State of West Virginia
Office of the Attorney General
State Capitol
Building 1, Room 26-E
Charleston, WV 25305-0220

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

September 10, 2021

The Honorable Craig P. Blair
President of the Senate
State Capitol Building 1, Room 229M
1900 Kanawha Boulevard East
Charleston, WV 25305

The Honorable Roger Hanshaw
Speaker of the House of Delegates
State Capitol Building 1, Room 228M
1900 Kanawha Boulevard East
Charleston, WV 25305

Dear President Blair and Speaker Hanshaw:

You have asked for an Opinion of the Attorney General about legal issues that may arise from vaccine mandates and vaccine passports related to coronavirus disease 2019 ("COVID-19"). This opinion is issued under West Virginia Code § 5-3-1, which provides that the Attorney General will "render to the President of the Senate and/or the Speaker of the House of Delegates a written opinion or advice upon any questions submitted to the Attorney General by them . . . whenever he . . . is requested in writing so to do."

Your letter observes that "public discussion" has recently increased surrounding the concepts of "mandatory vaccinations and vaccine passports." The letter asks questions about two forms of potential vaccine mandates: (1) a mandate imposed by the "State of West Virginia" requiring that state employees be vaccinated against COVID-19; and (2) mandates imposed by private employers requiring that their employees be vaccinated. Your letter also poses questions about "vaccine passports." You define "vaccine passports" to mean "any certification or required verification through some documentary or electronic means that would make access to some public accommodation or service dependent upon proof of a required vaccination status."

Your letter raises three primary legal questions:

(1) Could the State require state employees to be vaccinated?

(2) Could the State require businesses to request vaccine passports before permitting entry into public or private establishments?

(3) Can private entities require their employees to be vaccinated or ask for entrants to present vaccine passports to gain entry to their premises? Could the State prohibit them from doing so?

Your original questions focused on the constitutionality of the potential measures. Notably, this area of law is still developing and evolving, and specific authorities on these issues are often non-existent. Further, any complete answer to your questions also requires one to analyze state and federal authorities beyond the state Constitution. Accordingly, we offer here our best advice as to all the interests that the Legislature should bear in mind as it proceeds to consider legislation such as that described above. Rather than provide a simple, clinical description of the current state of play, this letter highlights the important liberty interests that mandates and passports implicate.

As explained below, broad vaccine mandates without exceptions and vaccine-passport requirements may offend:

- Constitutional interests in personal medical decision-making;
- The sacred constitutional right to religious freedom; and
- Fundamental rights to assemble, vote, petition, and generally engage as a member of civil society.

Even if a blanket mandate or passport requirement could pass constitutional muster, the Attorney General could not endorse it. "[T]he Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond [that floor]." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) (citing JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS (2018)). This situation is an opportunity for the Legislature to exercise its authority to guard and protect individual rights while advancing the public health.

For reasons discussed further, the Legislature can undeniably act. In fact, "[t]he Constitution of West Virginia being a restriction of power rather than a grant thereof, the legislature has the authority to enact *any measure* not inhibited thereby." Syl. pt. 5, *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 730 S.E.2d 368 (2012) (emphasis added; quotaton marks omitted). Ultimately, "[i]t is the duty of the Legislature to consider facts, establish policy, and embody that policy in legislation." Syl. pt. 3 (in part), *State v. Dubuque*, 239 W. Va. 660, 805 S.E.2d 421 (2017) (quotation marks omitted).

With those matters in mind, this letter first provides some factual and legal background before analyzing the specific questions your letter presents.

Factual Background

A. COVID-19 and Vaccines in West Virginia

Ever since the first documented case of COVID-19 in this State in March 2020, the virus has had significant consequences to the lives of West Virginians. Acting under his emergency powers, Governor Jim Justice proclaimed a state of emergency and took steps to address the spread of the virus. Among other things, the Governor closed schools, public services, elective medical facilities, and certain types of businesses. He instructed citizens to stay home as much as possible. As the State began to reopen over the next several months, the Governor required individuals to wear face coverings when gathering indoors, imposed smaller capacity limits for many businesses, mandated social distancing, and barred certain activities. Many of these measures remained in place well into 2021, as public health experts and policymakers grappled with how to return to "normal" while limiting disease spread. The Legislature, too, passed certain measures designed to address the crisis. *See, e.g.*, 2021 W. Va. Acts c.1 (COVID-19 Jobs Protection Act).

Vaccines offered a tool to help respond to the virus. In May 2020, President Donald Trump announced Operation Warp Speed, a public-private partnership meant to help speed the development of a COVID-19 vaccine. *See generally* U.S. Gov't Accountability Office, *Operation Warp Speed: Accelerated COVID-19 Vaccine Development Status and Efforts to Address Manufacturing Challenges* (Feb. 2021), *available at* https://www.gao.gov/assets/gao-21-319.pdf. Together, the Department of Defense and Department of Health and Human Services devoted billions in funds to support vaccine development, manufacturing, and distribution.

These efforts produced results. In December 2020, the Food and Drug Administration issued the first emergency use authorization ("EUA") for a vaccine to prevent COVID-19, the Pfizer-BioNTech COVID-19 Vaccine. The EUA authorized the vaccine for use in individuals 16 years and older, and the FDA later amended the EUA to permit the vaccine for those 12 years and older. Days after the first EUA, the FDA issued an EUA for persons 18 and older for the Moderna COVID-19 Vaccine. And in February 2021, the FDA issued an EUA for a third vaccine, the Johnson & Johnson/Janssen COVID-19 Vaccine; again, individuals 18 years and older could get it. The FDA and CDC recommended a pause in using this third vaccine in April 2021 while experts reviewed data on a potential side effect pertaining to blood clots. They recommended resuming use of the vaccine (with new warnings) a few days later. Just a few weeks ago, the FDA formally approved a COVID-19 vaccine for the first time: the Pfizer-BioNTech vaccine marketed as "Comirnaty."[1]

As these vaccines have become available, the Governor and state agencies have encouraged vaccination against COVID-19 through public-education campaigns, incentive programs, vaccination clinics, and similar measures. The State has not required its employees to be

[1] The FDA has said: "The licensed vaccine has the same formulation as the EUA-authorized vaccine and the products can be used interchangeably to provide the vaccination series without presenting any safety or effectiveness concerns. The products are legally distinct with certain differences that do not impact safety or effectiveness." FDA Letter to Elisa Harkins, Pfizer (Aug. 23, 2021), *available at* https://www.fda.gov/media/150386/download.

vaccinated against COVID-19 as a condition of employment. West Virginia schools do not require a COVID-19 vaccine for eligible schoolchildren. And although some private businesses in the State have required their employees to be vaccinated, the State has not demanded that these businesses do so (or, conversely, prohibited their private decisions to do so). Nor has the State imposed "vaccine passport" requirements on public facilities. In short, the State has not dictated private vaccination efforts.

