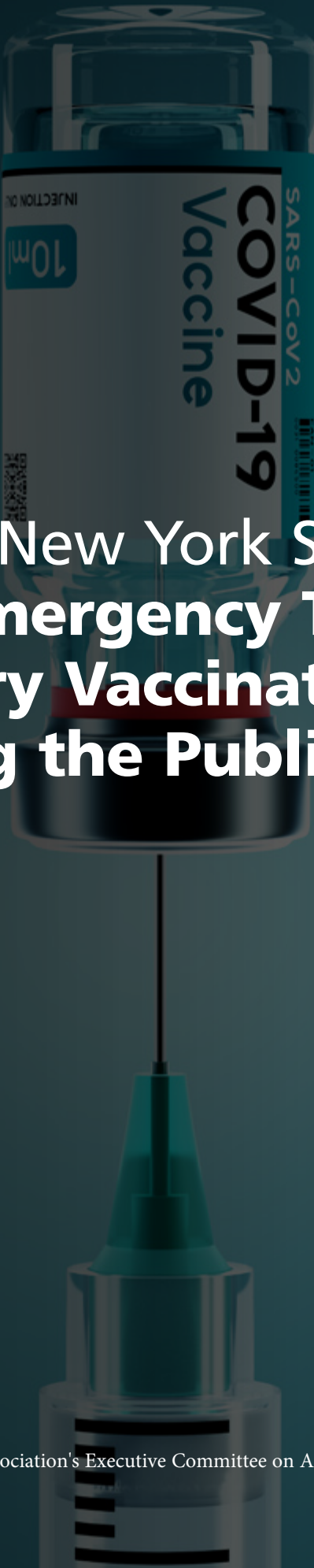




NEW YORK STATE  
BAR ASSOCIATION

A vertical image of a vial and a syringe. The vial is at the top, with a label that reads 'SARS-COV-2', 'COVID-19 Vaccine', and '10ml'. Below the vial is a syringe with a needle pointing upwards. The background is a dark teal color.

# Report of the New York State Bar Association **Emergency Task Force on Mandatory Vaccination and Safeguarding the Public's Health**

August 2021



**To:** New York State Bar Association Executive Committee

**From:** Mary Beth Quaranta Morrissey, Esq., PhD, MPH, Task Force Chair  
Emergency Task Force on Mandatory Vaccination and Safeguarding the Public's Health

**Subject:** Final Report

The New York State Bar Association (NYSBA) Emergency Task Force on Mandatory Vaccination and Safeguarding the Public's Health ("Task Force") provides below an Executive Summary of the Task Force's Recommendations for purposes of facilitating the Executive Committee's review and discussion of such recommendations at the Executive Committee meeting scheduled for tomorrow. The Resolutions adopted by the NYSBA House of Delegates on November 20, 2020 are also attached hereto for your ease of reference.

Please also note the following minor revisions to the Report:

- The Public Employers section of the Report has been revised to reflect Mayor de Blasio's reversal of his previous "vaccinate-or-test" requirement for New York City educators and new requirement that all New York City educators be vaccinated (*See* page 23).
- The recommendation on access to vaccination for immigrants in civil immigration detention in New York has been collapsed into one recommendation for purposes of parsimony and clarification (*See* page 4).

### **Executive Summary**

1. **NYSBA urges all NYSBA members to be fully vaccinated against COVID-19. In fact, NYSBA urges all lawyers to be fully vaccinated. NYSBA calls on every bar association within the State and nation to urge their members to be fully vaccinated.**

2. NYSBA urges all employers to require that their employees be fully vaccinated subject to medical exemptions or other recognized exceptions under applicable law. In this regard, NYSBA also urges all employers that have the capabilities to provide vaccines on-site, and to provide paid time-off for any employee who may suffer from temporary side-effects in the days post-vaccine. NYSBA is now requiring all its employees to be vaccinated as outlined below and urges all law firms to do the same.
  
3. NYSBA recognizes the herculean efforts of health care workers thus far. We have heard the calls from health care workers that New Yorkers and all Americans take steps to stop the spread of COVID-19. Health care workers must lead. Health care workers must be vaccinated. NYSBA endorses the State Department of Health Order and the NYS Public Health and Health Planning Council emergency regulations requiring that the health care workers and personnel of all hospital, nursing home and other covered entities be vaccinated. NYSBA calls upon health care employers not covered by the DOH Order and emergency regulations to require that their patient-facing workforces be fully vaccinated against the vaccine. NYSBA also calls upon health care professional associations to urge that their members be fully vaccinated their members be fully vaccinated.
  
4. NYSBA recommends to the State Legislature, State Government officials and departments/offices:

**A. Recommend** that actions, which were approved by the NYSBA House of Delegates on November 20, 2020 (attached hereto), be taken unless already implemented, including Public Health Legal Reforms and Legal Reforms in Care Provision, Congregate and Home Care, Workforce and Schools; and further that COVID Vaccine and Virus Testing Legal Reforms and Guidelines be fully implemented.

**B. Recommend to the Honorable Kathleen M. Hochul as Governor and/or local governments:**

Mandate that: **(1)** all State and local employees be masked during work hours when in the presence of others, **(2)** the Office of General Services require that only vaccinated (unless exempted and regularly tested) and masked individuals should be allowed to provide services under State contracts, and **(3)** each State Department and Office prepare a plan for fostering vaccination and masking in connection with regulation of the activities for which they are responsible;

Encourage businesses as permitted by law to require all individuals as a condition of entry and presence on their property: **(1)** either proof of vaccination or the results of a test within the past 24 hours showing that the individual is COVID-free and **(2)** the wearing of a mask.

**C. Recommend to the Department of Corrections** that immediate access to vaccination be provided in all correctional settings, as well as public health protections including masking and testing.

**Recommend to state, county, municipal or unit of local government, or officer, employee or agent of government** that immediate access to vaccination be provided to all immigrants being held in civil immigration detention in New York, including pregnant women, and require that such access to vaccination be a condition of any contract with private contractors operating detention facilities in New York; or take steps necessary to terminate or not renew immigration detention agreements with U.S. Immigration and Customs Enforcement in New York State or its private contractors for purposes of civil immigration detention, and ensure all persons currently detained under such agreements have immediate access to vaccination and all other public health protections.

**Recommend to the Commissioner/Department of Education,** to require that all individuals applying or reapplying for a license under the Education Law, to provide proof of vaccination unless the individual provides documentation acceptable to the Department that he or she is an exempted individual. The good faith of the Department in making that determination should be presumed. The licensees would include without limitation physicians, physician assistants, surgical assistants, pharmacists, nurses and nurse practitioner, midwives, psychologists, social workers, mental health practitioners, respiratory therapists,

respiratory therapy technicians, and clinical laboratory technologists, and for the DOE to recommend to school boards that school employees be vaccinated and at all times while on school property, be masked: and **Recommend to Department of State and Department of Financial Services** the same vaccination requirement for any occupational license.

**Recommend to the Department of Motor Vehicles**, to work with the Department of Health and each county to make vaccines available at each DMV location. In much of the state, DMV registration takes place at County Clerk offices.

5. **NYSBA urges that higher education institutions** require that their students and workforces be fully vaccinated.
  
6. **NYSBA recognizes the legitimate calls of teachers for safe teaching environments in schools.** NYSBA also recognizes the need for children to return safely to schools. As a part of those safe teaching environments, NYSBA calls upon all teachers, aides, support staff and schools administrators to be fully vaccinated. NYSBA also calls upon the State Legislature to require COVID-19 vaccination for elementary school-age children when a vaccine becomes available and is approved by regulators and public health authorities. **NYSBA recommends to educational institutions**, to: (1) require vaccination as a condition of teaching, registration as a middle or high school or college student or volunteer except in those cases where the teacher or student provides documentation convincing to the educational institution that he or she is an exempted individual and in

that case require regular testing no less than weekly; and (2) require each teacher, student and volunteer to wear a face covering or mask acceptable to the educational institution over the individual's nose and mouth for the entire time that the individual is on the education institution's premises or conducting business on behalf of the educational institution.

