, several employers, including the military, federal government, many state and local governments, hospitals, universities, and others began *requiring* vaccinations of their employees and students.<sup>270</sup> In addition, one city—New York City—in December 2021 required all employees of any business or entity working in person around other people to be vaccinated.<sup>271</sup>

At the same time, with the ascension of President Joe Biden, a Democrat, and his enthusiastic embrace of aggressive vaccination policy, partisan resistance, particularly among White Republicans, to the vaccines grew.<sup>272</sup> The net result is that as of this Article’s writing, the racial and ethnic disparities in vaccination are quite unlike what they were early on in the vaccines’ release. In some states, the Black population’s vaccine uptake exceeds the White population’s, particularly in parts of the Deep South and the Mountain West and Northwest.<sup>273</sup> In approximately half

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<sup>269</sup> Pub. L. No. 117-2, § 4001(b)(8), 135 Stat. 4, 77, (establishing “Emergency Federal Employee Leave Fund” and allowing federal agencies to offer paid leave to employees “obtaining immunization related to COVID-19 or is recovering from any injury, disability, illness, or condition related to such immunization.”).

<sup>270</sup> See generally Eric M. Fraser & Michael J. Neuss, *Who Calls the Shots? A Legal and Historical Perspective on Vaccine Mandates*, 162 CHEST 659 (2022).

<sup>271</sup> See BILL DE BLASIO, EMERGENCY EXEC. ORDER NO. 317 (Dec. 15, 2021). Mayor Bill de Blasio implemented this order at the end of his term. *Id.* Mayor Eric Adams ultimately announced the discontinuation of the policy in September 2022, effective November 2022. See *Transcript: Mayor Eric Adams Launches COVID-19 Booster Campaign, Announces Additional Flexibility for NYC Businesses, Parents*, NYC (Sept. 20, 2022), <https://www.nyc.gov/office-of-the-mayor/news/688-22/transcript-mayor-eric-adams-launches-covid-19-booster-campaign-additional-flexibility>; Lola Fadulu, *Eric Adams Stopped Enforcing Vaccine Mandate for New York City Businesses*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/nyregion/nyc-vaccine-mandate-adams.html>.

<sup>272</sup> Liz Hamel, Lunna Lopes, Grace Sparks, Ashley Kirzinger, Audrey Kearney, Mellisha Stokes & Mollyann Brodie, *KFF COVID-19 Vaccine Monitor: September 2021*, KAISER FAM. FOUND. (Sept. 28, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-september-2021/> (“The largest remaining gap in vaccination rates is by partisanship, with 90% of Democrats saying they have gotten at least one dose compared to . . . 58% of Republicans.”); David R. Jones & Monika L. McDermott, *Partisanship and the Politics of COVID Vaccine Hesitancy*, 54 POLITY 408, 423 (2020) (“[F]or the otherwise average white American, a strong Democrat has a .53 probability of being vaccinated, while a strong Republican has only a .39 probability.”).

<sup>273</sup> As measured by percentage of the population to receive at least one Covid vaccination shot, these states as of July 2022 included Alabama, Alaska, Idaho, Louisiana, Mississippi, Utah, Washington, and West Virginia. See Ndugga et al., *supra* note 262. Receipt of at least one shot is a less-than-perfect metric for “full vaccination,” of course, but it is the metric used by the site with the most detailed data on racial and ethnic uptake by state. See *id.*

the states, Hispanic Covid vaccine uptake exceeds the White population's.<sup>274</sup> In almost all states, Asian Covid vaccination rates are the highest among any racial or ethnic group reported.<sup>275</sup>

The original antidiscrimination laws, of course, were intended to prohibit discrimination against historically oppressed groups, with a particular focus on combating anti-Black discrimination.<sup>276</sup> From that perspective, it might seem curious to invoke such laws when a vaccine passport regime is most likely to discriminate against White persons in certain places. At the time that some of the earliest vaccine passport regimes were rolled out, however, this was not the case. In New Orleans, for instance, data indicated in August 2021 that White vaccination rates far exceeded those of the Black community, thus all but ensuring that a vaccine passport regime announced and implemented that month was likely to exclude Black persons disproportionately from public accommodations.<sup>277</sup> In addition, despite their original intent, antidiscrimination laws have now long been interpreted to apply equally across races and ethnicities.<sup>278</sup> Hence, the mere fact that vaccine passports in some jurisdictions may disproportionately exclude White people the most does not necessarily insulate such a regime from legal challenge.

In the absence of proof of intentional discrimination in the enforcement of a vaccine passport, any claim under Title II would need to be based on a disparate impact theory. As noted in Section III.B, the courts have thus far rejected arguments for disparate impact in the context of Title II, even if the Supreme Court has not officially foreclosed its use.<sup>279</sup>

<sup>274</sup> *Id.* (counting 24 states and the District of Columbia).