Many in West Virginia have already been vaccinated. All West Virginians ages 12 and older are eligible to receive a COVID-19 vaccine for free. The West Virginia Department of Health and Human Resources reports that roughly 920,000 West Virginians are fully vaccinated against COVID-19 as of September 7, 2021. As the B.1.617.2 (Delta) variant spreads throughout the United States, West Virginia has seen a jump in COVID-19 cases and related hospitalizations. Most individuals currently hospitalized for COVID-19 are unvaccinated.

B. COVID-19 and Vaccines Elsewhere

Other governments have taken varying approaches to COVID-19 vaccine mandates. Some States have required their employees to be vaccinated against COVID-19, while others have banned such mandates. Similarly, some States require health workers to be vaccinated against COVID-19, while others prohibit such requirements. States have implemented these various provisions through executive orders, amendments to existing legislation, and new laws.

Montana provides an example of one of the broadest anti-vaccine mandate laws. The law amends Montana's anti-discrimination statutes. The first subsection speaks to public services and benefits, the second subsection refers to employment, and the third subsection addresses access to public accommodations. *See* 2021 Mont. Laws c. 418 ("Prohibit Discrimination Based on Vaccine Status or Possessing Immunity Passport"). Together, the provisions make it an "unlawful discriminatory practice" to deny these benefits and rights "based on the person's vaccination status or whether the person has an immunity passport." *Id.* § 1. In other words, vaccination now constitutes a protected trait in Montana. The statute also provides for certain exceptions relevant to school vaccinations and the healthcare field. *Id.* § 2. Furthermore, it says that "[a]n individual may not be required to receive any vaccine whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials." *Id.* § 1(4).

Likewise, States have diverged when it comes to vaccine passports. The National Academy for State Health Policy reports that at least twenty States ban such passports in at least some form. Nat'l Acad. for State Health Policy, *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports* (Sept. 9, 2021), *available at* https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/. In an amendment to its public health laws, for example, Florida prohibited private entities, governmental entities, and educational institutions from requiring persons to provide "any documentation certifying COVID-19 vaccination or post-infection recovery" as condition of obtaining services from those entities. *See* Fla. Stat. § 381.00316(1)-(3). Health care providers are exempt. *Id.* § 381.00316(5). Likewise, a Tennessee law forbids the state from mandating that private businesses demand vaccine passports

from customers; it also prohibits state and local entities from requiring a vaccine passport to gain entry to government facilities. *See* Tenn. Code § 68-5-117(A).

In contrast, some locales have launched vaccine documentation and verification programs. In places like New York City, San Francisco, and Honolulu, patrons and staff must generally show proof of vaccination against COVID-19 to gain entry to entertainment venues, restaurants, and certain other public facilities.

Legal Background

A. The Constitution and Medical Treatment: Two Relevant but Divergent Doctrines

Substantial authorities from the U.S. Supreme Court and elsewhere address various forms of vaccine mandates and, more generally, the right to control one's own medical decisions. These federal cases guide how courts will likely construe provisions in our state constitution. As discussed more below, however, "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded the Federal Constitution." *State v. Clark*, 232 W. Va. 480, 494, 752 S.E.2d 907, 921 (2013) (quotation marks omitted, alterations in original).

The U.S. Supreme Court has not been consistent in how it has approached compulsory medical treatment like vaccines. Some scholars have identified two competing (and not entirely reconcilable) lines of cases addressing constitutional issues in medical decision-making: the so-called "public health cases" and the so-called "autonomy cases." *See, e.g.*, B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 294 (2007) (explaining how "two distinct lines of cases, both implicating the right to make medical treatment decisions, have developed without merging"); *see also* Sapna Kumar, *Life, Liberty, and the Pursuit of Genetic Information*, 65 ALA. L. REV. 625, 653 (2014) (describing three lines of cases: autonomy cases, public-health cases, and moral-values cases).

This letter addresses both lines of authority in turn—ultimately concluding that the autonomy cases should decide these issues.

1. Public Health Cases

The U.S. Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 13, 25 S. Ct. 358, 359 (1905), represents the chief authority in the public-health line of cases. In *Jacobson*, the Court addressed a regulation requiring every adult in a city to be vaccinated against smallpox. *Id.* at 12-13. A challenger argued that this compulsory vaccination "invaded" an individual's liberty in an "unreasonable, arbitrary, and oppressive" way—and was "hostile to the inherent right of every freeman to care for his own body." *Id.* at 26. The Supreme Court disagreed, concluding that the federal Constitution "does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* Ultimately, the Court thought Cambridge's mandatory-vaccination regulation had a "real [and] substantial relation to the

protection of the public health and the public safety," such that it could not be "in palpable conflict with the Constitution." *Id.* at 31. In effect, the Court believed that the interests of the city overcame the individual's interests in those specific circumstances:

> A community has the right to protect itself against an epidemic of disease which threatens the safety of its members. . . . There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 27-29.

Jacobson itself cautioned that a vaccination requirement might be applied in such an "arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." *Id.* at 28. Even so, the Court—in addressing a school vaccination requirement roughly two decades later—considered it "settled … that it is within the police power of a state to provide for compulsory vaccination." *Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 25 (1922). Courts have since construed *Jacobson* as a case that applies only the lightest form of scrutiny: a "rational basis" test that will sustain most laws. *See Bayley's Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 31 (D. Me. 2020) ("*Jacobson* represents a legal standard that is at least the opposite of strict judicial scrutiny. It barely authorizes judicial review at all.").

Since *Jacobson*, courts have employed a broad understanding of the case to hold that state-affiliated entities may require vaccines. Most often, these cases involved student challenges to compulsory vaccination as a condition for attending school. *See, e.g., Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (rejecting challenge to university vaccine mandate and explaining that "*Jacobson*, which sustained a criminal conviction for refusing to be vaccinated, shows that plaintiffs lack [a fundamental] right [to be free from vaccination]"); *Phillips v. City of New York*, 775 F.3d 538, 542-44 (2d Cir. 2015) (holding that a substantive due process challenge to a school vaccination requirement was "foreclosed by … *Jacobson*"); *Harris v. Univ. of Mass.*, No. 21-CV-11244-DJC, 2021 WL 3848012, at *6 (D. Mass. Aug. 27, 2021) (rejecting challenge to vaccine mandate and relying on *Jacobson*); *Doe v. Zucker*, No. 120CV840BKSCFH, 2021 WL 619465, at *21-*22 (N.D.N.Y. Feb. 17, 2021) (same); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1085-89 (S.D. Cal. 2016) (same); *Boone v. Boozman*, 217 F. Supp. 2d 938, 952-57 (E.D. Ark. 2002) (same).