7. **NYSBA recommends that businesses require proof of vaccination or negative test in last 24 hours for entry.**
  
8. **NYSBA concludes that the law permits all these steps.**
  
9. **NYSBA calls for a strong, multi-faceted campaign to encourage vaccine acceptance, using people, places and message likely to be effective.**



## **Final Report**

### **Emergency Task Force on Mandatory Vaccination and Safeguarding the Public's Health**

#### **I. Introduction**

The New York State Bar Association Emergency Task Force on Mandatory Vaccination and Safeguarding Public Health (“Task Force”), appointed end of July 2021 by New York State Bar Association (“NYSBA”) President Andrew Brown, builds on the considerable work done in 2020 and 2021 by NYSBA task forces appointed by bar leadership, including the 2020 Health Law Section COVID-19 Task Force<sup>1</sup> and the 2020 Long Term Care Task Force.<sup>2</sup> The establishment of the present Task Force responds to the ongoing Severe Acute Respiratory Syndrome Coronavirus 2 (a/k/a “COVID-19” or the “virus”) or COVID-19 public health crisis unfolding in New York, heightened in recent weeks by the spread of the Delta variant and possibly other variants in the ensuing weeks and months. In keeping with the overall NYSBA mission to educate the public about the law and serve the public interest, the goals of the Task Force are to provide the most current information on legal and policy issues relevant to the public health threat in New York as guided by New York Law, and make policy recommendations that prioritize safeguarding the public’s health consistent with scientific evidence. Central to these goals is advocating for equity and elimination of health disparities in the allocation and distribution of vaccines and access to immunization, building of community

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<sup>1</sup> NYSBA Health Law Section Task Force. See Resolutions adopted by NYSBA House of Delegates in November 2020; 1-8: <https://nysba.org/app/uploads/2021/01/health-Law-Resolutions-and-report-with-cover-approved-November-2020.pdf>

<sup>2</sup> NYSBA Nursing Homes and Long Term Care Task Force. See Report adopted by House of Delegates in June 2021: <https://nysba.org/app/uploads/2021/03/Task-Force-on-Nursing-Home-and-Long-Term-Care-Report-FINAL-approved-6.12.2021.pdf>

relationships and provision of community education to help address vaccine hesitancy and support uptake, and strengthening immunization and public health infrastructures.

## **II. Structural Contexts and Public Health Environment**

It is important to understand the larger contexts of the COVID-19 experience in New York as a backdrop to consideration of the Task Force recommendations. First and foremost, the 2020-2021 COVID-19 pandemic and the threats it poses to the public's health have been driven by longstanding pre-existing structural inequities and well-documented health disparities across diverse populations. Such inequities and disparities have contributed to the disproportionate impact COVID-19 has had upon people of color, indigenous peoples, and vulnerable populations including nursing home residents and others who are institutionalized, and persons with co-morbidities and who are homeless or living with disabilities or serious mental illness.<sup>3</sup> Systemic racism and social and economic determinants of health such as educational attainment, income inequality, poverty, lack of insurance or underinsurance, housing and food insecurity, and neighborhood or place are among the varied contexts of which policymakers need to remain mindful in weighing policy options for mitigating vaccine hesitancy and increasing vaccine uptake. A history of exploitation of people of color and distrust of government, ideological polarization, and inflammatory debates about liberty and civil rights have influenced attitudes toward vaccination and the variable public understanding of science, public health and vaccine mandates. The emergence and recent spread of the Delta variant have compounded the threat to the public's health for both those who are unvaccinated and vaccinated who remain at risk.

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<sup>3</sup> Id.

Finally, widespread distress from isolation and loneliness<sup>4</sup> has created an urgent need for mental health and psychosocial services even among those who have not been directly affected by the pandemic. The heightened individual and collective trauma experienced in the pandemic environment calls for expansion of trauma-informed care. For example, in some cases nursing home residents have experienced the trauma and detrimentality of long-term isolation as a result of state policies restricting visitation. Such policies may have also violated nursing home residents' human rights.

### Advancing Equity and Eliminating Health Disparities

Social and economic determinants of health, pre-existing inequities, and racial and ethnic disparities have created enormous challenges in the current pandemic environment. An important part of the policy process in developing recommendations for COVID vaccination in the face of an ongoing serious threat to the public's health is understanding how such inequities and disparities influence attitudes toward and access to vaccination. The problem of access is also a complex structural one and calls for systems-level changes including strengthening immunization and public health infrastructures at all levels of government.<sup>5</sup>

The Centers for Disease Control (CDC) has created a site on *Health Equity and Promoting Fair Access to Health* that identifies the following factors influencing vaccine access and acceptance: Education, income and wealth inequalities; employment access and conditions; racism and other forms of discrimination; healthcare access inequities; transportation; neighborhood; and distrust resulting from past racist practices such as medical exploitation and

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<sup>4</sup> National Academies of Sciences, Engineering, and Medicine. 2020 *Social Isolation and Loneliness in Older Adults: Opportunities for Health Care System*. Washington, DC: The National Academies Press.

<sup>5</sup> Shen, A. et al. Ensuring equitable access to COVID-19 vaccines in the US: Current system challenges and opportunities. *Health Affairs*, 40 (1), 62-69. doi: 10.1377/hlthaff.2020.01554.

experimentation.<sup>6</sup> Developing and implementing strategies for community outreach, including culturally appropriate education and identifying community champions, are essential to advancing equitable access to vaccination and eliminating health disparities in the contexts of the pandemic, and go hand-in-hand with vaccination mandates. Writing in *Health Affairs*, Moucheraud, Guo and Macinko (2021) conclude, “The interconnectedness of trust in institutions and associations with vaccine attitudes should be considered carefully in the context of policy making and messaging, particularly during a pandemic” (p. 1222).<sup>7</sup> This overarching context of building trust is key to increasing vaccine access and acceptance contemporaneously with implementing vaccine mandates in New York.

### **III. Constitutional Landscape**

American law protects the right of each individual to their own pursuit of a good life, to the extent that it does not unreasonably interfere with another’s pursuit. The COVID-19 pandemic demonstrates the tension between promotion of individual rights and protection of common good. The U.S. Constitution enables us to tip the scale to protect public health, but only so far as necessary. The Fourteenth Amendment provides, “. . . No state shall make or enforce any law . . . nor shall any State deprive any person of life, liberty, or property without due process of the law . . . .”<sup>8</sup> The Due Process Clause protects the fundamental rights and

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<sup>6</sup> See Centers for Disease Control. *Health Equity and Promoting Fair Access to Health*. <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/vaccine-equity.html>.

<sup>7</sup> Moucheraud, C., Huiying G, & Macinko, J. (2021). Trust in governments and health workers low globally, influencing attitudes toward health information, vaccines. *Health Affairs*, 40(8), 1215-1224. doi: 10.1377/hlthaff.2020.02006

<sup>8</sup> U.S. CONST. amend. XIV § 1.

substantive liberty interests of individuals from government interference.<sup>9</sup> The Court will review *substantive* rights protected under the Due Process clause under the rational basis standard of review where the state must show a legitimate state interest that is reasonably related to the law.<sup>10</sup>

The United States Supreme Court has held that a person has a *substantive* liberty interest in refusing unwanted medical treatment.<sup>11</sup> However, this substantive right is not absolute nor fundamental – “...the 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.”<sup>12</sup> Because the substantive liberty interest in refusing unwanted medical treatment is not a fundamental right, the Court will use the highly deferential rational basis standard of review for state infringement on said right.<sup>13</sup> If the state’s regulations are “reasonable regulations established directly by legislative enactment as will protect the public health and the public safety,” the infringement on individual liberty will be held constitutional.<sup>14</sup>

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<sup>9</sup> See Washington v. Glucksberg, 521 U.S. 702, 720 (1997). The standard of review for a state’s infringement on *fundamental* rights, “so rooted in the traditions and conscience of our people,” is a heightened level of scrutiny. See Washington v. Glucksberg, 521 U.S. at 720 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); See generally Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Skinner v. Oklahoma ex rel. Williamson, 36 U.S. 535 (1942) (right to education and rear children); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to contraception); Roe v. Wade, 410 U.S. 113 (1973) (right to an abortion).

<sup>10</sup> See Jacobson v. Massachusetts, 197 U.S. 11 (1904).

<sup>11</sup> See Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 278 (1990) (citing Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1904) (“the Court balanced the individual’s liberty interest in declining an unwanted smallpox vaccination with the states interest in preventing disease”).

<sup>12</sup> Jacobson v. Massachusetts, 197 U.S. 11, 28 (1904); Klassen v. Trs. Of Ind. Univ., 2021 U.S. LEXIS 22785 (citing Washington v. Glucksberg, 521 U.S. at 720-722 (the plaintiffs lack a fundamental liberty interest in refusing vaccination to participate in university education)).

<sup>13</sup> See Jacobson, 197 U.S. 11.

