

LAWS PROHIBITING VACCINE MANDATES: AN OVERVIEW

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During the COVID-19 pandemic, for the first time, a significant minority of states passed laws limiting or outright prohibiting vaccines mandates. The laws varied greatly in what they covered, the way they addressed the issue, and their intended results. This Article provides a detailed overview of these mandate bans. Consequently, this Article demonstrates that most of the bans target potential vaccine mandates limiting access to government buildings and services—and points out that no states adopted such mandates. That said, a growing sub-set of states also adopted laws or executive orders prohibiting private actors from imposing mandates—either on customers or on employees. These prohibitions are unusual in several ways, but one way is upending the usual political approaches, with Republican politicians supporting measures that limit individual business rights and Democrat politicians ranging themselves on the side of business rights. Other measures limit the ability of universities to mandate vaccines or preempt local governments from doing so. This Article is largely descriptive but argues that the main driver in enacting these laws and executive orders was the politicization of the pandemic rather than the direct efforts of the anti-vaccine movement. The laws were largely driven by mainstream politicians, not traditional anti-vaccine activists.

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I. INTRODUCTION

Struggles concerning vaccine mandates in the United States date back to the nineteenth century.¹ Mandates have always been controversial. But, until recently, the battle raged around questions such as whether or not the government should mandate vaccines, and, if the government does mandate them, on what terms.

During the COVID-19 pandemic, legislators in most states proposed legislation aimed to limit or prohibit vaccine mandates—including mandates imposed by private actors.² Dozens of those proposed bills became law.³ This is a new phenomenon.

This Article examines these new laws, looking at different kinds of measures, including: limits on mandates by government, limits on mandates aimed at customers, limits on mandates in the employment context, and limits on university mandates. It also briefly addresses local preemption.

This Article is primarily descriptive: It seeks to explain what is happening and places the current happenings in the context of both previous legislation around vaccine mandates and the COVID-19 pandemic. By providing this information, the hope is that this Article can help scholars assess these legislative developments and consider what the developments show and, consequently, offer suggestions for the future.

To achieve that goal, this Author and her research assistants created a database of measures limiting vaccine mandates. There were two waves of measures—the first, in response to both initial efforts to mandate vaccines and the rise of vaccine controversies, and the second, in response to President Biden’s proposal to impose federal mandates. Neither of these waves were mainly driven by anti-vaccine groups, though the groups certainly supported and

¹ Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws are Constitutional*, 110 NW. U. L. REV. 589, 596 (2016).

² Breanna Fernandes et al., *US State-Level Legal Interventions Related to COVID-19 Vaccine Mandates*, 327 JAMA 178, 178 (2021).

³ Joanne Braddock Lambert et al., *List of States Limiting Employer COVID-19 Vaccine Mandates Continues to Expand*, NAT’L L. REV. (Nov. 18, 2021), <https://www.natlawreview.com/article/list-states-limiting-employer-covid-19-vaccine-mandates-continues-to-expand> [<https://perma.cc/2TAP-JEWD>]; Fernandes et al., *supra* note 2, at 178.

encouraged the measures, but instead were driven by mainstream politicians, reflecting the politicization of pandemic information and attitudes.

Most legislation limited state and local governments' ability to mandate vaccines, but a minority of states also imposed limits on private actors' ability to mandate vaccines. The political struggles around these mandates were a reversal of usual positions—with Republicans proposing to limit the rights of private businesses and Democrats standing for the freedom of private businesses.

This Article proceeds as follows: Part II describes the previous struggles around vaccine litigation. Part II also points out that these struggles, although certainly political, have only recently become partisan, and the growing partisanship never led politicians to pass bills prohibiting mandates pre-pandemic. This Part additionally sets up the COVID-19 pandemic and how pandemic-related measures became politicized. Part III then describes the bills prohibiting mandates, focusing on those that became law and describing ensuing litigation. Part IV pulls together the description and draws a general conclusion, reinforcing this Article's finding that vaccine mandates have become thoroughly politicized.

II. BACKGROUND

Vaccine mandates are not new, nor are legislative battles around them. But the COVID-19 pandemic is new, and the lead up to the bills examined in this Article was not politics as usual. This Part sets out two types of background. First, it provides a historical overview of vaccine mandates and the legislative battles around them. Then, it moves on to discuss the COVID-19 pandemic, its politicization, and the lead up to the bills this Article analyzes.

A. The History of Vaccine Mandates and Legislative Battles Around Them

The first vaccine mandate in the United States was created in 1809 when Massachusetts passed a law allowing localities to impose vaccine mandates during smallpox outbreaks.⁴ Accordingly,

⁴ Chemerinsky & Goodwin, *supra* note 1, at 596.

litigation around vaccine mandates started in that time period as well.⁵ Controversy around these mandates has continued since.

Vaccine mandates vary. The initial 1809 Massachusetts law empowered local health boards to impose a general adult mandate.⁶ School immunization mandates started as early as 1855 (again in Massachusetts) and spread to all states and the District of Columbia by 1980.⁷ Workplace mandates also existed in the 1800s.⁸ Meanwhile, the first university mandates were imposed around the early 1900s.⁹ Pre-COVID-19, however, this Author has yet to find evidence of vaccine mandates by U.S. businesses for their customers or government-required vaccines for access to services (with the exception of mandates for immigrants, who are required to be vaccinated¹⁰). Each of the types of mandates that existed led to litigation, as described in Part III of this Article.

Every year, dozens of bills addressing vaccine mandates are filed with legislatures in various states.¹¹ Some of these bills seek to expand or create vaccine mandates—others seek to limit them.¹²

⁵ E.g., *Abeel v. Clark*, 24 P. 383 (Cal. 1890); *Morris v. City of Columbus*, 30 S.E. 850 (Ga. 1898).

⁶ *Jacobson v. Massachusetts*, 197 U.S. 11, 12–13 (1905) (quoting the law and its application in that case).

⁷ Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 69 BUFF. L. REV. 881, 892 (2015).

⁸ Kevin L. Cope et al., *Vaccine Passports as a Constitutional Right*, ARIZ. ST. L.J. 15 (forthcoming) (on file with authors).

⁹ *Wallace v. Regents of Univ. of Cal.*, 242 P. 892, 892–94 (Cal. Dist. Ct. App. 1925).

¹⁰ Ching Ping Ang, *Federal Law Requires HPV Vaccine for Green Card Applicants: Valid Exercise of Police Powers?*, 37 J.L., MED. & ETHICS 149, 149–51 (2009).

¹¹ Neal D. Goldstein et al., *Trends and Characteristics of Proposed and Enacted State Legislation on Childhood Vaccination Exemption, 2011–2017*, 109 AM. J. PUB. HEALTH 102, 103–04 (2018). For an earlier review, still showing tens of bills each year, see Denise F. Lillvis et al., *Power and Persuasion in the Vaccine Debates: An Analysis of Political Efforts and Outcomes in the United States, 1998–2012*, 92 MILBANK Q., 475, 489–90 (2014). Note that Lillvis et al. addressed more than mandates, addressing vaccine legislation more generally, but for the purpose of this paper, my focus is on mandates only. *Id.*

¹² Goldstein et al., *supra* note 11, at 103; Lillvis et al., *supra* note 11, at 489.

And every year, most of the bills on either side fail.¹³ Part of the reason for these failures is that passing legislation in almost every state is difficult, as there are many points at which legislation may fail.¹⁴ But there is more to it than that.

The changing patterns of legislation show political changes at work in vaccine policy. Public health researchers Denise Lillvis, Anna Kirkland, and Anna Frick, in a paper looking at trends between 1998 and 2012, found that exemptions to vaccine mandates expanded between 1998 and 2003—the laws passed made getting an exemption easier and provided more opportunities to opt-out of vaccine mandates.¹⁵ The researchers connected this rise in exemptions with parents’ concerns over vaccine-induced autism and the mobilization of anti-vaccine advocates taking advantage of such concerns.¹⁶

At the time, there were two strands of concerns about the link between vaccines and autism.¹⁷ In the United Kingdom, doctor Andrew Wakefield promoted the claim that the measles, mumps, and rubella (commonly known as “MMR”) vaccine caused autism—a claim later shown to be based on fraud.¹⁸ For the second strand, anti-vaccine activists also claimed a mercury-based preservative (called thimerosal) in vaccines caused autism.¹⁹ However, later medical research disproved such concerns and showed no link between the MMR vaccine and autism and that the preservative thimerosal did not cause autism.²⁰ In 2009 to 2010, in the United States, the Vaccine Injury Compensation Program rejected the anti-vaccine claims in lengthy judicial opinions.²¹ Anti-vaccine groups

¹³ Goldstein et al., *supra* note 11, at 103; Lillvis et al., *supra* note 11, at 491, 495–96.

¹⁴ Hillel Y. Levin et al., *Stopping the Resurgence of Vaccine-Preventable Childhood Diseases: Policy, Politics, and Law*, 43 U. ILL. L. REV. 233, 251–52 (2020).

¹⁵ Lillvis et al., *supra* note 11, at 499.

¹⁶ *Id.* at 499–502.

¹⁷ PAUL OFFIT, DEADLY CHOICES: HOW THE ANTI-VACCINE MOVEMENT THREATENS US ALL, 92–99 (2010).

¹⁸ *Id.* at 92–96.

¹⁹ *Id.* at 96–97.

²⁰ Lillvis et al., *supra* note 11, at 499–502.

²¹ OFFIT, *supra* note 17, at 99–103.

lost credibility due to the rise of preventable disease outbreaks (specifically, pertussis and measles); the increasing scientific evidence against their claims; and, the rise of a growing coalition in support of bills tightening vaccine mandates after 2010.²² In other words, evidence against anti-vaccine claims, the rise of disease, and patterns of pro-vaccine mobilization all contributed to a change in which, initially, legislation making it easier to opt out of school immunization mandates had passed, and then, it did not. In fact, legislation making it harder to opt out started passing. Over the following years, legislation aimed at expanding exemptions or otherwise weakening mandates at the state level continued to fail, while legislation strengthening mandates continued to have higher success rates (though, in both cases, most bills proposed never made it into law).²³

At the same time, the debates around vaccine mandates became more acrimonious and aggressive.²⁴ Since 2015, the year California passed a vaccine law removing its non-medical exemptions, the question of mandates—historically a non-partisan issue—has become more partisan.²⁵ The legislative battles in New York, New Jersey, and Connecticut to remove non-medical exemptions had a real partisan character, with Democrats more inclined to vote for removing the exemptions and Republicans more inclined to vote against removing them.²⁶ Most of the debate focused on personal

²² Lillvis et al., *supra* note 11, at 502–03.

²³ Goldstein et al., *supra* note 11, at 106.

²⁴ Levin et al., *supra* note 14, at 249–50. Dorit R. Reiss & Paul A. Offit, *Improving Vaccine Policy Making: A Dose of Reality*, 38 VACCINE 2273, 2273 (2020).

²⁵ David Gorski, *Texas: Ground Zero for the Politicization of School Vaccine Mandates*, SCI. BASED MED. (Mar. 5, 2018), <https://sciencebasedmedicine.org/texas-ground-zero-for-the-politicization-of-school-vaccine-mandates/> [https://perma.cc/YQC4-NDVC].

²⁶ Dorit Rubenstein Reiss, *Connecticut Repeals Vaccine Religious Exemption to School Mandates*, SKEPTICAL RAPTOR (Apr. 29, 2021), <https://www.skepticalraptor.com/skepticalraptorblog.php/connecticut-repeals-vaccine-religious-exemption-to-school-mandates/> [https://perma.cc/GX8X-WQYH]; Jesse McKinley, *Measles Outbreak: N.Y. Eliminates Religious Exemptions for Vaccinations*, N.Y. TIMES (June 13, 2019), <https://www.nytimes.com/2019/06/13/nyregion/measles-vaccinations-new-york.html> [https://perma.cc/5UGN-H4Z4];

freedom and the rights of parents to make medical decisions for their children, but some of the legislators repeated the aforementioned, disproved anti-vaccine claims. For example, Representative Anne Dauphinais of Connecticut raised the same concerns as anti-vaccine activists (and participated in events with them).²⁷ So, too, did Assemblyman Jamel Holley (a Democrat) from New Jersey and Senator Shannon Grove (a Republican) of California.²⁸

Stated simply, political coloring started to seep into the “vaccine wars” before the COVID-19 pandemic. And representatives did, on occasion, repeat anti-vaccine talking points.²⁹ But this tendency was

Sharon Otterman & Tracey Tully, *Strict Vaccine Law Stumbles in N.J. Legislature*, N.Y. TIMES (Dec. 17, 2019), <https://www.nytimes.com/2019/12/16/ny-region/vaccines-measles-nj-religious-exemptions.html> [<https://perma.cc/2GAR-34WJ>].

²⁷ *Public Health Committee Advances Religious Exemption Bills*, STATE REPRESENTATIVE ANNE DAUPHINAIS (Apr. 2, 2021), <https://www.cthouse.gov.com/dauphinais/public-health-committee-advances-religious-exemption-bills/> [<https://perma.cc/8596-THDL>] (claiming that vaccines are harmful based on compensation data); Jenna Carlesso, *Republican Lawmakers Ask Health Commissioner not to Offer Opinion on Vaccine Exemption Repeal*, THE CT MIRROR (Aug. 5, 2019), <https://ctmirror.org/2019/08/05/republican-lawmakers-ask-health-commissioner-not-to-offer-opinion-on-vaccine-exemption-repeal/> [<https://perma.cc/42V4-BG7M>] (appearing in an event with anti-vaccine leader Robert F. Kennedy Jr.).