West Virginia is no exception. In *Workman v. Mingo County Board of Education*, 419 F. App'x 348, 352-56 (4th Cir. 2011), the Fourth Circuit relied extensively on *Jacobson* and its successor cases to hold that West Virginia's mandatory school vaccine program did not offend

several provisions of the federal constitution. *See also D.J. v. Mercer Cty. Bd. of Educ.*, No. 13-0237, 2013 WL 6152363, at *3-4 (W. Va. Nov. 22, 2013) (mem. decision) (rejecting argument that West Virginia's compulsory vaccination program was unconstitutional under state constitution, as the State had a "compelling state interest" in "the protection of the health and safety of the public").

Beyond vaccines, courts have broadly applied *Jacobson* and its related cases to sustain other COVID-19 public-health measures. For example, courts upheld mask mandates in essentially every case in which persons challenged them on constitutional grounds. *See generally Stewart v. Justice*, No. CV 3:20-0611, 2021 WL 472937 (S.D.W. Va. Feb. 9, 2021) (rejecting several challenges to West Virginia's COVID-19 mask mandate); *see also, e.g.*, *Resurrection Sch. v. Hertel*, No. 20-2256, 2021 WL 3721475, at *16 (6th Cir. Aug. 23, 2021); *Denis v. Ige*, No. CV 21-00011 SOM-RT, 2021 WL 1911884 (D. Haw. May 12, 2021); *Oakes v. Collier Ct'y*, 515 F. Supp. 3d 1202, 1209 (M.D. Fla. 2021); *Delaney v. Baker*, 511 F. Supp. 3d 55, 73 (D. Mass. 2021). And taking a public-health-focused approach, courts have generally upheld even more aggressive measures than masks, including the total *closure* of certain private entities. *See generally* Order Granting Defendant's Motion to Dismiss, *Eden LLC v. Justice*, No. 5:20-cv-00201-JPB (N.D.W. Va. Jan. 7, 2021), ECF No. 14; *AJE Enter. LLC v. Justice*, No. 1:20-CV-229, 2020 WL 6940381 (N.D.W. Va. Oct. 27, 2020); *accord Talleywhacker, Inc. v. Cooper*, 465 F. Supp. 3d 523, 537–38 (E.D.N.C. 2020) (upholding COVID-19 restrictions that closed businesses); *Altman v. Cnty. of Santa Clara*, 464 F. Supp. 3d 1106, 1121 (N.D. Cal. 2020) (same).

2 Bodily Integrity and Autonomy Cases

A competing line of cases recognizes broader rights to bodily integrity, personal autonomy, and individual choice in medical treatment. Over the past several decades, "[t]he right to be free of compelled physical invasions has been recognized as an integral part of the individual's constitutional freedoms, whether termed a liberty interest protected by the Due Process Clause, or an aspect of the right to privacy contained in the notions of personal freedom which underwrote the Bill of Rights." *United States v. Charters*, 829 F.2d 479, 491 (4th Cir. 1987), *on reh'g*, 863 F.2d 302 (4th Cir. 1988).

In modern times, the Supreme Court has seemed especially unwilling to endorse unwanted medical treatments. So, for example, the U.S. Supreme Court recognizes that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229, 110 S. Ct. 1028, 1041 (1990). And generally, modern courts have been more reluctant to override an individual's choice and compel a specific medical treatment. *See generally*, *e.g.*, *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174 (2003) (anti-psychotic drugs); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 110 S. Ct. 2841 (1990) (life-sustaining treatment); *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611 (1985) (surgery under anesthesia); *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254 (1980) (transfer to mental hospital); *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205 (1952) (stomach-pumping). This long line of cases grows from the "well-established, traditional rights to

bodily integrity and freedom from unwanted touching." *Vacco v. Quill*, 521 U.S. 793, 807, 117 S. Ct. 2293, 2301, 138 L. Ed. 2d 834 (1997).

These more recent cases suggest that courts might well revisit *Jacobson*'s light-touch form of review if given the right opportunity to do so. Requiring an individual to obtain a vaccine as a condition of state employment might implicate the right to personal medical decisionmaking. *See, e.g.*, Christopher Richins, *Jacobson Revisited an Argument for Strict Judicial Scrutiny of Compulsory Vaccination*, 32 J. LEGAL MED. 409, 423 (2011) ("[T]he rights to privacy and bodily integrity necessarily encompass the right to be free from compulsory vaccination."); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606, 133 S. Ct. 2586, 2595, 186 L. Ed. 2d 697 (2013) ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."); *cf. Burke v. Wetzel Cty. Comm'n*, 240 W. Va. 709, 727, 815 S.E.2d 520, 538 (2018) ("This Court has held that public employees are protected from adverse employment consequences resulting from the exercise of their … First Amendment Rights.").

If a court finds the right to medical decision-making to be a *fundamental* right, then strict scrutiny would apply. *Bd. of Educ. of Cty. of Kanawha v. W. Va. Bd. of Educ.*, 219 W. Va. 801, 807, 639 S.E.2d 893, 899 (2006) ("[T]he strict scrutiny test is required when the law or governmental action at issue impinges upon a fundamental right."). Under strict scrutiny, "the State rather than [any] complainants must carry a heavy burden of justification." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16, 93 S. Ct. 1278, 1288, 36 L. Ed. 2d 16 (1973). First, "the State must prove that its action is necessary to serve some compelling State interest." Syl. pt. 1, *Cathe A. v. Doddridge Cty. Bd. of Educ.*, 200 W. Va. 521, 524, 490 S.E.2d 340, 343 (1997). Second, the law must be "narrowly tailored" to advance the interest served. *Id.* To do that, the State will need to show that the challenged mandate was the "least restrictive" means available to address the identified interest. *Pendleton Citizens for Cmty. Sch. v. Marockie*, 203 W. Va. 310, 318, 507 S.E.2d 673, 681 (1998); *see also Holt v. Hobbs*, 574 U.S. 352, 364, 135 S. Ct. 853, 864, 190 L. Ed. 2d 747 (2015) ("The least-restrictive-means standard is exceptionally demanding.").

A West Virginia court applying the West Virginia Constitution may consider setting the framework of *Jacobson* aside and instead choose to apply strict scrutiny in evaluating a case involving compulsory medical treatment. The Supreme Court of Appeals of West Virginia has held "repeatedly that the West Virginia Constitution's due process clause is more protective of individual rights than its federal counterpart." *State v. Mullens*, 221 W. Va. 70, 89, 650 S.E.2d 169, 188 (2007) (internal quotation marks omitted); *see also Morrisey v. W. Va. AFL-CIO*, 243 W. Va. 86, 124, 842 S.E.2d 455, 493 (2020) (Workman, J., concurring and dissenting) (collecting authorities). That Court has also already agreed that the right to bodily integrity embraces the right to refuse medical treatment. *See Kruse v. Farid*, 242 W. Va. 299, 304-05, 835 S.E.2d 163, 169 (2019); *see also State ex rel. White v. Narick*, 170 W. Va. 195, 199, 292 S.E.2d 54, 58 (1982) ("[R]ational patients have been allowed to determine their fates by refusing medical treatment."); *but see, e.g.*, *In re Kilpatrick*, 180 W. Va. 162, 165–66, 375 S.E.2d 794, 797–98 (1988) (holding that the State's requirement for a serological test before issuing a marriage license did not violate

the West Virginia Constitution). Indeed, even the Legislature has recognized the importance of autonomy in medical decision-making, stressing:

> Common law tradition and the medical profession in general have traditionally recognized the right of a capable adult to . . . reject medical . . . intervention affecting one's own medical condition.