<sup>14</sup> Id. 197 U.S. at 25-26.

At the Constitution’s ratification, the States did not relinquish their authority to enact “health laws of every description” under their broad police powers.<sup>15</sup> The States’ police power has not been specifically defined, but it does have limitations.<sup>16</sup>

Here, states acting under their police powers have taken action to respond to the COVID-19 pandemic that has swept the globe. Measures, such as quarantining, mandatory masks, limiting the number of people who may congregate, and mandatory vaccinations for participation in school, the workplace, and other social activities have burdened coveted individual liberties protected by the Constitution, such as free speech, free exercise, right to travel, voting, and abortion.<sup>17</sup> The Court has upheld said burdens on liberty because they are outweighed by the states’ legitimate interest in protecting the welfare of its citizens and the community from the spread of the deadly COVID-19 virus.<sup>18</sup> Moreover, absent going beyond the police power where a law has no reasonable relation to the states’ interest, a court will not second guess the decisions of the legislature based on experts and science.<sup>19</sup>

In Jacobson, the Court upheld the Massachusetts law imposing *compulsory* vaccination without exception to prevent the spread of the smallpox virus.<sup>20</sup> Many states, employers, and

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<sup>15</sup> Id.

<sup>16</sup> See In Jew Ho v. Williamson, 103 F. 10 (C.C.D. Cal. 1900) (the court struck down California’s action of closing off an area of San Francisco to prevent the spread of the plague because such action was overbroad); Ex parte Dillon, 44 Cal. App. 239, 244 (Cal. Ct. App. 1919) (court struck down quarantine in Los Angeles for lack of a reasonable showing inhabitants were infected with a contagious disease).

<sup>17</sup> See Murphy v. Lamont, 2020 WL 4435167 (D. Conn. Aug. 3, 2020) (upholding restriction on speech); S. Bay United Pentecostal Church v. Newsom, 140 S.Ct. (May 29, 2020) (upheld challenge to restriction on the size of religious gatherings); Page v. Cuomo, 2020 WL 4589329 (N.D.N.Y. Aug. 11, 2020) (upholding restriction on travel during quarantine); Republican Nat’l Committee v. Democratic Nat’l Committee, 140 S.Ct. 1205 (Apr. 6, 2020) (court extending voting deadlines); In re Abbott, 954 F.3d 772 (5<sup>th</sup> Cir. 2020) (court upheld restriction on abortion during emergency exercises of a public health crisis).

<sup>18</sup> Id.

<sup>19</sup> S. Bay United Pentecostal Church v. Newsom, 140 S.Ct. 716, 717 (May 29, 2020) (Roberts, J. concurring) (“Our Constitution principally entrusts the safety and the health of the people’ to the politically accountable officials of the States . . . when those officials undertake to act in areas fraught with medical and scientific uncertainties their latitude must be especially broad . . . not . . . subject to second guessing by an unelected federal judiciary which lacks the background, competence, and expertise to asses public health and is not accountable to the people.”).

<sup>20</sup> See Jacobson, 197 U.S. 11.

universities are now imposing mandatory vaccination as a prerequisite for participation.<sup>21</sup> It follows that states' measures that are less restrictive than those in Jacobson are a constitutional exercise of their police powers.<sup>22</sup>

### Religious Exemption

The circumstances with which the Court has been most concerned regarding the states' protective measures as a valid exercise of their police powers is in the realm of the fundamental right of free exercise under the First Amendment. As a starting point, the Supreme Court has held, “. . . the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)’”.<sup>23</sup>

The Court has only departed from the test of neutral and general applicability in circumstances where the law is, “. . . a religiously motivated action . . . in conjunction with other constitutional protections.”<sup>24</sup> When a law falls short of neutrality and general applicability, the standard of review is strict scrutiny requiring the state to show “a compelling governmental interest and must be narrowly tailored to advance that interest” for the law to survive.<sup>25</sup>

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<sup>21</sup> See Phillips v. City of New York, 775 F.3d 538 (2<sup>nd</sup> Cir. 2015) (court upheld New York chicken pox vaccination requirement for children's participation in public school was within the states police power); Klassen v. Trs. Of Ind. Univ., 2021 U.S. LEXIS 22785 (Indiana University vaccination requirement upheld); Bridges v. Houston Methodist Hosp., 2021 LEXIS 110382 (S.D. Tex. 2021) (court upholds employer vaccination requirement).

<sup>22</sup> Id.

<sup>23</sup> Employment Div. v. Smith, 494 U.S. 872, 886 (1990) (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982)). The right to free exercise, “does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.” Phillip, 775 F.3d 583 at 543 (citing Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944)).

<sup>24</sup> Employment Div., 494 U.S. 872 at 887 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right of parents to direct children's education); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (court struck down a tax on religious ideas); Wisconsin v. Yoder, 406 U.S. 205 (1972) (court struck down state law requiring Amish children to attend school against parents' religious beliefs); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993) (city ordinance prohibiting ritualistic animal sacrifice was found to target religion and violated free exercise clause); Fulton v. City of Philadelphia, 141 S.Ct. 1868, (2020) (court struck down as a violation of the free exercise clause a city's refusal to contract with a religious foster care agency unless they agreed to certify same-sex couples as foster parents).

<sup>25</sup> Id.

The Court has further explained, while states are free under the political process to afford religious accommodations to generally applicable regulations, it is not constitutionally required to provide such an exemption.<sup>26</sup> However, if the state does grant individual exceptions, but excludes a religious exemption, the Court will review such action as not neutral and subject to strict scrutiny standard of review.<sup>27</sup>

In the present circumstances of the states' efforts to contain the spread of the COVID-19 virus, the right to free exercise, "does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."<sup>28</sup> The Courts, consistent with this precedent, have upheld regulations that are neutral and generally applicable while invalidating laws that have impermissibly targeted religious exercise.<sup>29</sup> Moreover, consistent with the legislative right to afford accommodations that are not constitutionally required, the Court has upheld the legislative decision of New York to repeal an exemption from vaccination on religious grounds.<sup>30</sup>

### Implications in Current Pandemic

Given the ongoing threat of COVID-19, particularly with new variants replicating, it is constitutional for the states to act under their police powers to take measures necessary to control the spread of the virus. In so doing, the states may constitutionally mandate vaccination for

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<sup>26</sup> Employment Div., 494 U.S. 872 at 890 ("But to say a nondiscriminatory religious-practice exemption is permitted . . . is not to say that it is constitutionally required . . . it may be fairly said to leaving accommodation to the political process will place at a relative disadvantage those religious practices . . . but that unavoidable consequence of democratic government must be preferred . . .").

<sup>27</sup> See Fulton v. City of Philadelphia, 141 S.Ct. 1868 (2020).

<sup>28</sup> Phillip, 775 F.3d 583 at 543 (citing Prince v. Massachusetts, 321 U.S. 158, 166-67 (1994)).

<sup>29</sup> See Calvary Chapel Dayton Valley v. Gov. of Nevada et al., 591 U.S. (2020) (court denied injunction from Nevada's restriction on number of people allowed at religious congregations); But See, S. Bay United Pentecostal Church v. Newsom, 141 S.Ct. 716 (2021) (court invalidated California's unequal treatment of religious congregation while allowing other accommodations for entertainment industry); Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 66 (2020) (the Court invalidated New York Governor's executive order restricting the attendance of religious services as not neutral).

<sup>30</sup> See F.F., as Parent of Y.F. et al., Infants et al. v. State of New York et al., 194 AD 3d 80 (2021); See N.Y. Public Health Law §2164(8); Employment Div., 494 U.S. 872 at 890.



participation in social, educational, and employment contexts. As explained, states are free to carve out accommodations, such as religious or medical exemptions, but are not constitutionally required.<sup>31</sup> State elected officials must protect the welfare of their citizens. These duties are carried out under the authority of state police powers. Unless it is shown that the states have stepped beyond their police powers, or have “impermissibly targeted” religion, such measures will be found constitutional.<sup>32</sup>

#### IV. Employer Mandates

Employers are permitted to require employees to be vaccinated for COVID-19 before physically entering the workplace or engaging in other client/customer/patient activities, with certain exceptions. The Equal Employment Opportunity Commission (the “EEOC”) has blessed such a requirement, subject to the employer’s compliance with the reasonable accommodation provisions of Title VII and the Americans with Disabilities Act (the “ADA”).<sup>33</sup> The Department of Justice, in a July memorandum, has similarly opined that a vaccination requirement as a condition of employment, even if such vaccine was approved under Emergency Use Authorization, is permissible. To date, the only federal court to decide this issue has agreed with the DOJ.<sup>34</sup> Likewise, a vaccination requirement as a condition of employment would not run afoul of any

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<sup>31</sup> See Employment Div., 494 U.S. 872.