<sup>275</sup> In only Colorado, North Dakota, and South Dakota were Asian rates not the highest of the four major groups. *Id.* Most states report Pacific Islander separately from Asian, but Connecticut, Michigan, New Mexico, and Virginia “combine Asian and Pacific Islander populations into the Asian racial group.” *Id.*

<sup>276</sup> Indeed, at the time of the CRA’s passage, “Hispanic” (now Latino or Latinx) had not yet reified into a consolidated racial or ethnic group. See DAVID E. BERNSTEIN, CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATION IN AMERICA 29–57 (2022) (discussing the rise of the “Hispanic” category in the 1970s); see also Nancy MacLean, *The Civil Rights Act and the Transformation of Mexican American Identity and Politics*, 18 BERKELEY LA RAZA L.J. 123, 127 (2007) (arguing that the passage of the CRA in 1964 “enabled Mexican Americans to embrace non-white identity without assuming the risk involved when discrimination was legal”).

<sup>277</sup> Sabrina Wilson, *Vaccination Rates for African Americans Still Lag; La. COVID19 Task Force Works to Improve the Numbers*, FOX8 (Aug. 3, 2021, 5:39 PM), <https://www.fox8live.com/2021/08/04/vaccination-rates-african-americans-still-lag-la-covid19-task-force-works-improve-numbers/> (“In New Orleans, blacks are 60% of the population and blacks are 43.9% of the vaccinations completed by race which is slightly higher than whites at 43.0.”).

<sup>278</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 403, 557 (2009) (considering CRA Title VII claims of “certain white and Hispanic firefighters” who claimed that the city discriminated against them in favor of promoting “black candidates”).

<sup>279</sup> See SMOLLA, *supra* note 239.

Nonetheless, as noted above, even if Title II recognized disparate impact claims, presumably a burden-shifting analysis similar to Title VII would apply. A similar approach may also apply in the handful of state and local jurisdictions that recognize disparate impact discrimination as illegal in public accommodations in some way.<sup>280</sup> Under this approach, a covered entity would need to produce evidence of a “business necessity” for the practice.<sup>281</sup> As with religious discrimination, the weaker the evidence in favor of the vaccines’ protection against spread to other customers and employees, the stronger the plaintiffs’ case would be.

On the other hand, drawing on the Title VII model, plaintiffs would need to show that they have been denied access to public accommodations at a “substantially higher rate.”<sup>282</sup> Racial or ethnic imbalance alone does not create a prima facie case.<sup>283</sup> The EEOC in 1979 adopted a “four-fifths” guideline in the employment context: if a particular screening practice results in a selection rate that is 80% or less for a particular group, adverse impact is presumed.<sup>284</sup> Courts have embraced the guideline unevenly, with some treating it as a useful “rule of thumb” and others criticizing it as arbitrary.<sup>285</sup>

In the public accommodations context, administering this guideline would be tricky. Just looking at the publicly available vaccination rates by race and ethnicity for certain states, some comparisons in some states would meet this standard. In Florida, for instance, 45% of the Black population had one Covid shot as compared to 63% of the White population; four-fifths of 63% is 50%, and the Black vaccination rate is lower than that.<sup>286</sup> In many states, the numbers are even starker when White or Black populations are compared to Asian populations. In Oklahoma, for instance, the Black and White rates compared to Asian rates would amount to 54% and 53%, respectively.<sup>287</sup>

It is not clear, however, that vaccine rates in the general population are the correct metric for measuring public accommodations discrimination. Perhaps plaintiffs would need to show that the rates of vaccination among those who either at-

<sup>280</sup> See *supra* notes 249–50.

<sup>281</sup> In Title VII, unlike with Title II, this standard is spelled out in the statute. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2022) (allowing disparate impact claims where “respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity”).

<sup>282</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 425–26 (1971).

<sup>283</sup> ABIGAIL MODJESKA, *EMPLOYMENT DISCRIMINATION LAW* § 1:13, at 82 (3d ed. 1999).

<sup>284</sup> Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 11,998 (Mar. 2, 1979) (to be codified at 29 C.F.R. pt. 1607).

<sup>285</sup> 45A AM. JUR. 2D *Job Discrimination* § 306 (2022) (citing cases).

<sup>286</sup> Ndugga et al., *supra* note 262.