W. Va. Code §16-30-2(b)(1).

B. Religious Freedom: An Evolving Area of Constitutional Law

An independent line of cases reflecting greater protections for religious freedom may also push against applying *Jacobson* reflexively. In our view, courts in the past have been inappropriately hostile to claims premised on religious freedom. In rejecting a religious-based objection to West Virginia's school vaccine mandate, for instance, the Fourth Circuit cited "numerous federal and state courts that have reached similar conclusions in comparable cases" rejecting religious challenges. *Workman*, 419 F. App'x at 354; *see also Klaassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926, at *25 (N.D. Ind. July 18, 2021) (collecting authorities rejecting religious objections to vaccine requirements); *F.F. v. State*, 194 A.D.3d 80, 87, 143 N.Y.S.3d 734, 741 (2021) (same); *Brown v. Smith*, 24 Cal. App. 5th 1135, 1145, 235 Cal. Rptr. 3d 218, 225 (2018) (same). Some of these courts have relied on the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 1600, 108 L. Ed. 2d 876 (1990). There, the Supreme Court held that it would not deem a "valid and neutral law of general applicability" unconstitutional "on the ground that the law proscribes (or prescribes) conduct that [a claimant's] religion prescribes (or proscribes)." *Id.* Applying this thinking, courts have often agreed—though not universally—that COVID-19 vaccine mandates constitute "neutral laws of general applicability" that carry only incidental effects on the exercise of religion. *But see, e.g.*, *Dahl v. Bd. of Trustees of W. Michigan Univ.*, No. 1:21-CV-757, 2021 WL 3891620, at *2 (W.D. Mich. Aug. 31, 2021) (finding that plaintiffs had a likelihood of success on their free-exercise claim against student-athlete vaccine mandate and temporarily enjoining the mandate); *Magliulo v. Edward Via Coll. of Osteopathic Med.*, No. 3:21-CV-2304, 2021 WL 3679227, at *8 (W.D. La. Aug. 17, 2021) (same as to vaccine mandate for medical students). Other courts have employed *Jacobson*'s communitarian approach to reject other religious-based claims, even though *Jacobson* did not even address a claim based on religious freedom. *See Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944) (citing *Jacobson* and holding that "[a parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds").

Fortunately, though, the ground is shifting—and these anti-religion precedents may not survive for much longer. Just last year, the Supreme Court granted certiorari to decide whether *Smith* should be overruled. *See Fulton v. City of Philadelphia*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020). Although the Court ultimately did not reach that question, five justices signed opinions attacking *Smith*. *See Fulton*, 140 S. Ct. at 1882 (Barrett, J., concurring) ("[T]he textual and structural arguments against *Smith* are … compelling."); *id.* at 1924 (Alito, J., concurring in the

judgment) ("*Smith* was wrongly decided. … [T]he Court's error in *Smith* should now be corrected."); *id.* at 1931 (Gorsuch, J., concurring in the judgment) ("*Smith* committed a constitutional error."). *Smith*, then, seems ripe for reversal. And if *Smith* falls, then it seems likely religious objections to compulsory vaccines could be reinvigorated—a reality that *Smith* itself recognized. *See Smith*, 494 U.S. at 888–89 (describing how applying strict scrutiny would "open the prospect of constitutionally required religious exemptions from … compulsory vaccination laws").

Meanwhile, the West Virginia Supreme Court of Appeals has never endorsed *Smith*. The Court never endorsed *Smith* and instead applied the Supreme Court's more restrictive, pre-*Smith* approach. *See State ex rel. Heck's Inc. v. Gates*, 149 W. Va. 421, 444, 141 S.E.2d 369, 384 (1965) ("[I]f the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden*." (emphasis added)).

Generally, though, West Virginia courts seem to have taken a more favorable approach to free-exercise claims than federal courts. That different approach makes good sense, as Article III, Section 15 of the West Virginia Constitution "guarantee[s]" "religious freedom" in much broader terms than the First Amendment. Hence, the West Virginia Supreme Court of Appeals has broadly defined "religion" to reach any "convictions which form the basis for the moral and ethical aspirations upon which [West Virginians] structure their lives." *State v. Riddle*, 168 W. Va. 429, 441, 285 S.E.2d 359, 365 n.4 (1981). The Court has thus found that the "freedom of religion provision" of the West Virginia Constitution protected someone who raised a "personal conscientious objection" against jury service "based on his religious beliefs." Syl. pt. 2, *State v. Everly*, 150 W. Va. 423, 427, 146 S.E.2d 705, 706 (1966).

This solicitous approach toward religious objections contrasts with the Legislature's approach to this point. West Virginia is one of only six States to refuse any religious exemption to its school vaccination requirements. *See* Nat'l Conference of State Legislatures, *States with Religious and Philosophical Exemptions From School Immunization Requirements* (Apr. 30, 2021), *available at* https://bit.ly/3DRFjP0. That unusually restrictive approach, of course, is something that can—and should—be changed.

Even if a West Virginia court were to apply *Smith* in a vaccine case, the case provides at least two exceptions to its general rule. *First*, "[a] law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1296, 209 L. Ed. 2d 355 (2021) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."). And *second*, some courts have applied strict scrutiny in so-called "hybrid rights" cases. In those cases, the free-exercise claim is bound up with another constitutional claim. *Smith*, 494 U.S. at 882. Under the most permissive version of the hybrid-rights approach, a court will apply strict scrutiny where a

claimant brings a free-exercise claim and simultaneously establishes a "colorable" companion constitutional claim. *See, e.g.*, *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004). Whether this view is the right one—or whether a hybrid-rights claim is even viable—is a matter of debate among the federal courts. *See Fulton*, 141 S. Ct. at 1918 (Alito, J., concurring in the judgment).

Finally, the constitution provides substantial room for the Legislature to implement religious exceptions to otherwise generally applicable vaccine laws. The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45, 107 S. Ct. 1046, 1051, 94 L. Ed. 2d 190 (1987). "[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335, 107 S. Ct. 2862, 2868, 97 L. Ed. 2d 273 (1987). "The burdensome issue-by-issue free exercise litigation that would be necessary absent a general exemption "results in considerable ongoing government entanglement in religious affairs[,]" … [which would] chill and interfere with religious groups, enmeshing judges in intrusive and sometimes futile attempts to understand the contours, sincerity, and centrality of the religious beliefs of others." *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260, 264 (4th Cir. 1988) (internal quotation marks omitted). Thus, forty-four States and the District of Columbia have some form of religious exemption to compulsory vaccination requirements in schools; successful challenges to such exemptions are few and far between.