²⁸ Assemblyman Holley (a Democrat) wrote an op-ed repeating anti-vaccine claims about risks in February 2020. Jamel Holley, *Opinion: I Heard Cries. Then, I Saw The Faces . . . My Vaccine Story*, N.J. GLOBE (Feb. 24, 2020, 1:18 PM), <https://newjerseyglobe.com/legislature/opinion-i-heard-cries-then-i-saw-the-faces-my-vaccine-story/> [<https://perma.cc/7MZD-VNRV>]. Holley was praised by anti-vaccine leader Robert F. Kennedy Jr. for his efforts on behalf of the anti-vaccine movement. Chuck O'Donnell, *RFK Jr. Praises Holley For Anti-Vax Stance*, TAP INTO NEWARK (Jan. 29, 2020, 7:58 AM), <https://www.tapinto.net/towns/newark/sections/other-nj-news/articles/rfk-jr-praises-holley-for-anti-vax-stance> [<https://perma.cc/E8TC-KASH>]. Senator Grove also echoed anti-vaccine claims and spoke at an anti-vaccine rally. *Senate Republicans Voted Against Vaccine Legislation that Intrudes on Doctor-Patient Relationship*, SEN. SHANNON GROVE (Sept. 4, 2019), <https://grove.cssrc.us/content/senate-republicans-voted-against-vaccine-legislation-intrudes-doctor-patient-relationship> [<https://perma.cc/RE4J-GDTG>]. Shannon Grove, *Assemblywoman Shannon Grove Speak [sic] Out Against Forced Vaccinations*, FACEBOOK (June 9, 2015), <https://www.facebook.com/ShannonGroveForStateSenate/videos/1006028469416926/> [<https://perma.cc/QGW6-GY59>].

²⁹ See e.g., Gorski, *supra* note 25.

mostly limited to whether representatives would or would not support a mandate without exceptions. And, by and large, legislators across the board supported vaccines themselves.³⁰ No state seriously advanced a bill to, for example, remove school immunization requirements.³¹ Although some states did propose bills that prohibited employers from requiring their employees to receive certain vaccines (e.g., Ohio), the only state that had actually enacted such a law before the pandemic was Oregon. That law, passed in 1989, exempted specific categories of workers and could be overridden by any federal or state rule or law.³²

Then, the COVID-19 pandemic arrived.

³⁰ As of 2018, vaccines “have not yet been adopted by a major political party or ideological camp” Bert Baumgaetner et al., *The Influence of Political Ideology and Trust on Willingness to Vaccinate*, 13 PLOS ONE e0191728, 3 (2018), <https://www.ncbi.nlm.nih.gov/labs/pmc/articles/PMC5784985/> [<https://perma.cc/WN3Q-REUA>] (suggesting, however, that conservative individuals may be less likely to vaccinate and pointing to some conservative leaders who expressed opposition to vaccines). In 2019, a bi-partisan resolution in support of vaccines passed the Senate. S. RES. 165, 116th Cong. (2019). See also Jessie Hellman, *Top Lawmakers from Both Parties: ‘Vaccines Save Lives,’* THE HILL (Feb. 21, 2017), <https://thehill.com/policy/healthcare/320452-top-lawmakers-vaccines-save-lives> on the history [<https://perma.cc/5UX5-KZWL>]; Charles McCoy, *Anti-Vaccination Beliefs Don’t Follow the Usual Political Polarization*, THE CONVERSATION (Aug. 23, 2017), <https://theconversation.com/anti-vaccination-beliefs-dont-follow-the-usual-political-polarization-81001> [<https://perma.cc/468Q-7V8D>].

³¹ This Author would consider a bill “seriously advanced” if it came out of committee and onto the floor of the legislature for a vote.

³² Jackie Borchardt, *Not Vaccinated? A New Ohio Bill Could Prevent You From Being Fired for Refusing Immunizations*, CINCINNATI ENQUIRER (June 26, 2019, 1:58 PM), <https://www.cincinnati.com/story/news/politics/2019/06/26/should-ohio-businesses-able-fire-employees-who-refuse-shots/1562184001/> [<https://perma.cc/844U-YQ3B>]. Oregon’s bill can be overridden by a statute or rule: “A worker shall not be required as a condition of work to be immunized under this section, unless such immunization is otherwise required by federal or state law, rule or regulation.” OR. REV. STAT. § 433.416(3) (2022). Workers covered by this mandate, defined in § 433.407, are healthcare workers, firefighter, or law enforcement officers. OR. REV. STAT. § 433.407(3) (2022); see also *Covid Vaccinations and the Workplace*, BUREAU LAB. & INDUS., <https://www.oregon.gov/boli/workers/Pages/covid-vaccine.aspx> [<https://perma.cc/DQD2-C6WZ>] (last visited Mar. 30, 2022). The structure and different status of workplace mandates is further described in Part III. See *infra* Part III.

B. COVID-19, Vaccines, and the Mandates Question

In December 2019, China saw the first cases of an unidentified respiratory disease, which later became designated as COVID-19—spreading to other countries in early 2020.³³ By early 2022, the virus had killed millions of people worldwide, over 800,000 of which were in the United States, and cases in the United States were rising, not falling.³⁴ Experts strongly criticized the United States' haphazard response for lacking effective testing and tracking plans.³⁵ Further, although most states responded with strong initial containment measures, such as social distancing, those measures rapidly became controversial.³⁶

Politicization of the pandemic began early.³⁷ As early as February 28, 2020, President Donald Trump described Democrats' criticism of his handling of COVID-19 as a “new hoax” and accused Democrats of politicizing the pandemic.³⁸ President Trump's

³³ Jin Yong Kim et al., *The First Case of 2019 Novel Coronavirus Pneumonia Imported into Korea from Wuhan, China: Implication for Infection Prevention and Control Measures*, 35 J. KOREAN MED. SCI. e61 (2020).

³⁴ Jennifer B. Nuzzo & Lawrence O. Gostin, *The First 2 Years of COVID-19*, 327 JAMA 217 (2022), <https://jamanetwork.com/journals/jama/fullarticle/2787943> [<https://perma.cc/CRT8-P5L7>].

³⁵ John Kirlin, *COVID-19 Upends Pandemic Plans*, 50 AM. REV. PUB. HEALTH 467 (2020); Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—the U.S. Response to COVID-19*, 382 NEW ENG. J. MED. 75 (2020); Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599239 [<https://perma.cc/5TQ3-FD6C>]; H. Daniel Xu & Rashima Basu, *How the United States Flunked the COVID-19 Test: Some Observations and Several Lessons*, 50 AM. REV. PUB. ADMIN. 6 (2020).

³⁶ Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 YALE J. HEALTH POL'Y, L., & ETHICS 50, 73–81 (2020).

³⁷ The term politicization here refers to creating, promoting, or contributing to partisan differences in perception of the pandemic's risks and the appropriateness of public health measures against COVID-19. This definition draws on Wolfgang Stroebe et al., *Politicization of COVID-19 Health-Protective Behaviors in the United States: Longitudinal and Cross-National Evidence*, 16 PLOS ONE e0256740 3–4 (2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0256740> [<https://perma.cc/A3HX-LYJY>].

³⁸ Sarah E. Gollust et al., *The Emergency of COVID-19 in the US: A Public Health and Political Communication Crisis*, 45 J. HEALTH POL., POL'Y & L. 967, 968 (2020).

substantial personal influence with the Republican base likely contributed to the politicization, but that influence was certainly not the sole cause of it. The initial response was not partisan; in March and April 2020, most states—regardless of which party controlled the legislature and governorship—issued limits on gathering, closed schools and non-essential business, and somewhat later, issued face-covering orders.³⁹ Republican governors clashed with President Trump, as did Democratic governors.⁴⁰ But within a few months, statements by leading politicians, the nature of media coverage, and a political tinge in opposing restrictions led to politicization.⁴¹ Data suggests that willingness to engage in behaviors like face covering, social distancing, and vaccination (once available) varied by political views, with liberals more willing to engage in such behaviors than conservatives.⁴² Given the political divide in attitude, the political divide in bill passage described in the following Parts

³⁹ Wiley, *supra* note 36, at 74–75.

⁴⁰ Ken Stern, “We’re Going to Rely Disproportionately on Ourselves”: Amid Coronavirus Pandemic, Governors Are Cutting Out Trump, VANITY FAIR (Apr. 3, 2020), <https://www.vanityfair.com/news/2020/04/amid-coronavirus-pandemic-governors-are-cutting-out-trump> [<https://perma.cc/2TSZ-F73U>]; Eric Posner & Emily Bazelon, *Trump is Politicizing the Pandemic. Governors Can Fight Back*, N.Y. TIMES (Apr. 2, 2020), <https://www.nytimes.com/2020/04/02/opinion/governors-states-coronavirus.html> [<https://perma.cc/8WGT-PD4T>].

⁴¹ Tony Bolsen & Risa Palm, *Politicization and COVID-19 Vaccine Resistance in the United States*, 188 PROGRESS MOLECULAR BIOLOGY TRANSLATIONAL SCI. 81 (2021).

⁴² Cope et al., *supra* note 8; John Kerr et al., *Political Polarization on COVID-19 Pandemic Response in the United States*, 179 PERSONALITY & INDIVIDUAL DIFFERENCES 110892 (2021), <https://www.sciencedirect.com/science/article/pii/S0191886921002671> [<https://perma.cc/LKB8-BW52>]; Lisa J. Hardy et al., *Who is to Blame for COVID-19? Examining Politicized Fear and Health Behavior Through a Mixed Methods Study in the United States*, 16 PLOS ONE e0256136 (2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0256136> [<https://perma.cc/L68H-98C4>]; Stroebe et al., *supra* note 37; Erfei Zhao et al., *Media Trust and Infection Mitigating Behaviours During the COVID-19 Pandemic in the USA*, 5 BMJ GLOB. HEALTH e003323 2020, <https://gh.bmj.com/content/5/10/e003323> [<https://perma.cc/L68H-98C4>] (using media sources as a proxy for political affiliation, found that viewers of the more right-leaning Fox News practiced less preventive behaviors and more risky behaviors than viewers of the more left-leaning CNN).

is unsurprising: Elected representatives may—and, in fact, maybe should—follow their constituencies’ preferences.

Although the anti-vaccine movement has worked to promote misinformation throughout the COVID-19 pandemic, and although many of the talking points used by those against vaccines—even if for political reasons—started in the anti-vaccine movement, the anti-vaccine movement was not in the driver’s seat for these bills.⁴³ The wave of bills reflected a broader political struggle; and, although anti-vaccine activists supported the bills, anti-vaccine activists were not the primary force turning these bills into law. None of the legislatures that passed these bills did so after—or in a way that can be directly causally connected to—rallies or speeches by leading anti-vaccine luminaries like Robert F. Kennedy Jr. or Del Bigtree, for example.

Adding to the mix is the overlap between anti-vaccine activists and believers in other conspiracy theories. QAnon—a conspiracy theory with far-right roots that reflect anti-Semitism, the belief in a conspiracy of highly placed officials, and other related ideologies—has increased in prominence both in the United States and the world.⁴⁴ Several anti-vaccine activists have actively embraced QAnon beliefs, and anti-vaccine beliefs have become part of the QAnon movement.⁴⁵ The COVID-19 pandemic created extensive fear and uncertainty, leaving people more vulnerable to conspiracy theories—conspiracy theories that included QAnon and those more

⁴³ Aaron Blake, *The GOP’s Antivaccine Mandate Push is Seeping into Other Vaccines – and Schools*, WASH. POST (Jan. 25, 2022), <https://www.washingtonpost.com/politics/2022/01/25/gops-anti-vaccine-mandate-push-is-seeping-into-other-vaccines-schools/> [https://perma.cc/BB2W-8EH7]. Although this Article does not directly address the role of the anti-vaccine movement, it shows that the drivers are Republican politicians, and anti-vaccine leaders are absent from the movement.

⁴⁴ MIKE ROTHSCHILD, *THE STORM IS UPON US: HOW QANON BECAME A MOVEMENT, CULT, AND CONSPIRACY THEORY OF EVERYTHING* 17–32 (2021).

⁴⁵ *Id.* at 126–33; Tim Dickinson, *How the Anti-Vaxxers Got Red-Pilled*, ROLLINGSTONE (Feb. 10, 2021, 8:30 AM), <https://www.rollingstone.com/culture/culture-features/qanon-anti-vax-covid-vaccine-conspiracy-theory-1125197/> [https://perma.cc/YJ8W-TP4J].

specific to COVID-19.⁴⁶ Although QAnon is not affiliated with the Republican party, the group has been described as leaning extreme right, and its strong support for former President Donald Trump gives the group a political flavor.⁴⁷

The Biden Administration's mandates, announced in September 2021, exacerbated the politicization—and led to another wave of bills. On September 9, 2021, President Biden announced a plan to combat COVID-19 that, among other things, included requiring large employers to vaccinate and test their employees.⁴⁸ The plan also included mandates for healthcare workers, federal employees, and federal contractors.⁴⁹ The response was clearly split along partisan lines, and a number of Republican state leaders—both attorneys general and governors—announced their intent to bring

⁴⁶ Peter J. Hotez, *Anti-Science Extremism in America: Escalating and Globalizing*, 22 MICROBES & INFECTION 505, 506 (2020); Sandra P. Thomas, *Combating the Anti-Vaccination Movement*, 42 ISSUES MENTAL HEALTH NURSING 891, 891 (2021); Kenneth Graham Drinkwater et al., *To What Extent Have Conspiracy Theories Undermined COVID-19: Strategic Narratives?*, FRONTIERS COMM'N. (Mar. 15, 2021), https://www.frontiersin.org/articles/10.3389/fcomm.2021.576198/full?utm_source=S-TWT&utm_medium=SNET&utm_campaign=ECO_FCOMM_XXXXXXX_auto-dlvrit [https://perma.cc/22PJ-YNCK].

