

2022

## Vaccine Passports and the Right to Exclude: How the Court's Holding in *Cedar Point Nursery v. Hassid* Could Light Fire to the Debate on the Constitutionality of Vaccine Passport Requirements and Bans

John A. Kuzora

Follow this and additional works at: <https://scholarship.law.campbell.edu/clr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

John A. Kuzora, *Vaccine Passports and the Right to Exclude: How the Court's Holding in Cedar Point Nursery v. Hassid Could Light Fire to the Debate on the Constitutionality of Vaccine Passport Requirements and Bans*, 44 CAMPBELL L. REV. 395 (2022).

This Comment is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized editor of Scholarly Repository @ Campbell University School of Law.

# Vaccine Passports and the Right to Exclude: How the Court's Holding in *Cedar Point Nursery v. Hassid* could Light Fire to the Debate on the Constitutionality of Vaccine Passport Requirements and Bans

## ABSTRACT

*The COVID-19 pandemic gave America its biggest health crisis in the last one hundred years. In efforts to resolve this crisis, several state governments have issued various types of public health measures. Three of these measures are Vaccine Mandates, Vaccine Passport Requirements, and Vaccine Passport Bans. This Comment explores the legality of these three public health measures through the unique lens of the Fifth Amendment Takings Clause. Specifically, this Comment focuses on how both Vaccine Passport Requirements and Bans infringe on property owners' rights to include and exclude unvaccinated patrons. This, in turn, results in a physical taking under the Supreme Court's current jurisprudence.\**

ABSTRACT .....	395
INTRODUCTION .....	396
I. BACKGROUND ON THE COVID-19 PANDEMIC.....	397
II. VACCINE MANDATES .....	400
A. State Vaccine Mandates .....	400
B. Private Employer-Issued Vaccine Mandates.....	401
III. VACCINE PASSPORTS AND VACCINE PASSPORT BANS.....	403
A. Vaccine Passport Bans .....	404
B. Vaccine Passport Requirements .....	405
C. The Legal Significance of a Religious Exemption.....	406
IV. PROPERTY LAW, THE TAKINGS CLAUSE, AND THE RIGHT TO EXCLUDE .....	408
A. The Takings Clause: Physical Versus Regulatory Takings....	408
B. The Right to Exclude .....	412

---

\* This abstract was written posthumously by the *Campbell Law Review* Board of Editors.

CONCLUSION .....415

## INTRODUCTION

Since March of 2020, America has been faced with a public health emergency of a scale and scope unseen since the Spanish Flu of 1919.<sup>1</sup> The COVID-19 pandemic has brought to the surface national debate over the efficacy of public health measures enacted to “slow the spread” of COVID-19, such as mask mandates, stay-at-home orders, and mandatory vaccinations.<sup>2</sup> Accompanying each of these public health measures are issues of legal authority.

This Comment will examine the legal issues presented by three related public health measures: Vaccine Mandates, Vaccine Passport Requirements, and Vaccine Passport Bans. For the purposes of this Comment, a Vaccine Mandate refers to a law or regulation requiring vaccination. A Vaccine Passport Requirement is a law or ordinance requiring patrons or employees to provide proof of vaccination against COVID-19 before entering certain businesses and public places such as restaurants, theaters, and health clubs. Conversely, a Vaccine Passport Ban is a law or regulation preventing a business from requiring proof of vaccination for service or employment. It can be helpful to consider a Vaccine Passport Requirement as a law requiring other entities, such as private businesses and schools, to issue their own Vaccine Mandates, while a Vaccine Passport Ban forbids such entities from mandating vaccination. While most scholarship in this area has examined the issue through the lens of substantive due process,<sup>3</sup> the

---

1. *COVID-19 Pandemic in the United States*, WIKIPEDIA (Feb. 21, 2022), [https://en.wikipedia.org/wiki/COVID-19\\_pandemic\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/COVID-19_pandemic_in_the_United_States) [<https://perma.cc/MSW8-SVVF>] (noting that the death toll from COVID-19 exceeded that of the Spanish flu in September 2021, making COVID “the deadliest respiratory pandemic in recent American history”).