<sup>32</sup> S. Bay United Pentecostal Church v. Newsom, 140 S.Ct. 716 (May 29, 2020) (*citing* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534-535 (1993)).

<sup>33</sup> See EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at K.1, EEOC.GOV, <https://www.eec.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated May 28, 2021).

<sup>34</sup> See Bridges v. Houston Methodist Hosp., No. 4:21-cv-01774, 2021 WL 2399994, at \*1–2 (S.D. Tex. June 12, 2021), *appeal docketed*, No. 21-20311 (5th Cir. June 14, 2021).

express prohibition under New York State Human Rights Law (“NYSHRL”), again subject to an employer’s obligation to engage in a reasonable accommodation analysis.<sup>35</sup>

In most cases, unionized private employers cannot unilaterally implement a vaccination requirement as such a requirement would be a mandatory subject of bargaining with the union.<sup>36</sup> If an employer has a broad management rights clause or other specific grant of authority within its collective bargaining agreement, it might be able to implement without the union’s consent, but this would be a rare case. An employer could implement such a requirement if it reached a bargaining impasse with the union (even without the union’s agreement), but implementation at impasse brings on a host of practical and legal obstacles. Weekly COVID testing requirements would be subject to the same analysis and, in most cases, not permitted without notice and bargaining.<sup>37</sup>

In order to comply with state and federal law, an employer imposing a vaccination requirement as a term of employment is obligated to reasonably accommodate an employee who is unable to receive the vaccine because of a disability or a sincerely-held religious belief. Under the NYSHRL (which is slightly broader in its definition than Title VII), a disability is defined as “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.”<sup>38</sup> In virtually all cases, documentation from a healthcare provider that an employee is unable to receive the vaccine because of a medical condition will qualify as a disability. This would include medical conditions

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<sup>35</sup> Vaccination requirements are not specifically approved by the New York State Division of Human Rights, although the EEOC’s guidance has been adopted by New York City Commission of Human Rights.

<sup>36</sup> See, e.g., Virginia Mason Hospital, 357 NLRB 564 (2011).

<sup>37</sup> See, e.g., Johnson-Bateman, Co., 295 NLRB 180, 193 (1989).

<sup>38</sup> N.Y. Human Rights Law § 292.21

that are pregnancy-related, although pregnancy itself is not considered a disability under the ADA<sup>39</sup> and recent CDC guidance urges that pregnant women receive the vaccine.<sup>40</sup> Regarding requests for religious accommodation, the EEOC has advised employers that they “should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief.”<sup>41</sup> However, if an employer has some objective basis for questioning the sincerity or the practice, it may request additional supporting information, such as written material describing the belief, the employee’s explanation of his or her religious belief, or statements/documents from third-parties, including a religious leader, about the employee’s beliefs or practices.<sup>42</sup> Without more, an employee’s reluctance, non-religious objection to a vaccination, or medical opinion that a vaccine is not necessary would not entitle an employee to a reasonable accommodation.

Under state and federal law, employers must offer accommodation to those with a medical/disability or religious exemption if it does not pose an undue hardship to the employer or pose a direct threat to the health and safety of others in the workplace. In New York, undue hardship is defined as “an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system).”<sup>43</sup> Examples of an accommodation might include requiring a mask, permitting entry only after a negative COVID test, remote work, changing an employee’s schedule,

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<sup>39</sup> EEOC, *supra* note 33, at J.2. “First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability.”

<sup>40</sup> CDC, *Pregnant and Recently Pregnant People*, CDC.GOV, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnant-people.html> (last updated Aug. 16, 2021), “COVID-19 vaccination is recommended for all people 12 years and older, including people who are pregnant...”

<sup>41</sup> EEOC, *supra* note 33, at K.12; 29 CFR § 1605; *see also United States v. Seeger*, 380 U.S. 163, 192 (1965) (construing religious belief broadly, holding it more akin to a “sincere belief” for purposes of religious exemptions for conscientious objectors).

<sup>42</sup> EEOC, *supra* note 33, at K.12.

<sup>43</sup> N.Y.C. Admin. Code § 8-107(3)(b); 9 NYCRR § 466.11(b)(2).

leave of absence, or any combination therein. However, the law does not require that an employer remove any essential function of an employee's job as an accommodation. If an employer determines that an employee cannot perform the essential functions remotely or cannot grant other accommodation without causing undue hardship, then an employer may place that employee on an unpaid leave until such time as the accommodation is possible or, if leave is not an option, terminate the employee.

### Healthcare Workers

Mandatory vaccinations for healthcare workers have long been the policy of healthcare organizations, which courts have consistently upheld. New York State requires that all persons who work at hospitals,<sup>44</sup> nursing homes,<sup>45</sup> diagnostic and treatment centers,<sup>46</sup> certified home health agencies and programs,<sup>47</sup> licensed home care services,<sup>48</sup> and hospices<sup>49</sup> be vaccinated against measles and rubella. New York State requires employees of healthcare facilities, including hospitals, diagnostic and treatment centers and hospices, to be vaccinated against influenza or wear a surgical or procedure mask during "flu season," i.e., when influenza is prevalent as determined by the New York State Commissioner of Health.<sup>50</sup> Employees and residents of long-term care facilities, adult homes, adult day healthcare facilities, and enriched housing programs must receive an influenza vaccination annually.<sup>51</sup>

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<sup>44</sup> NYCRR Title 10, 405.3

<sup>45</sup> NYCRR Title 10, 415.26

<sup>46</sup> NYCRR Title 10, 751.6

<sup>47</sup> NYCRR Title 10, 763.13

<sup>48</sup> NYCRR Title 10, 766.11

<sup>49</sup> NYCRR Title 10, 794.3

<sup>50</sup> NYS Public Health Law Section 2168. *Regulation for Prevention of Influenza Transmission by Healthcare and Residential Facility and Agency Personnel*

<sup>51</sup> NYS Public Health Law Article 21-A *The Long-term Care Resident and Employee Immunization Act*

In accordance with those precedents, on August 16th, 2021, the State Department of Health announced that all hospital and long-term care workers must be vaccinated by September 27<sup>th</sup>, 2021. On August 26<sup>th</sup>, the NYS Public Health and Health Planning Council adopted emergency regulations requiring all health care workers and personnel of covered entities including hospitals, nursing homes, hospices and community-based health care programs and agencies to be fully vaccinated. The regulations allow certain medical exemptions but eliminate religious exemptions.

The policy and practice of mandatory vaccination for healthcare workers have withstood constitutional challenges in court. In 2016, for example, the Appellate Division in New York held that New York State had not exceeded its power and the regulation requiring healthcare workers to receive an influenza vaccination or wear a face mask was not “arbitrary or capricious, irrational or contrary to law.”<sup>52</sup>

### Universities and Schools

Courts have consistently recognized the “broad discretion of state power required for the protection of the public health”<sup>53</sup> to mandate vaccinations for elementary school students<sup>54</sup> and universities.<sup>55</sup> According to the National Conference of State Legislatures, all fifty states and the District of Columbia have laws requiring students to be vaccinated before attending school.<sup>56</sup> In

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<sup>52</sup> Spence v. Shah, 136 A.D.3d 1242, 1246 (App.Div 3d 2016).

<sup>53</sup> *Id.* at 177

<sup>54</sup> *Garcia v. New York City Dept. of Health and Mental Hygiene*, 31 A.D.3d 601, 621 (N.Y. 2018) (NYC Dept. of Health and Mental Hygiene was acting “...pursuant to its legislatively-delegated and long-exercised authority to regulate vaccinations” of children for influenza).

<sup>55</sup> *Klassen v. Trs. Of Ind. Univ.*, 2021 U.S. LEXIS 22785 (The 14<sup>th</sup> Amendment permits Indiana University to pursue a reasonable and due process of COVID-19 vaccination in the legitimate interest of public health for its students, faculty, and staff).

