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COVID-19 POLICIES AT SPORTS VENUES: THE NFL SHOULD HAVE REQUIRED ATTENDEES TO BE VACCINATED

DAVID S. CAUDILL*

We live in a divided culture, and one aspect of that division is reflected in the debate over Covid-19 vaccinations—should citizens be free to refuse vaccinations when (i) consensus science indicates their efficacy in prevention of Covid infection, and (ii) vaccinations arguably are the keys to ending the pandemic and to economic recovery? With respect to travel, admission to large entertainment venues, or, my own focus, attendance at sports events, the question becomes whether those who voluntarily refuse vaccinations should be allowed to participate. The purpose of this essay is to argue that the NFL should have required vaccinations of all attendees of the 2021 season football games, even if it meant moving games away from those states that prohibit vaccine mandates (which prohibitions may not, however, survive legal challenges). To explain the NFL's reluctance, I locate my argument in the context of the current cultural divide in the U.S., and especially the phenomenon of vaccine hesitancy. Faced with these, the NFL chose the easier route—ignoring the culture wars, persistent vaccine hesitancy, and public health.

For some, my argument is common-sensical and uncontroversial, while others see a host of problems if the NFL would have adopted such a policy—state laws forbidding vaccination mandates, enforcement problems, how to handle exemptions, expensive protocols and logistics, and angering the fan base. In the course of this essay, I confront those and other objections, and defend my argument on the basis of public health concerns. I also highlight the numerous governmental and private employers, as well as many sports teams and arenas, that adopted vaccine mandates during the fall football season, showing that any NFL worries over enforcement and exemptions

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would have been shared with others—solutions would have also been shared. Moreover, any expense that the NFL would have had to bear is not unlike the numerous losses experienced throughout the pandemic by the major professional leagues, college sports, and even the 2021 Olympics organizers.

I. INTRODUCTION

In the spring of 2021, in the midst of the Covid-19 pandemic, the NFL seemingly considered requiring fans to have Covid-19 vaccinations at football stadiums for the fall 2021 season,¹ a move that might have seemed uncontroversial. But that depends on which world you live in. As we all know, the U.S. population now inhabits several different realities. We are divided politically *and* divided with respect to our trust in consensus science, both of which are reflected in our feelings about Covid precautions at stadium sports events.

Perhaps facing perceived pressure from vaccine hesitant fans, and even the vaccinated fans who support the freedom of anyone to refuse to be vaccinated, the NFL decided that the League would allow the unvaccinated to attend games—notably, however, the Seattle, Las Vegas, New Orleans, and Buffalo teams did end up requiring a Covid-19 vaccination or a negative Covid-19 test to attend a game.² The NFL announced some guidelines but they are weak and hard-to-enforce, like the “Fan Health Promise” (those who

1. See Evan MacDonald, *Should Vaccinations Be Required For Fans Attending The NFL Draft Experience At FirstEnergy Stadium?*, CLEVELAND.COM (Mar. 23, 2021), <https://www.msn.com/en-us/sports/nfl/should-vaccinations-be-required-for-fans-attending-the-nfl-draft-experience-at-firstenergy-stadium/ar-BB1eT85F> [<https://perma.cc/9M8V-7RVF>] (weighing logistical challenges of vaccinating patrons against likelihood of a super spreader event if attendees are masked and capacity is limited). As to the regular NFL season,

Dr. Allen Sills, the NFL’s Chief Medical Officer, said [in April 2021] it’s “too early” to speculate as to whether the NFL will require fans attending games to be vaccinated (or show proof of a negative test). The NFL probably won’t make a decision on this until later this summer.

See Alek Arend, *NFL Was Asked If Fans Will Be Required To Be Vaccinated*, SPUN (Apr. 8, 2021), <https://www.msn.com/en-us/sports/nfl/nfl-was-asked-if-fans-will-be-required-to-be-vaccinated/ar-BB1frKgZ> [<https://perma.cc/8J3F-SKC6>] (showing uncertainty regarding vaccine mandate or lack thereof). In mid-May, the “NFL declined to say whether it would require proof of vaccination for fans to gain entry into stadiums but admitted it is still developing its stadium protocols.” See Athletic Staff, *NFL to Loosen COVID-19 Restrictions For Fully Vaccinated Fans in 2021 Season*, ATHLETIC (May 17, 2021), <https://theathletic.com/news/nfl-to-loosen-covid-19-restrictions-for-fully-vaccinated-fans-in-2021-season/FoSeAWRXDiZG> [<https://perma.cc/KZH3-EPYG>] (stating changes in NFL game attendance policy).

2. See Khristopher J. Brooks, *These NFL Teams Are Requiring Fans To Get Vaccinated Before Entering Their Stadiums*, CBS NEWS: MONEYWATCH, (Sept. 16, 2021), <https://www.cbsnews.com/news/nfl-stadiums-vaccine-mandate-fans-bills-seahawks->

have tested positive, who were exposed to someone who tested positive, or who have symptoms “promise” to stay away).³ Yet by mid-September, health experts were warning that “football stadiums could create ripe conditions for COVID-19 to spread among unvaccinated fans.”⁴

Major League Baseball teams, on the other hand, were much more careful in the spring of 2021—for example, the Seattle Mariners were quite strict:

The ballpark is now able to sell more than 26,000 tickets to fans who are fully vaccinated against coronavirus with no social distancing or masks in the stands. Other tickets were sold in socially distanced pods of one to six people. Those who want to get in without a face covering must show proof of their vaccinations and get a handstamp before the security check. People who are unvaccinated have to wear masks and are required to wear a mask at all times unless actively eating or drinking.⁵

The Mets had a similar approach,⁶ and while the Giants initially required fans “to show proof of vaccination or a negative test,” by September there were no vaccination requirements at Oracle Park.⁷ By contrast, although the NBA did not mandate vaccinations for fans, by September the Golden State Warriors, Brooklyn Nets and Toronto Raptors decided to “require vaccinations for fans wanting to view home games,” and the TD Garden, the home of the Celtics

saints-raiders/ [https://perma.cc/9M4M-4DEN] (highlighting franchises’ varying vaccination requirements across the NFL).

3. See NFL SUPPLEMENTAL AND CLUB TICKET TERMS AND CONDITIONS, <https://www.nfl.com/legal/clubs-game-ticket-policy> [https://perma.cc/QKH9-U7L2] (outlining how policy requirements rely on the honesty of fans and no requirements for testing or vaccination).

4. See “Virus Notebook” Associated Press, BOS. SUNDAY GLOBE (Sept. 12, 2021), at A2 (“At any sort of large event like at a football stadium, without question there will be many infected people there.”).

5. See Franque Thompson, *Seattle Mariners’ New COVID-19 Guidance Allows Nearly 31,000 Fans Inside T-Mobile Park*, Q13 FOX (June 14, 2021), <https://www.q13fox.com/news/seattle-mariners-new-covid-19-guidance-allows-nearly-31000-fans-inside-t-mobile-park> [https://perma.cc/JU5G-MD49] (identifying strict policies enacted at the beginning of the MLB Season).

6. See “FAQs—Fully Vaccinated Fan Sections,” METS.COM <https://www.mlb.com/mets/tickets/specials/vaccinated-sections/faqs> [https://perma.cc/KC23-2QCX] (detailing Mets’ Covid policies).

7. See Marc Norton, *Why No COVID Vaccine Requirements For S.F. Giants Fans?*, PEOPLE’S WORLD (Sept. 20, 2021), <https://www.peoplesworld.org/article/why-no-covid-vaccine-requirements-for-s-f-giants-fans/> [https://perma.cc/6ELU-DYC3] (reporting updated policies no longer require vaccination or negative tests).

and the Bruins, followed suit for that arena's events, including NBA and NHL games.⁸

As to the NFL, Erie County (New York) officials, for example, were initially cautious and decided that only vaccinated fans would be allowed at Buffalo Bills games; but "the decision didn't last long"—within a week it was announced "that the County is 're-scinding the vaccination requirement to attend Bills games and stadium events.'"⁹ While the reversal was explained by the County in terms of fewer new Covid cases, "low hospitalization, and good vaccination rates," David Hookstead at the *Daily Caller* praised the decision on other grounds, namely freedom to "live life," the practicalities of enforcement, and "common sense":

This is 100% the correct decision. You simply can't ban unvaccinated individuals from living life. It's not right and it's not going to be tolerated. Access to the vaccine is plentiful, [but] we shouldn't just ban unvaccinated people from sporting events. How is that even going to be enforced? Are people who take tickets going to be required to check vaccination cards? Yeah, I'm sure that'd go over really well. Let's just use some common sense to get through life. . .¹⁰

The problem, of course, is that with respect to Covid-19 vaccinations, there is no "common sense." The leading sports law casebook describes sports, somewhat optimistically, as "a unifying mechanism that provides a sense of community among increasingly sizeable and diverse constituents."¹¹ Twenty-five years ago, Professor Rodney Smith agreed:

8. See Michael Silverman, *TD Garden To Require COVID-19 Vaccination Or Negative Test To Attend Bruins and Celtics Games, Concerts*, BOS. GLOBE (Sept. 23, 2021), <https://www.msn.com/en-us/news/us/td-garden-to-require-covid-19-vaccination-or-negative-test-to-attend-bruins-and-celtics-games-concerts/ar-AAOIsl8?ocid=uxbndlbing> [<https://perma.cc/PUR9-Y6JD>] (noting in order to attend Bruins or Celtics game, concert, or any other event at arena, fans 12 and older must show proof of vaccination or one of two types of negative COVID-19 test results).

9. David Hookstead, *Decision To Allow Only Vaccinated Fans At Buffalo Bills Games Reversed*, DAILY CALLER (June 21, 2021), <https://dailycaller.com/2021/06/21/buffalo-bills-unvaccinated-fans-games-attendance> [<https://perma.cc/HZ67-9M5M>] (quoting Erie County executive Mark Poloncarz).

10. See *id.* (agreeing with Erie County executive Mark Poloncarz's tweet even though Hookstead is himself vaccinated).

11. See Matthew J. Mitten et al., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 9 (5th ed. 2020) (finding athletic competition to be a unifying force across socio-economic differences).

In our diverse culture, characterized by a wide variety of ethnic, religious, socio-economic and other groups, there may well be no other force quite like sport, in terms of bringing people of diverse backgrounds together in pursuit of a common purpose. People from all walks of life are able to sense some unity of purpose as they gather to participate in or watch competitive athletics. With growing divisiveness on the basis of ethnic, religious and cultural differences, the capacity of sport to unify may be of increasing significance. . .¹²

Even in 2021, with respect to the Covid pandemic, there was optimism about sports as

a vehicle for well-being, tolerance and a means of raising awareness and lessening the cultural divide. The return of sports and even the re-opening of sports facilities could significantly improve the mental health of sports fans and athletes who find themselves at risk of mental health decline due to isolation.¹³

Sporting events, in this view, “are powerful tools for social integration and inclusion, whilst having the power to unite people in challenging times [and] to strengthen social cohesion.”¹⁴ Finally, sports journalist Jason Whitlock of Blaze Media also recently acknowledged that “many people have long-recognized the power of sports to unite otherwise disparate people. . .”¹⁵

12. See Rodney K. Smith, *When Ignorance Is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO L. REV. 329, 341 (1996) (highlighting sports’ importance as one of the last great unifying forces).

13. See Hesham Zafar and Ahmed Medien, *How the Power of Sport Can Bring Us Together and Drive Social Justice*, WORLD ECONOMIC FORUM (June 21, 2021), <https://www.weforum.org/agenda/2021/01/uniting-the-world-through-sport-what-can-we-learn-from-sport-in-enabling-social-cohesion/> [https://perma.cc/JA5S-SUBZ] (“Liverpool FC’s Mo Saleh . . . has enabled cultural acceptance of Islam amongst British fans, [showing that] athletes can promote diversity and tolerance [and help] to build understanding towards communities that face cultural marginalization.”).