C. Federal and State Anti-Discrimination Laws

The imposition of vaccine mandates and vaccine passports may also be subject to attack under various state and federal anti-discrimination laws.

1. Disability Discrimination

An individual unable to obtain a vaccine for medical reasons may be able to successfully challenge a mandate under federal and state law. The West Virginia Human Rights Act ("WVHRA") bars disability discrimination in employment. An employee making disability discrimination claim under that Act must show that "(1) he or she meets the definition of having a 'disability,' (2) he or she is a 'qualified individual with a disability,' [(meaning he or she could do the job with accommodation)] and (3) he or she was discharged from his or her job." Syl. pt. 5, *Woods v. Jefferds Corp.*, 241 W. Va. 312, 824 S.E.2d 539, 541 (2019) (alterations omitted). The employer then must present "a legitimate nondiscriminatory reason for such person's discharge." *Id.* If the employer does so, the complainant must prove by a preponderance of the evidence that the employer's proffered reason was not a legitimate reason but a pretext for the discharge. *Id.*

Title I of the Americans with Disabilities Act ("ADA"), which applies to employers with more than 15 full-time employees, also governs disability-related employment discrimination.

"[T]he standards governing the ADA ... and the WVHRA are coextensive." *Kitchen v. Summers Continuous Care Ctr., LLC*, 552 F. Supp. 2d 589, 593 n.5 (S.D. W. Va. 2008) (internal quotation marks omitted). To establish discrimination under the ADA, the employee must show "(1) he was a qualified individual with a disability; (2) he was discharged; (3) he was fulfilling his employer's legitimate expectations at the time of discharge; and (4) the circumstances of his discharge raise a reasonable inference of unlawful discrimination." *Reynolds v. Am. Nat. Red Cross*, 701 F.3d 143, 150 (4th Cir. 2012) (internal alterations and quotation marks omitted).

An employer could impose a qualification standard such as a vaccine requirement only if that standard "is job-related and consistent with business necessity." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 79, 122 S. Ct. 2045, 2049, 153 L. Ed. 2d 82 (2002) (internal quotation marks omitted); *accord Stone v. St. Joseph's Hosp. of Parkersburg*, 208 W. Va. 91, 99, 538 S.E.2d 389, 397 (2000). If a disabled employee cannot meet that standard, then the employer cannot enforce the standard against the employee unless the employee poses a "direct threat" to himself or others. *Echazabal*, 536 U.S. at 80. Even then, the employer must offer a reasonable accommodation (so long as it will not unduly burden the employer to do so); *see also Bills v. OS Rest. Servs., LLC*, No. CV 3:18-1232, 2019 WL 3491249, at *4 (S.D.W. Va. July 31, 2019) (applying WVHRA "direct threat" provisions). If the reasonable accommodation eliminates or reduces the threat, then the employee can keep his job. *Id.* Deciding what constitutes a "direct threat" involves a multi-factor test that focuses on the facts of each case.

Under Title III of the ADA, a disabled person can also bring a claim based on disability-discrimination in public accommodations. *See* 42 U.S.C. § 12182. To do that, the claimant must only show that "(1) he is disabled within the meaning of the ADA; (2) the defendant owns, leases, or operates a place of public accommodation; and (3) the defendant discriminated against him because of his disability." *J.D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 669–70 (4th Cir. 2019). If the claimant can meet that test, then the business owner must offer a reasonable modification—that is, a modification comprising "necessary and reasonable" steps to afford a "like experience." *Id.* at 671. Meanwhile, under similar standards, Title II of the ADA prohibits disability-based discrimination in the provision of public services. *Id.* at 670 (noting the "similar standards" under Title II). And the WVHRA contains a similar provision precluding discrimination as to public accommodations. *See* W. Va. Code § 5-11-9(6).

2. Religious Discrimination

Title VII of the Civil Rights Act of 1964 ("Title VII") "makes it an unlawful employment practice 'to discharge any individual because of such individual's religion.'" *EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 141 (4th Cir. 2017) (internal quotation marks omitted). In other words, the law provides potentially significant protections to West Virginians who might seek a religious exemption from an employer-imposed vaccine requirement. To make out a *prima facie* case of that type of discrimination, an employee must show that "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief, and, (3) he or she was not hired or promoted, fired, or otherwise discriminated against for failure to comply with the conflicting employment requirement." *Henegar v. Sears, Roebuck &*

Co., 965 F. Supp. 833, 836 (N.D.W. Va. 1997). "[A]n employer must make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship." *Consol Energy*, 860 F.3d at 141. An accommodation becomes an "undue hardship" when it imposes "more than a de minimis cost" on the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S. Ct. 2264, 2277, 53 L. Ed. 2d 113 (1977).

The WVHRA prohibits religious discrimination in employment, too. *See* W. Va. Code §§ 5-11-3(h), 5-11-9(1). "[T]he [WVHRA] should be construed to coincide with the prevailing federal application of Title VII unless variations in statutory language or other compelling reasons require a different result." *Henegar*, 965 F. Supp. at 836 (internal quotation marks omitted). We presume then that West Virginia courts would apply the same religious discrimination standards in applying the WVHRA that a federal court would in applying Title VII.

Title II of the Civil Rights Act of 1964 provides further relevant protections. In general, Title II bars religious and other forms of discrimination as to certain facilities open to the public. *See Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 431 (4th Cir. 2006). Courts do not agree about whether Title II requires public facilities to accommodate religious objections—but it might. *Compare Dragonas v. Macerich*, No. CV-20-01648-PHX-MTL, 2021 WL 363852, at *5 (D. Ariz. Feb. 3, 2021) (finding that apparent failure-to-accommodate claim premised on religion survived motion to dismiss), *with Zinman v. Nova Se. Univ.*, No. 21-CIV-60723-RAR, 2021 WL 1945831, at *2 (S.D. Fla. May 14, 2021) ("Plaintiff has not pointed to any authority indicating that Title II requires public facilities to *accommodate* religious beliefs and practices." (emphasis in original)).

3. Disparate Impact

The WVHRA—along with its federal counterparts—generally prohibits employment "practices [that] have the *effect* of disproportionately excluding persons on the basis of race, age, and so forth." *W. Va. Univ. v. Decker*, 191 W. Va. 567, 573, 447 S.E.2d 259, 265 (1994). If a claimant can indeed show that a given employment practice has had a disparate impact, then the employer must show that the practice is "job related and consistent with business necessity." *Anderson v. Consolidation Coal Co.*, No. 1:11CV138, 2014 WL 4388288, at *11 (N.D.W. Va. Sept. 5, 2014). If the State (as employer) meets that standard, then the employee could still succeed if he shows that the State had an "alternative, less burdensome practice" that it refused to adopt. *Id.*

Analysis

I. A Blanket Law Requiring All State Employees To Obtain the COVID-19 Vaccine Contravenes the West Virginia Constitution and Conflicts With Other State and Federal Laws.