<sup>56</sup> National Conference of State Legislatures, *States with Religious and Philosophical Exemptions from School Immunization Requirements* States With Religious and Philosophical Exemptions From School Immunization Requirements (ncsl.org) (August 7, 2021)

New York State, for example, every student entering or attending public, private or parochial school must be vaccinated against diphtheria, tetanus, pertussis, measles, mumps, rubella, poliomyelitis, hepatitis B and varicella.<sup>57</sup> College, university and students attending post-secondary institutions in New York (registered for 6 or more credit hours) must demonstrate proof of immunity against measles, mumps and rubella subject to exemptions on medical and religious grounds.<sup>58</sup>

Exemptions from state-mandated vaccination vary from state to state: all fifty states allow for medical exemptions from school immunization requirements; 44 states and Washington D.C. grant religious exemptions; 15 states allow philosophical exemptions for children whose parents object to immunizations because of personal, moral or other beliefs; and there are currently no states that require children to receive COVID vaccination for school entry.<sup>59</sup> It should be noted that many states, including New York, align their vaccine requirements in accordance with recommendations from the Centers for Disease Control and Prevention's Advisory Committee on Immunization Practices.<sup>60</sup> There are six states that do not allow non-medical (i.e. religious and philosophical/personal) exemptions to school mandated vaccinations: Maine, Connecticut, New York,<sup>61</sup> West Virginia, Mississippi and California.<sup>62</sup> Although New York State continues to provide medical exemptions for public school age

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<sup>57</sup> New York State Public Health Law Section 2164 and New York Codes, Rules and Regulations (NYCRR) Title 10, Subpart 66-1

<sup>58</sup> NYS Public Health Law Section 2165 and NYCRR Title 10, Subpart 66-2.

<sup>59</sup> National Conference of State Legislatures, *States with Religious and Philosophical Exemptions from School Immunization Requirements* [States With Religious and Philosophical Exemptions From School Immunization Requirements \(ncsl.org\)](https://www.ncsl.org/legislatures/state-religious-philosophical-exemptions) (August 7, 2021).

<sup>60</sup> Centers for Disease Control and Prevention, *ACIP Vaccine Recommendations and Guidelines*. (ACIP recommends vaccines when the benefits outweigh the risks for a target population.) <https://www.cdc.gov/vaccines/hcp/acip-recs/index.html>.

<sup>61</sup> NYS Public Health Law Section 2164(8) provides for medical exemptions to immunization for schools and child care programs.

<sup>62</sup> National Conference of State Legislatures, *States with Religious and Philosophical Exemptions from School Immunization Requirements* [States With Religious and Philosophical Exemptions From School Immunization Requirements \(ncsl.org\)](https://www.ncsl.org/legislatures/state-religious-philosophical-exemptions)

students, the religious exemption was repealed in 2019<sup>63</sup> in response to a severe measles outbreak. A recent challenge to the repeal in the New York State Appellate Division by parents who, prior to the repeal, had been granted religious exemptions, was rejected.<sup>64</sup> In observing that “the sole purpose of the repeal is to make the vaccine requirement generally available to the public at large in order to achieve herd immunity”, the court held that “given the significant public health concern, the repeal is supported by a rational basis and does not violate the Free Exercise Clause.”<sup>65</sup> New York State law, however, continues to provide medical and religious exceptions to immunization mandates for students enrolled in colleges, universities and other post-secondary institutions.<sup>66</sup>

*Klaassen v. The Trustees of Indiana University* appears to be the first decision issued by a U.S. court regarding the constitutionality of a university’s COVID-19 vaccine mandate policy. The District Court for Northern Indiana addressed the question of whether the University acted constitutionally in mandating the COVID-19 vaccine for its students, and the court upheld the University’s mandate.

The decision responds to a preliminary injunction motion to prevent the implementation of the mandate, therefore it does not represent a final disposition of the case, but it may serve as an important bellwether for other colleges and universities seeking to implement similar vaccine mandate policies.

The court acknowledged that Indiana University’s policy has real implications. Specifically, students could be deprived of attending the university without being vaccinated or qualifying for an exemption. Eight students sued the University because of its vaccination

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<sup>63</sup> NYS Public Health Law Section 2164(9) (repealed June 13, 2019)

<sup>64</sup> *F.F. v. State of New York* 2021 NY Slip OP 01541 Decided on March 18, 2021.

<sup>65</sup> *Id.*

<sup>66</sup> NYS Public Health Law Section 2165.

mandate and because of the extra requirements of masking, testing, and social distancing that apply to those who receive an exemption. “They asked the court to enter a preliminary injunction – an extraordinary remedy that requires a strong showing that they will likely succeed on the merits of their claims, that they will sustain irreparable harm, and that the balance of harms and the public interest favor such a remedy.”<sup>67</sup>

The court denied the students’ motion, noting that students still had options with respect to the vaccine mandate, which applied for the Fall 2021 semester only. Students could choose to take the vaccine, apply for a religious exemption, apply for a medical exemption, apply for a medical deferral, take a semester off, or attend another university.

The court recognized the students’ significant liberty to refuse unwanted medical treatment, however, the court held that the Fourteenth Amendment permits the University to implement a reasonable vaccination policy meeting due process requirements in the legitimate interest of public health for its students, faculty and staff.

Most recently, Justice Amy Coney Barrett denied students’ challenge to Indiana University’s vaccine mandate without comment.<sup>68</sup>

### Public Employers

Although private employers generally have great latitude when deciding whether to implement vaccine mandates for employees, public employers have the additional consideration of the Taylor Law. The Taylor Law, officially entitled the Public Employees’ Fair Employment Act, is codified as Article 14 of the Civil Service Law. Enacted in 1967, the Taylor Law governs

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<sup>67</sup> Klaassen v. Trustees of Indiana University, 1:21-CV-238 DRL, 2021 WL 3073926, at \*1 (N.D. Ind. July 18, 2021)

<sup>68</sup> Klaassen v. Trustees of Indiana University, No. 21-2326, 2021 WL 3281209, (7th Cir. Aug. 2, 2021), cert. denied, 594 U.S. \_ (U.S. Aug. 12, 2021)( No. 21A15).



labor relations between public employers and public employees in New York State. The Taylor Law is administered by the Public Employment Relations Board (PERB).

As public employers, school districts and public universities in New York State have the duty to negotiate with certified or recognized employee organizations (labor unions) regarding mandatory subjects of bargaining. There is an open legal question as to whether a public employer's decision to require COVID-19 vaccination/testing is a mandatory subject of bargaining. There is little precedent from PERB regarding employee vaccinations generally, and it does not appear that we currently have any PERB decisions regarding the COVID-19 vaccine. Even if it is not a mandatory subject of bargaining, and vaccination/testing is something that can be unilaterally imposed by the employer, it is likely that the effects/impact of the employer's decision upon the union members must be negotiated. It must also be noted that medical exemptions and religious exemptions must be taken into account unless the employer is a covered entity subject to the emergency regulations recently adopted by the NYS Public Health and Health Planning Council mandating vaccination for all health care workers and personnel and eliminating religious exemptions.

## **V. Discussion of Strategies**

Increasing the rate of vaccination will require a variety of actions. Vaccine resistance has arisen on multiple accounts: The speed with which the vaccines have been developed; a pre-existing anti-vaccine movement; politics; distrust of the medical establishment; a belief that "it can't happen to me;" and an uncompromising emphasis on personal liberty. To meet these

varied rationales, responses must be a mix of carrots and sticks, as well as campaigns of education and persuasion. In addition, conversations with hard-to-reach communities in a spirit of cultural humility must continue through engagement with trusted community leaders.

The carrots thus far have taken a variety of forms. First and foremost is connecting vaccination to protection from the virus itself. For many, that has been enough. Others have responded to various minor incentives: lottery tickets, baseball tickets, movie passes. New York City Mayor DeBlasio has recently proposed \$100 payments to those who complete a full vaccine regimen.<sup>69</sup>

Some responses are a mix of carrot and stick. The denial of the ability to travel across borders was a stick, and returning this ability through “vaccine passports” – proof of vaccination – is a carrot. This concept has been extended beyond travel to entertainment and public gathering forums including concerts and sports matches.

The sticks are extending to college attendance. The New York State University system has announced that fall attendance will require proof of vaccination. Many of the State’s private universities have announced similar policies.<sup>70</sup>

In the face of the Delta variant, employers are beginning to require proof of vaccination. Employer mandates are supported by guidance from the U.S. EEOC and a recent U.S. Department of Justice advisory.<sup>71</sup> Both the State and City of New York have now announced requirements for full vaccination or a literal stick -- weekly nasal swab testing. The Governor went further, announcing that all patient-facing State employees must be fully vaccinated. A number of private employers have made similar announcements.