⁴⁷ Ahmed Anwar et al., *Analyzing QAnon on Twitter in Context of US Elections 2020: Analysis of User Messages and Profiles Using VADER and BERT Topic Modeling*, DG.O'21: THE 22ND ANN. INT'L CONF. ON DIGIT. GOV. RSCH. (2021), <https://dl.acm.org/doi/10.1145/3463677.3463718>, at 82–88 [https://perma.cc/L3R8-DWVA]; Daniel Taninecz Miller, *Characterizing QAnon: Analysis of YouTube Comments Presents New Conclusions about a Popular Conservative Conspiracy*, 26 FIRST MONDAY (2021), <https://journals.uic.edu/ojs/index.php/fm/article/view/10168> [https://perma.cc/SKE3-F3DC].

⁴⁸ Kevin Liptak & Kaitlan Collins, *Biden Announces New Vaccine Mandates that Could Cover 100 Million Americans*, CNN (Sept. 09, 2021), <https://www.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html> [https://perma.cc/LN97-79BT].

The current plan can be found at: THE WHITE HOUSE, NATIONAL COVID-19 PREPAREDNESS PLAN (2020), <https://www.whitehouse.gov/covidplan/> [https://perma.cc/2QCB-V5CM].

⁴⁹ *Id.*

claims against the federal government regarding the mandates.⁵⁰ During November and December 2021, state legislatures proposed and enacted bills opposing vaccine mandates established by the federal government. Those bills are detailed in the following sections.

III. WHAT DOES THE DATA SHOW?

This Author, with help from research assistants, compiled a database of bills and executive orders limiting vaccine mandates across states. Those findings can be found online.⁵¹ The initial list included bills mandating vaccines; but, to make the project more manageable, those mandates were removed from the public spreadsheet. During August to September 2021, a research assistant compiled a list of all bills and executive orders found through online searches for each state. This search was repeated in November 2021. A second research assistant independently conducted searches in September 2021 to update the list—and again at the start of January 2022. This Author subsequently conducted her own searches in case any bills were missed. Then, this Author compared the findings to the list created by the National Academy for State Health Policy⁵²

⁵⁰ Tom Hals, *Republican Governors Lead Attack on Biden Vaccine Mandate*, REUTERS (Nov. 5, 2021, 1:17 PM), <https://www.reuters.com/world/us/republican-governors-lead-attack-biden-vaccine-mandate-2021-11-05/>. As discussed later in this Article, on January 13, 2022 the Supreme Court invalidated the administration's planned vaccinate-or-test plan for large workers but upheld the healthcare workers mandate. Kevin Breuninger and Spencer Kimball, *Supreme Court Blocks Biden COVID Vaccine Mandate for Businesses, Allows Health-Care Worker Rule*, CNBC (Jan. 13, 2022, 2:30 PM), <https://www.cnbc.com/2022/01/13/supreme-court-ruling-biden-covid-vaccine-mandates.html> [<https://perma.cc/U526-L9VN>].

⁵¹ JOLT's editorial board helpfully converted the spreadsheet into an appendix that has references to each statute. The full citation for each state referenced here can now be found in Appendix A. The text will refer to states, with a reference to Appendix A for full citations. The full spreadsheet is posted here: https://docs.google.com/spreadsheets/d/1R87LLra-0QqaZNVesZh_1Bv54m5A1-5Bd_Bay-_gUH4/edit#gid=1383977065.

⁵² Melissa Quinn, *Arizona Becomes First State to Sue Biden Administration Over COVID-19 Vaccine Mandates*, CBS NEWS (Sept. 15, 2021, 9:06 AM), <https://www.cbsnews.com/news/arizona-sues-biden-administration-covid-19->

and the list compiled by the Kaiser Family Foundation⁵³ to check for accuracy. The list includes both bills and executive orders enacted between May and December 2021 (with the exception of an Oregon bill from 1989 discussed later in this Article).

Although not all bills fit this timeline, there were two large waves of bills and executive orders. In Spring 2021, many state legislatures enacted bills limiting or banning entities from imposing COVID-19 vaccine mandates—many date from April through June 2021, some bleeding over into summer.⁵⁴ Then, a second wave occurred from October through November 2021, likely in response to the Biden Administration’s vaccine mandates.⁵⁵

By September 15, 2021, there were over 140 proposed “interventions” (the term used in the JAMA Article to address both bills and executive orders), most of which (131) opposed mandating vaccination.⁵⁶ However, the number of interventions that actually went into effect showed a slightly varied result. The percentage of interventions facilitating vaccine mandates that went into effect was higher (12 out of 17 bills, or 70.6%) than interventions limiting or prohibiting them (43 out of 131 bills, or 32.8%).⁵⁷ As with pre-COVID vaccine legislation, most bills failed, though this barrier—having to go through the legislative process—inherently did not apply to executive orders.

The rest of this discussion focuses on bills that did pass and executive orders that went into effect. By December 2021, twenty-six states had enacted some type of measure that limited or

vaccine-mandates/ [https://perma.cc/8MSG-SR98]; *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, NAT’L ACAD. STATE HEALTH POL’Y (Mar. 23, 2022), <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/> [https://perma.cc/HQ7U-GPZV].

⁵³ *State COVID-19 Data and Policy Actions*, KAISER FAM. FOUND. (Feb. 10, 2022), <https://www.kff.org/report-section/state-covid-19-data-and-policy-actions-policy-actions/> [https://perma.cc/F5ND-CFKX].

⁵⁴ This description and the following were based on the online spreadsheet’s findings. See *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39.

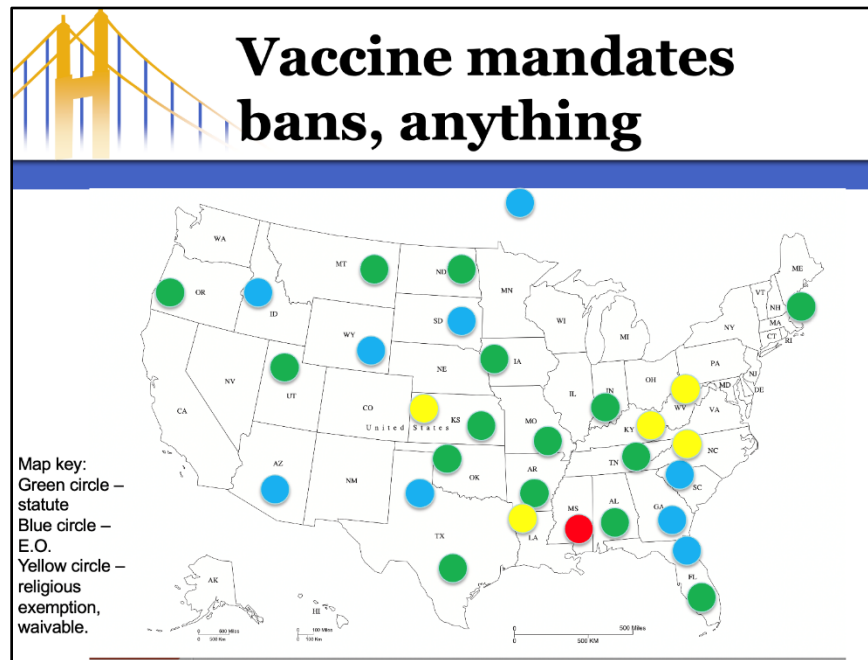
⁵⁵ Liptak & Collins, *supra* note 48.

⁵⁶ Fernandes et al., *supra* note 2, at 178.

⁵⁷ *Id.* at 178.

prohibited vaccine mandates to a certain extent.⁵⁸ But this general statement does not provide a good picture of what is going on.

Figure 1: States with Any Type of Measure.⁵⁹



⁵⁸ States (eighteen total) with laws limiting or prohibiting vaccine mandates: Alabama, Arkansas, Florida, Indiana, Iowa, Kansas, Kentucky, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon (predates covid-19), Tennessee, Texas, Utah, West Virginia. States (nine total) with executive orders: Alaska, Arizona, Florida, Georgia, Idaho, Oklahoma, South Carolina, South Dakota, Texas, Wyoming. (Some states, as these lists show, fall into both categories). Additionally, Louisiana has a related House resolution. *See* Appendix A.

⁵⁹ To avoid cluttering the map, this Author did not add an explanation of the red circle, the one and only. It refers to the Mississippi Institute of Higher Education, which prohibited universities from requiring vaccines, but does not fit other categories. Molly Minta, 'A Slap in the Face': In Surprise Vote, IHL Board Bans COVID-19 Vaccine Mandates, MISS. TODAY (Sept. 20, 2021), <https://mississippitoday.org/2021/09/20/ihl-board-bans-covid-19-vaccine-mandates/> [<https://perma.cc/Z2VS-XHP8>].

Most of these measures are directed at limiting the ability of states to deny access to government services or buildings based on individuals' vaccination status.⁶⁰ Some of these measures limit the ability of private businesses to require vaccination from customers.⁶¹ Some require employers who mandate vaccination to provide exemptions for certain populations, and some completely prohibit employer mandates.⁶² The exception to the laws discussed here is an earlier Oregon law that dates back to 1989 and can be overridden by either a state or federal statute or rule.⁶³ Some measures prohibit educational institutions from imposing mandates—most for universities, but a few create prohibitions for educational institutions at multiple levels.⁶⁴ And some state measures expressly preempt local government measures.⁶⁵ Each type of measure deserves its own discussion to which the Author now turns.⁶⁶

Table 1: Overview of Bills

Type of Measure	Number of states with statutes	Number of states with executive orders	Total
Limiting government mandates	13	8	20
Limiting customer mandates	7	0	7
Limiting employer mandates	9	1	10

⁶⁰ See discussion *infra* Part III.A.

⁶¹ See discussion *infra* Part III.B (describing the measures used to limit the ability of private business to require vaccination from customers).

⁶² See *infra* Part III.C.

⁶³ OR. REV. STAT. § 433.416(3) (1989).

⁶⁴ See *infra* Part III.D.

⁶⁵ See *infra* Part III.E.

⁶⁶ One measure, Alaska's Administrative Order No. 321, did not address any of these categories but instead prohibited requiring people to produce evidence of their vaccine history to travel to or around Alaska. See *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39.

Limiting university mandates ⁶⁷	11	2	13
Explicit local preemption	4	6	10
All of the above	19	9	26

A. Measures Limiting Government Mandates

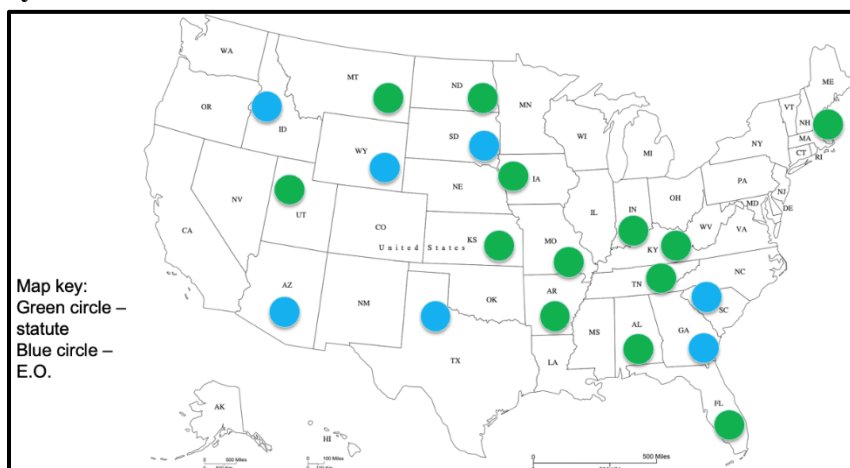
A vast majority of the twenty-six states that implemented policies limiting mandates had measures that limited local government entities from requiring that individuals be vaccinated.⁶⁸ Not all of these measures were similar but most prohibited “government units” (with different definitions of what constitutes a government unit) from requiring vaccines for access to state spaces and services.⁶⁹

⁶⁷ This category does not include states in which government mandates also apply to public universities.

⁶⁸ Statutes in Alabama, Arkansas, Indiana, Iowa, Missouri, Montana, New Hampshire, North Dakota, Tennessee, and Utah (ten states) and executive orders in Arizona, Florida, Georgia, Idaho, Oklahoma, South Carolina, South Dakota, Texas, and Wyoming (nine states) limited local government entities from requiring vaccines. Kentucky’s law that provides exemptions seems to apply to mandates from government entities as well. *See infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39.

⁶⁹ *Compare* Ala. Code §22-11B-5(b) (prohibiting state agencies from requiring vaccination or documentation of vaccination “as a condition for receiving any government service or for entry into a government building”) (cited in Appendix A: 50 States Vaccine Mandate Bans app. 832, *with* Executive Order 2021-04 Idaho, available at: <https://gov.idaho.gov/wp-content/uploads/2021/04/eo-2021-04.pdf> (prohibiting agencies from “require[ing] [vaccination] as condition of accessing state services or facilities”). *See infra* Appendix A: 50 States Mandate Bans app. 832–38.

Figure 2: States with Measures Limiting Vaccine Mandates by State Entities.



Some of the measures prohibited government units from requiring a vaccine passport or immunization passport for access to either buildings or services. For example, Indiana’s law said that the State or a local unit “may not issue or require an immunization passport” and defined immunization passport as “written, electronic, or printed information regarding an individual’s immunization status.”⁷⁰ South Dakota prohibited requiring an immunization passport to receive government benefits or licenses.⁷¹ Other states did not use the term “immunization passport” but broadly prohibited requiring documentation of COVID-19 vaccination status. Arizona governor Douglas Ducey’s executive order, for example, prohibited government units from requiring documentation to access government buildings or services.⁷² Montana also prohibited the government from denying services, advantages, or employment

⁷⁰ See *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39; IND. CODE § 16-39-11-3.