No West Virginia authority specifically addresses whether, under our constitution, a state employer can mandate that an employee be vaccinated as a condition of employment. Our analysis concludes, however, that such a mandate should be held unconstitutional.

Jacobson alone canot provide the answer. As one federal court recognized, "*Jacobson* predated the modern constitutional jurisprudence of tiers of scrutiny, was decided before the First Amendment was incorporated against the states, and did not address the free exercise of religion." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020) (internal quotation marks omitted); *see also, e.g., Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 897 (W.D. Pa. 2020) ("Since [*Jacobson*], there has been substantial development of federal constitutional law in the area of civil liberties. As a general matter, this development has seen a jurisprudential shift whereby federal courts have given greater deference to considerations of individual liberties, as weighed against the exercise of state police powers."); *Bayley's Campground Inc.*, 463 F. Supp. 3d at 32 ("[T]he permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review."). Decided the same year as the now-repudiated decision in *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), the case seems out of step with our country's present understanding of the Bill of Rights. Extending it too far could lead to disastrous results—as demonstrated by the U.S. Supreme Court's use of *Jacobson* to justify forced sterilization in one infamous case. *See Buck v. Bell*, 274 U.S. 200, 207, 47 S. Ct. 584, 585, 71 L. Ed. 1000 (1927) (citing *Jacobson* and holding: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.").

If a court were to apply the so-called "autonomy cases" to any mandate case, then the court could apply strict scrutiny to the challenged mandate. Rather than relying on the permissive *Jacobson* standard, strict scrutiny focuses more on the individual liberty and autonomy interests at stake. "[I]t is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID–19 pandemic." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608, 207 L. Ed. 2d 1129 (2020) (Alito, J., dissenting from denial of application for injunctive relief). And "*Jacobson* hardly supports cutting the Constitution loose during a pandemic." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70, 208 L. Ed. 2d 206 (2020) (Gorsuch, J., concurring). But in many respects, some have incorrectly read it to do just that. *See id*. at 71 ("Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? … [W]e may not shelter in place when the Constitution is under attack. Things never go well when we do."). This analysis suggests that any state-based vaccine-related mandate should be subject to more stringent scrutiny than *Jacobson* applied. *See, e.g., Culinary Studios, Inc. v. Newsom*, 517 F. Supp. 3d 1042, 1063 (E.D. Cal. 2021) (citing the recent Supreme Court opinions and concluding from the "the normal constitutional standards of review should apply, not a separate '*Jacobson* standard'").

A broad state-employee mandate—especially one without exceptions—would not survive strict scrutiny, if for no other reason than the mandate's overbreadth and lack of tailoring. "Stemming the spread of COVID-19 is unquestionably a compelling interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020). Yet a mandate for *all* employees to be vaccinated is not narrowly tailored to achieve that interest. Most obviously, "there are many other less restrictive rules that could be adopted to minimize the risk." *Id.* Remote work, social distancing, frequent testing, altered shifts, and similar mechanisms are now familiar tools to limit spread of COVID-19; they stem the spread with less of an imposition on bodily integrity.

Public information campaigns and the similar initiatives in place serve the State's apparent interest in encouraging its employees to obtain the vaccine. At least without legitimate legislative findings describing why those other methods are insufficient, a broad mandate would likely fail constitutional review.

Also, a mandate fully embracing those who have had COVID-19—and who therefore may possess some natural immunity already—may be overbroad for the same reasons. *See United States v. Arencibia*, No. CR 18-294 ADM/DTS, 2021 WL 2530209, at *4 (D. Minn. June 21, 2021) (noting how an individual's prior infection with COVID-19 "provide[d] him with some natural immunity and lessen[ed] his risk of re-infection"). Although data is still developing, research suggests that those with natural immunity may enjoy the same—or even greater—levels of protection that those who are vaccinated. *See, e.g.*, Faye Flam, *Vaccines Versus Covid-19: The Great Immunity Debate*, WASH. POST (Sept. 7, 2021), *available at* https://wapo.st/3lcyyP6 ("People who had two Pfizer shots were about 27 times more likely to get symptomatic Covid-19 and eight times more likely to be hospitalized than were people who'd been infected."). Insisting that persons who already enjoy a high level of protection against the disease to obtain an *additional* level of protection is not the least restrictive means of achieving the State's interest in advancing public health. *See, e.g.*, Chris Burt, *George Mason Relents, Grants COVID-19 Medical Exemption to Professor*, University Business (Aug. 17, 2021), *available at* https://bit.ly/2X8Ez7z (describing settlement of litigation brought by law professor with natural immunity against his employer).

If the State were to proceed with a mandate anyway, then the burden would fall on the State to show why the alternative mitigation measures or a more circumscribed mandate would not be as effective as a broader, universal mandate for state employees. *See Ashcroft v. ACLU*, 542 U.S. 656, 665, 124 S. Ct. 2783, 2791, 159 L. Ed. 2d 690 (2004). Carrying that burden will be difficult for the State to do, especially if new variants challenge the effectiveness of vaccines, more individuals acquire long-lasting natural immunity, and state entities become used to life with limited mitigation measures in place.

In summary, a mandate that all state employees obtain a COVID-19 vaccine as a condition of employment offends the constitutional right to bodily integrity and personal medical decision-making.

Beyond the bodily-integrity issue, a wide-ranging state-employee mandate lacking any religious exemption would offend our constitution's guarantee of religious freedom. "Texts and decisions of appellate courts dealing with the fundamental nature of religious liberty are almost without limit." *Bond v. Bond*, 144 W. Va. 478, 494, 109 S.E.2d 16, 24 (1959). As the U.S. Supreme Court explained long ago:

> We are a religious people whose institutions presuppose a Supreme Being. … [The State may] respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over

> those who do believe. … But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Zorach v. Clauson, 343 U.S. 306, 313–14, 72 S. Ct. 679, 684, 96 L. Ed. 954 (1952).

Smith stands apart from principles like these, and it does not adequately protect the free exercise of religion. Given the direction of the Court, however, it is conceivable, if not likely, that the *Smith* test will be buried soon—at least in this State. And once *Smith* is gone, the strict-scrutiny standard should apply in any free-exercise challenge, too. Once that happens, the tailoring problems already described would defeat the law—particularly as religious objectors would represent only a subset of state employees. *See Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S. Ct. 1355, 1359, 79 L. Ed. 2d 604 (1984) ("[T]he Constitution … affirmatively mandates accommodation, not merely tolerance, of all religions.").