14. See *id.* (quoting Cameron Mitchell, Chief Executive Officer at Majid Al Futtaim Leisure, Entertainment & Cinemas, who sees sports as a tool of social change)

15. See Video of Whitlock by PragerU, *Sports Can Bring Us Together. So Get The Politics Out*, DAILY WIRE, posted June 21, 2021, available at <https://www.dailywire.com/news/watch-sports-can-bring-us-together-so-get-the-politics-out> [https://perma.cc/AB67-UQBF] (quoting Whitlock’s take).

The best example of this, says Whitlock, was when the mixed-race South African rugby team won the 1995 World Cup, only a year after the formal end to apartheid in South Africa. Sports has also been a unifying force in the United States, such as when Jesse Owens, a black [O]lympic sprinter

But, Whitlock cautions that, just because sports have been unifying in the past, doesn't mean they will stay so. He cites the decision of former San Francisco 49ers player Colin Kaepernick to take a knee during the national anthem. "We all know what happened next. . . . [J]ust as sports has the power to unite, we have discovered it also has equal power to divide."¹⁶

We now have *another* example of how sports can divide us—there is tension between those who do not want the Covid-19 vaccination, and those who are vaccinated and concerned that the vaccine-hesitant are prolonging the pandemic and endangering lives. That tension is exemplified by Buffalo Bills wide receiver Cole Beasley's statement that he would refuse the vaccination if the NFL required it, and even retire if necessary.¹⁷ His critics, on the other hand, find it astounding that he is willing to "increase his risk of catching the deadly disease" while claiming a "right to spread it to his teammates and others."¹⁸

and long-jumper, won four gold medals at the 1936 Olympics in Nazi Germany. Only two years later, another black American, Joe Louis, scored a first-round knockout against Max Schmeling, a German heavyweight boxer.

Id.

16. *See id.* ("Players across the NFL followed Kaepernick's lead, kneeling, locking arms, and even raising fists during the national anthem. Then athletes from other sports joined in. . . .").

17. *See* Nick Wojton, *Bills' Cole Beasley Does Not Regret COVID Vaccine Comments*, BILLS WIRE (June 23, 2021), <https://www.msn.com/en-us/sports/nfl/bills-cole-beasley-does-not-regret-covid-vaccine-comments/ar-AALmdmQ?ocid=uxbndlbng> [<https://perma.cc/W7YD-D45E>] (detailing initial press conference where Beasley staunchly opposed Covid vaccination).

18. *See* Ron Borges, *Cole Beasley Provides Scientific Proof There Is No Vaccine for Being Stupid . . . Honest to God*, NEWSBREAK (June 24, 2021), <https://www.newsbreak.com/news/2290488344383/cole-beasley-provides-scientific-proof-there-is-no-vaccine-for-being-stupid-honest-to-god>. [<https://perma.cc/5CR9-QEU6>] ("It is no surprise there are 'anti-vaxers' in the NFL, as there are in all walks of life."). On July 22, 2021, the NFL announced a new policy to punish teams experiencing a covid outbreak. *See id.* (describing new policy). This policy said, if a game cannot be rescheduled during 18-week schedule due to COVID-19 outbreak among unvaccinated players, team with outbreak will forfeit and be credited with loss). . . . In addition, players on both teams will not be paid for the lost contest, and the team responsible for the cancelled game due to unvaccinated players will cover financial losses and be subject to potential discipline from the Commissioner's office.

Id. *See* Becky Sullivan, *The NFL Warns Teams Will Forfeit Games And Players Won't Be Paid In COVID Outbreaks*, NPR (July 22, 2021), <https://www.npr.org/2021/07/22/1019461203/nfl-penalties-teams-outbreaks-unvaccinated-players-covid-forfeit-games> [<https://perma.cc/XQ9F-34NA>] (acknowledging procedures NFL has put in place). *See also* Kevin Patra, *NFL Informs Clubs That COVID-19 Outbreaks Among Unvaccinated Players Could Lead to Forfeited Games*, AROUND THE NFL, NFL (July 22, 2021), <https://www.nfl.com/news/nfl-covid-19-outbreaks-unvaccinated-players-for>

The purpose of this essay is to reflect upon the effects of the Covid-19 pandemic during the fall 2021 NFL season, and to argue that the NFL should have required, of anyone entering an NFL stadium, evidence of a Covid-19 vaccination. I begin Section II with the cultural divisions in our country, to provide a context for my criticism of the NFL; I concede that “following science” is not an unambiguous concept, and that in the culture wars, people see even scientific data differently.¹⁹ In Section III I survey the reasons for vaccine hesitancy to clarify what the NFL was facing just before the 2021 fall season, as it is likely that many fans were not vaccinated; I highlight the likelihood that a vaccine mandate could have encouraged vaccinations and helped to end the pandemic.²⁰ Section IV addresses briefly the fall 2021 NFL attendance policy²¹, and in Section V I justify my criticism of that policy on the basis of public health, even while I acknowledge the problems with, and barriers to, my argument—including state laws prohibiting vaccine mandates, enforcement problems, and the prospect of claims for medical or religious exemptions from any vaccine mandate.²² I believe that the NFL should have either played all games in stadiums located in states allowing vaccine mandates or—although the law is unstable in this area—challenged the relevant state prohibitions against vaccine mandates.²³ In any event, a vaccine mandate would have been expensive, with logistical complications, but I conclude in section VI that when the NFL faced a policy choice, it chose the wrong side in the culture wars, unwittingly supporting science skepticism while lacking the courage to sacrifice profits to ensure fan health.

feit-cancelled-game?campaign=twitter_atn [https://perma.cc/22ZF-AN49] (discussing full text of new policy, delivered to clubs as a 10-page memo).

19. See *infra* notes 31-51 and accompanying text.

20. See *infra* notes 52-74 and accompanying text.

21. See *infra* notes 75-83 and accompanying text.

22. See *infra* notes 84-141 and accompanying text.

23. For an in-depth analysis of the Norwegian Cruise Lines’ successful challenge of the Florida mandate see *infra* notes 93-97 and accompanying text. Some state governors have prohibited vaccine mandates, and even if those prohibitions were overturned as beyond a governor’s authority, the state legislature could pass similar laws regulating business within the state. See Kathryn Watson, *Can Businesses Require Proof of Vaccination? Experts Say Yes*, CBS NEWS (Apr. 13, 2021), <https://www.cbsnews.com/news/can-businesses-require-vaccination-proof-experts-say-yes/> [https://perma.cc/C9Y2-FP7W] (quoting Walter Olson, senior fellow at the Cato Institute’s Robert A. Levy Center for Constitutional Studies) (stating governors will have difficult time restricting “private companies that receive no government funding from requiring proof of vaccination to enter”).

II. WE LIVE IN TWO DIFFERENT WORLDS

*[W]hether or not a statement is believed depends far less on its veracity than on the conditions of its “construction”—that is, who is making it, to whom it’s being addressed and from which institutions it emerges and is made visible.*²⁴

“But I just want to tell my side of the story.”

*“There are not sides of a story,” Marco says. “There are just different stories. People will either believe yours or the other one. Usually the other one.”*²⁵

The controversy over vaccine mandates has everything to do with the current cultural divide in the U.S., and especially one aspect of that divide—the crisis of expertise.²⁶ We often hear questions nowadays from colleagues, friends and family, whether in discussions of climate change,²⁷ the Covid pandemic, or the safety of vaccines:²⁸ “How can those people ignore the obvious facts? How can they be so lost in their bubble? Who are their so-called ex-

24. See Ava Kofman, *Bruno Latour, The Post-Truth Philosopher, Mounts a Defense of Science*, N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/magazine/bruno-latour-post-truth-philosopher-science.html> [<https://perma.cc/K3WZ-DKP5>] (quoting Bruno Latour’s take on how to formulate and disseminate information).

25. See Sam Lipsyte, *My Apology*, NEW YORKER (June 28, 2021), <https://www.newyorker.com/magazine/2021/07/05/my-apology> [<https://perma.cc/VE3B-2JVF>] (discussing author’s fictional narrative that focuses on differing points of view).

26. See Gil Eyal, *THE CRISIS OF EXPERTISE*, (Polity Press, 2019) (popularizing term “crisis of expertise”).

27. See John Cook, *Countering Climate Science Denial and Communicating Scientific Consensus*, *Climate Science*, OXFORD RES. ENCYCLOPEDIA (Oct. 26, 2016), <https://oxfordre.com/climatescience/view/10.1093/acrefore/9780190228620.001.0001/acrefore-9780190228620-e-314> [<https://perma.cc/ZV8Z-H4HD>] (noting scientific consensus on human-caused global warming). See also Frank Luntz, *The Environment: A Cleaner, Safer, Healthier America*, LUNTZ RES. CO. (2002) (stating market research shows that many voters “believe that there is no consensus about global warming in the scientific community”).

28. See Adam Hadhazy, *Anti-Vaccination Groups Dealt Blow as Lancet Study is Retracted*, POPULAR MECHANICS (Feb. 5, 2010), <https://www.popularmechanics.com/science/health/a5008/4344963/> [<https://perma.cc/M9Z4-UTBX>] (finding claims of vaccines causing autism were legitimized by a 1998 study by Dr. Andrew Wakefield in *The Lancet* medical journal, but that article was retracted on Feb. 2, 2010, due to accusations of unethical and irresponsible research). Recently, there are concerns, likely unjustified, about the dangers of covid vaccines. See Kelly McLaughlin & Yelena Dzhanova, *Experts Warn Anti-Vaxxer Concerns About a COVID-19 Vaccine Could Slow the End of the Pandemic*, BUS. INSIDER (Dec. 3, 2020), <https://www.msn.com/en-us/health/medical/experts-warn-anti-vaxxer-concerns-about-a-covid-19-vaccine-could-slow-the-end-of-the-pandemic/ar-BB1bB8RH> [<https://perma.cc/F7TX-VY6G>] (illustrating effects of negative media around Covid-19 Vaccine).

perts?” And of course, I do not mean to imply that it is only one “side” is asking those questions. Both sides in the “culture wars” view the other as living inside a bubble or an echo chamber.²⁹ Fox News and CNN are “said [to] report as if from alternate universes.”³⁰ These divisions have legal and policy consequences, as we have seen in the suggestion that the Trump administration reflected an anti-scientific bias in appointments to head science-related government agencies as well as in its response to the Covid pandemic.³¹ While scholars agree that 21st-century technological growth and the digital age has exacerbated the “tribal” divisions in the U.S. and internationally,³² the phenomenon of citizens living in “two different worlds,” in “alternative realities,” is hardly new.

About thirty years ago, Michiel Schwarz and Michael Thompson, focusing on risk assessment in policy contexts, highlighted the role of cultural cognition in ongoing clashes of contradictory certainties and plural rationalities.³³ For example, the contradictory

29. See Eli Pariser, *THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK*, (Penguin Books, 2011) (arguing term “filter bubble”—a state of intellectual isolation brought on by website algorithms that filter out disagreeable information—is an advance over the term “echo chamber.”).

In the filter bubble, there’s less room for the chance encounters that bring insight and learning. . . . By definition, a world constructed from the familiar is a world in which there’s nothing to learn. If personalization [via filters] is too acute, it could prevent us from coming into contact with the . . . preconception-shattering experiences and ideas that change how we think about the world and ourselves.

Id. at 13 (describing ramifications of filter bubble). Moreover, when a filter bubble occupant does confront an opposing perspective, logical arguments may not sound compelling due to identity politics. See Marcus Gilroy-Ware, *THE TRUTH ABOUT FAKE NEWS*, (Repeater Books, 2020) at 19 (“[P]olitics is not just about making the most logical argument. It also needs to be appealing to the imagination and identity of the people it concerns, and is often a case of trying to convince people “who we are” in terms of shared identity and values.”).