⁷¹ *Id.*

⁷² Ariz. Exec. Order No. 2021-09 (Apr. 19, 2021). See *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832.

opportunities based on vaccine status.⁷³ Some measures expressly mentioned local government while others did not.⁷⁴

These measures are unprecedented. There were no laws barring government entities from requiring vaccines prior to the COVID-19 pandemic. There is also no historical record, based on the research findings of this Article, of governments requiring vaccines for access to services or government buildings. Nor did the research findings indicate there to be any state requiring vaccination to access government services as of February 2022—though, at that time, there were mask requirements.⁷⁵ Even cities requiring vaccines to go into certain businesses, like San Francisco and New York City, did not require vaccines for access to city services.⁷⁶ A few federal programs did condition access on vaccination status (and accordingly have been challenged in court), but state laws did not

⁷³ § 20-5-403 MCA.

⁷⁴ For example, Arkansas's Act 1030 mentioned "local official." 2021 Ark. Acts 1030. Missouri's House Bill 271 was directly aimed at local government, prohibiting local government units from requiring documentation of vaccination to access services. H.B. 271, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021). In contrast, Wyoming's HB 1002 talked about public entities generally, H.B. 1002, 66th Leg., 1st Special Sess. (Wyo. 2021), and Alabama's Senate Bill 267 talked about government entities without mentioning local government, S.B. 267, 2021 Leg., Reg. Sess. (Ala. 2021). *See infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39.

⁷⁵ For an overview of mask mandates, see, e.g., Kaia Hubbard, *These States Have COVID-19 Mask Mandates*, U.S. NEWS & WORLD REPS. (Feb. 11, 2022), <https://www.usnews.com/news/best-states/articles/these-are-the-states-with-mask-mandates> (providing an example of states with mask mandates, including Indiana, which mandated masks inside government buildings but not private establishments).

⁷⁶ S.F. DEP'T OF PUB. HEALTH, FAQs FOR COVID-19 HEALTH ORDER C19-07Y (2022), <https://www.sfdph.org/dph/alerts/coronavirus-faq.asp> [<https://perma.cc/ANC3-5HMP>]; Press Release, Office of the Mayor of the City of New York, 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> [<https://perma.cc/D8FD-74PK>]; Emma G. Fitzsimmons, *New York City to Require Proof of Vaccination for Indoor Dining and Gyms*, N.Y. TIMES (Aug. 30, 2021), <https://www.nytimes.com/2021/08/03/nyregion/new-york-city-vaccine-mandate.html> [<https://perma.cc/MP6T-LXJL>] (also noting some federal services—like Head Start—have required vaccines as a service condition).

directly prevent the federal mandates, and most of these state laws predated them.⁷⁷ In other words, states and local governments in the United States do not require proof of vaccination status to access government services or buildings.

Arguably, states and local governments where the political environment supported enacting a statute prohibiting government entities from requiring vaccines are those where the government is least likely to require vaccines in the first place. But this assertion must be qualified. First, government is made up of a variety of units, and some units may decide to impose a mandate when others do not. Second, local governments may be inclined to impose a mandate even if the state does not. So, while the main purpose of these prohibitions was symbolic, the fear of actual mandates being imposed and maybe also the fear of political backlash from their constituents made these enacted prohibitions more than just statements of intent or symbolic gestures.

At any rate, this set of measures concerning access to government services and buildings is likely to be the least problematic. It is reasonable to say that government services should be available to all. Although government employees should not be compelled to put themselves at a greater risk of exposure to disease than the other members of society, there is often no real alternative to government services. Indeed, lack of government access can prevent citizens from access to very basic but essential services—without any countervailing limit on individual rights if government cannot require proof of vaccination status. This issue of tradeoffs is

⁷⁷ OFFICE OF HEAD START, U.S. DEP'T OF HEALTH & HUM. SERVS., VACCINATION FOR HEAD START STAFF (Dec. 23, 2021), <https://eclkc.ohs.acf.hhs.gov/about-us/coronavirus/vaccination-head-start-staff> [<https://perma.cc/2NHZ-R3T9>] (explaining that federal contractors have been subject to vaccines requirements); Karen L. Corman et. al, *Status of Recent Federal and NYC Workplace Vaccination and Testing Mandates*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP AND AFFILIATES (Jan. 3, 2022), <https://www.skadden.com/insights/publications/2022/01/status-of-recent-federal-and-nyc-workplace-vaccination-and-testing-mandates> [<https://perma.cc/9KEB-KZZH>] (noting that challenges to vaccine mandates have been initiated in the judicial branch). The bills can be found in Appendix A: 50 States Vaccine Mandate Bans app.

really the kind of decision that the political process is best suited to address.

B. Measures Concerning Private Businesses and Customers

At least within the past one-hundred years, to this Author's knowledge, private businesses have not required proof of vaccination for services. In a recent article, Professor Jordan E. Taylor, of Smith College, described employment vaccine mandates as a reality in the nineteenth and twentieth centuries but did not mention private business services mandates.⁷⁸ However, during the COVID-19 pandemic, several businesses announced their intent to impose vaccine mandates on customers for their services.⁷⁹ The recent bills prohibiting private business mandates need to be considered on that background.

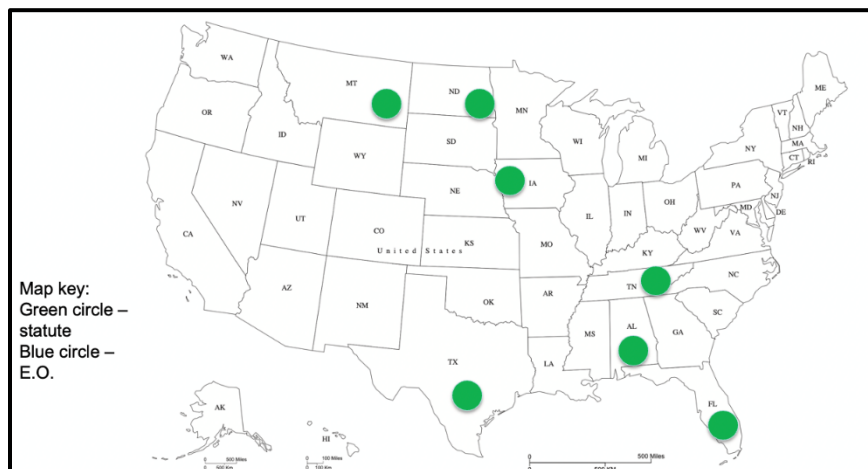
1. Limits on Private Business Mandates

Seven states enacted bills prohibiting businesses from refusing to serve customers based on a customer's COVID-19 immunization status. Unlike measures limiting government that were implemented via both statutes or executive orders, almost all of these limits were imposed through enacted statutes. Alabama, Florida, Iowa, Montana, North Dakota, Tennessee, and Texas have statutes prohibiting customer vaccine mandates; additional states have pending bills including, for example, a recently introduced bill in Utah.⁸⁰

⁷⁸ Jordan E. Taylor, *The U.S. Has Had 'Vaccine Passports' Before—And They Worked*, TIME (Apr. 5, 2021), <https://time.com/5952532/vaccine-passport-history/> [<https://perma.cc/U9LV-ANVY>].

⁷⁹ Cope et al., *supra* note 8, at 15–16.

⁸⁰ See *infra* Appendix A: 50 States Vaccine Mandate Bans app. [pg #s]. For the Utah bill, see Bridger Beal-Cvetko, *Vaccine Passports Draw Ire of Lawmakers as House Committee Advances Bill to Prohibit Them*, DESERET NEWS (Feb. 15, 2022) <https://www.deseret.com/utah/2022/2/15/22936142/vaccine-passport-bill-covid-19-businesses-utah-vaccine-mask-mandate-discrimination-individual-rights>.

Figure 3: Measures Limiting Customer Vaccine Mandates.

These types of laws vary in their effects. Most of the states limiting customer mandates prohibit requiring evidence of vaccination, including Florida, North Dakota, Tennessee, and Texas.⁸¹ Alabama's law, on the other hand, prohibits refusing service based on immunization status.⁸² The difference between these first two categories may be more apparent than real: It is unclear whether, in practice, Alabama businesses could request evidence of vaccine status but cannot refuse service based on it, and whether the other states could allow different treatment of people based on vaccine status. Just reading the various statutes does not answer these questions, as their textual provisions are ambiguous. However, this Author speculates that, in all, the prohibition will be interpreted to prohibit both checking vaccine status and distinguishing customers based on vaccine status. Indeed, the predicted interpretation is likely the legislatures' intent, but the laws will ultimately need to be interpreted by courts.

To summarize the key measures within this category and their effects: Montana's law is likely the broadest, prohibiting discrimination based on vaccine status.⁸³ On the other hand, Iowa's law names not receiving government money as the only sanction,

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

implying that businesses that do not receive government money will face no adverse consequences for imposing vaccine mandates—though the first provisions are general enough that businesses may hesitate to do so.⁸⁴ Most of the bills (Alabama’s, Florida’s, Iowa’s, Montana’s, North Dakota’s, and Texas’s) were enacted in the spring and summer of 2021.⁸⁵ This wave was the initial spate of bills prohibiting mandates. Tennessee passed its prohibition in November 2021.⁸⁶

2. *Legal Challenges to Prohibitions on Vaccine Mandates*

Unsurprisingly, some private businesses have challenged state laws that prohibit private businesses from requiring proof of COVID-19 vaccination. One case, at least initially, was successful, exposing the vulnerabilities of these types of measures. Florida’s law prohibits private businesses from requiring documentation of vaccine status.⁸⁷ On August 8, 2021, a federal district court judge stayed Florida’s law as it applied to Norwegian Cruiseline Holdings, Ltd. (“Norwegian”).⁸⁸ The court in this case found for Norwegian in part because it determined Norwegian to have a “substantial likelihood of success” of its claims that Florida’s law violated (1) the First Amendment and (2) the Dormant Commerce Clause.⁸⁹

⁸⁴ *Id.*

⁸⁵ The earliest bills, Montana’s and North Dakota’s, became effective in May 7, 2021 (Florida’s executive order predated it, dating to April 2, 2021, but the statute only became effective on July 1, 2021). *Id.* Texas’ statute became effective June 7, 2021 and Florida’s July 1, 2021. *Id.*

⁸⁶ Yelena Dzhanova, *The Governor of Tennessee Signed a Sweeping Bill into Law that Prohibits Businesses from Mandating COVID-19 Vaccinations and Imposes Limits on Schools*, BUS. INSIDER (Nov. 14, 2021), <https://www.businessinsider.com/tennessee-law-prohibits-businesses-from-mandating-covid-vaccinations-2021-11> [<https://perma.cc/5BZX-QPE6>].

⁸⁷ FLA. STAT. § 381.00316 (2021) (“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 or post-infection recovery to gain access to, entry upon, or service from the business operations in this state.”).

⁸⁸ *See Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 553 F. Supp. 3d 1143, 1143 (S.D. Fla. 2021).

⁸⁹ *Id.* at 1156.

First, the court found that Florida's law violated the First Amendment by imposing a content-based speech restriction.⁹⁰ The court concluded that, by prohibiting businesses from "requiring their patrons to present 'documentation certifying COVID-19 vaccination or post-infection recovery' for access or services" but not prohibiting requiring, for example, documentation of test results, the law is singling out one type of document request and hence regulating the content of speech.⁹¹

The district court's reasoning, however, is unconvincing for several reasons. First, it is unclear why a prohibition on demanding certain documentation is a prohibition on speech—rather than on action—when the focus of the law is on preventing a business from the act of denying services based on vaccine status. The Supreme Court cases cited by the district court provides weak support for the court's arguments. For instance, *Reed v. Town of Gilbert* focused on whether a city can impose content-based restrictions on signs.⁹² Although the restriction did not focus on the specific content of the sign, the Court in *Reed* found that the city's ordinance, which exempted certain kinds of content from requiring permits but not others, violated the First Amendment, broadening previous jurisprudence that suggested content-neutral regulations would not be subject to strict scrutiny.⁹³ But, broadened or not, the focus of *Reed* was on a regulation that addressed content of signs—and signs are speech.⁹⁴ Whereas, requiring specific documentation as a condition for services, as was the case in *Norwegian Cruise Line Holdings*, is better described as an action, and the Supreme Court has not indicated an intent to broaden its interpretation of speech to this type of action—various entities require documentation, such as a driver's license in a variety of contexts, from driving to flying.

⁹⁰ *Id.* at 1169.

⁹¹ *Id.* at 1156–57 (quoting FLA. STAT. § 381.00316(1) (2021)).

⁹² *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (permitting certain categories of signs to be posted without a permit based on their content, but not others).

⁹³ See Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2017 SUP. CT. REV. 233, 234–36. *But see*, Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. REV. 65, 69–74 (2017) (suggesting that the change was not as large as critics say).

⁹⁴ *Reed*, 576 U.S. at 159–62.

The second case cited by the district court in *Norwegian Cruise Line Holdings* was *Barr v. Am. Assn. of Political Consultants, Inc.*,⁹⁵ which may better support the district court's argument. In *Barr*, the Supreme Court held that a 2015 congressional exception from a prohibition on robocalls for calls seeking to collect debts to the government was speech-based regulation and thus subject to strict scrutiny.⁹⁶ This prohibition is closer to the type of regulation covered here—because robocalls are closer to action (talking) than speech from signs or public statements. The plurality rejected the view that the restriction limited commercial conduct and only incidentally burdening speech.⁹⁷ This Author believes the dissent had the better argument in suggesting that the *Barr* regulation did, in fact, regulate speech.⁹⁸ However, even under the plurality's approach, a distinction can be made between regulating calls based on content and limiting requests for documentation.⁹⁹ The latter is still better categorized as action than speech because prohibiting requests for documentation is closer to other instructions, which are geared towards actions and not expressions.

The court in *Norwegian Cruise Line Holdings* concluded that the law was not economic regulation but speech-based, focusing on the fact that the language of the law did not prohibit oral verification of vaccine status.¹⁰⁰ This distinction, however, seems to make the law less content-based regulation of speech—not more.