Even if the test in *Smith* were to survive, two other significant problems exist for a mandate in the religious sphere. For one thing, if a mandate provides for a medical exemption (as most every vaccination mandate now in place does), then that mandate should no longer be called "generally applicable." At the same time, exempting religious objectors would not necessarily defeat the objective of reaching a high enough level of immunization to achieve herd immunity if national rates hold. *See* Seither R. McGill, et al., *Vaccination Coverage with Selected Vaccines and Exemption Rates Among Children in Kindergarten - United States, 2019-20 School Year*, 70 MMWR MORB. MORTAL. W'KLY REP. 75 (2021) (showing an average non-medical exemption rate of 2.5% from kindergarten compulsory vaccinations). For another thing, this situation appears to present a classic "hybrid rights" case. Free exercise is at stake, but so, too, is bodily integrity. We cannot say with certainty whether the Supreme Court of Appeals of West Virginia would adopt the "hybrid rights" model that has so divided federal courts. But given that the Court has never spoken to the issue, it is at least plausible that the Court may embrace it.

Accordingly, if the State or state actor does not offer any religious exemption to a mandate that State employees be vaccinated, then such a mandate violates the West Virginia Constitution's guarantee of religious freedom.

Of course, the problems of a state-employee vaccine mandate go beyond the aforementioned analysis; additional challenges to such a mandate are likely to arise under federal and state law.

First, a mandate requiring vaccination under penalty of dismissal could be subject to a claim of disability discrimination. If an employee cannot get a COVID-19 vaccine because of a disability, and the State then dismisses him for it, then that dismissal could violate both the WVHRA and the ADA. An employer could find it hard to establish a "direct threat" on these facts given that many employees in this State have worked in the office without mandatory vaccines for several months. Even if the State can establish that a particular employee's unvaccinated status poses a "direct threat," then reasonable accommodations—such as the mitigation measures

described above—would still seem to be available to reduce or eliminate that threat. For this reason, the Equal Employment Opportunity Commission ("EEOC") counsels that "an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis." EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* § K.5 (updated May 28, 2021), *available at* https://bit.ly/3zQ0COB ("EEOC Guidance").

Second, the State could unwittingly engage in religious discrimination if it requires all employees to be vaccinated without exception. An employee objecting to a vaccine based on bona fide religious grounds would be entitled to a reasonable accommodation. And *any* religious belief *or* practice would be enough to compel the employer to offer those accommodations, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774, 135 S. Ct. 2028, 2033, 192 L. Ed. 2d 35 (2015), so long as the cost is insubstantial to the employer. *Accord* EEOC Guidance at K.12. The employee cannot insist on any specific form of accommodation. *See EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312–13 (4th Cir. 2008). But where an employee raises a valid religious objection, and *some* reasonable accommodation is available, that accommodation must be offered.

Third, the State could face a disparate-impact discrimination claim. Given that disparities in vaccination rates among racial and ethnic populations have persisted, the State could face disparate-impact claims from members of those protected classes should a mandate be implemented. *See* Nambi Ndugga, *Latest Data on COVID-19 Vaccinations by Race/Ethnicity*, Kaiser Family Foundation (Sept. 9, 2021), *available at* https://bit.ly/2Vp7542 (providing data concerning disparities among vaccination rates); *see also* EEOC Guidance at K.1 ("[E]mployers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact. … [B]ecause some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.").

All together, these other state and federal laws confirm that an unmitigated law mandating that all state employees be vaccinated is ill advised and unlawful.

II. A Blanket Law Requiring All Public or Private Establishments To Demand That Patrons Present a "Vaccine Passport" Before Entry Is Unconstitutional Under the West Virginia Constitution and Conflicts with Other State and Federal Laws.

In contrast to existing requirements,[2] a separate requirement that a person show a vaccine passport to enter "*either* public *or* private establishments throughout the state" is a legal step too

[2] West Virginia law already incorporates certification requirements that would qualify as "passports" under the definition you offered. *See* W. Va. Code R. § 64-95-14.1 (providing that a child must have "a complete certificate of immunization or similar medical record of immunizations" to gain entry to a state-regulated childcare facility or public, private, or parochial school). The Supreme Court of Appeals has held that "there is a compelling state interest for the rules requiring proof of these vaccinations to attend public school in this state." *Mercer Cty. Bd. of Educ.*,

far. Such a far-reaching requirement effectively equals banishment from society, preventing a person from participating in even the most basic activities of society. *See Rutherford v. Blankenship*, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) ("Banishment has also been viewed as unconstitutional because it amounts to cruel and unusual punishment or is a denial of due process of law."). It is one thing to impair a person's right to social association—a right that has never been viewed as fundamental. *See City of Dallas v. Stanglin*, 490 U.S. 19, 24–25, 109 S. Ct. 1591, 1595, 104 L. Ed. 2d 18 (1989) (holding that dance-hall patrons had no fundamental right to association); *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990) (explaining that a business's relationship with its customers does not implicate a protected First Amendment right). Although courts have not yet addressed the question, it is quite another matter to insist on total isolation for the unvaccinated—an outcome that would seem to inevitably result from the lack of a passport.

A state-enforced, total prohibition on entry to public and private establishments could significantly impair the exercise of many fundamental rights—the right to worship, speak, assemble, petition, vote, travel, and more. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); *but cf. Indigo Room, Inc. v. City of Fort Myers*, 710 F.3d 1294, 1300 (11th Cir. 2013) (finding that prohibition against persons under age 21 in bars did not violate First Amendment because it did not regulate speech). And it should make no difference that the ultimate actor could well be a private entity, as your hypothetical contemplates that the State will have compelled the private entity to demand a passport in the first place. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928, 204 L. Ed. 2d 405 (2019) (explaining that a private entity can become a state actor, to which constitutional strictures apply, "when the government compels the private entity to take a particular action").

These substantial impairments—whether examined through the lens of due process, equal protection, or the First Amendment—would, in our view, trigger strict scrutiny. And as already detailed, a law like this would struggle to meet the narrow-tailoring aspect of the strict-scrutiny analysis, especially if other mitigation methods have been used to good effect for some time.

Further, as with the hypothetical state-employee mandate, this universal vaccine passport would struggle to fit with other state and federal anti-discrimination statutes. For instance, a private business could find itself facing an ADA or WVHRA claim if it were compelled to bar an unvaccinated person from its premises and that person was unable to obtain the vaccine because of a disability. We recognize that the Department of Justice (the agency that enforces ADA Titles II and III) has not yet issued guidance on this issue. But we can imagine many troubling scenarios. For example, giving an unvaccinated-because-of-disability patron the chance to order takeout, while denying him the chance to eat in, might deny the guest a "like experience" and thus contravene the statute. *Id.* at 672 n.7 (rejecting the argument that a disabled patron could have just eaten his meal later). Ultimately, the business would need to show that the vaccination "passport" requirement was an essential eligibility requirement justified by a patron's "direct threat."

2013 WL 6152363, at *4. COVID-19 is not one of the diseases against which compulsory vaccination is required. W. Va. Code § 16-3-4(b).