30. See Reed Richardson, *Dueling Chyrons: CNN, Fox News Report From Alternate Universes During Trump’s Bizarre Coronavirus Briefing*, MEDIAITE (Apr. 13, 2020), <https://www.mediaite.com/news/dueling-chyrons-cnn-fox-news-report-from-alternate-universes-during-trumps-bizarre-coronavirus-briefing/> [https://perma.cc/6KRZ-V77G] (citing differences in coverage and viewpoint).

31. See Shi-Ling Hsu, *Anti-Science Politics*, 75 U. MIAMI L. REV. 405 (2021) (referencing Trump administration expanded depth and breadth of attacks on science by displaying outward animosity towards scientific processes).

32. See GILROY-WARE, *supra* note 29, at 5 (“[T]echnology platforms [enable] misinformation and disinformation. . .”). See also Hsu, *supra* note 31, at 456 (“Social media certainly feeds oxygen to crackpot science. . .”).

33. See Michiel Schwarz & Michael Thompson, *DIVIDED WE STAND: REDEFINING POLITICS, TECHNOLOGY AND SOCIAL CHANGE* (Univ. of Penn. Press, 1990) at 33 (“If different actors, in the same debate, cognize differently (that is, if they see things differently and know things differently), then they will inevitably be operating with different definitions of what is there. The debate, therefore, will entail

certainties between the producer of a genetically-modified (GM) food product (that the product is safe) and an anti-GM activist (that the product is unsafe) might be explained by reference to differing perceptions of nature as, respectively, robust and vulnerable. For Schwarz and Thompson, these contradictory views of nature “lie beyond the reach of both orthodox scientific method and the conventional notion of ‘decision making under uncertainty.’”³⁴ “Another way of putting it is that each actor is perfectly rational, given his or her convictions as to how the world is. . . . The situation is one of plural rationality”³⁵ In a similar 2008 study of cultural cognition in the debate over the risks of synthetic *biology*,³⁶ politically conservative and religious opposition to such “Frankenstein” science was associated with an individualistic and hierarchical (i.e., restricting choices) cultural worldview, whereas those with a communitarian and egalitarian worldview were less sensitive to the risks.³⁷ The

the clash of differently drawn boundaries and the contention of incompatible rules of closure.”).

34. *See id.* at 4 (referencing grey areas in decision making as result of personal perception).

35. *See id.* at 6 (challenging view that science, “for all its admitted uncertainties, is factual” and not driven by values). Schwarz and Thompson concluded: Anthropologists and sociologists of knowledge have shown us that what are considered facts depends ultimately on an accepted framework of social (and therefore evaluative) premises. Even scientific knowledge, whilst not perhaps wholly fluid, is certainly plastic in the sense that it is socially negotiated (science being a social activity) and molded by values of various kinds.

See id. at 18-19 (arguing environmental “impact assessments, far from reflecting conflicting evaluations of the facts, involve rival interpretive frames in which facts and values are all bound up together”).

36. *See generally* David S. Caudill, *Synthetic Science: A Response to Rabinow*, 21 L. & LITERATURE 431 (2009). (“Some critics consider idea of creating artificial organisms in the laboratory to be a frightening example of scientific hubris, evocative of Faust or Dr. Frankenstein.”). In less literary terms, synthetic biology provokes “fears about scientists ‘playing god’ and raises deeper philosophical and religious concerns about the nature of life itself and the process of creation.” *See id.* (stating fears raised about synthetic biology).

37. *See* Gregory Mandel et al., *The Cultural Cognition of Synthetic Biology Risks: A Preliminary Analysis*, CULTURAL COGNITION PROJECT AT YALE L. SCH. (Sept. 5, 2008), <http://ssrn.com/abstract=1264804> [<https://perma.cc/55U4-RQBC>] (confirming link between cultural values and disputes over environmental risks, and demonstrating curious reversal of expectations—those who are not sensitive to risks of synthetic biology because they admire secular science are suddenly sensitive to risks of global warming and nuclear power, because they are willing to challenge authority).

In general, individuals who hold relatively egalitarian values tend to be more risk sensitive and those who hold relatively hierarchical values more risk skeptical concerning technological and environmental risks [R]ecognition of global warming and nuclear power risks, for example, tends to be associated with challenges to authority, [which] repels persons who are culturally hierarchical, politically conservative, and relig-

relevance of these analytical frameworks nowadays is that while much has changed, we should not be provincial and assume that our seemingly striking, contemporary cultural divisions over scientific and political matters are new.

The NFL therefore faced a complex culture as it responded to the Covid-19 pandemic and began to set League policy for its games. There were not a set of facts that were obvious to everyone to guide the NFL's decision regarding attendance requirements. Instead, there was a dilemma—a choice between appeasing those who oppose vaccine mandates or appeasing those who focus on public health (to be fair, those opposed to vaccines also likely do so out of concern for their health). Neither “side” could convince the other to change, and the NFL was not capable of establishing a policy that all fans will support.

In the broader culture wars, there is a tendency to oversimplify—some critics often talk of those who live in an “alternate reality” as if the critics live in the “real” world. However, many of the differences between the two sides in the culture wars reflect different values and visions for the nation. As sociologist Nissim Mizrahi explained, with respect to the working-class voters in Israel who supported Netanyahu:

The problem [is not that they were] confused about what was best for them. They weren't suffering from . . . “false consciousness”. . . . [They] were consciously spurning liberalism for a reason: what they see as the endgame of the liberal worldview is not a world they wish to inhabit.³⁸

One need only think of the abortion rights controversy, immigration policies, or the supposed attacks by the left on religious freedom or gun rights, to recognize that the divisions in the culture wars are not simply about misinformation from unreliable internet sources—they are about values, identities, and foundational commitments to a way of life. And those on the right do not have a

ious; recognition of synthetic biology risks, in contrast, coheres with resentment of a form of cultural secularism, symbolized by science, that is . . . subversive of traditional forms of authority.

Id.

38. See David M. Halbfinger, *Explaining Right-Wing Politics in America, Via the Middle East*, N.Y. TIMES (Dec. 19, 2020), at A16 (stating both working-class Mizrahi voters and the Trump voters “see themselves as their countries’ most patriotic citizens and demonize the left and its allies in the news media, academia and other liberal redoubts as traitorous enemies. Both . . . feel disdained by those elites, who dismiss their views as racist, ignorant or unwittingly self-defeating”). See also *id.* (representing the views of Nissan Mizrahi).

monopoly on foundational commitments—both left and right have a moralized anchor “around which to understand the world.”³⁹

The delusional claim not to have any ideology. . . is almost always a camouflage. Just as in the joke about one fish saying to the other “what’s water?”. . . the claim not to have any conscious ideological positions at all signifies at best that the person making such a claim has simply absorbed the dominant ideology.⁴⁰

One can certainly argue that there is no moral equivalency between the opposing ideologies in the culture wars, and that the views of one side will lead to superior outcomes in terms of fairer opportunities for success, racial and gender equality, public health, and helping those in need. But the notion that any group occupies a neutral center in politics is a myth. Likewise, with respect to scientific facts in the crisis of expertise, some humility is also warranted. The “Because Science” and “Trust the Science” t-shirts, worn by those on the left who see the culture wars as a struggle between those with apolitical scientific facts against anti-science ideologues, are also oversimplifications. Even with something as clear as the much-needed coronavirus vaccine, there are

all kinds of extra-scientific variables: moral assumptions about what kind of vaccine testing we should pursue (one reason we didn’t get the “challenge trials” that might have delivered a vaccine much earlier); legal assumptions about who should be allowed to experiment with unproven treatments; political assumptions about how much bureaucratic hoop-jumping it takes to persuade Americans that a vaccine is safe.⁴¹

It is never as simple as just “following the science.” If one assumes science is always right, that position is easily discredited by highlighting the publication by *The Scientist* of the “top retractions of 2020.”⁴²

39. See Gilroy-Ware, *supra* note 29, at 63 (noting contrasting world views in abortion rights debate).

40. See *id.* at 209 (discussing the implications of adhering to the dominant ideology).

41. See Ross Douthat, *When You Can’t Just Trust the Science*, N.Y. TIMES (Dec. 20, 2020), at SR 9 (listing variables and obstacles which have stalled vaccine roll out).

42. See Retraction Watch Team, *The Top Retractions of 2020: The Retraction Watch Team Takes a Look at the Most Important Publishing Mistakes This Year*, SCIENTIST (Dec. 15, 2020), <https://www.the-scientist.com/news-opinion/the-top-retractions-of-2020-68284> [<https://perma.cc/J62J-NV8D>] (referencing research article claim-

The cliché is that people should “follow the science” and do whatever “science says.” But the truth is that science says many things at once. Science says that the coronavirus can last one month on surfaces; it also says it’s vanishingly rare to get the coronavirus from surfaces. Bad studies, good studies, and mediocre studies are all part of the cacophonous hydra of “science” that is constantly “saying” stuff.⁴³

When a decision about whether to require vaccinations to attend a professional football game needed to be made, and the science was not absolutely clear, a risk analysis needed to be made. With no NFL vaccination mandate, there was arguably a greater risk of Covid-19 infections—the scientific consensus is that vaccine mandates work.⁴⁴ While one can easily sympathize with the NFL’s dilemma—this has been a difficult year for all business enterprises—the NFL should have chosen public safety over popularity.

III. VACCINATION HESITANCY AS A CULTURAL PHENOMENON

[W]e can break people down. . .into three groups—vaccine enthusiasts (those who are already vaccinated or definitely plan to get vaccinated), vaccine hesitant (unsure but persuadable), and anti-vaxxers. . . The vaccine hesitant group is further broken down into three subgroups: the watchful (those who are waiting to see how everything goes), the cost-anxious (those with resource barriers like time or money to vaccination), and the system distrusters

ing virus was transmitted through surface contact); See Shane Riddell et al., *The Effect of Temperature on Persistence of SARS-CoV-2 on Common Surfaces*, 17 No. 145 VIROLOGY J. 1 (2020) (finding it to be “a greatest-hits compilation of research errors.”); See Derek Thompson, *Hygiene Theater Is Still a Huge Waste of Time*, ATLANTIC (Feb. 8, 2021), https://www.theatlantic.com/ideas/archive/2021/02/hygiene-theater-still-waste/617939/?campaign_id=9&emc=edit_nn_20210211&instance_id=27043&nl=the-morning®i_id=100596401&segment_id=51522&te=1&user_id=4f435818fe714149705b758320ac43f9 [https://perma.cc/35ZX-6D6Z] (stating grimy surfaces are not problem; cleaning subways and buses every night is a waste of money).

43. See Thompson, *supra* note 42 (highlighting imperfect art of science and how initial facts are held onto even when disproven).

44. See David Leonhardt & Ian Prasad Philbrick, *Over the Noise, One Fact Rings True: Vaccine Mandates Have Saved Lives*, N.Y. TIMES (July 24, 2021), at A13 (statement of Dr. Céline Gounder) (“The takeaway message remains, if you’re vaccinated, you are protected. . . . You are not going to end up with severe disease, hospitalization, or death. . . . Companies. . . .that decide to enact vaccine mandates will almost certainly save American lives by doing so.”).

(those distrustful of the medical establishment, but not necessarily anti-vaccine).⁴⁵

With whom are the sports leagues dealing when confronted with fans who are for some reason not vaccinated? It turns out that the reasons that one may be vaccine hesitant are bafflingly varied and complex; even summaries like the one in the foregoing epigram (3 subgroups) inevitably oversimplify the situation. For example, one study, using a psycho-behavioral segmentation approach, divided the hesitant portion of the US population into four groups: the watchful, the cost-anxious, the system-distrusters, and the Covid skeptics.⁴⁶ While such schemes are helpful, they raise questions as to *why* the watchful are waiting, and which systems are not trusted or merit skepticism.