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<sup>69</sup> See COVID-19 Vaccine Incentives, <https://www1.nyc.gov/site/coronavirus/vaccines/vaccine-incentives.page>

<sup>70</sup> See What Colleges Require the COVID-19 Vaccine?, Aug. 12, 2021, <https://www.bestcolleges.com/blog/list-of-colleges-that-require-covid-19-vaccine/#new-york>

<sup>71</sup> EEOC, *supra* note 33, at K.1.

Continued incentives and mandates must comply with state and federal law and be supported. Public accommodations – stores, restaurants, theaters, stadiums, etc. – should be encouraged to require proof of vaccination, and explicitly authorized to do so if necessary. Public and private employers, especially health care providers, also should be encouraged to require proof of vaccination, and explicitly authorized to do so.

For incentives and mandates to be most effective, hearts and minds must be changed to willingly accept vaccination. The experience of illness and death will alter the risk/reward calculation for some. Other minds may change through interaction with influencers. The influencers may be, or at least appear to be, apolitical, such as Olivio Rodrigo’s outreach to young adults. Previous studies have demonstrated that respected celebrities and cultural icons have significant impact on public health behaviors and attitudes.<sup>72</sup> What could be accomplished if our cultural icons used the same level of expertise to influence vaccination acceptance that is used to sell car insurance or Tostitos?

Continued efforts must also be made through faith-based and other community groups. Priests, rabbis, imams and ministers must be enlisted with the same energy political candidates use when seeking election. The same is true for trusted community groups and leaders. As extensive as the efforts have been thus far, they have not yet been enough. Particular attention must be paid to Black, Latinx, and Indigenous communities, and their respective political leaders, faith-based leaders, medical and health and mental health professionals, athletes and entertainers all enlisted in the effort.

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<sup>72</sup> Hoffman et al., Celebrities’ impact on health-related knowledge, attitudes, behaviors and status outcomes: protocol for a systematic review, meta-analysis and met-regression analysis. *Syst. Rev.* 2017; 6: 13. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5251292/>

Political persuasion will be more difficult. There is no denying that COVID-19 has been made a political fault line. Nevertheless, some Republicans, including U.S. Senate Republican Leader Mitch McConnell, have publicly endorsed vaccination. As difficult as it may be, the President should take steps to induce Donald Trump to support vaccination. After all, it was Donald Trump who announced Operation Warp Speed.

Finally, vaccinations must be made physically accessible to those who are unvaccinated. Such efforts have been ongoing. They must continue and be well thought through. They should be tied to acceptance campaigns and in many cases will be local, such as setting up vaccination in a housing site or for outside a health club or concert. Employers can also establish on-site vaccination clinics for their employees.

In sum, there are many steps that can be taken, encouragement, incentives and requirements. The law is not an impediment to their success.

## **VI. Recommendations**

The Task Force recommends a comprehensive and re-invigorated campaign to eradicate Severe Acute Respiratory Syndrome Coronavirus 2 in New York State. The primary way to accomplish the goal is to vaccinate as many people as possible. A companion approach is to require masking of all persons in any indoor venue. The urgent need for strong and decisive action continues. It is imperative that every government unit, business, educational institution, union, and community-based organization recommit as one, to wipe out the virus. Many entities in these constituencies have already implemented on their own creative and effective ways to encourage vaccination and to make the opportunity for vaccination more available.

The Task Force makes a number of recommendations including requiring vaccination for many groups of individuals. In cases where mandating vaccinations is recommended, the law provides there must be “reasonable accommodation” to exempt an individual who provides convincing and acceptable documentation that he or she should be exempted from a vaccine requirement because of either a medical condition or a sincerely held religious belief, practice, or observance (hereinafter “exempt individual”). We believe that in such cases, masking and testing (at minimum weekly) must be required.

Finally, the Task Force calls for priority attention to glaring inequities across diverse populations that have been heightened during the pandemic, including limited access to public health protections for certain groups and subgroups. For example, Miller and colleagues (2021) report in *Health Affairs* that, “Black people in the highest income group experienced an increase of mortality of more than 3.5 times larger than the increase in mortality experienced by the poorest White people” on account of the pandemic (p. 1253).<sup>73</sup>

Strategies for dismantling racism and other structural forces and social determinants of health that have contributed to growing inequities and health disparities, especially for people and communities of color, must be deployed in working with all governmental and non-governmental actors through trusted community leaders and champions. In such contexts, the Task Force recommends that government take immediate steps to make vaccination available to all immigrants, refugees and asylum seekers and their children and families, whether in the community or in detention facilities, and to all persons incarcerated in the State of New York.

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<sup>73</sup> Miller et al., (2021). Estimated Mortality Increases During The COVID-19 Pandemic By Socioeconomic Status, Race And Ethnicity. *Health Affairs*, 40(8), 1252-1260. doi: 10.1377/hlthaff.2021.00414

1. **NYSBA urges all NYSBA members to be fully vaccinated against COVID-19. In fact, NYSBA urges all lawyers to be fully vaccinated. NYSBA calls on every bar association within the State and nation to urge their members to be fully vaccinated.**

**A. Recommend to the NYSBA** that a Call to Action be issued to all the members of the Association to be vaccinated, and in turn to encourage their families, friends and colleagues to be vaccinated. This Call to Action is grounded upon the epistemic access of members of the state bar in their privileged position as attorneys in the State of New York *and the cultural humility which they bring to these conversations with other communities.* NYSBA's Call to Action also stands as a model of leadership for other professional communities who are in a position to serve as trusted ambassadors to their constituencies in these vaccination efforts and conversations.

2. **NYSBA urges all employers to require that their employees be fully vaccinated. In this regard, NYSBA also urges all employers that have the capabilities to provide vaccines on-site, and to provide paid time-off for any employee who may suffer from temporary side-effects in the days post-vaccine. NYSBA now requires all its employees to be vaccinated as outlined below, and urges all law firms to do the same.**

**A. Recommend to employers** to require vaccination for current employees and applicants as a condition of employment when the employee's job requires work to be performed on the employer's premises or to conduct face-to-face business elsewhere

on behalf of the employer, subject to medical exemptions and other recognized exceptions under applicable law (e.g., disability/medical- including in some cases, pregnancy- and sincerely-held religious beliefs) and further subject to any collective-bargaining obligations. NYSBA will adopt this standard for its employees. NYSBA will urge all law firms to adopt this standard for all their employees.

- 3. NYSBA recognizes the herculean efforts of health care workers thus far. We have heard the calls from health care workers that New Yorkers and all Americans take steps to stop the spread of COVID-19. Health care workers must lead. Health care workers must be vaccinated. NYSBA endorses the State Department of Health Order, and the NYS Public Health and Health Planning Council emergency regulations requiring health care workers and personnel of all hospital, nursing home and other covered entities be vaccinated subject to certain medical exemptions but eliminating religious exemptions. NYSBA calls upon health care employers not covered by the emergency regulations to require that their patient-facing workforces be fully vaccinated against the vaccine. NYSBA also calls upon health care professional associations to urge that their members be fully vaccinated.**

**Recommend to the Commissioner/Department of Health as applicable;**

Direct each county and NYC to develop and implement by September 30th a plan for outreach to unvaccinated residents in their county, in order to encourage — such individuals to be vaccinated and such plans should be placed on the DOH website and include:

1. The particulars of assistance to individuals as to making an appointment and providing transportation for the individual to and from the vaccination site;
2. How vaccines would be made available to, and convenient for, the residents to obtain;
3. Initiatives to encourage vaccination by offering a financial benefit, similar to the NYC MTA's offering a free Metro card for vaccination; and
4. Include the community leaders, groups and organizations, such as schools, houses of worship and faith communities, day care centers, senior citizen centers, YWCAs and YMCAs, health clubs, homeless shelters, theatres or concert venues already enlisted or to be recruited to participate in the effort as Vaccine Champions and to make their locations available as sites for vaccination or to otherwise publicize the availability and location of where vaccines may be obtained.

4. **Recommend to the State Legislature, State Government officials and departments/offices:**

**A. Recommend** that actions, which were approved by the NYSBA House of Delegates on November 20, 2020 (attached hereto), be taken unless already implemented, including Public Health Legal Reforms, Legal Reforms in Care Provision Congregate and Home Care, Workforce and Schools; and COVID Vaccine and Virus Testing Legal Reforms and Guidelines be fully implemented.