Second, the court found that *Norwegian* was likely to succeed on its claim that the state violated the Dormant Commerce Clause because it indirectly affects interstate commerce and does not withstand the Pike balancing test.¹⁰¹ This argument is likely stronger than *Norwegian's* First Amendment claim. The court pointed out that Florida did not articulate a purpose, but the court assumed—

⁹⁵ *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020).

⁹⁶ *Id.* at 2356.

⁹⁷ *Id.* at 2347.

⁹⁸ *Id.* at 2362.

⁹⁹ *Id.* at 2346–47 (defining content-based regulation as focused on the content of the speech in question, not on a request to provide documentation).

¹⁰⁰ *Norwegian Cruise Lines Holdings, Ltd. v. Rivkees*, 553 F. Supp. 3d 1143, 1159–61 (S.D. Fla. 2021).

¹⁰¹ *Id.* at 1169–77.

probably correctly—that the State’s argument was its “desire to safeguard its residents’ rights to medical privacy and prevent ‘discrimination’ against unvaccinated residents.”¹⁰² The district court found that Florida did not adequately show that these were legitimate state interests and, moreover, that the statute advanced those interests because the Florida law does not prevent other ways of interfering with privacy (like oral verification) and does not directly prevent imposing different rules on vaccinated or unvaccinated cruise passengers.¹⁰³ On the other side of the balancing scale, the law directly burdens interstate commerce because cruise ships stop in many places that require proof of vaccination, and the lack of the ability to demand verifying documentation would interfere with the cruise line’s business.¹⁰⁴ This reasoning is well-founded.

The court in *Norwegian Cruise Line Holdings* also noted that the plaintiffs made a compelling case for why there was preemption because the Centers for Disease Control (“CDC”) guidelines require vaccination, and federal rules preempt state law.¹⁰⁵ However, the strength of this claim is questionable because, in the midst of the litigation, the CDC’s rules had been stayed by a district court, later upheld by the Eleventh Circuit, and therefore there was no federal rule conflicting with Florida’s law at that time.¹⁰⁶

Norwegian Cruise Line Holdings suggests that vaccine mandate prohibitions are vulnerable to challenges from some businesses. Few businesses have the cruise industry’s obvious connection to interstate and foreign commerce, but many organizations conduct business across state lines and may face similar challenges—especially businesses with mobile workforces, if they face different

¹⁰² *Id.* at 1171.

¹⁰³ *Id.* at 1171–72.

¹⁰⁴ *Id.* at 1172–76.

¹⁰⁵ *Id.* at 1177–78.

¹⁰⁶ *See generally* Florida v. Dep’t of Health & Hum. Servs., 19 F.4th 1271 (11th Cir. 2021) (affirming the Northern District of Florida’s decision to deny the State’s motion for preliminary injunction against the Secretary of HHS’s interim rule mandating vaccination for employees of healthcare facilities providing services to Medicare and Medicaid beneficiaries).

polices in each state in which they do business. Airline and delivery companies serve as great examples.

Additionally, private businesses might be able to challenge restrictions on vaccine mandates by arguing that the restrictions are unreasonable. This interesting legal issue can arise if businesses bring a *Jacobson* claim. In *Jacobson v. Massachusetts*, the Supreme Court stated that the government could limit individual rights in the public health domain but only if the limit was reasonable.¹⁰⁷ Businesses, therefore, could challenge the restrictions on vaccine mandates by arguing that the restrictions fail the reasonableness standard and cannot survive even a low level of scrutiny. Specifically, they limit the right of private legal persons—corporations—to manage their own affairs. In its challenge to Florida’s law, Norwegian argued exactly that, claiming that the law was not reasonable and could not stand.¹⁰⁸ The Court did not rule on this issue, but we may see further litigation under this heading. Under existing jurisprudence, this will be a hard case, but companies may be able to make good arguments.

Legal challenges may not be the only issues with these laws. The fact that most of these statutes prohibit requiring documentation rather than directly prohibiting treating people differently based on vaccine status could allow some businesses to circumvent the law by asking for oral vaccine confirmation. But that tactic is certainly not a strong option. Vaccine documentation has already proven itself vulnerable to abuse through the novel industry of falsified vaccination cards.¹⁰⁹ Oral verification is even more vulnerable to this

¹⁰⁷ *Jacobson v. Massachusetts*, 197 U.S. 11, 26–29 (1905).

¹⁰⁸ Dorit Rubinstein Reiss, *Norwegian Cruise Lines Vaccine Passports—Judge Prevents Florida From Blocking It*, SKEPTICAL RAPTOR (Aug. 9, 2021), <https://www.skepticalraptor.com/skepticalraptorblog.php/norwegian-cruise-lines-vaccine-passports-judge-prevents-florida-from-blocking-it/> [https://perma.cc/XVY5-7YVT].

¹⁰⁹ See Edward Segarra, *A Fake COVID Card Can Cause Real Trouble for College Students. It’s Also Likely a Crime*, USA TODAY (Aug. 11, 2021, 8:40 PM) <https://www.usatoday.com/story/news/education/2021/08/11/fake-covid-vaccine-cards-colleges-students-warned-consequences/8101036002/?emci=00cafb10-1bfc-eb11-b563-501ac57b8fa7&emdi=34df56a6-3afc-eb11-b563-501ac57b8fa7&ceid=4111191> [https://perma.cc/G8YK-6ZFG]; Nicholas

abuse, and is therefore not likely to be an effective way for businesses to impose vaccine requirements. Moreover, state laws like Montana's, which directly prohibit discrimination based on vaccine status, rather than prohibiting a requirement of vaccine verification through whatever medium, foreclose the option of businesses to even attempt to circumvent the law in the first place.¹¹⁰

An interesting aspect of the laws prohibiting businesses from imposing a customer vaccine mandate is the support and opposition for such laws. The bills passed in Republican-controlled legislatures, which were signed by Republican governors—were most of the time enacted over the opposition of the business community.¹¹¹ Ironically, the political parties find themselves switching positions in this struggle: Republicans, usually in support of expanding the rights of business to manage their own affairs, are now limiting the ability of private business to require vaccines from customers, while Democrats are raising the banner of private businesses' rights.¹¹²

From a policy point of view, these laws are highly problematic. They prevent private businesses from competing by offering a safe

Reimann, *California Woman Arrested for Making Fake Vaccine Cards, Justice Department Says*, FORBES (July 14, 2021, 4:10 PM EDT), https://www.forbes.com/sites/nicholasreimann/2021/07/14/california-woman-arrested-for-making-fake-vaccine-cards-justice-department-says/?sh=62fe4f6a4a76&fbclid=IwAR1eFtcvOTVQiES9VmAXnrZ7qHG5ios8tvD_Q-68l8sbJTbr0NmmDT_vljk.

¹¹⁰ MONT. CODE ANN. §§ 49-2-312, 49-2-313 (effective May 7, 2021).

¹¹¹ Jarod Clay, *Ohio House Passes Bill that Would Ban Vaccines Mandates in State*, DAYTON 24/7 NOW (Nov. 18, 2021), <https://dayton247now.com/news/local/ohio-house-republicans-again-push-anti-vaccine-legislation> [https://perma.cc/WP36-XQKV]; Tessa Weinberg, *Missouri Businesses Oppose Ban on COVID Vaccine Mandates, Argue It's Their Choice*, MO. INDEP., (Jan. 12, 2022, 7:04 PM), <https://missouriindependent.com/2022/01/12/missouri-business-oppose-covid-vaccine-mandate-ban/> [https://perma.cc/K38R-MQJP]; Aaron McDade, *Business-Friendly South Carolina Set to Debate Ban on Vaccine Mandates*, NEWSWEEK, (Dec. 9, 2021, 4:12 PM), <https://www.newsweek.com/business-friendly-south-carolina-set-debate-ban-vaccine-mandates-1657923> [https://perma.cc/ZGL9-84Y9].

¹¹² *Republicans Want to Ban Businesses From Requiring Proof of Vaccination*, ECONOMIST, (May 1, 2021), <https://www.economist.com/united-states/2021/05/01/republicans-want-to-ban-businesses-from-requiring-proof-of-vaccination> [https://perma.cc/4QYE-ZXQL].

environment to those seeking a highly vaccinated business—and, in contrast, by offering an environment in which anyone is welcome, regardless of vaccine status. They foreclose an option for a business with many high-risk customers or employees (or, for example, a small business managed by an immuno-compromised owner) from providing a safe environment to the people within its business. And they remove a grassroots-level option for increasing vaccination rates and accordingly reducing the pandemic's harms. Absent these bills, in a state with a large population that is vaccine hesitant, many businesses may have chosen not to require vaccines; although, some would have otherwise chosen to impose a requirement. Still, the laws take away businesses' ability to make their own choices.

C. *Employment Mandates*

Unlike customer mandates, employer mandates have a long history, dating back to at least the nineteenth century.¹¹³ These mandates were not, however, common during most of the twentieth century.¹¹⁴ But by the twenty-first century, workplace vaccine mandates began to come back into focus. In 2005, Virginia Mason Medical Center in Washington and Bronson Methodist Hospital in Michigan became the first hospitals to require their staff to be vaccinated against influenza.¹¹⁵ For Virginia Mason Medical Center, the decision came after a voluntary vaccination program (running from 1998 to 2004), and did not achieve high vaccination rates.¹¹⁶ By 2012, twenty states had laws requiring certain healthcare employers to have influenza vaccination programs (not necessarily mandates) for healthcare workers, including, among others,

¹¹³ Taylor, *supra* note 77.

¹¹⁴ For example, although the CDC had been recommending healthcare workers receive influenza vaccines since 1981, as of 2007, very few healthcare workers worked in hospitals that required them. Pritish K. Tosh & Gregory A. Poland, *Healthcare Worker Influenza Immunization*, MEDSCAPE (2007), <https://www.medscape.org/viewarticle/567336>.

¹¹⁵ Alexandra M. Stewart & Sara Rosenbaum, *Vaccinating the Health-Care Workforce: State Law vs. Institutional Requirements*, 125 PUB. HEALTH REP. 615, 615 (2010).

¹¹⁶ Teri Dobbins Baxter, *Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks*, 2017 UTAH L. REV. 885, 909 (2017).

Tennessee and Utah, which now prohibit employer COVID-19 vaccine mandates.¹¹⁷ At the point of the COVID-19 pandemic in 2020, vaccine mandates in the healthcare sector were known—if not ubiquitous¹¹⁸—and have since been mostly upheld by courts, though courts have, on occasion, required accommodation based on religious beliefs or disability.¹¹⁹

Businesses also started discussing the possibility of vaccine mandates in the workplace even before the COVID-19 vaccines were generally available to their employees. As early as December 16, 2020, the Equal Employment Opportunity Commission, responding to questions from businesses, issued guidance on vaccine mandates in the workplace.¹²⁰ In fact, some of the early litigation against mandates was in the workplace context. For example, the first case to directly address whether an employer can mandate a vaccine authorized by an emergency use authorization (“EUA”) rather than by a license was *Bridges v. Houston Methodist Hospital*, a case in Texas.¹²¹

¹¹⁷ Alexandra M. Stewart & Marisa A. Cox, *State Law and Influenza Vaccination of Health Care Personnel*, 31 VACCINE 827, 828 (2013).

¹¹⁸ See Baxter, *supra* note 114, at 913–14.

¹¹⁹ See Douglas J. Opel, James A. Sonne & Michelle M. Mello, *Vaccination without Litigation – Addressing Religious Objections to Hospital Influenza-Vaccination Mandates*, 378 N. ENGL. J. MED. 785, 786 (2018); Y. Tony Yang, Elizabeth Pendo & Dorit Rubinstein Reiss, *The Americans with Disabilities Act and Healthcare Employer-Mandated Vaccinations*, 38 VACCINE 3184, 3184 (2020). Accommodations do not always equate to full exemptions; they may mean that employees would not lose their job but may face limits or requirements not imposed on other employees (like, in this context, testing requirements).

¹²⁰ *What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, (Mar. 14, 2022), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K.1> [https://perma.cc/H8AV-VK4P]. In a January 2021 blog post, this Author wrote a small-scale legal explanation on this topic: Dorit Rubinstein Reiss, *COVID-19 Vaccines Employer Mandates – Legal Basics for and Against*, SKEPTICAL RAPTOR, (Jan. 1, 2021), <https://www.skepticalraptor.com/skepticalraptorblog.php/covid-19-vaccines-employer-mandates-legal-basics-for-and-against/> [https://perma.cc/3B28-VFJQ].

¹²¹ *Bridges v. Hous. Methodist Hosp.*, 543 F. Supp. 3d 525, 526 (S.D. Tex. 2021). For an in-depth discussion of the EUA question, see Dorit R. Reiss & John DiPaolo, *COVID-19 Vaccine Mandates for University Students*, 24 LEGIS. & PUB. POL’Y 1, 51–60 (2022).