In response to a *New York Times* column arguing that lack of trust in the “system,” and not “vaccine hesitancy,” explains low vaccination rates,⁴⁷ the response of many readers was impatient:

“THIS IS INSANE. Just require it. Enough.”

“It’s time to. . .[require]vaccines to go back to school, to work, to enter stores, to travel. I don’t care about your ‘beliefs’; this is a public health crisis, and the willfully unvaccinated are a menace to others. . .”

45. See Steven Novella, *The Causes of Vaccine Hesitancy: The Vaccine Hesitant Are Now the Front Lines of the Battle to Contain COVID*, EVIDENCE-BASED MED. (May 19, 2021), <https://sciencebasedmedicine.org/the-causes-of-vaccine-hesitancy/> [<https://perma.cc/3G25-D6KT>] (discussing various views on Covid vaccination).

Decision making around vaccination entails complex mix of cultural, psychosocial, spiritual, political, and cognitive factors. Reasons for vaccine hesitancy fit into 3 categories: lack of confidence (in effectiveness, safety, the system, or policy makers), complacency (perceived low risk of acquiring [vaccine-preventable diseases]), and lack of convenience (in the availability, accessibility, and appeal of immunization services, including time, place, language, and cultural contexts).

Shixin (Cindy) Shen & Vinita Dubey, *Addressing vaccine hesitancy: Clinical guidance for primary care physicians working with parents*, 65(3) CAN. FAM. PHYSICIAN. 175–181 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6515949/> (explaining what factors may contribute to people’s decision making on whether to get vaccine).

46. See Sema Sgaier, *Meet the Four Kinds of People Holding Us Back From Full Vaccination*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/interactive/2021/05/18/opinion/covid-19-vaccine-hesitancy.html> [<https://perma.cc/JRU9-A8V6>] (categorizing four groups of vaccine averse individuals).

47. See Gina Bellafante, *Free Doughnuts Aren’t Going to Boost Vaccination Rates*, N.Y. TIMES (July 9, 2021), <https://www.nytimes.com/2021/07/09/nyregion/free-doughnuts-arent-going-to-boost-vaccination-rates.html> [<https://perma.cc/HXX2-T2V2>] (noting citizens are skeptical because they think government will use vaccine programs to track people).

“I would love to have a government-issued vaccine passport. . .that would get me onto Covid-19-vaccinated-only flights, movie theatres and concert venues. . .”⁴⁸

The idea of vaccine passports, which makes sense to so many concerned citizens, is problematic in several respects. The authors of a March 2021 paper from the University of Oxford’s Centre on Migration, Policy and Society argued that

vaccination passports will not become the main tool in the fight with the COVID-19 crisis and are unlikely to play a positive role in the mitigation of its impact. There is no clear and straightforward connection to safety and security, while their rapid introduction might have similar consequences to opening Pandora’s box of discrimination and stigmatization.⁴⁹

Other substantial barriers to vaccination passports become apparent, including (i) ethical and social concerns, such as the fact that a passport requirement to participate in common activities represents a proxy of a (frequently unpopular) government *obligation* to get vaccinated, and (ii) legal concerns related to privacy and data protection given the likely “electronic or digital element” in any vaccination passport program.⁵⁰ Even if we reject the idea of vaccination

48. See *Reader Comments*, N.Y. TIMES (July 18, 2021) at MB 3; See also *Letters to the Editor: ‘I’ve had enough’: Readers Are Furious at Vaccine Refusers*, LOS ANGELES TIMES (July 21, 2021), <https://www.msn.com/en-us/news/us/letters-to-the-editor-ive-had-enough-readers-are-furious-at-vaccine-refusers/ar-AAMoqNx?li=bbnb7Kz> [https://perma.cc/L6NS-VLPT] (statement of Mitchell Zimmerman) (“Enough is enough. Tolerance for those who insist on defying reality must end.”).

“I think there’s some real anger brewing out there among vaccinated folks that’s not getting much attention,” David Nir, the political director of *Daily Kos*, wrote. My [N.Y. Times] colleague Roni Caryn Rabin reported, “Many inoculated Americans are losing patience with vaccine holdouts.”

Kay Ivey, Alabama’s Republican governor, was harsher: “Time to start blaming the unvaccinated.”

See David Leonhardt, *Mandate Momentum: Vaccine Mandates are on the Rise, and they Will Probably Have a Bigger Effect than Mask Mandates*, N.Y. TIMES (July 29, 2021), <https://www.nytimes.com/2021/07/29/briefing/mask-mandates-coronavirus.html> [https://perma.cc/4QJK-3X4E] (noting vaccine’s increased efficacy over masks in ending pandemic; however, this is weighed against people pushing back against emergency use authorized vaccine).

49. See Oskar Josef Gstrein et al., *A Terrible Great Idea? COVID-19 ‘Vaccination Passports’ in the Spotlight*, Working Paper No. 153 (Mar. 2021), CENTRE ON MIGRATION, POL’Y & SOC’Y UNIV. OF OXFORD, at 2, <https://www.compas.ox.ac.uk/wp-content/uploads/WP-2021-153-Gstrein-Kochenov-Zwitter-A-Terrible-Great-Idea-Vaccination-Passports.pdf> [https://perma.cc/Y2F9-8NDD] (identifying drawbacks and advantages of vaccine passports).

50. See *id.* at 17-19 (“Current developments in public administration suggest that many solutions [to the pandemic] will have at least some sort of electronic or

passports, and decide to require vaccination cards, that option unfortunately introduces the genuine possibility of fraud on the part of the unvaccinated—a “focus group of vaccine-hesitant Trump voters” led by Republican pollster Frank Luntz

revealed that [m]ost participants said they would want a fake vaccination card that would allow them to claim they had received shots, after Luntz granted them anonymity to speak honestly. “One-thousand percent,” one woman said. “If I have a fake vaccine card, I can go anywhere,” added a man. . . .⁵¹

Such responses should raise concerns about sports stadiums, but as more and more businesses require proof of vaccination, the NFL would not be alone if it had chosen to confront and strategically find a solution to the problem of fraud.

Setting aside another challenge, the problem of vaccine access,⁵² there is also high vaccine hesitancy among young Americans;⁵³ their hesitancy perhaps feels justifiable due to fears of myocarditis and pericarditis, the cases of which “have been most common in male adolescents and young adults.”⁵⁴ This raises another question about whether it is appropriate to label as “hesi-

digital element. However, [given] historic lessons from the adoption of data retention systems, this is worrying since digital solutions have a tendency towards ‘mission creep’ as time evolves and despite the original justification for their existence disappearing.”).

51. See Dan Diamond, “I’m Still a Zero”: Vaccine-Resistant Republicans Warn That Their Skepticism is Worsening, WASH. POST (Apr. 20, 2021), <https://www.washingtonpost.com/health/2021/04/20/vaccine-hesitant-republicans/> [<https://perma.cc/LF7V-FDK4>] (illustrating concerns about possible fake vaccine card usage).

52. See Lauren Dubois *Why Vaccine Hesitancy Is Still An Issue In COVID-19 Fight*, INT’L BUS. TIMES (July 3, 2021), <https://www.ibtimes.com/why-vaccine-hesitancy-still-issue-covid-19-fight-3242584> [<https://perma.cc/V6W2-4A43>] (statement of Dr. Lisa Cooper) (discussing low vaccination rates in black communities “may be due in part, to vaccine hesitancy, but they may also be due to inequities in vaccine access. . . . Many African Americans in the South live in rural areas with limited access to health care facilities. . . . Furthermore, many people may have other stressors related to housing, food, or job insecurity, which may be preventing them from getting vaccinated.”).

53. See Emily Anthes, *Younger Adults are Less Likely to Get Vaccinated Than Their Elders*, *New C.D.C. Studies Say*, N.Y. TIMES (June 21, 2021), <https://www.nytimes.com/2021/06/21/health/vaccination-young-adults.html> [<https://perma.cc/TPN6-D4TM>] (detailing factors which drive older adults to get vaccinated at much higher rate than young adults).

54. See Claire McCarthy, *New Information for Parents on Myocarditis and COVID-19 Vaccines*, HARV. HEALTH BLOG (July 1, 2021), <https://www.health.harvard.edu/blog/new-information-for-parents-on-myocarditis-and-covid-19-vaccines-202107012523> [<https://perma.cc/ECP5-QV8B>] (noting risks of serious side effects are statistically unlikely but not unheard of).

tancy” a reasonable decision based on, for example, a concern that someone with small children and no child care, or with an economically essential job, might get sick from the vaccine—this is perhaps better labeled as “vaccine impeded.”⁵⁵ One survey found that almost “half of vaccine-hesitant respondents said their reasons included fear of side effects,” although “lack of trust in the vaccine or in the government” was also given as a reason.⁵⁶ A Kaiser Family Foundation poll found that even among those who were influenced by pro-vaccine messages, the issue of mistrust of science arose:

For many people who got vaccinated, messages from politicians, national experts and the mass media were persuasive. But many other Americans—especially those without a college degree—don’t trust mainstream institutions.⁵⁷

Then there are the “vaccine indifferent” (not even focused enough on Covid-19 to be “hesitant”) and the “vaccine ambivalent” (who see the risks of the disease and the vaccine as equivalent).⁵⁸ Complicating the issue of whether hesitancy is justified, the Johnson & Johnson vaccine raised concerns after “reports of rare but serious blood clots in at least six women.”⁵⁹ Other concerns include whether vaccine production was rushed, perhaps for political reasons (i.e., before the 2020 presidential election), and whether test-

55. See Elisa J. Sobo et al., *Stop Saying Black People Are “Vaccine Hesitant.” Reasons For Not Getting Vaccinated Are Much Deeper*, NEWSONE (July 10, 2021), <https://newsone.com/4172879/disproving-black-vaccine-hesitancy/> [<https://perma.cc/WL8U-V78N>] (citing social factors and limited access to vaccines as large contributors to low vaccination rates).

56. See Nick Trombola, *Pitt and CMU Researchers Find COVID-19 Vaccine Hesitancy Trends Based On Occupation*, PITTSBURGH POST-GAZETTE (May 3, 2021), <https://www.postgazette.com/news/health/2021/05/03/Pitt-researchers-vaccine-hesitancy-trends-occupations-industries-health-vaccination-covid-19/stories/202105030109>. [<https://perma.cc/NDV8-59DX>] (discussing risk of side effects playing a role in people’s decision making to receive vaccine). As to fear of side effects, we often hear experts say the risk of side effects is very low, but “laypeople also tend to understand risk from an ego-centered perspective, as the probability of harm to themselves and their loved ones, rather than distributed over a population, where they themselves can be risks to others.” See Eyal, *supra* note 26 at 72.

57. See David Leonhardt, *Vaccine Persuasion: Many Vaccine Skeptics Have Changed Their Minds*, N.Y. TIMES (July 7, 2021), <https://www.nytimes.com/2021/07/19/briefing/vaccine-skepticism-vaccination-drive.html> [<https://perma.cc/Y2TG-8S92>] (noting vaccine hesitancy related to educational level and government distrust).