**B. Recommend to the Honorable Kathleen M. Hochul that as Governor and/or local governments, she:**

Mandate that: **(1)** all State and local employees be masked during work hours when in the presence of others, **(2)** the Office of General Services require that only vaccinated (unless exempted and regularly tested) and masked individuals should be allowed to provide services under State contracts, and **(3)** each State Department and Office should prepare a plan for fostering vaccination and masking in connection with regulation of the activities for which they are responsible;

Encourage businesses to require of all individuals as a condition of entry and presence on their property: **(1)** either proof of vaccination or the results of a test within the past 24 hours showing that the individual is COVID-free and **(2)** the wearing of a mask.

**C. Recommend to the Department of Corrections** that immediate access to vaccination be provided in all correctional settings, as well as public health protections including masking and testing.

**D. Recommend to state, county, municipal or unit of local government, or officer, employee or agent of government** to that immediate access to vaccination be provided to all immigrants being held in civil immigration

detention in New York, including pregnant women, and require that such access to vaccination be a condition of any contract with private contractors operating detention facilities in New York, or terminate or not renew immigration detention agreements with U.S. Immigration and Customs Enforcement in New York State or its private contractors for purposes of civil immigration detention, and take all necessary steps to ensure all persons currently detained under such agreements have immediate access to vaccination and all other public health protections.

**E. Recommend to the Commissioner/Department of Education**, to require that all individuals applying or reapplying for a license under the Education Law, to provide proof of vaccination unless the individual provides documentation acceptable to the Department that he or she is an exempted individual. The good faith of the Department in making that determination should be presumed. The licensees would include without limitation physicians, physician assistants, surgical assistants, pharmacists, nurses and nurse practitioner, midwives, psychologists, social workers, mental health practitioners, respiratory therapists, respiratory therapy technicians, and clinical laboratory technologists, and for the DOE to recommend to school boards that school employees be vaccinated and at all times while on school property, be masked: and **Recommend to Department of State and Department of Financial Services** the same vaccination requirement for any occupational license.

**F. Recommend to the Department of Motor Vehicles,** to work with the Department of Health and each county to make vaccines available at each DMV location. In much of the state, DMV registration takes place at County Clerk offices.

5. **NYSBA urges that higher education institutions require that their students and workforces be fully vaccinated.**

6. **NYSBA recognizes the legitimate calls of teachers for safe teaching environments in schools. NYSBA also recognizes the need for children to return safely to schools. As a part of those safe teaching environments, NYSBA calls upon all teachers, aides, support staff and schools administrators to be fully vaccinated. NYSBA also calls upon the State Legislature to require COVID-19 vaccination for elementary school-age children when a vaccine becomes available and is approved by regulators and public health authorities.**

A. **Recommend to educational institutions,** to: **(1)** require vaccination as a condition of teaching, registration as a middle or high school or college student or volunteer except in those cases where the teacher or student provides documentation convincing to the educational institution that he or she is an exempted individual and in that case require regular testing no less than weekly; and **(2)** require each teacher, student and volunteer to wear a face covering or mask acceptable to the educational institution over the individual's nose and mouth for the entire time that the individual is on the

education institution's premises or conducting business on behalf of the educational institution.

7. **Recommend that businesses require proof of vaccination or negative test in last 24 hours for entry.**

A. **Recommend to businesses**, that, in order for an individual to enter onto and remain on the entity's premises, to require (1) proof either of vaccination or that the individual has been tested for the virus within the prior 24-hour period and found to be virus-free.

8. **NYSBA concludes that the law permits all these steps.**

9. **NYSBA calls for a strong, multi-faceted campaign to encourage vaccine acceptance, using people, places and message likely to be effective.**

**New York State Bar Association Emergency Task Force on Mandatory Vaccination and  
Safeguarding Public Health Members, Experts and Volunteers**

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## Appendix A

### NEW YORK STATE BAR ASSOCIATION COVID-19 RESOLUTIONS

Approved by House of Delegates: November 7, 2020

The following Resolutions, as clarified and revised, have been approved by the New York State Bar Association (NYSBA) House of Delegates (HOD) on November 7, 2020.

#### Resolution #1

##### Public Health Legal Reforms

The seriousness and magnitude of the present COVID-19 pandemic are unprecedented over the course of the last hundred years by any measure - the number of lives lost, the number of people afflicted with serious COVID-19 illness and the complications of pre-existing co-morbidities, the risks to health care workers and other frontline and essential workers, disruptions to businesses and the New York State (“the State”) economy, impacts upon employment and family life, and the profound trauma, losses and bereavement persons, families, communities, especially communities of color, have suffered and continue to suffer. Public health law and preparedness play an essential role in addressing disasters and emergencies. New York, like the rest of the country, was unprepared to deal with the pandemic. The report of the Health Law Section recommends reforms to public health law addressing identified gaps in the law to strengthen the preparedness and capacities of the State both during the present and in future pandemics, and to protect the public’s health.

**The New York State Bar Association recommends: State Government to:**

A.1.(a) Enact a **state emergency health powers act** addressing gaps in existing laws in New York, drawing upon the Model State Emergency Health Powers Act (MSEHPA), developed by the Center for Law and Public Health at Georgetown and John Hopkins Universities (2001), and other sources as appropriate;

A.1.(b) Adopt **crisis standards of care** addressing gaps in existing laws in New York, drawing upon the Crisis Standards of Care, developed by the Institute of Medicine (2012); The Arc, Bazelon Center for Mental Health Law, Center for Public Representation and Autistic Self Advocacy Network Evaluation Framework for Crisis Standard of Care Plans (Evaluation Framework); and other sources as appropriate.

## Resolution #1 (continued)

A.1.:

A.1.(c) Provide comprehensive workforce education and training in the implementation of the above state emergency health powers act and crisis standards, including proper use and disposal of PPE and other equipment;

A.2.(a) Appoint and maintain a core team of emergency preparedness experts to review evidentiary sources and draft legislation to strengthen emergency preparedness planning; and

A.2.(b) Evaluate the public benefit and costs of laws and/or regulations waived during the COVID-19 emergency, and the Executive Orders and emergency regulations issued in response to the COVID-19 emergency and consider eliminating or amending those laws and/or regulations, as appropriate.

B.1.(a) Adopt **resource allocation guidelines** addressing gaps in existing laws in New York, drawing upon the New York State Task Force on Life and the Law 2015 Report, Ventilator Allocation Guidelines, the Evaluation Framework, and other sources as appropriate;

B.1.(b) Issue emergency regulations mandating all providers and practitioners follow the ethics guidelines, and ensure:

- i. the needs of vulnerable populations, including persons and communities of color, older adults and nursing home residents, persons with disabilities, persons who are incarcerated, and immigrants, are met in a non-discriminatory manner in the implementation of emergency regulations and guidelines;
- ii. provision of palliative care to all persons as an ethical minimum to mitigate suffering among those who are in institutional, facility, residential, or home care settings during the COVID-19 crisis;
- iii. provision of education and training to physicians, health care practitioners, and institutional triage and ethics committees; and
- iv. provision of generalist-level palliative care education and training for all health care workers and health-related service workers in all settings who are providing supportive care.

B.2. Amend the New York State Public Health Law: Article 29-C “Health Care Proxy,” to require in the case of a State Disaster Emergency Declaration:

B.2.(a) at least one, rather than two, witnesses, or

B.2.(b) attestation by a notary public in person or remotely;



## **Resolution #1 (continued)**

B.2:

B.2.(c) adoption of legislation or regulation as necessary to implement:

- i. procedural requirements for remote witnessing and execution of a health care proxy;
- ii. specific language to be included in the attestation of the notary public;
- iii. that the services of a witness and a notary public be made available by the facility where the individual executing the health care proxy is being treated; and
- iv. that the services of a witness and notary public be provided to institutionalized individuals without charge and regardless of their ability to pay.

B.3. Nothing contained in the Resolutions herein calls for consideration of any proposed change to New York Law as to authority to terminate treatment over the objection of a patient or the patient's surrogate.

## **Resolution #2**

### **Legal Reforms in Care Provision, Congregate and Home Care, Workforce and Schools**

**The New York State Bar Association recommends: State Government to:**

A.1. Evaluate the public benefit and costs of continuing the following laws and/or regulations which were waived by executive orders, for possible repeal and/or amendment:

A.1.(a) Ability to Exceed Certified Bed Capacity for Acute Care Hospitals: Continue the waiver by the Governor's Executive Orders 202.1 and 202.10 of the DOH regulations governing certified bed restrictions for the pendency of the State Disaster Emergency.