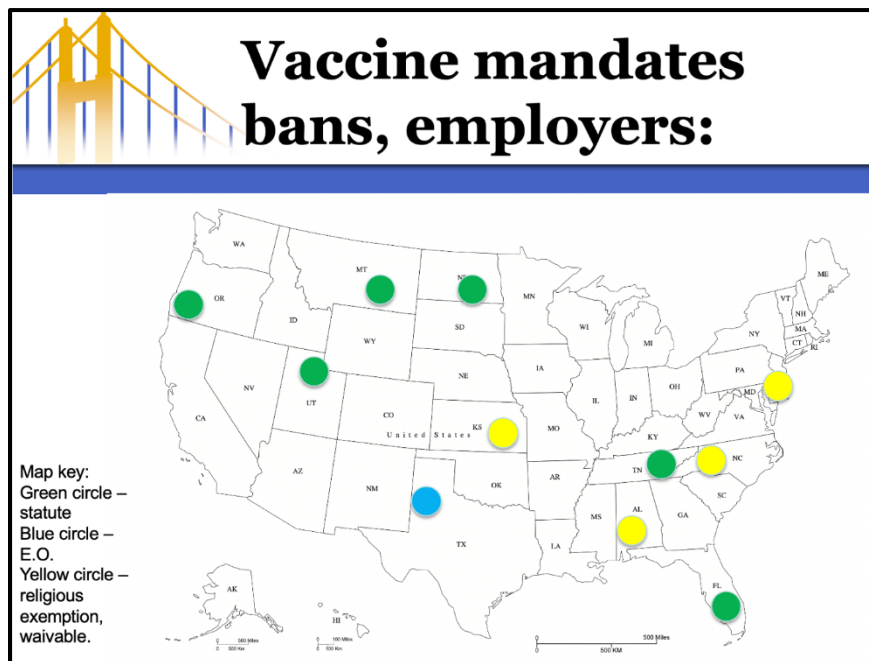
Bills to prohibit employer vaccine mandates were proposed early on. But, even more so than for customer mandates, the business community in many states opposed prohibiting employers from mandating vaccines.¹²² Nonetheless, some bills passed—again, in two waves. During the spring and summer of 2021, Montana, North Carolina, and North Dakota passed bills limiting employment mandates.¹²³ Of these, Montana and North Dakota introduced a complete ban, and North Carolina prohibited mandating vaccination if the employee opposed receiving the vaccine on religious grounds, except if necessary for the protection of the health or safety of others¹²⁴—a much weaker ban. Then, from November to December 2021, Alabama, Florida, Kansas, Tennessee, and Utah passed their own prohibitions limiting employment mandates.¹²⁵

¹²² Mike Cason, *Alabama Business Groups Oppose Bill Banning Employer Vaccine Mandates*, AL.COM (Oct. 20, 2021, 6:30 AM), <https://www.al.com/news/2021/10/alabama-business-groups-oppose-bill-banning-employer-vaccine-mandates.html> [<https://perma.cc/KN5C-DWGX>]; ASSOCIATED PRESS, *SC GOP Removes Private COVID-19 Vaccine Ban in Sudden Switch*, U.S. NEWS & WORLD REP. (Dec. 9, 2021), <https://www.usnews.com/news/best-states/south-carolina/articles/2021-12-09/republicans-buck-sc-businesses-to-back-covid-19-vaccine-ban>; Mitchell Ferman & James Barragan, *Texas Bill to Block COVID-19 Vaccine Mandates for Employers Failed in Legislature After Business Groups Rallied Against It*, TEX. TRIB. (Oct. 18, 2021), <https://www.texastribune.org/2021/10/18/texas-covid19-vaccine-mandates-bill/> [<https://perma.cc/6A8D-MNDT>].

¹²³ See *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39.

¹²⁴ *Id.*

¹²⁵ *Id.*

Figure 4: Measures Limiting Employment Mandates.

Tennessee’s law was a complete ban on employee vaccination mandates.¹²⁶ Alabama, Florida, Kansas, and Utah required giving broad exemptions and, essentially, opted to not police violations of these mandates.¹²⁷ The Florida and Utah November bills likely took an exemption approach in response to an Emergency Temporary Standard (“ETS”) from the U.S. Occupational Safety and Health Administration (“OSHA”) that would have required employers with over one-hundred employees to impose either a vaccine mandate or a vaccinate-or-test program—which may have limited the existing bill through preemption.¹²⁸ Exemptions, however, would not be preempted, and the states appeared to have been acting to make sure

¹²⁶ *Id.* (finding that OSHA’s ETS went beyond the Agency’s statutory power; therefore, the court stayed the rule, which, by implication, invalidated the rule and made the Florida and Utah bills unnecessary)

¹²⁷ *Id.*

¹²⁸ *Id.*; see also *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 663 (2022).

people could refuse vaccines even if the ETS became operational. North Dakota enacted a supplementary law on November 15, 2021, giving employees exemptions for antibody tests or personal or religious beliefs, likely for the same reason.¹²⁹ The Supreme Court stayed OSHA's ETS on January 13, 2022.¹³⁰

In addition, Texas Governor Greg Abbot issued an executive order in October 2021 prohibiting any "entity" in Texas from requiring "receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19."¹³¹ For background, this reflects the debate about whether U.S. policymakers should exempt those previously infected with COVID-19 from vaccine mandates. Other countries provide such exemptions, if only temporarily, because there is evidence that those with prior infections have a similar degree of immunity to those who are fully vaccinated; thus, policymakers have argued those previously infected should be exempt, though it's controversial and there is no consensus.¹³² In this Author's view, there are arguments both ways, with the main arguments against allowing an exemption for the previously-immune drawing on implementation challenges.¹³³ Specifically, there may be challenges

¹²⁹ See *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39; see also *Nat'l Fed'n of Indep. Bus.* 142 S. Ct. 661.

¹³⁰ See *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39; see also *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666–67. The Supreme Court instated a stay while litigation is pending, but the nature of the decision—finding that the ETS went beyond OSHA's powers—essentially concludes that the ETS is invalid, and lower courts are likely to follow the Supreme Court's lead here, so this holding was—rightly—seen as the end of the line for OSHA's ETS.

¹³¹ Tex. Exec. Order No. GA-40 (Oct. 11, 2021).

¹³² Jennifer Block, *Vaccinating People Who Have Had COVID-19: Why Doesn't Natural Immunity Count in the US?*, 374 BRIT. MED. J. 1, 2–4 (2021); Dennis G. McGonagle, *Health-Care Workers Recovered from Natural SARS-CoV-2 Infection Should be Exempt from Mandatory Vaccination Edicts*, 4 LANCET RHEUMATOLOGY E170 (2022).

¹³³ Dorit Rubinstein Reiss, *Vaccine Mandates for Those With Previous COVID Infection – Policy Debate*, SKEPTICAL RAPTOR (Sept. 14, 2021), <https://www.skepticalraptor.com/skepticalraptorblog.php/vaccine-mandates-for-those-with-previous-covid-infection-policy-debate/> [https://perma.cc/X7W5-H2VK].

in identifying which previous infections warrant exemptions—for example, asymptomatic infections—and, in confirming previous infections, whether an individual was in fact previously infected. Vaccinating the previously-infected can still increase immunity and prevent disease. Further, exempting the previously-infected may create incentives to seek out infections, which is surely not a good thing amidst a deadly pandemic.¹³⁴

As mentioned earlier, Oregon already had a law that prohibited imposing vaccine mandates on healthcare workers and first responders. However, that prohibition could be overridden by a State or federal law or rule; in August 2021, Oregon’s governor did override the State law for most of these employees.¹³⁵

Overall, nine states have statutes currently in place addressing employers’ vaccination mandates for employees in the workplace, and one state, Texas, has an executive order doing the same—for a total of ten measures. This number does not include the overridden mandate in Oregon. However, of the ten, only three states—Montana, North Dakota, and Tennessee—are full bans; while five states—Alabama, Florida, Kansas, Utah, and Texas—have broad enough exemptions to make the mandate an opt-out program, where employers that want to get an exemption can get one on demand.¹³⁶ For example, the Code of Alabama exempts “any employee who has completed and submitted the exemption form described in subsection (e),” allowing employees to request an exemption for “one of the following reasons,” one of the reasons being a statement that “[r]eceiving the COVID-19 vaccination conflicts with my sincerely held religious beliefs, practices or observances.”¹³⁷ Although the law does tell employees that “providing false or misleading information is grounds for discipline, up to and including

¹³⁴ *Id.*

¹³⁵ *COVID Vaccinations and the Workplace*, OR. BUREAU OF LAB. & INDUS., <https://www.oregon.gov/boli/workers/Pages/covid-vaccine.aspx> [<https://perma.cc/4983-GKSC>] (last visited May 6, 2022).

¹³⁶ See *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39.

¹³⁷ ALA. CODE § 22; see also *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832.

termination from employment,” essentially the law orders employers to exempt anyone who simply asks for an exemption.¹³⁸

The ninth state statute, North Carolina’s law, creates a religious exemption but with a waiver if needed for public health.¹³⁹ This Statute is substantially weaker, making a stronger mandate possible in North Carolina. So, there are eight states with strong limits on employer mandates. Even without the exception to the North Carolina law, merely providing a religious exemption likely adds little to existing law, since under the Civil Rights Act of 1964, most employers would be offering accommodations to workers with religious objections anyway.¹⁴⁰ Employers may, however, try to assess the sincerity of a worker’s religious objection (which the North Carolina law does not prevent).¹⁴¹

It is worth mentioning that, during that time, several other states failed to pass laws limiting mandates. Such laws failed in Texas, Ohio, and Indiana, for example, over successful opposition from the business community.¹⁴²

As this Part has discussed, employer vaccine mandates suffer from the same problems as private customer mandates—primarily within the freedom-of-choice context—but have additional problems. Besides limiting the rights of private businesses to govern themselves, these mandates interfere with other important interests for both employees and employers. First, employees are often required to be near other employees for long periods of time during the workday—a different type of exposure than customers in casual

¹³⁸ ALA. CODE § 22; *see also infra* Appendix A: 50 States Vaccine Mandate Bans app. 832.

¹³⁹ *See infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39.

¹⁴⁰ *See Baxter, supra* note 114, at 893–94.

¹⁴¹ *Id.*

¹⁴² Mitchell Ferman & James Barragan, *Texas Bill to Block COVID-19 Vaccine Mandates for Employers Failed In Legislature After Business Groups Rallied Against It*, TEX. TRIB. (Oct. 18, 2021), <https://www.texastribune.org/2021/10/18/texas-covid19-vaccine-mandates-bill/> [<https://perma.cc/HS8Z-SU5R>]; Meredith Hackler, *Indiana Chamber of Commerce Not in Favor of Vaccine Mandate Bill*, WLFI (Dec. 22, 2021), https://www.wlfi.com/news/local/indiana-chamber-of-commerce-not-in-favor-of-vaccine-mandate-bill/article_ebaa108d-6e5c-5f90-96c6-5c0f486a81be.html.

encounters in stores.¹⁴³ Not allowing employers to protect their workers means the state is, essentially, requiring that workers be left in a preventable risk. Second, employers have their own interests in protecting workers—interests beyond the market appeal to customers. Employers have a longstanding ethical—and sometimes even a legal—duty to provide employees with a safe workplace.¹⁴⁴ This can, in fact, include a duty to protect workers from themselves.¹⁴⁵ Beyond those obligations, however, employers have additional reasons to want to reduce COVID-19 exposure: Employers can find themselves liable if workers contract COVID-19 on the job, since it would constitute a work-related injury.¹⁴⁶ Further, employers can be negatively impacted if employees are sick, or have to be isolated, and cannot work—undermining the business’s productivity. Therefore, a ban on employment vaccine mandates is a heavy intrusion into workplace management. This effect may explain the stronger opposition in many states to these laws from the business community and why most of these laws have failed.¹⁴⁷ Even now, only a few states have successfully enacted these bans.

D. Universities’ Mandates

Vaccine mandates in higher education go back at least to the early twentieth century.¹⁴⁸ However, mandates have been uneven, with different universities requiring, or not requiring, different

¹⁴³ Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin., 142 S.Ct. 661, 670–71 (2022) (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

¹⁴⁴ Robert F. Eckhardt, *The Moral Duty to Provide Workplace Safety*, 46 PRO. SAFETY 36, 36 (2001); Leslie Zellers et al., *Legal Risks to Employers Who Allow Smoking In The Workplace*, 97 AM. J. PUB. HEALTH 1376, 1377 (2007).

¹⁴⁵ Earl W. Spurgin, *Occupational Safety and Paternalism: Machan Revisited*, 63 J. BUS. ETHICS 155, 157–58 (2006).

¹⁴⁶ Zellers et al., *supra* note 142, 1377–78.

¹⁴⁷ The data obtained for this Article show that before October 2021, very few states had bills that banned employers from mandating vaccination. *See infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39.

¹⁴⁸ *Wallace v. Regents of Univ. of Cal.*, 75 Cal. App. 274, 275–76 (Cal. Ct. App. 1925).

vaccines, and with varying consequences.¹⁴⁹ Some states have imposed on universities specific vaccination requirements for affiliated university members through statutes.¹⁵⁰ Until the COVID-19 pandemic, no state prohibited such mandates.

Faced with a risk of having to close again after COVID-19 related closures during the summer of 2021, universities across the Nation adopted vaccine mandates.¹⁵¹ In response, several states adopted measures prohibiting such vaccine mandates—some through statutes and others through executive orders.¹⁵²

The mandates counted below relate to measures directly targeting universities and therefore is an undercount: The total does not include states that apply measures aimed at government agencies to state universities. This Author is aware of, anecdotally, some states applying state measures in that way. For example, Indiana Attorney General Todd Rokita advised public universities in the State that the law prohibiting vaccine passports for State agencies covers State universities as well.¹⁵³ Notably, the format of these bills often does not answer the question of whether public universities are captured. For that reason, this Article does not address that precise issue.

States with statutes prohibiting university-mandated vaccinations include: Alabama, Arkansas, Florida, Kentucky, Montana, Ohio, Oklahoma, Tennessee, and Utah (nine states

¹⁴⁹ Leila Barraza et al., *Immunization Laws and Policies Among U.S. Institutes of Higher Education*, 47 J.L. MED. & ETHICS 342, 342–43 (2019).

¹⁵⁰ *Id.* at 344.