2. *Id.*

3. *See, e.g.*, Julie Fekete, *Required Protections for the Right of Medical Exemption From Vaccine Mandates: A Modern Analysis of a Deeply Rooted Fundamental Right*, 15 CHARLESTON L. REV. 821, 823 (2021) (arguing that “the right to a medical exemption is . . . protected by the Due Process Clause of the Fourteenth Amendment”).

First Amendment,<sup>4</sup> and the general police power,<sup>5</sup> this Comment focuses on how such laws infringe upon the property rights guaranteed by the Fifth Amendment of the United States Constitution. Additionally, this Comment focuses solely on the legal issues, preferring to leave the medical and scientific debate in the hands of those more qualified than lawyers to debate such issues—namely, doctors and scientists.

Part I of this Comment provides a brief background on the COVID-19 pandemic as well as both the political and legal issues surrounding the governmental response. Part II examines the foundational legal issue of Vaccine Mandates in both the public and private spheres. Part III examines the issue of Vaccine Passport Requirements and Bans through specific examples of each type: a New York City Vaccine Passport Requirement and a Florida State Vaccine Passport Ban. Part IV examines the property law concept of a bundle of sticks and the Takings Clause, focusing on the recent Supreme Court decision in *Cedar Point Nursery v. Hassid*.<sup>6</sup> Part IV also explores the significance of the right to exclude for the legality of Vaccine Passport Requirements and Bans. Finally, this Comment concludes by proposing that under current Supreme Court jurisprudence, a Vaccine Passport Ban would constitute a physical taking by appropriating a property owner's right to exclude. Additionally, the same legal reasoning may apply to Vaccine Passport Requirements based on the principle that the right to exclude inherently implies a right to include. By infringing upon a property owner's right to include the unvaccinated, a Vaccine Passport Requirement would constitute a physical taking identical to that presented by a Vaccine Passport Ban.

## I. BACKGROUND ON THE COVID-19 PANDEMIC

In early 2020, the first case of COVID-19 was reported in the United States.<sup>7</sup> By the end of the year, the disease had caused more than 377,000

---

4. See, e.g., Amanda Naprawa, *Don't Give Your Kid That Shot!: The Public Health Threat Posed by Anti-Vaccine Speech and Why Such Speech Is Not Guaranteed Full Protection Under the First Amendment*, 11 CARDOZO PUB. L. POL'Y & ETHICS 473, 478 (2013) (arguing that "speech [that] has the specifically desired outcome of decreasing vaccination and thereby causes infectious diseases to spread . . . is . . . akin to shouting fire in a crowded theatre").

5. See, e.g., Tryon P. Woods, *Public Health Policing and the Case Against Vaccine Mandates*, 33 ST. THOMAS L. REV. 219, 222 (2021) (describing pandemic control measures as "policing by medical science and public health institutions in the service of an expanded social control apparatus").

6. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

7. *COVID-19 Pandemic in the United States*, *supra* note 1.

deaths in the country.<sup>8</sup> Federal, state, and local governments across the country have enacted a cornucopia of policies aimed at limiting the effects of the pandemic on Americans.<sup>9</sup> These policies have included stay-at-home orders, mask mandates, and travel bans, to name just a few.<sup>10</sup>