A.1.(b) Temporary Changes to Existing Hospital Facility Licenses Services and the Construction and Operation of Temporary Hospital Locations and Extensions: Continue the waiver provided in Executive Orders 202.1 and 202.10 of the State requirements that restrict the ability of Article 28 facilities to reconfigure and expand operations as necessary, for the pendency of the State Disaster Emergency.

A.1.(c) Anti-Kickback and Stark (AKS) Law Compliance during the COVID-19 Emergency: New York State to adopt the waivers provided by CMS and the OIG as to the Anti-Kickback and Stark Laws in substantially similar form for the state versions of the Stark Law and AKS during the State Disaster Emergency, each as tailored for the particular statute at issue.

**Resolution #2** (continued)

A.2.:

A.2. Congregate Care and Home Care: Ensure, as applicable to all congregate settings and residents thereof, and recipients of home care, including:

A.2.(a) Older Adults, Persons with disabilities, Persons with disabilities in Residential Facilities or Group Homes, Persons confined in Psychiatric Centers, Nursing Home and Adult Care Facilities Residents, and Nursing Home Providers and Adult Care Facilities Operators:

- i. Equitable allocation of scarce resources from the Public Health and Social Services Emergency Fund—established by the CARES Act—to older adults and their health care providers, prioritizing under-resourced long-term care providers;
- ii. Adequate provision of PPE;
- iii. Adequate levels of staffing;
- iv. Adequate funding of employee testing;
- v. Consistent and timely tracking and reporting of case and death data;
- vi. Adoption of non-discriminatory crisis standards and ethics guidelines;
- vii. Recognition and honoring of Older New Yorkers’ and New Yorkers’ with disabilities right to health and human rights, including rights to be free from abuse and neglect and to care in the most integrated setting, as protected under federal law and international conventions; and
- viii. Adequate resources for the Office of the State Long Term Care Ombudsman, which provides advocacy for nursing home residents and families and helps residents understand and exercise their rights to quality care and quality of life.

A.2.(b) Persons incarcerated and correctional facilities and care: Ensure:

- i. Adequate access of persons incarcerated to COVID-19 testing, medical care and mental health and supportive services;
- ii. COVID-19 testing of correctional staff and adequate provision of gloves, masks and other protective equipment;
- iii. Release to the community of older persons and persons with disabilities who are incarcerated or living with advanced illness who do not pose a danger to the community;
- iv. Adequate funding of prison-to-community transitions including access to housing, meals, and supportive services, and non-discriminatory access to employment opportunities; and

**Resolution #2** (continued)

A.2.(b):

- v. Recognition and honoring of the right to health and human rights of persons who are incarcerated, as protected under international conventions.

A.2.(c) Immigrants in detention facilities: In its exercise of state police powers in the COVID-19 public health emergency, New York State must take steps, similar to those outlined above, in cooperation with federal agencies, to ensure:

- i. Reduction of risk of the spread of COVID-19 among immigrants being held in detention centers, and recognition and honoring of immigrants' right to health and human rights, as protected under international conventions.

A.3. Telehealth: Eliminate restrictions on the provision of care by telehealth and increase reimbursement for services provided via telehealth.

B.1.(a) Prioritize additional childcare funding and implementing novel childcare staffing strategies, such as utilizing staffing firms dedicated to child care to supplement the childcare workforce, to ensure quality childcare services, effective and sustainable facility operations and the health and safety of our children and childcare providers, enabling businesses to effectively reopen with sufficient childcare resources and support;

B.1.(b) Prioritize education and training pertaining to crisis standards to assure all practitioners are supported as they exercise professional medical judgment in triage, treatment and services; and

B.1.(c) Prioritize enhanced employee assistance and other mental health counseling programs to address and mitigate the moral distress suffered by frontline workers under crisis conditions.

B.2. Enhance regulatory oversight, to ensure:

B.2.(a) adequate and non-discriminatory allocation of resources to persons and communities of color and vulnerable populations in conformity with state and federal laws;

B.2.(b) equitable access of persons and communities of color and vulnerable populations to health and mental health services in conformity with state and federal law, including palliative care as an ethical minimum to mitigate suffering among those persons who remain in institutional, facility, residential or home care settings, or are hospitalized during the COVID-19 crisis; and

## **Resolution #2 (continued)**

B.2.:

B.2.(c) provision of PPE and testing to essential workers at highest risk in delivering essential services to vulnerable populations.

B.3. Monitor conformity with state and federal laws barring discrimination.

## **Resolution #3**

### **COVID-19 Vaccine and Virus Testing: Legal Reforms and Guidelines**

The authority of the State to respond to a public health threat and public health crisis is well-established in constitutional law and statute. In balancing protection of the public's health and civil liberties, the Public Health Law recognizes our interdependence, and that a person's health, or her/his/their lack of health, can and does affect others. This is particularly true for communicable and infectious diseases. Since the discovery of the smallpox vaccine in 1796, vaccines have played a crucial role in preventing the spread of dangerous and often fatal diseases. The New York Public Health Law mandates several vaccinations for students at school-age up through post-secondary degree educational levels, and for health care workers. The Public Health Law also mandates treatment for certain communicable diseases, such as tuberculosis.

#### **The New York State Bar Association recommends:**

To protect the public's health, it would be useful to provide guidance, consistent with existing law or a state emergency health powers act as proposed in Resolution #1, to assist state officials and state and local public health authorities should it be necessary for the state to consider the possibility of enacting a vaccine mandate. A vaccine must not only be safe and efficacious; it must be publicly perceived as safe and efficacious. Diverse populations, including people of color, older adults, women, and other marginalized groups, must be represented in clinical trials. The trials also must follow rigorous protocols that will establish a vaccine's safety and efficacy through expert consensus of the medical and scientific communities.<sup>1</sup>

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<sup>1</sup> The National Academies of Sciences, Engineering and Medicine is an example of a recognized organization of medical and scientific experts that assists U.S. policymakers, such as in planning for equitable allocation of COVID-19 vaccines.

It is noted further that nothing in this Resolution or the underlying Report should be regarded as suggesting that emergency use authorization should be considered in determinations concerning any immunization requirement.

## **Resolution #3 (continued)**

### **State Government to:**

**A.1. Ensure Access to Virus Testing:** Establish a coordinated statewide plan for Virus Testing to ensure:

A.1.(a) frontline health care workers are prioritized in access to rapid diagnostic testing; and

A.1.(b) the most vulnerable individuals from health status and essential business/employee standpoint have equitable access to rapid diagnostic testing.

**A.2. Adopt Ethical Principles Guiding Equitable Allocation and Distribution:** Once available, a vaccine should first be equitably allocated and distributed based upon widely accepted ethical principles including maximizing benefit to the society as a whole through reducing transmission and morbidity and mortality; recognizing the equal value, worth and dignity of all human persons and human lives; mitigating suffering, health inequities and disparities; and ensuring fairness and transparency in decision making. Health care workers and other essential workers most endangered by COVID-19 and populations at highest risk must be afforded priority access to a vaccine.

**A.3. Encourage Public Acceptance and Educational Programs:** Efforts must be made to encourage public acceptance. Public health authorities should build on existing systems and infrastructures including community-based organizations and networks. The campaign must acknowledge distrust in communities of color from a history of medical exploitation. Efforts should include linguistically and culturally competent educational and acceptance programs, and stakeholder community engagement strategies, to build public trust, widely encouraging vaccine uptake and addressing vaccine hesitancy.

**A.4. Take Steps to Protect the Public's Health and Consider Mandate As May Be Necessary to Reduce Risks of Transmission and Morbidity and Mortality:** Our state and nation have suffered terrible losses from COVID-19. As of September 3, 2020, 186,000 Americans, including 26,000 New Yorkers, have lost their lives. Unemployment has been at the highest levels since the Great Depression. Numerous businesses have closed.

Should the level of immunity be deemed insufficient by expert medical and scientific consensus to check the spread of COVID-19 and reduce morbidity and mortality, a mandate and state action should be considered, as may be warranted, only after the following conditions are met and as a less restrictive and intrusive alternative to isolation, subject to exception for personal medical reasons:

A.4.(a) evidence of properly conducted and adequate clinical trials;

A.4.(b) reasonable efforts to promote public acceptance;

**Resolution #3** (continued)

A.4.:

A.4.(c) fact-specific assessment of the threat to the public health in various populations and communities; and

A.4.(d) expert medical and scientific consensus regarding the safety and efficacy of a vaccine and the need for immunization.

Enforcement of any immunization requirement should be along the lines of current New York law.