<sup>287</sup> *Id.*

tempted to enter certain public accommodations or would have liked to enter certain entities are disparate, which would be akin to showing disparate impact among applicants to jobs rather than among the general public. These numbers may be different from those of the general population (e.g., the White percentage that is vaccinated seeking to eat out at a particular restaurant with a vaccine passport in Oklahoma may be higher than the vaccinated percentage of the state's White population as a whole). Regardless, there is likely enough of a disparity in some market in some state that an enterprising plaintiff's lawyer could make out a prima facie case. In response, the business can offer business necessity. In response to that, the plaintiff may argue that the defendant could have chosen a less discriminatory means of achieving that necessity. As in the religion context, the argument on this point might be that masks could have worked as effectively as a vaccine passport, at least in certain settings.<sup>288</sup> The argument would likely be similar under the state and local laws that expressly embrace disparate impact discrimination, like New York City's.<sup>289</sup>

### 1. *Municipal Overlay*

As in the religion context, the existence of a municipal mandate can provide an extra layer of protection to businesses that implement vaccine mandates. If the city requires that businesses screen for proof of vaccination in order to avoid fines or retain their licenses, that is likely a sufficiently compelling "business necessity" in defense of any claim of disparate impact. Similar to the analysis in the religion context, it is unlikely that a city or county could be held liable under Title II for causing a disparate impact through its rule, and it is similarly unlikely that liability would attach through state or local antidiscrimination law, the latter of which might be waived by the emergency order putting the vaccine passport into effect.<sup>290</sup>

### D. *Age Discrimination*

Although Title II does not include age among its protected classes, many state statutes and local ordinances do;<sup>291</sup> in Louisiana, the state constitution prohibits "unreasonable" discrimination in public accommodations by age.<sup>292</sup> In some of these jurisdictions, it is possible that prohibiting those below a certain age from entering an establishment could violate state or local antidiscrimination law, even if

<sup>288</sup> See *supra* note 253 and accompanying text.

<sup>289</sup> See *supra* notes 249–50.

<sup>290</sup> See *supra* note 261 and accompanying text.

<sup>291</sup> See *State Public Accommodation Laws*, *supra* note 247 (listing 20 states as prohibiting age discrimination in public accommodations); see also SHERRY, *supra* note 143, § 4:7, at 61 ("[S]everal states do include age as a prohibited basis for treatment by owners or operators of public accommodations.").

<sup>292</sup> LA. CONST. art. I, § 12.

the reason for such a policy is because there is no vaccination available to the excluded ages.<sup>293</sup> In other jurisdictions, however, the prohibition on discrimination in public accommodations on the basis of age does not apply to minors.<sup>294</sup>

A venue's policy that requires *only* persons above a certain age to get more booster shots in order to access a public accommodation than those below that age would also likely present at least something like a prima facie case of discrimination. As noted above, at least one university required that those 50 and over have received *two* boosters, if eligible, during the summer and early fall of 2022, in order to access its premises, whereas those under 50 need only have received one (which was all that was authorized by the FDA except for "certain immunocompromised individuals" 12 and older).<sup>295</sup> Because the primary purpose of authorizing the second booster for those over 50 in the spring of 2022 was to allow such persons to protect *themselves* from the consequences of infection, rather than from infection itself, it is difficult to see what valid defense a venue could offer for such a policy.<sup>296</sup> As discussed above in the common-law context, courts have not recognized paternalism as a valid reason for public accommodations to deny service.<sup>297</sup>

Perhaps the best argument a business or venue could put forward in defense of age discrimination in admission is that every bit of vaccination helps reduce transmission, and therefore it is justified in requiring the maximum amount of vaccination from anyone as permitted by the U.S. regulatory regime. In the absence of evidence that the additional booster is more useful at stopping spread, however, this defense should falter. Even if the venue could offer such evidence, it is still highly questionable under civil rights law whether a venue may impose an additional burden on a protected class merely because that class is theoretically capable of meeting that burden whereas others are not. Imagine, for instance, a public accommodation that was limited to those 18 and over that required all attendees to present government-issued identification for admittance but required only men *also* to show proof of their selective service registration.<sup>298</sup> This would almost surely constitute illegal sex discrimination.

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<sup>293</sup> SHERRY, *supra* note 143, § 4:7, at 61 (noting that "the age groups protected" "will vary from state to state").

<sup>294</sup> *E.g.*, CONN. GEN. STAT. § 46a-64(b)(2) (West 2022) ("The provisions of this section with respect to the prohibition of discrimination on the basis of age shall not apply to minors.").

<sup>295</sup> See *supra* note 103 and accompanying text.

<sup>296</sup> Press Release, U.S. Food and Drug Admin., *supra* note 91.

<sup>297</sup> See *supra* Section II.B.

<sup>298</sup> 50 U.S.C. app. § 453 (requiring males between the ages of 18 and 26 to register for the selective service consistent with presidential proclamations and regulations).

## CONCLUSION

In conclusion, vaccine-check systems themselves are not inherently illegal except in the eight states that banned them, but they implicate several other forms of discrimination that are legally prohibited. Moreover, they provide an interesting opportunity to revisit and examine centuries-old debates about the extent of public accommodations' duty to serve and any exceptions thereto. While it is unlikely that federal antidiscrimination law would invalidate vaccine passports, a lawsuit alleging such would bring the long-simmering question of whether Title II covers disparate impact discrimination to the fore.