Two highly debated public health measures are the Vaccine Mandate and the closely related Vaccine Passport. It bears remembering that a Vaccine Mandate refers to a rule, ordinance, regulation, or statute that compels vaccination. A Vaccine Mandate can be issued by a state or local government as a prerequisite for school attendance or as a response to a public health concern. Additionally, a private employer can issue a Vaccine Mandate in the form of a rule requiring all employees receive certain vaccinations. In contrast, a Vaccine Passport law refers to a government ordinance, regulation, or statute requiring either physical or digital proof of vaccination in exchange for entry or employment. As previously stated, it can be helpful to think of a Vaccine Passport Requirement as a law that requires other entities to issue their own Vaccine Mandates. For example, a New York City Vaccine Passport Requirement, issued as an Executive Order, compels private businesses to require employees and patrons to show proof of COVID-19 vaccination at various dining, entertainment, and fitness venues.<sup>11</sup> In effect, the regulation compels private entities to issue a Vaccine Mandate, requiring vaccination against COVID-19 as a condition of employment or service, thereby denying the private entity the right to decide on the issue of vaccination for itself. Conversely, a Vaccine Passport Ban is a law forbidding entities from issuing their own Vaccine Mandates. A forthcoming example discussed below is a Florida law forbidding businesses, government entities, and schools from requiring proof of COVID-19 vaccination in most settings.<sup>12</sup>

Like many issues involving the pandemic, opinions about vaccine passports break roughly along party lines, with former President Trump voters being nearly five times as likely as President Biden voters to oppose regulations requiring Vaccine Mandates (i.e., Vaccine Passport

---

8. Farida B. Ahmad et al., Ctrs. for Disease Control & Prevention, *Provisional Mortality Data—United States, 2020*, 70 MORBIDITY & MORTALITY WKLY. REP. 519, 519 (2021).

9. Dena Bunis & Jenny Rough, *List of Coronavirus-Related Restrictions in Every State*, AARP (Mar. 11, 2022) <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html> [<https://perma.cc/9UFY-TZWK>].

10. *Id.*

11. See Emergency Exec. Order No. 239, Office of the Mayor, City of New York (Sept. 14, 2021).

12. FLA. STAT. ANN. § 381.00316 (West 2021).

Requirements).<sup>13</sup> Additionally, the issues of Vaccine Passport Requirements and Bans have been the topic of extensive public debate that has extended beyond the political spectrum to the world of popular culture. Many music artists, such as The Eagles, Maroon 5, and The Killers, have required attendees at their shows to provide a Vaccine Passport or proof of a recent negative COVID-19 test.<sup>14</sup> Others, including Travis Tritt, Van Morrison, and Eric Clapton, have refused to perform at venues requiring Vaccine Passports.<sup>15</sup> In the sports world, local Vaccine Passport regulations have precluded unvaccinated players on the Golden State Warriors, New York Knicks, and Brooklyn Nets from playing home games in the National Basketball Association.<sup>16</sup> Given the widespread discussion of Vaccine Mandates, Vaccine Passport Requirements, and Passport Bans, it is important to understand the rationale for and against each.

Those in support of Vaccine Passports argue that such a regulatory scheme is the cost society must pay to return to normal daily life.<sup>17</sup> These regulations are justified by the duty of easy rescue, a theory that members of society have a collective duty to rescue each other when the cost of such a rescue is minimal.<sup>18</sup> Philosopher Peter Singer illustrated this theory with the following example: “If you are walking past a shallow pond and see a child drowning in it, you ought to wade in and pull the child out. This will mean getting your clothes muddy, but this is insignificant, while the death

---

13. Nicholas Reimann, *Here Are the Groups Who Don't Want a Vaccine—and Trump Voters Are Near Top*, FORBES (Mar. 11, 2021, 5:10 PM), <https://www.forbes.com/sites/nicholasreimann/2021/03/11/here-are-the-groups-who-dont-want-a-vaccine-and-trump-voters-are-near-top/> [https://perma.cc/9JJM-GSTS].

14. Tommy Beer, *Here are the Bands Requiring Fans to Provide Proof of Vaccination or a Negative Covid Test to Attend Their Shows*, FORBES (Aug. 14, 2021, 1:03 PM), <https://www.forbes.com/sites/tommybeer/2021/08/12/here-are-the-bands-requiring-fans-to-provide-proof-of-vaccination-or-a-negative-covid-test-to-attend-their-shows/?sh=3ef35463ecd0> [https://perma.cc/77JM-JB6K].