58. See Sobo et al., *supra* note 55 (finding individuals are not hesitant but rather feel Covid is not a large threat).

59. See Paola Rosa-Aquino, *What We Know About the Johnson & Johnson Pause and Vaccine Hesitancy*, INTELLIGENCER (Apr. 15, 2021), <https://nymag.com/intelligencer/2021/04/what-we-know-about-the-j-and-j-pause-and-vaccine-hesitancy.html> [<https://perma.cc/5RZS-KU6L>] (documenting Johnson & Johnson’s 10-day pause after six recipients experienced blood clots as a side effect).

ing was adequate (e.g., why only an emergency FDA approval?).⁶⁰ Finally, psychological reasons for vaccine hesitance have also been offered; for example, in the U.K. and Ireland:

Vaccine hesitance/resistance has . . . been associated with conspiratorial, religious, and paranoid beliefs, while mistrust of authoritative members of society, such as government officials, scientists, and health care professionals, has been linked to negative attitudes towards vaccinations, as has endorsement of authoritarian political views, societal disaffection, and intolerance of migrants.⁶¹

With the onset of the Delta variant of Covid-19 in mid-2021, a large number of those who would probably or definitely not get vaccinated believed that “U.S. officials are exaggerating the risk of the delta variant—and 79% think they have little or no risk of getting sick from the coronavirus.”⁶² Perception of (low) risk alongside political affiliation (i.e., distrust of the Biden administration messag-

60. See Alberto Coustasse et al., *COVID-19 and Vaccine Hesitancy*, 44 J. OF AMBULATORY CARE MGMT. 71-75 (Jan. 2021), https://journals.lww.com/ambulatorycaremanagement/Fulltext/2021/01000/COVID_19_and_Vaccine_Hesitancy__A_Challenge_the.10.aspx?context=latestArticles&casa_token=LWQHEi0oJvAAAAA:UGhvkFUshxA-xePvbXOm3pVctYGuyTcrmQWaBdaOAFFYKFCXl06Ga51aZfwbdIuyIpQmoAT2W39ofO7I7HS-wv0 [https://perma.cc/Y6HE-8PAP] (discussing other concerns contributing to vaccine hesitancy); See also Maggie Fox, *Operation Warp Speed is Fueling Vaccine Fears, Two Top Experts Worry*, CNN Health (June 5, 2020) <https://www.cnn.com/2020/06/05/health/warp-speed-coronavirus-vaccine-worries/index.html> [https://perma.cc/P2H7-59HL] (“Operation Warp Speed’ vaccine program, with its emphasis on quick production and testing of experimental coronavirus vaccines, is fueling fears already stirred up by vaccine skeptics. . .”). There are additional concerns of fraud and bias, due to conflicts of interest, in the regulatory process. See Eugene McCarthy, *The Regulatory Production of Vaccine Hesitance*, 86 BROOK. L. REV. 81, 84 and 96 (2021), <https://brooklynworks.brooklaw.edu/blr/vol86/iss1/3> [https://perma.cc/M832-KLNV] (“Despite extensive FDA safety protocols, vaccine critics perceive regulatory loopholes and occasional financial conflicts of interest as cause for concern in the vaccine approval process. In particular, critics express concerns over industry-sponsored clinical trials, post-market vaccine safety analysis, and the revolving door between the FDA, CDC, and the pharmaceutical industry.”).

61. See Jamie Murphy et al., *Psychological Characteristics Associated With COVID-19 Vaccine Hesitancy and Resistance in Ireland and the United Kingdom*, 12 NATURE COMM. 29 (Jan. 4, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7782692/> [https://perma.cc/UEK2-GELA] (listing socioeconomic, personal and cultural reasons for vaccine refusal).

62. See Gary Langer, *Vaccine-Hesitant Americans Reject Delta Variant Risk, Posing Questions For Pandemic Recovery: POLL*, ABC NEWS (July 4, 2021), <https://abcnews.go.com/Politics/vaccine-hesitant-americans-reject-delta-variant-risk-posing/story?id=78609691> [https://perma.cc/Z9PA-QQ3H] (“Several groups are especially likely to say it’s being exaggerated, including Republicans (57%), conservatives (55%), evangelical white Protestants (49%) and rural residents (47%).”).

ing) remain strong predictors of vaccine hesitancy.⁶³ All of those reasons together represent the complex social and political situation facing professional sports leagues and team owners as they tried in 2021 to devise policies to deal with the Covid-19 pandemic.

However, and most importantly for this essay, it seems that vaccination requirements, when they interfere with travel or social plans, can (unsurprisingly) influence the decision to get vaccinated. A Kaiser Family Foundation poll of American adults who had (in an earlier poll) decided to not get vaccinated, or to wait and see, found that about a fourth of them had changed their minds, not only because (i) they've seen millions safely vaccinated, or (ii) heard pro-vaccine messages from doctors or family members, but because (iii) they learned "that not being vaccinated will prevent people from doing some things":

There is now a roiling debate over vaccine mandates, with some hospitals, colleges, cruise-ship companies and others implementing them—and some state legislators trying to ban mandates. The Kaiser poll suggests that these [mandates] can influence a meaningful number of skeptics to get shots, sometimes just for logistical reasons.⁶⁴

This presented an opportunity for the NFL to contribute, with a vaccine mandate, to the defeat of the pandemic. The flip side of that opportunity is that by foregoing a vaccine mandate, the NFL unwittingly encouraged the social practices of fans who reject available vaccinations. A parallel situation persists in the controversy over masks, insofar as repeal of mask mandates relieved the "social and even legal pressure for [the unvaccinated] to mask up while engaging in [public] activities."⁶⁵ The unvaccinated, "in everyday

63. See Jagdish Khubchandani et al., *COVID-19 Vaccination Hesitancy in the United States: A Rapid National Assessment*, 46 J. CMTY. HEALTH 270–77 (2021), <https://link.springer.com/article/10.1007/s10900-020-00958-x> [<https://perma.cc/D2JJ-CWZ7>] ("These findings can be explained by the current polarized sociopolitical climate and individual COVID-19 risk perceptions across the US. COVID-19 has been highly politicized in the US.").

64. See David Leonhardt, *supra* note 57 (identifying vaccine hesitant individuals who have gotten jab to make life easier and enjoy amenities they would otherwise would not be able to use due to vaccine status).

65. See Aaron Blake, *How Many Unvaccinated People Will Stop Wearing Masks Now?*, WASH. POST (May 14, 2021), <https://www.msn.com/en-us/news/politics/how-many-unvaccinated-people-will-stop-wearing-masks-now/ar-BB1gJs1w> [<https://perma.cc/RRH5-MG2Q>] ("An *Axios/Ipsos* poll. . . showed that a previous (and more limited) relaxing of the CDC masking guidance led to a significant increase in unvaccinated people taking off their masks. While on April 19, 23 percent of unvaccinated people said they either "never" or only 'occasionally' wore a mask, the number rose to 34 percent by May 3.").

public interactions,” can simply take off their masks—they will blend in with the vaccinated and “won’t really even have to” lie “about their status.”⁶⁶ Likewise, unvaccinated fans who attended most NFL games were not identifiable to those sitting, standing, or eating and drinking near them.

IV. WHAT NFL DECIDED TO DO

*The weaknesses in the legal arguments against vaccine mandates have been around for a long time now,” [University of Michigan law professor Nicholas] Bagley said.*⁶⁷

On May 25, 2021, the NFL informed its clubs (i) that teams could allow fans at summer training camps (a change from 2020), “subject to state and local guidelines,” and (ii) that thirty of the thirty-two stadiums had received approval from local governments to open the stadiums at full capacity.⁶⁸ Peter O’Reilly, the NFL’s executive vice president of club business and league events, added that the league “will not overlay a fan vaccination policy on top of any state and local regulation that might exist.”⁶⁹ As early as March 2021, “NFL commissioner Roger Goodell expect[ed] all stadiums to have full capacity this upcoming season,” and by July 2021, it was implied that there would be no vaccine requirements for attendance at NFL games.⁷⁰ Some teams also made it clear that vaccina-

66. See *id.* (“An *Economist/YouGov* poll released last week showed that 63 percent of Americans who said they didn’t plan to get vaccinated said they felt at least ‘somewhat’ safe socializing indoors with other unvaccinated people without a mask. . . . [This] suggests nearly two-thirds of those who won’t get vaccinated are rather prepared to venture out into society and interact with other people who might or might not be vaccinated.”).

67. See Evan Perez & Tierney Sneed, *Federal Law Doesn’t Prohibit Covid-19 Vaccine Requirements, Justice Department Says*, CNN (July 26, 2021), <https://www.cnn.com/2021/07/26/politics/doj-covid-19-vaccine-requirements-olc-opinion/index.html> [<https://perma.cc/B8J5-WYM8>] (quoting Law Professor Michael Badgley) (discussing skepticism of Justice Department’s legal arguments).

68. See Kevin Seifert, *NFL Says Fans Can Attend Training Camps This Season, 30 Teams Given OK to Have Full Stadium Capacity*, ESPN (May 25, 2021), https://www.espn.com/nfl/story/_/id/31510724/nfl-says-fans-attend-training-camps-season-30-teams-given-ok-full-stadium-capacity [<https://perma.cc/U3YE-J74V>] (identifying relaxed precautions this season for attendance).

69. See *id.* (quoting Peter O’Reilly’s statement that the NFL will rely on the states vaccination policies to determine entry criteria).

70. See Nate Hanson, *No, NFL Teams Aren’t Currently Requiring Fans To Be Vaccinated Against COVID-19 To Attend Games*, ABC 10 (July 20, 2021), <https://www.abc10.com/article/news/verify/sports-verify/nfl-fans-vaccine-2021-season/536-6fc6eccd-4e0d-4361-909e-bfb2c0f5b9f1> [<https://perma.cc/2MN2-E2ZA>] (reporting that some states vaccines will be required, but that is not a requirement imposed by NFL).

tions would not be required, including the New Orleans Saints,⁷¹ the Carolina Panthers,⁷² and the New York Giants.⁷³

The league was willing to endure expensive schedule changes by the new policy concerning outbreaks caused by unvaccinated players—games would be forfeited, “and the team responsible for the cancelled game due to unvaccinated players would cover financial losses.”⁷⁴ Significantly, the city of Tokyo was also willing to give up civic and economic “glory and riches” when it decided to “put the [2020 Summer Olympics] Games inside an anti-coronavirus bubble.”⁷⁵ In light of those sacrifices, a vaccination mandate would not have been overly burdensome, especially given the high stakes for public health and the possibility that state prohibitions on vaccine mandates would not endure legal challenges.

V. WHAT THE NFL SHOULD HAVE DONE

[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members.⁷⁶

71. See John Hendrix, *Saints: “No Intention” of Requiring COVID Vaccination to Attend Games*, FANNATION (May 15, 2021), <https://www.si.com/nfl/saints/news/saints-no-intention-requiring-covid-vaccination-attend-games> [https://perma.cc/AF8A-WYNJ] (noting vaccinations were initially not required for entrance).

72. See Hank Lee, *Panthers To Have 100% Fan Capacity At Home Games in 2021*, WCNC CHARLOTTE, (May 24, 2021), <https://www.wcnc.com/article/sports/nfl/panthers/carolina-panthers-bank-of-america-stadium-fan-capacity-2021-season/275-e3fc8dbf-f7f1-443b-93ec-6a45d0793f93> [https://perma.cc/K7P3-95F2] (reporting stadium open at full capacity and will not require proof of vaccination).

73. See Ryan Honey, *MetLife Stadium to Open at Full Capacity for 2021 NFL Season, No Masks or Vaccination Proof Required*, ESNY (June 17, 2021), <https://elitesportsny.com/2021/06/17/metlife-stadium-open-full-capacity-2021-nfl-season-no-masks-or-vaccination-proof-required/> [https://perma.cc/2YXZ-Q9DT] (reporting Giants and Jets are following lead of other NFL teams by not requiring vaccinations).

74. See Sullivan, *supra* note 18 (discussing full text of new policy and game forfeiture to penalize less vaccinated teams).