Theriault v. Flynn, 162 F.3d 46, 48 (1st Cir. 1998). That analysis would track the similar rationale described above in the employment context.

Overall, any passport requirement would, in our view, present significant additional problems under the West Virginia Constitution—as well as state and federal law.

III. A Private Entity's Choice to Require Employee Vaccination or Request Showing of a Vaccine Passport Without Exceptions Already Violates Federal and State Law, But the Legislature Could—and Should—Pass Additional Laws Banning Vaccine Mandates or Vaccine Passports.

While a private entity is not, as a general matter, subject to the same constitutional duties or restrictions as public entities, *W. Va. Tr. Fund, Inc. v. Bailey*, 199 W. Va. 463, 466, 485 S.E.2d 407, 410 (1997), imposition of a vaccine mandate without exception may still give rise to some legal liability.

The anti-discrimination laws described above, including Title II, Title VII, the ADA, and the WVHRA, would still apply to both a private vaccine mandate and a request for a passport in a private business subject to these statutes. *See, e.g.*, *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35, 41 (3d Cir. 2018) (finding that nurse plausibly alleged an ADA claim premised on the anxiety she faced from a compulsory vaccine); *Chmura v. Monongalia Health Sys.*, No. 1:17CV222, 2019 WL 3767469, at *9 (N.D. W. Va. Aug. 9, 2019) (applying ADA to case in which employee was fired for failure to satisfy vaccine requirement, but ultimately finding that the claim failed); *EEOC v. Mission Hosp., Inc.*, No. 116CV00118MOCDLH, 2017 WL 3392783, at *3 (W.D.N.C. Aug. 7, 2017) (denying summary judgment on religious discrimination claim based on religious objections to hospital's vaccination mandate); *Chenzira v. Cincinnati Child.'s Hosp. Med. Ctr.*, No. 1:11-CV-00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012) (finding that employee stated plausible religious-discrimination claim as to vaccine mandate based on her asserted veganism).[3] Thus, at a minimum, even private employers need to provide exceptions for religious- and disability-based objections for their employees.

In short, state and federal law may prevent private entities from imposing a blanket employee vaccination mandate.

To the extent that, as discussed above, state law does not expressly limit private entities from imposing vaccine-related initiatives, we believe this area is one ripe for legislative action—at a minimum, to provide for express religious or health exceptions to any such mandate. As a general matter, the West Virginia Constitution would not prevent the Legislature from banning

[3] Courts have rejected more generalized challenges to private mandates premised on generalized constitutional concerns or similar policy arguments. *See, e.g.*, *Bridges v. Houston Methodist Hospital*, No. 4:21-cv-01774, 2021 WL 2399994, at *2 (S.D. Tex. June 12, 2021); *Hencey v. United Airlines, Inc.*, No. 21-61702-CIV, 2021 WL 3634630, at *2 (S.D. Fla. Aug. 17, 2021); *LaBarbera v. NYU Winthrop Hosp.*, No. 218CV6737DRHSIL, 2021 WL 980873, at *21 (E.D.N.Y. Mar. 16, 2021); *Fallon v. Mercy Cath. Med. Ctr. of Se. Pennsylvania*, 200 F. Supp. 3d 553, 564 (E.D. Pa. 2016), *aff'd*, 877 F.3d 487 (3d Cir. 2017).

both vaccine mandates (imposed by public or private entities) and vaccine mandates (imposed by the same). Even a broad ban—such as an amendment to the WVHRA like the Montana law—would not give rise to significant constitutional concerns, although it would impact the traditional framework for analyzing current anti-discrimination laws.

While we believe that such a restriction or model could be defended, we acknowledge that a federal court in Florida has enjoined enforcement of that State's vaccine-passport bans, reasoning that they violate the First Amendment and substantially burden interstate commerce. *See Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, No. 21-22492-CIV, 2021 WL 3471585, at *19 (S.D. Fla. Aug. 8, 2021). Among other things, the court did not believe that Florida had identified any compelling state interest that the law advanced. *Id.* The court thought the law (1) did not protect medical privacy in any provable way; (2) did not stop other ways to invade a patron's privacy, like simply asking about vaccine status orally; (3) did not prohibit private entities from discriminating against *un*vaccinated people; and (4) did not regulate employers. *Id.* But in contrast to the view of the Florida court, West Virginia's interest in preserving the liberty of its citizens is real. A conscientious Legislature can address these under- and over-inclusiveness issues addressed in the Florida district court's opinions through careful drafting.

There should be no reason for hesitation in passing a ban on vaccine mandates or passport requirements or, at a minimum, requiring religious or medical exemptions in such requirements.

* * * *

In the end, a law requiring all state employees to be vaccinated or requiring all businesses to demand vaccine passports from all patrons would violate our State's constitution (as it should be properly understood) and violate both state and federal law. The same finding would follow no matter what aspect of "state" government is implicated; mandates and passport requirements imposed by counties, municipalities, and other public actors would give rise to the same legal concerns as a mandate or passport requirement imposed at the statewide level. We therefore urge any public entities to comply with such guidance and come into accordance with this opinion.

Likewise, a private employer's mandate or vaccine-passport requirement may violate federal and state anti-discrimination laws if it does not, at a minimum, provide for appropriate exceptions for those with religious- or disability-based objections.

Additional steps can and should be taken by the Legislature to ensure that individual liberty interests are protected. The Legislature could:

- Preclude vaccine mandates for some or all employees;

- Bar governments from imposing vaccine passport requirements or bar such passport requirements outright;

- Ensure that employment-related policies contain, at a minimum, exceptions for those with religious objections and other objections, such as those of a medical or conscientious nature; and/or

- Implement a religious or conscientious objector exception for compulsory school vaccinations.

Legislation already implemented in states such as Arizona, Florida, Montana, and North Dakota provide examples of how such protections might be implemented in practice.

"In view of the broad notions of individual liberty and security which underlie our sense of freedom, potent constraints on overreaching governmental intrusions are appropriate." *State v. Mullens*, 221 W. Va. 70, 99, 650 S.E.2d 169, 198 (2007) (Benjamin, J., dissenting). As many other states have already recognized, an anti-passport, anti-mandate law could helpfully serve as one such constraint—all at a time when individual liberty has too often fallen by the wayside. We strongly implore the Legislature to act.[4]

Sincerely,

Patrick Morrisey
West Virginia Attorney General

[4] Since you sent your opinion request, there has been an additional major development concerning vaccine mandates. On Thursday evening, President Biden issued a proposal to impose broad new vaccine mandates on large employers and others across the nation. We are now closely analyzing the details of that overreaching proposal. Our first reaction is that the Biden administration is greatly overstepping its authority and none of our recommendations in this letter will change. At the same time, we are now working with other state attorneys general to ascertain appropriate ways to challenge the new Biden proposal when it is finalized. We will work to ensure that the federal government does not impose an unlawful mandate on West Virginians.