15. Kristen Hall, *Music Industry Weighs Vaccine Mandates, But Politics Collide*, AP NEWS (Aug. 26, 2021), <https://apnews.com/article/entertainment-lifestyle-health-arts-and-entertainment-coronavirus-pandemic-ab306f0473b79731a3b8cd7680afd37f> [https://perma.cc/VQ3V-6GGP].

16. NBA.com Staff, *FAQ: How NBA Teams are Impacted by City-Imposed COVID-19 Vaccine Mandates*, SPORTING NEWS (Oct. 7, 2021), <https://www.sportingnews.com/ca/nba/news/faq-how-nba-teams-are-impacted-by-city-imposed-covid-19-vaccine-mandates/qzxx843c5ncls1jqdv718s2zi8> [https://perma.cc/BE8Z-SD53].

17. See, e.g., Barbara Jacquelyn Sahakian et al., *Vaccine Passports: Why They are Good for Society*, THE CONVERSATION (May 13, 2021, 6:32 AM), <https://theconversation.com/vaccine-passports-why-they-are-good-for-society-160419> [https://perma.cc/F6A5-SWJM].

18. *Id.*

of the child would be a tragedy.”<sup>19</sup> Those in support argue that is precisely the situation presented by Vaccine Passport Requirements: the minimal individual cost of vaccination is far outweighed by the collective societal benefits.<sup>20</sup> In contrast, many against Vaccine Passports cite concerns of privacy and government overreach,<sup>21</sup> with one critic expressing a fear of a world “divided between the jabs and the jab-nots[.]”<sup>22</sup> Those in opposition believe such laws “coerce people into accepting a vaccine in exchange for recovering their basic liberties.”<sup>23</sup> Other critics focus on the fact that the COVID-19 vaccination is not equally accessible to all members of society and believe Vaccine Passport Requirements would exacerbate existing inequalities.<sup>24</sup> Not surprisingly, the issue has also extended to the courts of law.

## II. VACCINE MANDATES

The power to compel vaccination in the form of a Vaccine Mandate is foundational to any law requiring proof of vaccination for entry. Vaccine Mandates issued by both states and private employers present distinct legal issues that will be discussed in turn.

### A. State Vaccine Mandates

State-issued Vaccine Mandates have a long history in this country, dating back to the Continental Army, when General George Washington compelled the inoculation of his troops against smallpox.<sup>25</sup> In addition, all fifty

---

19. *Id.* (citing Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFFS. 229, 231 (1972)).

20. *Id.*

21. See, e.g., Staff, *Governor Ron DeSantis Signs Landmark Legislation to Ban Vaccine Passports and Stem Government Overreach*, RON DESANTIS, 46TH GOVERNOR OF FLA. (May 3, 2021), <https://www.flgov.com/2021/05/03/governor-ron-desantis-signs-landmark-legislation-to-ban-vaccine-passports-and-stem-government-overreach/> [<https://perma.cc/3QTL-KGV7>] [hereinafter *DeSantis Signs Legislation*].

22. Lionel Laurent, *Covid-19 Vaccine Passports Are a Ticket to Nowhere*, BLOOMBERG OPINION (Jan. 20, 2021, 1:00 AM), <https://www.bloomberg.com/opinion/articles/2021-01-20/covid-vaccine-passports-are-a-ticket-to-nowhere> [<https://perma.cc/7FKS-DTLU>].

23. Mike Fox, *Professor Explores Legality, Efficacy of Vaccine Passports*, UNIV. VA. SCH. L. (Apr. 19, 2021), <https://www.law.virginia.edu/news/202104/professor-explores-legality-efficacy-vaccine-passports> [<https://perma.cc/7XQE-FPNJ>].

24. See, e.g., Seema Mohapatra, *Passports of Privilege*, 70 AM. U. L. REV. 1729, 1733 (2021) (“The COVID-19 pandemic has laid bare deep inequities in our society, and . . . the use of immunity passports and vaccine passports would further exacerbate such chasms.”).