75. See Ben Dooley et al., *Tokyo Had Expected to Reap Civic and Economic Gold: It Has Lost Out on Both*, N.Y. TIMES (Aug. 7, 2021), at B1 (detailing effects of holding games under Covid precautions, especially its effect on tourism and monetary gain).

76. See *Jacobson v. Mass.*, 197 U.S. 11, 26 (1905) (holding Henning was not permitted to refuse smallpox vaccine).

*“No government should order the general public to take a vaccine except in cases of the most extreme health danger. The matter is different for private employers, who should be able to set their own workplace rules. . . . It’s an odd libertarian streak that dislikes government orders to individuals but then says private employers shouldn’t be free to choose.”*⁷⁷

In 1905, the U.S. Supreme Court in *Jacobson v. Commonwealth of Massachusetts*⁷⁸ heard a challenge to a law requiring all Massachusetts citizens to get a smallpox vaccine. The court rejected that challenge—the commonwealth’s police power allows reasonable health regulations.⁷⁹ One can object that this opinion reflected and should be limited to the extreme terror of the smallpox epidemic, but the holding was followed in a 1922 case involving a San Antonio city ordinance requiring vaccinations to attend school.⁸⁰ One could also argue that *Jacobson* was overruled or abrogated in *Roman Catholic Diocese of Brooklyn v. Cuomo*,⁸¹ where the Court enjoined capacity restrictions on religious institutions (liquor and hardware stores were treated better), but “*Cuomo* and *Jacobson* involved entirely different modes of analysis, entirely different rights, and entirely different kinds of restriction.”⁸² A greater challenge, however, is Professor Scott Burris’ concern about the “viability” of *Jacobson* now that recent “courts have unveiled a new view based less on the social contract than on a strong form of libertarianism.”⁸³

77. See David Leonhardt, *Mandate Momentum: Vaccine Mandates are on the Rise and They Will Probably have a Bigger Effect than Mask Mandates*, N.Y. TIMES (July 29, 2021), <https://www.nytimes.com/2021/07/29/briefing/mask-mandates-coronavirus.html> [<https://perma.cc/3AX6-8KRU>] (quoting the Wall Street Journal Editorial Board) (“To Mandate or Not to Mandate Vaccines: The FDA should move faster on final approval to reassure the public.”).

78. 197 U.S. 11 (1905).

79. See *id.* at 25 (finding police power “must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety”).

80. See *Zucht v. King*, 260 U.S. 174, 176-177 (1922) (finding compulsory vaccination is within the states’ police powers).

81. See 141 S. Ct. 63, 67 (2020) (applying strict scrutiny because law targeted religion, violating First Amendment; the limitations were not narrowly tailored to control the spread of Covid-19).

82. See *Klaassen v. Trustees of Ind. Univ.*, Opinion and Order, Cause No. 1:21-CV-238 DRL at 43 (U.S. Dist. Ct., N. D. Ind.) (July 18, 2021) (finding against eight students challenging Indiana University’s vaccine mandate, contending *Cuomo* overruled *Jacobson*).

83. See Scott Burris, *Individual Liberty, Public Health, and the Battle for the Nation’s Soul*, REG. REV. (June 7, 2021), <https://www.theregreview.org/2021/06/07/burris-individual-liberty-public-health-battle-for-nations-soul/> [<https://perma.cc/KTS3-454B>] (discussing *Wisconsin Legislature v. Palm*, which overturned Wisconsin’s COVID-19 emergency measures; and *County of Butler v. Wolf*, which overturned Pennsylvania governor’s pandemic restrictions).

However, the 7th Circuit, in August 2021, relied on *Jacobson* in *Klaassen v. Trustees of Indiana University*, in a short opinion denying a motion to enjoin that university's Covid-19 vaccine mandate, pending appeal of a District Court's denial of a request for a preliminary injunction.⁸⁴ Eight students sued Indiana University, contending (i) that the vaccine mandate violated the Due Process Clause of the 14th Amendment, (ii) that the rational-basis standard used in *Jacobson* did not protect their interests, and (iii) that courts should be less "deferential to the decisions of public bodies" than *Jacobson*.⁸⁵ Judge Easterbrook, writing for the 7th Circuit panel, noted that (i) "a court of appeals must apply the law established by the Supreme Court,"⁸⁶ and, in any event, (ii) conditions of enrollment,⁸⁷ as well as vaccine requirements, are common in higher education—the university offered exemptions for medical and religious reasons (masks required, but not vaccination), and students "who do not want to be vaccinated may go elsewhere."⁸⁸ That appellate decision was appealed, and the U.S. Supreme Court denied the plaintiffs' application for injunctive relief.⁸⁹

The much-longer District Court opinion in *Klaassen* represents a comprehensive guide to the constitutional dimensions of the students' challenge to the vaccine mandate, the best arguments for and against the mandate, and its justification on the basis of public health.⁹⁰ The significance of *Klaassen* for this essay is that Indiana is not a state that prohibits vaccine mandates—there are now good reasons to suspect that most legal challenges to my proposed NFL vaccine mandate for fans would not have been successful. In any

84. See *Klaassen v. Trustees of Indiana University*, Case No. 21-2326 (U.S. Ct. App., 7th Cir.) (Aug. 2, 2021) (allowing Indiana University's vaccine mandate to continue).

85. See *id.* at 1-2 (stating student's arguments against mandate).

86. See *id.* at 2. (referencing Supreme Court's binding ruling on appeals court).

87. See *id.* at 3 ("[A] state university may demand that students read things they prefer not to read and write things they prefer not to write").

88. See *id.* at 2-3 (differentiating *Jacobson*, where *Jacobson* "lacked exceptions for adults," here "Indiana does not require that every adult member of the public to be vaccinated").

89. See Amy Howe, *Barrett Leaves Indiana University's Vaccine Mandate in Place*, SCOTUSBLOG (Aug. 12, 2021), <https://www.scotusblog.com/2021/08/barrett-leaves-indiana-universitys-vaccine-mandate-in-place/> [<https://perma.cc/Q9RJ-697E>] ("[T]he students' request [was denied] without comment, without seeking a response from the state, and without referring the request to the full court for a vote—suggesting that she and the other justices did not regard it as a particularly close.").

90. See *Klaassen v. Trustees of Ind. Univ.*, Opinion and Order, Cause No. 1:21-CV-238 DRL (U.S. Dist. Ct., N. D. Ind.) (July 18, 2021) (highlighting district court opinion provided more elaborate reasoning than Circuit Court opinion)

state where vaccine mandates are allowed, the NFL could almost certainly institute a vaccine mandate for fans attending games.⁹¹ The Department of Justice recently confirmed that vaccine mandates issued by public agencies *and private businesses* are not prohibited on the basis that the vaccines are subject to an emergency use authorization.⁹² And so far,

opponents of vaccine mandates haven't had much luck in court when challenging the requirements. In June [2021], a federal judge sided with a Houston hospital when employees sued to block its Covid-19 vaccine requirement.⁹³

Employees, of course, have more rights than patrons of businesses—the league and team employees in the NFL have such rights, but the limitations on employers (and accommodations that may be required) with respect to vaccine mandates in the workplace are irrelevant to my proposal for stadium attendees.⁹⁴ Like-

91. See Sasha Hupka, *No, It's Not Illegal for Businesses to Require Proof of Vaccination*, POLITIFACT, (May 26, 2021), <https://www.politifact.com/factchecks/2021/may/26/instagram-posts/no-it-not-illegal-businesses-require-proof-vaccina/> [<https://perma.cc/D2LV-8Z9U>] (“Legal experts say businesses are allowed to ask for proof of vaccination from customers. . . . Additionally, businesses can generally deny entry to unvaccinated customers, provided they offer reasonable accommodations for people who might be unable to receive a vaccine because of a disability, a medical condition or their religious beliefs. Experts say a reasonable accommodation does not necessarily mean the individual would be able to walk into the business or access their services in person.”); see also Watson, *supra* note 23 (“‘It is lawful and ethical for a business to require proof of vaccination as a condition of . . . getting service,’ Georgetown Law professor and public health expert Lawrence Gostin told CBS News.”).

92. See Memorandum Opinion for the Deputy Counsel to the President, *Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization* (July 6, 2021), <http://cdn.cnn.com/cnn/2021/images/07/26/dojvax.pdf> [<https://perma.cc/EZ8Z-KSGU>] (concluding section 564 of the FDCA does not “prohibit public or private entities from imposing vaccination requirements, even when the only vaccines available are those authorized under Emergency Use Authorization”).

93. See Perez & Sneed, *supra* note 67 (referring to lawsuit filed by some employees against Houston Methodist Hospital claiming that hospital’s March 31 mandate required that they receive *experimental* vaccines); See Bridges et al. v Houston Methodist Hosp., Case 4:21-CV-01774 (U.S. Dist. Ct., S. Dist. Texas) (June 12, 2021) (dismissing case in favor of hospital); see also Deanna Hackney & Holly Yan, *Judge Rules In Favor Of A Houston Hospital Requiring Employees To Be Vaccinated Against Covid-19*, CNN (June 13, 2021), <https://www.cnn.com/2021/06/13/us/houston-methodist-covid-vaccine-lawsuit/index.html> [<https://perma.cc/4TE6-STU3>] (detailing court opinion dismissing appeal of vaccine mandate).

94. See Eric Morath & Sarah Chaney Cambon, *Employers Can Require Covid-19 Vaccine Under Federal Law, New Guidance States*, WALL STREET J. (May 28, 2021), <https://www.wsj.com/articles/employers-can-require-covid-19-vaccine-under-federal-law-new-guidance-states-11622230319> [<https://perma.cc/XGK9-TZHS>] (discussing updated guidance by EEOC confirming that employers can require Covid-19 vaccinations, but also may be required to provide reasonable accommodations).

wise, any rights under the Health Insurance Portability and Accountability Act (HIPAA), applicable to healthcare plans and providers, would not prevent a private business like the NFL “from asking for proof of vaccination status. . . . Federal law doesn’t restrict private businesses from asking for proof of vaccination, although some states may pass their own laws on the issue.”⁹⁵ There are, however, some limits on businesses dealing with customers—“The Civil Rights Act applies to all entities and prohibits discrimination based on race, color, religion, sex and national origin,” and the Americans with Disabilities Act might require accommodation of those who cannot be vaccinated (discussed below under *Medical Exemptions*).⁹⁶ Otherwise, I agree with Dane S. Ciolino, a professor at Loyola University New Orleans College of Law, “that a property owner can decide which people they let in as long as they’re not excluding them based on categories like race or religion. . . . ‘Unvaccinated people are not a protected class,’ Ciolino said.”⁹⁷ In my view, given the current cultural context, the NFL should have required vaccination of all fans who attended games. I recognize several arguments against that view, to which I respond below.

A. The Challengeable Hurdle: State Laws

The most compelling argument against a fall 2021 NFL vaccine mandate was that some states prohibited businesses from requiring vaccinations, thus making it impossible for teams in those states to enforce such a mandate. For example, on May 3, 2021, the Florida

There are circumstances however that require the employer to provide reasonable accommodations for employees who, because of a disability or a religious belief, aren’t vaccinated. For example, the EEOC said as a reasonable accommodation, an unvaccinated employee entering workplace might wear a face mask, work at a social distance, or be given the opportunity to telework.

See id. (providing example of EEOC guidance).

95. *See* Brian Krans, *No, Businesses Aren’t Violating Your Rights When They Ask If You’re Vaccinated*, HEALTHLINE (June 9, 2021), <https://www.healthline.com/health-news/businesses-arent-violating-your-rights-when-they-ask-if-youre-vaccinated> [https://perma.cc/5F29-4E6S] (quoting Joyce Smithey, founder and partner at employment and labor law firm Smithey Law Group). *See also* Watson, *supra* note 23 (quoting Walter Olson).