Even if vaccine passports are legal in many states or might survive challenges thereto, their legality nonetheless demonstrates the limits of current public accommodations law and many unanswered questions therein. The arguments against the unlimited right to exclude under the common law have been largely unsuccessful to date in terms of changing doctrine. It is also possible that many claimants have not felt the need to press common-law arguments because expansive public accommodations laws in certain states did most of the work at ensuring sufficiently equal access. Nonetheless, at least under the extant black-letter law, most businesses in most states retain near-absolute discretion to discriminate on the basis of anything but what federal, state, or local law denominates as a "protected class."

For those who do not fall into a federal, state, or local protected class but nonetheless experience what feels like arbitrary refusal of services, the law is currently quite unsatisfactory. While some left-leaning scholars long questioned empowering public accommodations to act in an unrestrained fashion, the political left as a whole, at least in the United States, largely looked the other way with respect to vaccine passports, wholeheartedly embracing the "it's their business and they can do what they want with it" attitude long associated with the political right. On the other hand, eight states stepped in to ban Covid vaccine status discrimination in public accommodations, including—ironically—two states (Alabama and Texas) that had never previously passed a general public accommodations antidiscrimination law. These states, therefore, protect Covid vaccination status from discrimination in their statutes but not race, gender, religion, etc.

With respect to discrimination, vaccine passports illustrate both the reach and limitations of the current structure of federal, state, and local antidiscrimination law. Policies that have a disparate impact—perhaps even vastly so—on religious, racial, and ethnic minorities may well be legal under federal and state law in most states. In only a handful of jurisdictions is disparate impact discrimination even expressly contemplated by the legal regime that applies to public accommodations. The law in this field is highly unsettled and unexplored. Despite the initially low vaccination rates in Black and Hispanic communities, established civil rights organizations generally did not object to vaccine passports. Where proof of vaccination requirements

were imposed by municipal mandate, the lack of any formal law or rulemaking process in most such places may have limited the opportunities for a full and public discussion of these implications.<sup>299</sup>

Vaccine passports also nicely illustrate the underlying tension in the common and statutory law governing public accommodations. States and courts disagree over whether it is more important to preserve the right of some minority of the public (the unvaccinated) to access public accommodations versus allowing individual business owners the autonomy to decide which policies to adopt and with which kinds of customers—in terms of vaccination status—to associate. Whereas “progressive” states are often at the cutting edge of prioritizing rights of access over private property values, in this instance they were on the other side of that debate, allowing businesses to choose for themselves whom to serve. In the case of the nearly two dozen local jurisdictions with mandatory proof of vaccination regimes, the governments overrode *both* the unvaccinated individuals’ right of access *and* the prerogative of private property owners to choose whom to serve.<sup>300</sup>

It is the hope of this Article to remain a resource for policymakers and interest groups who may focus on this issue in the future. While Covid may have receded and vaccine passports have (almost) entirely disappeared, they are not forgotten. We are just one new virulent variant away from a potential similar response from business and government. The next time around, the vaccine passport regimes may last longer, and with technology continuing to facilitate their use, may reify into the “new normal” that some have expected and even desired.<sup>301</sup> If it is to be a new normal, we must wrestle with how such a “normal” meshes with long-existing principles of the common law governing public callings, as well as decades-old commitments

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<sup>299</sup> See Diller, *supra* note 74, at 648–49 (discussing shortcomings of emergency processes used to promulgate vaccine passport regimes in most cities).

<sup>300</sup> Instances of governments overriding both a venue’s right to exclude (and include) and customers’ rights of access simultaneously are rare. Jim Crow, of course, is the most well-known and odious, example of this phenomenon, at least in the states and localities where segregation was required as opposed to permitted. See *supra* note 141 (discussing municipal ordinances and a state regulation requiring segregation in private facilities); see also Singer, *supra* note 145, at 1388–90 (discussing Jim Crow laws that “intru[ded] on property rights in order to maintain white supremacy”) (citing DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW § 1.13, at 44–50 (3d ed. 1992)). Another example of this phenomenon in a completely different and unrelated context is raising the drinking age to 21, which happened state by state but was accelerated by a federal law passed in 1984. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding the National Minimum Drinking Age Act of 1984). Such laws had the effect of prohibiting entry to certain premises to those who were not of drinking age, thus limiting both the right of venue operators to admit 18-, 19-, and 20-year-olds as customers, as well as the right of such persons to access those premises. See, e.g., OR. ADMIN. R. 845-006-0340 (2022) (delegating authority to state commission to post “no minors” signs “premises, room, or area where alcohol is consumed or where there is a drinking environment,” with “minors” defined as under 21 years of age).

<sup>301</sup> See Smith, *supra* note 23.

to equal access to public accommodations codified into federal, state, and local statutes.