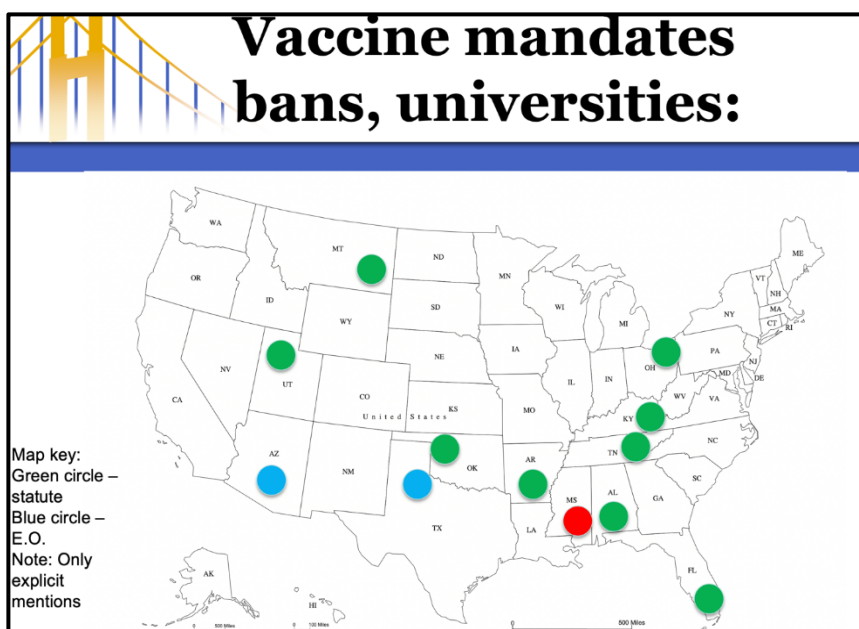
¹⁵¹ Reiss & DiPaolo, *supra* note 119, at 4–6, 17 n.73.

¹⁵² For a clear connection between an announcement of a mandate and the related state response, see Rick Seltzer, *Governor Bars Arizona Public Colleges from Mandating COVID-19 Vaccines*, HIGHER ED DIVE (Jun. 16, 2021), <https://www.highereddive.com/news/governor-bars-arizona-public-colleges-from-mandating-covid-19-vaccines/601948/> [<https://perma.cc/PVC7-J9VL>], which reports on the Arizona governor's executive order, which was explicitly a result of a university announcing a vaccination requirement.

¹⁵³ Ind. Att'y Gen. Op. No. 2021-1 (May 26, 2021). Note that the Attorney General interpreted the law to prohibit requiring proof of vaccination, not to prohibit a mandate per se; the public universities therefore allowed students to self attest. *Id.*; see also *Klaassen v. Trustees of Indiana Univ.*, 549 F. Supp. 3d 836, (N.D. Ind. 2021), *vacated and remanded*, 24 F.4th 638 (7th Cir. 2022).

total).¹⁵⁴ Meanwhile, Arizona and Texas have executive orders prohibiting them (as Texas's order, which applies to "any entity," clearly covers State universities as well).¹⁵⁵

Figure 5. Measures Limiting University Mandates (Directly).



Arizona and Arkansas only apply their prohibitions to public universities.¹⁵⁶ In some states, such as Florida, the limit applies to all public educational institutions, not just higher education.¹⁵⁷ Kentucky allows vaccination mandates but requires accepting "conscientiously held beliefs" as an exemption.¹⁵⁸ Montana allows mandates but requires universities to give an exemption if the student signed a notarized form that immunization is against their religious tenets and practices.¹⁵⁹ Ohio's bill only prohibits requiring vaccination for a vaccine under an EUA, leaving open mandates for

¹⁵⁴ See *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

vaccines that have full approval.¹⁶⁰ Mississippi does not have a law or executive order, but its institute for higher education prohibited universities from requiring COVID-19 vaccines.¹⁶¹ All in all, thirteen states have some form of a limit: ten states have full limits; Ohio has a limit that may no longer be operational; and, two states have bills that turn mandates into opt-out programs.

E. Local Preemption

In the past decade, general state preemption of local government measures (many related directly or indirectly to public health) has grown, often having a punitive nature.¹⁶² In response to the COVID-19 pandemic—as with other public health emergencies—local government was on the frontline, and many local governments took the lead.¹⁶³ Unsurprisingly, disagreements led state legislatures to preempt local governments in some cases.¹⁶⁴ While the most common state government actions were floor preemption (i.e., requiring local governments to impose public health measures as restrictive or more restrictive than the states' measures), in several cases, states enacted ceiling preemptions, preventing local government from taking more expansive measures the local government would have preferred.¹⁶⁵

A minority of bills explicitly preempted local action. This action should be seen as part of a broader struggle in some states between state and local government—a move in some states to entirely limit local government authority within areas related to public health.¹⁶⁶

¹⁶⁰ *Id.*

¹⁶¹ MISS. BD. OF TRS. OF STATE INSTS. OF HIGHER LEARNING, BOARD MEETING OUTLINE (2021), <http://www.mississippi.edu/board/downloads/boardbooks/2109.pdf> [<https://perma.cc/JQZ6-EHR2>]; Minta, *supra* note 59.

¹⁶² Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1999–2006 (2018).

¹⁶³ Bruce D. McDonald et al., *Tensions in State-Local Intergovernmental Response to Emergencies: The Case of COVID-19*, 52 STATE & LOCAL GOV'T REV. 186, 188–89 (2020).

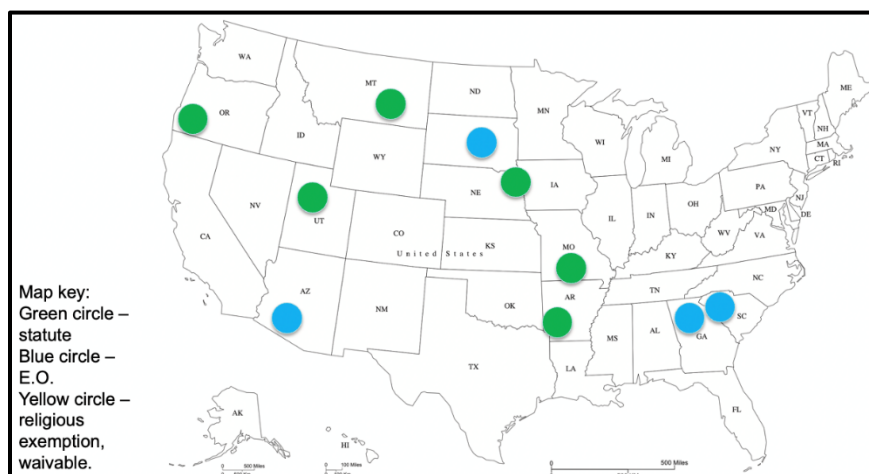
¹⁶⁴ *Id.* at 190–91.

¹⁶⁵ *Id.* at 190; *see also* Kim Haddow et al., PREEMPTION, PUBLIC HEALTH, AND EQUITY IN THE TIME OF COVID-19, ASSESSING LEGAL RESPONSE TO COVID-19 71, 71 (Scott Burris et al., eds., 2020).

¹⁶⁶ Briffault, *supra* note 160, at 1999–2000.

On this background, several of the states prohibiting mandates included explicit provisions that forbade local governments from enacting such mandates. Specifically, Arkansas, Indiana, Missouri, Montana, and Utah (five states) had explicit local preemption provisions in statutes.¹⁶⁷ Arizona, South Carolina, South Dakota, and Texas (four states) had explicit local preemption provisions in executive orders prohibiting mandates.¹⁶⁸ These nine states, apparently, were concerned about local resistance to vaccine mandates. As with the universities, these numbers refer to explicit preemption clauses and therefore do not reflect bans that apply to all levels of government.

Figure 6: Explicit Local Preemption.



IV. CONCLUSION & ADDITIONAL INSIGHTS

Until the COVID-19 pandemic, the only successful legislation limiting vaccine mandates was a narrow bill in Oregon from 1989, which limited employment vaccine mandates for healthcare workers, firefighters, and police officers, but allowed state and federal statutes and rules to overcome the prohibition.¹⁶⁹ That scenario changed with the COVID-19 pandemic. Mistrust and

¹⁶⁷ See *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39.

¹⁶⁸ *Id.*

¹⁶⁹ OR. REV. STAT. § 433.416(3).

concerns about COVID-19 vaccines, coupled with politicization of the pandemic, provided a moment of opportunity for state legislatures that led to the passage of many bills. During spring and summer of 2021, and again during November and December 2021, many state legislatures proposed bills to limit COVID-19 vaccine mandates, and some governors established executive orders to do so. As with every spate of bills, including vaccine bills, most proposed bills failed, but, comparatively, an unusually large number of these bills became law—and some states that did not manage to pass bills during that initial wave, passed bills after the Biden Administration's mandates, which spurred another wave of pushback and a politicized focus on the question of vaccine mandates.

Although over twenty states have passed some kind of measure to limit vaccine mandates, a vast majority of the bills was directed at government (both government units and local governments) rather than at private actors. But a minority of states have also limited the rights of private businesses to mandate vaccines for customers or employees in a variety of ways.

On a tangential note, the progress of these bills varied in different states. In Arizona, an attempt to ban vaccine mandates failed in May 2021.¹⁷⁰ The Governor enacted several executive orders and tried to include the bans in a budget bill that passed, but each attempt was struck down by the State's courts since a vaccine

¹⁷⁰ Cole Lauterbach, *Attempt to Ban Vaccine Passports In Arizona Fails*, CTR. SQUARE (May 21, 2021), https://www.thecentersquare.com/arizona/attempt-to-ban-vaccine-passports-in-arizona-fails/article_af6addbc-ba76-11eb-b299-7f07d643a03e.html [https://perma.cc/YE79-76YY].

mandate was deemed unrelated to the budget.¹⁷¹ In Ohio, a broad bill failed to pass.¹⁷² Each state, of course, has its own story.

In looking at the proposed prohibitions from different states, it is clear that successful passage of these bills was not driven by the anti-vaccine movement, although anti-vaccine activists certainly supported these state prohibitions. In fact, several states with strong anti-vaccine groups (largely built before the pandemic)—Ohio, Texas, and Arizona—failed to pass bills limiting vaccine mandates.¹⁷³ What appears to have driven many bills to success, more than anti-vaccine efforts, was the broader political context—especially the promotion of an anti-public-health and anti-expertise view by several prominent politicians. For example, both in Tennessee and Florida, bill passage was driven by politicians who, historically, were not considered “anti-vaccine.” Florida Governor Ron DeSantis has garnered support as the champion of opposition to strong public health measures, going so far as to criticize former President Trump for supporting some of them.¹⁷⁴ In Tennessee, after the State’s highest immunization official was fired for circulating a memorandum advocating for children’s right to receive vaccines

¹⁷¹ Bob Christie, *Arizona High Court Explains Why It Tossed Budget Bills*, AP NEWS (Jan. 6, 2022), <https://apnews.com/article/us-supreme-court-health-business-court-decisions-legislature-5f1923ac4df9edea89acc233fad35152>; Terri Jo Neff, *Arizona Supreme Court Strikes Down Mask And Vaccine Mandate Protections, Ruling Several Budget Bills Unconstitutional*, ARIZ. DAILY INDEP. NEWS NETWORK (Nov. 2, 2021), <https://arizonadailyindependent.com/2021/11/02/arizona-supreme-court-strikes-down-mask-and-vaccine-mandate-protections-ruling-several-budget-bills-unconstitutional/> [https://perma.cc/J728-RSPS].

¹⁷² Jim Gaines, *Ohio GOP’s Anti-Vaccine Mandate Bill on Hold Again*, SPRINGFIELD NEWS-SUN (Oct. 14, 2021), <https://www.springfieldnewssun.com/local/ohio-gops-anti-vaccine-mandate-bill-on-hold-again/C6UWTJ21GBAHTJKT2UUBWN5QWU/> [https://perma.cc/ELF3-K4L3].

¹⁷³ See *infra* Appendix A: 50 States Vaccine Mandate Bans app. 832–39.

¹⁷⁴ Richard Luscombe, *Florida’s Governor Celebrated His Anti-Mandate Covid Laws. Now Omicron Is Here*, GUARDIAN (Dec. 4, 2021), <https://www.theguardian.com/us-news/2021/dec/04/covid-omicron-florida-republican-ron-desantis>; Steve Contorno, *Desantis Says He Regrets Not Speaking Out ‘Much Louder’ Against Trump’s Recommendation to Stay Home*, CNN POL. (Jan. 16, 2022, 12:58 PM), <https://www.cnn.com/2022/01/14/politics/desantis-trump-covid-response/index.html> [https://perma.cc/WA78-ZA43].

without parental consent under Tennessee law,¹⁷⁵ a coalition of politicians angry at public health efforts around vaccines organized to support bills that limit mandates.¹⁷⁶ However, it seems that it took the announcement of the Biden Administration's mandates to get the Tennessee governor on board.¹⁷⁷ In essence, mainstream politics and the broader struggles between political parties allowed the various bills to pass, not the anti-vaccine movement by itself. The support for the bills in some states reflects the general politicization of the pandemic—politicization that has been escalating since the beginning, with both sides of the political spectrum continuing to harden their position. Meanwhile, the virus continues to enjoy the opportunity afforded by the petty human squabbles of polarized U.S. politics, doing what viruses do—multiplying while killing its vulnerable hosts.

COVID-19 vaccine mandates have become a political battleground, which begs the question: Will these battles remain confined to COVID-19, or is it only the beginning? Opposition may very well spread to other vaccine mandates. This political theatre could continue to be problematic and could open the door to the resurgence of new diseases and even those believed to be long gone.

¹⁷⁵ Maggie Fox, *Tennessee's Vaccine Manager Says She's Worried for Her State After She Was Fired*, CNN HEALTH (July 13, 2021), <https://www.cnn.com/2021/07/12/health/tennessee-vaccine-manager-fired/index.html> [<https://perma.cc/C2MZ-XD2X>].