96. *See* Hupka, *supra* note 91 and accompanying text.

97. *See* Janet Nguyen, *Can Businesses Deny You Entry If You Don’t Have A Vaccine Passport?*, MARKETPLACE (April 7, 2021), <https://www.marketplace.org/2021/04/07/can-businesses-deny-you-entry-if-you-dont-have-a-vaccine-passport/> [https://perma.cc/3MQV-SUHT] (quoting Robert I. Field, Public Health Professor at Drexel University) (stating “proof of vaccination would be indication that you’re low risk to other customers or to employees of the business and it would be a reasonable step”).

governor signed into law Section 381.00316, Florida Statutes, which provides:

A business entity . . . 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. This subsection does not otherwise restrict businesses from instituting screening protocols consistent with authoritative or controlling government-issued guidance to protect public health.⁹⁸

There are, however, states where NFL teams are located that allow a vaccination requirement, and in my view, games should have been moved to those states. On dates when an NFL stadium was not being used by the home team, that stadium could have been used by a team or teams from a state that does not allow businesses to require vaccination. Even if a stadium were needed for a home game, that stadium could be used on an alternative date. Ticket sales would of course have suffered, but the cost of a pandemic that continues due to vaccination hesitancy must be considered. More importantly, state prohibitions may not withstand court challenges.

On August 9, 2021, Norwegian Cruise Line's parent company, pursuing a policy of requiring passengers to be vaccinated on its three cruise lines, was granted a preliminary injunction against Florida's prohibition on vaccine mandates.⁹⁹ U.S. District Judge Kathleen Williams, in a 59-page opinion, stated that the plaintiff company would likely succeed on the merits of its First Amendment and dormant Commerce Clause claims,¹⁰⁰ having shown irrepara-

98. See SB 2006 (2021 Florida Legislature), §18, available at <https://www.flsenate.gov/Session/Bill/2021/2006/BillText/er/HTML> [<https://perma.cc/J9EY-XBUV>]; see also Senate Bill 2006, FLORIDA SENATE, available at <https://www.flsenate.gov/Session/Bill/2021/2006/?Tab=billHistory> [<https://perma.cc/5U3V-V8SX>] (quoting legislation which prohibits vaccine mandates in Florida).

99. See *Norwegian Cruise Line Holdings, Ltd., et al. v Scott Rivkees*, Case No. 21-22492-CIV-Williams (U.S. Dist. Ct., S.D. Fla.) (Aug. 8, 2021) (noting plaintiff is holding company of Norwegian Cruise Line, Regent Seven Seas Cruises and Oceania Cruises; the defendant Rivkees is Florida's Surgeon General, who leads the Florida Department of Health).

100. See *id.* at 55. As to the First Amendment claim, Judge Williams explained: The Statute prohibits businesses from requiring their patrons to present documentation certifying COVID-19 vaccination or post-infection recovery for access or services. Fla. Stat. § 381.00316(1). However, nothing in the Statute prohibits businesses from demanding documentation of a negative COVID-19 test or any other type of medical or informational documentation. In fact, business entities are expressly permitted to re-

ble injury absent a preliminary injunction (monetary losses as well as lost reputation, trust, and goodwill), and demonstrating that “the equities and public interest weigh in favor of an injunction.”¹⁰¹

[While the plaintiff] has demonstrated that public health will be jeopardized if it is required to suspend its vaccination requirement, Defendant identifies no public benefit from the continued enforcement of the Statute against [the plaintiff]. For these reasons, the balance of equities and the public interest also weigh in favor of an injunction.¹⁰²

Although the State of Florida promised to appeal this ruling,¹⁰³ the Norwegian Cruise Line victory raises the chances that the NFL may

quire this type of documentation, including COVID-19 test results, other vaccine documentation, and other types of medical information. Under Section 381.00316, the only documentation businesses cannot demand is COVID-19 vaccine documentation. Accordingly, the statute is a content-based restriction because it singles out documentation regarding a particular subject matter (certification of “COVID-19 vaccination or post-infection recovery”) and subjects it to restrictions (businesses may not require them for entry or services) that do not apply to documents regarding other topics.

Id. at 17-18. As to the dormant Commerce Clause claim, the court confirmed that the

dormant Commerce Clause not only limits the authority of states to enact laws that affirmatively discriminate against out-of-state actors, but it also limits the authority of states to enact laws that indirectly affect—that substantially burden—interstate commerce.

Id. at 39. Finally, the court noted that it need not address the Preemption claim at this stage. Nevertheless, the Court notes that Plaintiffs have raised compelling arguments as to why the Statute is conflict preempted by the CDC’s guidelines. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). The Court will address these arguments at a later stage of the proceeding.

Id.

101. *See Norwegian Cruise Line Holdings v. Rivkees*, at 55-58 (citing merits of plaintiff’s commerce clause claim).

102. *See id.* at 58-59 (holding injunction is proper due to lack of public benefit).

103. *See Morgan Hines, Judge Sides With Norwegian, Allows Cruise Lines To Ask For COVID-19 Vaccine Proof In Florida—For Now*, USA TODAY (Aug. 10, 2021), <https://www.usatoday.com/story/travel/cruises/2021/08/09/norwegian-cruise-florida-covid-vaccine-passport-ban-judge-rules/5535291001/> [https://perma.cc/46LV-879K] (noting judgement for Norwegian). It appears this will be appealed because

According to a statement from Gov. DeSantis’ office, provided by press secretary Christina Pushaw, the state will appeal as they “disagree with the judge’s legal reasoning. . . .A prohibition on vaccine passports does not even implicate, let alone violate, anyone’s speech rights, and it furthers the substantial, local interest of preventing discrimination among customers based on private health information”

Id.

not have been prevented from establishing a Covid-19 vaccination mandate in *every* state where NFL games are played.

B. Enforcement Problems

Indiana state law does not prohibit vaccine mandates, but as discussed above, eight students sued when Indiana University announced a coronavirus vaccine requirement. Relief was denied, Judge Leichty explained, because “the balance of harms and the public interest favor Indiana University and the determination that it has reasonably determined the best course of action for the health of its academic community this upcoming fall semester”¹⁰⁴ The president of neighboring Purdue University, however, said he would not institute a vaccine mandate, believing that it is up to each individual to decide whether to be vaccinated, and in any event, a mandate would be impractical and difficult to enforce.¹⁰⁵

Enforcement problems include deciding what sort of documentation would be required—e.g., a CDC vaccine card indicating a Covid-19 shot or shots—and dealing with fake documentation by vaccine hesitant (or anti-vax) fans.¹⁰⁶ Canadian border agents are aware that fake cards are available for purchase on-line and are being used to enter Canada, but are trained to discern authenticity—of course, agents have at their disposal the threat of criminal law

104. See *Klaassen v. Trustees of Ind. Univ.*, Opinion and Order, Cause No. 1:21-CV-238 DRL, (July 18, 2021) (U.S. Dist. Ct., N. D. Ind.) at 96 (requesting to enjoin the mandate pending appeal denied), See *Klaassen v. Trustees of Indiana University*, Case No. 21-2326, (Aug. 2, 2021) (U.S. Ct. App., 7th Cir.). See generally Nick Niedzwiadek, *Federal Judge Rejects Bid To Block Indiana University Vaccine Mandate*, POLITICO (July 19, 2021), <https://www.politico.com/news/2021/07/19/indiana-university-vaccine-mandate-lawsuit-500117> [<https://perma.cc/TC64-NEGJ>] (stating judge rejected student’s arguments that Indiana University could not require students and employees to be vaccinated).

105. See MSNBC, *Purdue University President Reacts To Judge’s Ruling To Uphold Nearby Indiana University’s Vaccine Mandate* (July 19, 2021), <https://www.msn.com/en-us/news/other/purdue-university-president-reacts-to-judges-ruling-to-uphold-nearby-indiana-universitys-vaccine-mandate/vi-AAMjX4J> [<https://perma.cc/2GSL-TLHC>] (describing Purdue University President defending his decision to not require students to be fully vaccinated against Covid-19). Arizona Governor Doug Ducey signed an order on June 15, 2021, mandating that universities cannot require Covid-19 vaccinations, and he also emphasized that despite his encouragement to get the vaccine, “it is a choice and we need to keep it that way.” See *Arizona executive order bans universities from requiring students to receive COVID-19 vaccine*, ABC15 ARIZ. (June 15, 2021), <https://www.abc15.com/news/state/gov-ducey-issues-order-for-college-students-to-not-be-mandated-to-take-covid-19-vaccine> [<https://perma.cc/JX5M-C7GE>] (quoting Gov. Ducey).

106. See MacDonald, *supra* note 1 (discussing difficulties in screening for proof of vaccinations at NFL games).

sanctions for providing false information to enter Canada.¹⁰⁷ The NFL would not have had that threat of prosecution, but ticket personnel could have been trained to identify the characteristics of fakes. Moreover, the likely honesty of most fans would not make game attendance as big a risk of a spreader event as simply allowing the unvaccinated to attend games.

There are middle positions, popular in many entertainment venues. In March 2021, the Miami Heat, for example, perhaps to incentivize vaccination, set aside two sections of its arena for the vaccinated, who could sit closer together—the unvaccinated were required to socially distance.¹⁰⁸ Madison Square Garden in New York started, in the spring of 2021, requiring vaccination *or* a recent negative PCR or antigen test.¹⁰⁹ One can easily see the compromise made and its attractiveness to those who are vaccine hesitant, but there is always a risk that the person with the negative test has been infected *after* the test. In addition,

[s]ophisticated, high-tech options are rolling out. The Commons Project, for example, has developed the CommonPass—an app that shows you were vaccinated or your negative test result. Some airlines have launched trials of the platform. New York state has debuted the Excelsior Pass, which provides the same information. “Think of it as a mobile airline boarding pass,” the state’s website said.¹¹⁰

As earlier mentioned, the idea of a vaccine passport raises ethical and legal concerns. While requiring some form of proof of a Covid-19 vaccination to enter a stadium does not seem problematic,¹¹¹ the more fraud-proof the vaccine identification system (using digital or electronic elements) is, the more the need for privacy and data pro-

107. See Noor Ibrahim, *Are Fake Vaccine Cards Being Used To Enter Canada?*, GLOBAL NEWS (July 26, 2021), available at <https://globalnews.ca/news/8054332/fake-covid-vaccine-cards-enter-canada/>. [<https://perma.cc/48E2-8RSL>] (“In the province of Manitoba, ‘inoculated residents receive an immunization card with a scannable QR [Quick Response] code.’”).

108. See Corky Siemaszko, *Miami Heat Redefines VIP in Covid Era: Vaccinated Important People*, NBC NEWS (March 25, 2021), <https://www.nbcnews.com/news/us-news/miami-heat-redefines-vip-covid-era-vaccinated-important-people-n1262072>. [<https://perma.cc/YT9X-82QE>] (allowing vaccinated patrons to follow less strict protocols).

109. See Nguyen, *supra* note at 97 (“New York’s Madison Square Garden is requiring proof of either vaccination or a negative PCR or antigen test taken within a specific time frame.”).

110. See *id.* (equating recommended vaccine passport to the wallet app in phones).

111. See *id.* (stating legal experts say businesses have the right to deny entrance to those who can’t show proof).

tection, and the greater the risk for discrimination and stigmatization. Balancing these considerations favors the simpler solution of a CDC vaccination card.

C. Exemption Issues

*"I don't think going to a basketball game is a fundamental right."*¹¹²

The issue of exemptions from vaccine mandates is complex because this area of law is not only state-specific but unstable and evolving.¹¹³ There is a major question concerning whether a business like the NFL (unlike a public school¹¹⁴ or an employer¹¹⁵) needs to provide for exemptions for customers, whether religious or medical, to a vaccine mandate.

1. Religious Exemptions

Religious exemptions are an especially complex area of law—on the one hand, no court should be in the business of deciding what a genuine religious objection looks like;¹¹⁶ on the other hand, the current U.S. Supreme Court seems especially interested in identifying and eliminating burdens on religious freedom.¹¹⁷ While forty-five states and the District of Columbia recognize religious exemptions from vaccination, a compelling argument can be made to

112. See *id.* (quoting University of Washington law professor Patricia Kuszler).

113. See Jennifer Nessel, *Religious Vaccine Exemption Bills Spark Debate Across The United States*, PHARM. TIMES (Feb. 25, 2020), <https://www.pharmacytimes.com/view/religious-vaccine-exemption-bills-spark-debate-across-the-united-states> [<https://perma.cc/558L-THS8>] (discussing legislative efforts in Illinois, New Jersey, and Connecticut to remove religious exemptions from vaccine mandates).

114. See *Religious & Medical Exemptions from COVID-19 Vaccine Mandate* (June 16, 2021), <https://www.tc.columbia.edu/articles/2021/june/religious-medical-exemptions-from-covid-19-vaccine-mandate/> [<https://perma.cc/WG56-N28V>] (finding universities with Covid-19 vaccine mandates are typically allowing religious and medical exemptions).

115. See generally Poonam Lakhani, *The Covid-19 Vaccine is Here: What About Religious and Medical Exemptions in the Workplace?*, THE PRINZ L. FIRM (Dec. 18, 2020), <https://www.prinz-lawfirm.com/our-blog/2020/december/the-covid-19-vaccine-is-here-a-look-at-religious/> [<https://perma.cc/J32C-W6CV>] (illuminating obligations of employers with respect to religious and medical exemptions).

116. See *Fowler v. R.I.*, 345 U.S. 67, 70 (1953) (“[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.”).

117. See *Fulton et al. v. Phila.*, 593 U.S. (2021) (“City’s action, ending contract with Catholic Social Services over service to LGBT people, burdened that agency’s religious liberty.”). See generally Carrie Severino, *Opinion: No Doubt About It: We Have A Pro-Religious Freedom Supreme Court*, WASH. EXAMINER (July 27, 2021), available at <https://www.washingtonexaminer.com/opinion/op-eds/no-doubt-about-it-we-have-a-pro-religious-freedom-supreme-court> [<https://perma.cc/USB6-KEJA>] (elaborating on possible future effects of *Fulton* decision).

eliminate religious exemptions to compulsory vaccination statutes.¹¹⁸ First, what is considered a genuine religious belief in some states is not in others—veganism is not a religious belief in California,¹¹⁹ but it is in Ohio.¹²⁰ Second, while the “vast majority of states do not allow . . . philosophical exemptions,”¹²¹ some do—Pennsylvania, for example, under the heading “Religious Exemption” (from immunization), allows objections based “on religious grounds or on the basis of strong moral or ethical conviction similar to religious belief.”¹²² Finally, the experiences with immunizations of children indicate that “parents are using religious exemptions without really having a religious objection to vaccines.”¹²³

Researchers believe some parents use states’ religious exemptions even though they don’t necessarily have a religious objection, said Peter Hotez, a vaccination proponent and dean of the National School of Tropical Medicine at the Baylor College of Medicine in Houston. “As the anti-vaccine movement grows in strength and power, they could use the religious exemption loophole,” he said.¹²⁴

In short, a policy allowing religious exemptions was probably too complex for the NFL to consider. It would be difficult for stadium personnel to have made judgments as to genuine religious or philosophical objections to a Covid-19 vaccine mandate. Although pro-

118. See Emma Tomsick, *The Public Health Demand for Revoking Non-Medical Exemptions to Compulsory Vaccination Statutes*, 34 J.L. & HEALTH 129, 137, 151-156 (2020) (“In cases where religious beliefs are juxtaposed against the public welfare . . . the public welfare takes precedence.”).

119. See *Friedman v. Southern Cal. Permanente Med. Group*, 102 Cal. App. 4th 39 (2002) (finding veganism fails to qualify as religious belief given facts presented).

120. See *Chenzira v. Cin. Child. Hosp. Med. Cent.*, Case No. 1:11-CV-00917 (U.S. Dist. Ct, S.D. Ohio) (Dec. 27, 2012) (finding it “plausible that Plaintiff could subscribe to veganism with a sincerity equating that of traditional religious views”).

121. See Tomsick, *supra* note 118, at 140 (highlighting states that “offer philosophical, or personal belief exemptions, employ a variety of procedures for parents to obtain exemption. Exemption rates are significantly [lower] in the states where the exemption is more challenging to obtain. Some states require minimal effort—a parent may simply sign a form to exempt the child. In these states, exemption rates are high”).

122. See PA CODE § 23.84 (identifying religious exemptions).

123. See Tomsick, *supra* note 118, at 138 (“Religious exemptions are becoming a loophole”).

124. See Sarah Pulliam Bailey, *Some Anti-Vaccination Parents Cite Religious Exemptions. Measles outbreaks Could Change That*, WASH. POST (Feb. 21, 2019), <https://www.washingtonpost.com/religion/2019/02/21/some-anti-vaccination-parents-cite-religious-exemptions-measles-outbreaks-could-change-that/> [<https://perma.cc/8JBW-JDQ9>] (quoting Peter Hotez).

viding for religious exemptions made the Indiana University mandate more palatable to courts,¹²⁵ it seems obvious that the right to attend an NFL game is not as compelling as a right to attend a public university.

2. Medical Exemptions

*“Even people who are medically exempt from vaccination would not have a case against a business that kept them out. . . .”*¹²⁶

Medical exemptions are also important to consider. While most of those with allergies can safely get the Covid-19 vaccine, there are exceptions: those with anaphylaxis (severe allergic reaction) to components of a particular vaccine (e.g., Polyethylene Glycol in Pfizer or Moderna, or Polysorbate in J&J) should find an alternative vaccine, and those with autoimmune disease or who have anaphylaxis “to any vaccine or injectable (intramuscular or intravenous) medication should consult with their health provider to assess risk prior to receiving the COVID-19 vaccine.”¹²⁷ A history of Guillain-Barré syndrome can also provide a basis for a medical exception due to increased risk of vaccination.¹²⁸ Concerns include myocarditis and pericarditis, discussed above,¹²⁹ with respect to the

125. For a discussion of the 7th Circuit decision in *Klaassen*, see *supra* notes 93-97 and accompanying text.

126. See Nguyen, *supra* note 97 (stating “inappropriate medical exemptions could hasten the spread of the virus and threaten public health.”). Professor Michael Raz at the University of Rochester believes that while most people should be able to wear a mask, there likely are a few legitimate reasons for exemptions. Perhaps someone has a facial deformity that makes it difficult or impossible to wear a mask. In other cases, a person may have sensory or developmental disabilities, such as forms of autism. At the same time, there may be options. A person who’s unable to wear a typical mask may be able to wear a different mask or face shield in most situation. . . . But if an exemption is granted . . . patients whose conditions are exacerbated by wearing a mask should evaluate risks they face as well as risks they may pose to others.

See Peter Iglinski, *In Time Of Masking Mandates, How To Evaluate Exemptions?*, NEWSCENTER (July 24, 2020), <https://www.rochester.edu/newscenter/in-time-of-masking-mandates-how-to-evaluate-exemptions-446442/>. [https://perma.cc/UJ44-6T6M] (giving more insight why some may be exempted from wearing a mask).

127. See *Information for Special Populations and the COVID-19 Vaccine*, YALE HEALTH (June 19, 2021), <https://yalehealth.yale.edu/yale-covid-19-vaccine-program/information-special-populations-and-covid-19-vaccine> [https://perma.cc/7SUL-GZ9F] (highlighting allergies which would trigger exemption or require weighing options regarding which vaccine).

128. See Lakhani, *supra* note 115 (listing medical exemptions to vaccine mandates).

129. See Berkely Lovelace Jr., *CDC Safety Group Says There’s A Likely Link Between Rare Heart Inflammation In Young People After Covid Shot*, *Health and Science*, MSNBC (June 23, 2021), <https://www.cnbc.com/2021/06/23/cdc-reports-more-than-1200->

Moderna and Pfizer vaccines, and blood clots, with respect to the J&J vaccine.¹³⁰ Finally, the Indiana University vaccine mandate included, in its medical exemption (or deferral), “active pregnancy or breastfeeding, receiving a hematopoietic or solid organ transplant, receiving treatment with Rituximab within the past 3-6 month, or COVID-specific antibodies in the past 90 days.”¹³¹

Most of the conversation around medical exemptions concerns employers, thus, there is a question whether the NFL, if it had a vaccination mandate for fans, would even have to recognize medical exemptions. In the UK, the Premier League decided to require vaccination of all fans attending games, and only “those with medical exemption will be permitted to attend games without a vaccine ‘passport’.”¹³² The NFL could have followed the lead of the Premier League, as there is a lot of good will surrounding respect for those who cannot safely get a vaccine. If the NFL had chosen not to recognize medical exemptions, however—and even though some fans could challenge that decision—there is no obvious legal obligation to do so.

VI. CONCLUSION

*“Over the Noise, One Fact Rings True: Vaccine Mandates Have Saved Lives.”*¹³³

The Indiana University policy isn’t forced vaccination. The students have options—taking the vaccine, applying for a religious exemption, apply-

cases-of-rare-heart-inflammation-after-covid-vaccine-shots.html [https://perma.cc/3WD7-APJP] (citing rare but serious side effects of the Covid jab).

130. See Paola Rosa-Aquino, *What We Know About the Johnson & Johnson Pause and Vaccine Hesitancy*, *Intelligencer*, N.Y. MAG., (Apr. 15, 2021), <https://nymag.com/intelligencer/2021/04/what-we-know-about-the-j-and-j-pause-and-vaccine-hesitancy.html> [https://perma.cc/NQ9J-R7G9] (listing rare vaccine side effects which have accompanied specific vaccines).

131. See Klaassen, *supra* note 82, at 12 (listing accepted medical exemptions).

132. See Jack Lusby, *Premier League To Require COVID-19 Vaccine For Players, Staff AND Fans*, *THIS IS ANFIELD* (July 23, 2021), <https://www.thisisanfield.com/2021/07/premier-league-to-require-covid-19-vaccine-for-players-staff-and-fans/> [https://perma.cc/BVP8-G5XN] (stating vaccination requirements related to Premier League staff and fans).

133. See David Leonhardt & Ian Prasad Philbrick, *supra* note 44.

[M]andates are not 100 percent effective. Some people will receive exemptions . . . [and a] small number may forge vaccine records. And some vaccinated people will still contract . . . Covid . . . But . . . mandates can play a major role in . . . saving lives. . . . Supporters of mandates have [argued] that society has a duty to protect its citizens . . . put at risk by people who voluntarily refuse vaccines.

Id.

*ing for a medical exemption, applying for a medical deferral, taking a semester off, or attending another university.*¹³⁴

I think that the NFL showed a lack of leadership and concern by deciding against a vaccine mandate for stadium attendance, especially as they returned to full capacity. Perhaps the league feared a loss of fans due to unpopular decision to require vaccines for admission into stadiums. Yet, given that so many government agencies, employers, and service businesses have required vaccination, the challenges of enforcement and exemptions would not have been so great—there were eventually well-worn paths for the NFL to follow. In the end, it is a question of how to balance public health with the desire for popularity and profits. In my view, the NFL should have erred on the side of caution—too many people have died from Covid-19.

134. *See* Klaassen et al. v. Trustees of Ind. Univ., Cause No. 1:21-CV-238 DRL (N.D. Ind.) (July 18, 2021), at 97 (detailing alternatives to this policy, however, to enroll at university of Indiana even online you must be vaccinated).