¹⁷⁶ Yue Stella Yu, *Tennessee Bill Barring Vaccination Mandate with Exceptions For Health Care Facilities Moves Forward*, TENNESSEAN (Feb. 24, 2021, 5:21 PM), <https://www.tennessean.com/story/news/politics/2021/02/24/tennessee-bills-barring-vaccination-mandate-allowing-religious-exemptions-proceed/4556974001/> [<https://perma.cc/PF8V-F7XR>].

¹⁷⁷ Rachel Wegner, *'Heavy-Handed': TN Gov. Bill Lee Vows To Fight Biden's COVID-19 Vaccine Mandate For Workers*, TENNESSEAN (Sept. 10, 2021, 6:53 PM), <https://www.tennessean.com/story/news/politics/2021/09/10/tn-gov-bill-lee-vows-fight-biden-covid-vaccine-mandate/8272852002/> [<https://perma.cc/46MH-N6BZ>].

APPENDIX A: TABLE OF STATUTES¹⁷⁸

State	Legislation/ Executive Order	Stage/Status	Applies to Private Businesses	Applies to Employers	Applies to Governme nt Entities
Ala.	Senate Bill 267	Effective May 24, 2021	Yes	No	Yes
	Senate Bill 9: https://legiscan.com/AL/text/SB9/2021/X2	November 4, 2021			
Alaska	Administrative Order 321	Effective April 26, 2021	No	No	Yes
	Administrative Order No. 325	Effective November 2, 2021			
	House Bill 175	Pending in Community and Regional Affairs Committee as of 10/26/21	Yes	Yes	No
Ariz.	Executive Order 2021-09	Effective April 19, 2021	No	Yes for government employers No for private employers	Yes
	Executive Order 2021-18	Effective August 16, 2021	No	Yes	Yes
	Executive Order 2021-15	Effective June 15, 2021	No	No	Yes
Ark.	Act 1030	Effective April 29, 2021	No	only government employers prohibited from asking for vaccination status (exception for medical employers)	Yes
	Act 977 (H.B. 1547)	Effective April 28, 2021	No	Yes	Yes
Cal.	AB 327	Pending; Re-Referred to Committee on HEALTH and P. & C.P. as of April 15, 2021	Yes if state-funded	No	Yes
Colo.	HB21-1191	Postponed indefinitely as of May 12, 2021	Yes	Yes	Yes
Conn.	Only orders for mandates.				
D.C.	Only orders for mandates.				

¹⁷⁸ A full description of the statutes can be found in the online version of the Appendix A, *50 States Vaccine Mandate Bans*, https://docs.google.com/spreadsheets/d/1R87LLra-0QqaZNVesZh_1Bv54m5A1-5Bd_Bay-_gUH4/edit#gid=1383977065.

Del.	House Bill 209	Pending in Committee as of June 3, 2021	No	Public Employers	Yes
Fla.	Executive Order 21-81	Effective April 2, 2021	Yes	Yes	Yes
	Senate Bill 2006 https://www.flsenate.gov/Session/Bill/2021/2006	Effective July 1, 2021	Yes	No	No
	House Bill 1-B : https://www.flsenate.gov/Session/Bill/2021B/1B	Effective November 18, 2021	Yes	Yes.	Yes.
Ga.	Executive Order 5.25.21.01	Effective May 25, 2021	Yes	Yes	Yes
	House Bill 413	Pending as of February 17, 2021	Yes	Yes	Yes
Haw.	Safe Travels Program	Effective July 8, 2021	No	No	No
	House Resolution 123	Pending as of May 21, 2021	Yes	Yes	Yes
	House Bill 241	Pending as of May 21, 2021	Yes	Yes	Yes
Idaho	Executive Order No. 2021-04	Effective April 7, 2021	No	Public Employers	Yes
	House Bill 140	Passed the House on February 23, 2021 and was sent to the Senate for consideration	Yes	Yes	Yes
	House Bill 443	Referred to the Committee on Commerce & Human Resources on February 7, 2021	No	Public Employers	Yes
	House Bill 301	Referred to the Committee on Commerce & Human Resources on March 8, 2021	Yes	Yes	Yes
	House Bill 63	Pending in the Ways and Means Committee as of February 1, 2021	No	Yes	Yes
Ill.	House Bill 3682	Referred to the Rules Committee on March 27, 2021	Yes	Yes	Yes
Ind.	House Bill 1405	Effective July 1, 2021	No	Public Employers	Yes
	Senate Bill 74	Referred to the Committee on Pensions and Labor on January 4, 2021	Yes	Yes	Yes
	House Bill 1488	Referred to the Committee on Judiciary on March 16, 2021	Yes	Yes	No

Iowa	House File 330 Senate File 555	Referred to the Human Resources Committee on April 1, 2021	Yes	Yes	No
	<u>House File 217</u>	Referred to the Human Resources Committee on January 25, 2021	Yes	No	No
	<u>House File 889</u> https://www.legis.iowa.gov/legislation/BillBook?ba=HF%20889&ga=89	Effective May 20, 2021	Yes	No	Yes
Kan.	<u>Senate Bill 213</u>	Referred to the Committee on Commerce on March 5, 2021	Yes	Yes	No
	<u>House Bill 2001</u> http://www.kslegislature.org/li_2021s/b2021s/measures/documents/ccrb_hb2001_02_0000.pdf	Effective November 23, 2021	No	Yes	Yes
	<u>House Concurrent Resolution 5017</u>	Referred to the Committee on Judiciary on March 16, 2021	Yes	Yes	Yes
Ky.	<u>Senate Bill 8</u>	Effective May 29, 2021	No	No	Yes
	<u>Bill Request 106</u>	Pending as of June 21, 2021	Yes	No	Yes
La.	<u>House Resolution 20</u>	Sent to Secretary of State	Yes	No	Yes
	<u>House Bill 349</u>	Vetoed by Governor July 1, 2021; returned to the House for re-evaluation	No	No	Yes
	<u>House Bill 498</u>	Vetoed by Governor July 1, 2021; returned to the House for re-evaluation	No	No	Yes
	<u>House Bill 103</u>	Vetoed by Governor July 20, 2021; returned to the House for re-evaluation	Yes	No	Yes
Me.	<u>Legislative Document No. 867</u>	Carried over to any special or regular session of the 130th Legislature			
Md.	<u>Maryland Employee Protection Plan for Vaccine Refusal (HB1171)</u>	Pending in the House	Yes	Yes	Yes
	<u>House Bill 1150</u>	Pending in the House	Yes	Yes	Public Universities
Mass.	<u>House Bill 2411</u>	Pending	Yes	No	Yes

	<u>Senate Bill 1517</u>	Pending	Yes	No	Yes
Mich.	<u>House Bill 4791</u>	Pending in the Committee on Oversight as of May 5, 2021.	Yes	Yes	Yes
	<u>Informed Consent in the Workplace Act</u>	Pending in the Committee on Workforce, Trades and Talent since March 23, 2021	Yes	Yes	Yes
	<u>Senate Bill 457</u>	Pending in the Committee on Government Operations as of May 25, 2021	No	No	Yes
	<u>House Bill 4667</u>	Passed in the House; pending in the Committee on Health Policy and Human Services as of June 3, 2021	No	Yes	Yes
	<u>COVID-19 vaccination privacy act</u>	Pending in the Committee on Oversight as of May 5, 2021.	Yes	No	Yes
Minn.	<u>HF 2511</u> <u>SF 2430</u>	pending	No	No	Yes
	<u>HF 2530</u> <u>SF 2474</u>	Pending	Yes	Yes	Yes
Miss.		No pending legislation			
	Institute of higher education banned university mandates https://mississippitoday.org/2021/09/20/ihl-board-bans-covid-19-vaccine-mandates/	Passed September 16, 2021: http://www.mississippi.edu/board/downloads/boardbooks/2109.pdf			
Mo.	<u>House Bill 838</u>	Hearing indefinitely deferred	No	Public Employers	Yes
	<u>House Bill 566</u>	Pending in the Special Committee on Government Accountability as of May 14, 2021	Yes	Yes	Yes
	<u>House bill 271</u> https://www.senate.mo.gov/21info/BTS_Web/Bill.aspx?SessionType=R&BillID=58845294	Effective June 15, 2021	No	No	Yes
	Executive Order No. 21-10	Effective October 28, 2021			
Mont.	<u>House Bill 334</u>	Effective July 1, 2021	No	No	Yes
	<u>House Bill 702</u>	Effective May 7, 2021	Yes	Yes	Yes

Neb.	Legislative Bill 643	Pending since House debate on February 4, 2021	Yes	Yes	No
	Legislative Bill 447	Health and Human Services Committee as of February 23, 2021	Yes	No	No
Nev.		No Pending Legislation			
N.H.	https://legiscan.com/NH/text/2406665	Effective July 23, 2021	No	Public Employers	No
	House Bill 506 updated link https://legiscan.com/NH/bill/HB506/2021	Pending in Committee as of May 26, 2021	No	No	Yes
N.J.	Assembly Bill 5607 Senate Bill 3681	Assembly Bill 5607 was referred to the Assembly Health Committee on May 12, 2021, and Senate Bill 3681 was referred to the Senate Health, Human Services and Senior Citizens Committee on April 26, 2021	Yes	Yes	Yes
	Assembly Bill 5609	Referred to the Assembly Health Committee on May 12, 2021	No	Public employers	Yes
N.M.	Senate Bill 408	Referred to the Senate Health and Public Affairs Committee on February 18, 2021	No	No	Yes
	Senate Bill 232	Pending with the Senate Judiciary Committee	Private Schools	No	Yes
N.Y.	Assembly Bill 4602	Pending in Assembly as of February 4, 2021	Yes	Yes	Yes
	Senate Bill 6747	Referred to the Committee on Health on May 13, 2021	Yes	No	Yes
N.C.	North Carolina Occupational Safety and Health Act	Effective July 21, 2021	Yes	Yes	Yes
	House Bill 558	Referred to the Committee on Health on April 15, 2021	Yes	Yes	Yes
	House Bill 779	Referred to the Committee on Rules on May 4, 2021	No	Public employers	Yes

N.D.	House Bill 1465	Effective May 7, 2021	Yes	Yes	Yes
	House bill 1511 https://www.legis.nd.gov/assembly/67-2021/special-session/bill-actions/ba1511.html	Effective November 15, 2021	Yes	Yes	Yes
Ohio	House Bill 350	Referred to the House Civil Justice Committee on June 16, 2021.	Yes	No	Yes
	House Bill 253	Referred to the Health Committee on April 14, 2021.	No	Public employers	Yes
	House Bill 248	Pending in Committee as of August 24, 2021	Yes	No	Yes
	House Bill 244 https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA134-HB-244	Effective October 13, 2021	No	No	Yes
Okla.	Senate Bill 658	Effective July 1, 2021	Private Schools	No	Yes
	Executive Order 2021-16, Para. 2	Effective as of May 28, 2021	No	No	Yes
Or.	Oregon Revised Statute 433.416	Effective 1989	Yes	Yes	Yes
Pa.	House Bill 262	Re-committed to the Rules Committee on June 15, 2021	Yes	Yes	Yes
R.I.	House Bill 5989	Recommended that the Bill be held for further study on April 6, 2021	Yes	Yes	Yes
	House Bill 6302	Recommended to be held for further study on May 13, 2021	Yes	No	Yes
S.C.	Executive Order No. 2021-23	Effective May 11, 2021	No	Public Employers	Yes
S.D.	Executive Order 2021-08	Effective April 20, 2021	Yes	Yes	Yes
Tenn.	Senate Bill 187	Effective May 25, 2021	No	Public Employers	Yes
	Senate Bill 858	Effective May 26, 2021	Yes	No	Yes
	House Bill No. 9077 / Senate Bill No. 9014	Effective November 1, 2021	Yes	No	Yes
Tex.	Executive Order GA 35	Effective April 5, 2021	Yes (government funded)	No	Yes
	Senate Bill 968	Effective June 7, 2021	Yes	No	Yes
	Executive Order GA 39	Effective August 25, 2021	Yes	No	Yes

	Executive Order GA-40 https://gov.texas.gov/uploads/files/press/EO-GA-40_prohibiting_vaccine_mandates_legislative_action_IMAGE_10-11-2021.pdf	Effective October 11, 2021	Yes	Yes	Yes
Utah	House Bill 308	Effective May 5, 2021	No	Public Employers	Yes
	House Bill 60 https://www.sltrib.com/news/politics/2021/12/22/more-anti-vaccine-bills/	Introduced December 2021, not yet assigned to Committee			
	Senate Bill 2004 https://le.utah.gov/~2021S2/bills/static/SB2004.html	Effective November 16, 2021	No	Yes	No
Vt.	House Bill 283	Referred to the Committee on Human Services on February 18, 2021	Yes	Yes	Yes
Va.	House Bill 2242	Pending as of January 28, 2021	No	Yes	Yes
Wash.	House Bill 1305	Referred to the Health Care and Wellness Committee on January 19, 2021	Yes	Yes	Yes
	House Bill 1065	Referred to the Health Care and Wellness Committee on January 11, 2021	Yes	Yes	Yes
W.Va.	House Bill 4114	Referred to House Health and Human Resources Committee in January 2020	Yes	No	Yes
	House Bill 335	Passed October 21, 2021, effective 90 days after	Yes	Yes	Yes
Wis.	Assembly Bill 23	Placed on calendar by Committee on rules May 11, 2021	No	No	Yes
	Assembly Bill 25	Referred to the Assembly Committee on Constitution and Ethics on May 7, 2021	No	Public Employers	Yes
	Assembly Bill 299	Pending in Health Committee as of June 16, 2021	Yes	Yes	Yes
Wyo.	Governor Directive https://governor.wyo.gov/media/news-releases/2021-news-	Effective May 7, 2021	no	No	Yes

	releases/governor-gordon-issues-directive-banning-vaccine-passports (copy on file with Dorit Reiss)				
	HB 1002	Effective November 12, 2021			Yes