25. Christian Spencer, *Why George Washington Mandated Inoculations*, THE HILL: CHANGING AMERICA (Sept. 20, 2021), <https://thehill.com/changing-america/well->

states and the District of Columbia have laws compelling students to receive certain vaccinations before attending public school.<sup>26</sup>

Finally, compulsory vaccination laws enacted by state and local authorities have been upheld by the Supreme Court.<sup>27</sup> In *Jacobson v. Massachusetts*, the Court considered the constitutionality of a Massachusetts statute compelling vaccination against smallpox under certain circumstances.<sup>28</sup> Violation of the statute was punishable by a five dollar fine,<sup>29</sup> roughly equivalent to a \$150 fine today.<sup>30</sup> While noting that “for nearly a century most of the members of the medical profession have regarded vaccination . . . as a preventive of smallpox[,]”<sup>31</sup> the Court held that the Massachusetts statute was not repugnant to the rights guaranteed by the United States Constitution.<sup>32</sup> The Court reasoned that the vaccination program had a “real or substantial relation to the protection of the public health and the public safety” and, as such, was a proper exercise of the general state police power.<sup>33</sup> Although *Jacobson* was decided before the current tiers of constitutional scrutiny were created,<sup>34</sup> most legal scholars acknowledge that *Jacobson* is accepted as authority for Vaccine Mandates imposed by state governments and generally stands on firm legal ground.<sup>35</sup>

#### B. Private Employer-Issued Vaccine Mandates

The power of private employers to require employees to get vaccinated also stands on relatively solid legal footing. In most states, employer-employee relationships are considered “at will,” allowing employers to terminate workers for not complying with companywide Vaccine Mandates.<sup>36</sup>

---

being/prevention-cures/573043-why-george-washington-mandated-vaccines [https://perma.cc/4DRN-KPZD].

26. *Klaassen v. Trs. of Ind. Univ.*, 549 F. Supp. 836, 863 (N.D. Ind. 2021), *vacated as moot*, 24 F.4th 638 (7th Cir. 2022).

27. *See generally* *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

28. *Id.* at 12.

29. *Id.*

30. *Value of \$5 from 1905 to 2022*, CPI INFLATION CALCULATOR, <https://www.in2013dollars.com/us/inflation/1905?amount=5> [https://perma.cc/WQ38-DLAS].

31. *Jacobson*, 197 U.S. at 23–24.

32. *Id.* at 39.

33. *Id.* at 31.

34. Mohapatra, *supra* note 24, at 1744.

35. *Id.*

36. Robert Iafolla, *Can Your Boss Force Your Vaccination? Employer Mandates Explained*, BLOOMBERG LAW (Dec. 10, 2020, 5:46 AM),

Additionally, employers have a “duty to provide a safe and healthy workplace[.]”<sup>37</sup> and employers with a unionized workforce may have a legal obligation to collectively bargain the issue of compulsory vaccination.<sup>38</sup>

One important legal limitation on the right of private entities to issue Vaccine Mandates is religious exemptions. The 1964 Civil Rights Act provides a legal basis for workers to seek a religious exemption from employer-issued Vaccine Mandates.<sup>39</sup> The Act allows an employee to request an exception to a job requirement if the requirement conflicts with a sincerely held religious belief.<sup>40</sup> However, this legal basis is limited if such an accommodation would result in an “undue hardship” on the employer.<sup>41</sup> In *Trans World Airlines, Inc. v. Hardison*, the Court determined that forcing employer TWA to fill an employee’s Saturday shifts with more senior employees who demanded higher compensation was an “undue burden” under the Act.<sup>42</sup> The Court announced that any accommodation to an employee’s religious exemption that required TWA “to bear more than a *de minimis* cost . . . is an undue hardship.”<sup>43</sup> While employee mandates not allowing for a religious exemption are likely to be challenged, under *Hardison*, an employer would prevail provided it could show that unvaccinated employees force the employer to bear more than a *de minimis* cost. Most likely, any increase in sick days or employer-paid healthcare costs associated with vaccine status would easily exceed the *de minimis* cost threshold.

In summary, both state and private employer-issued Vaccine Mandates are supported by historical and legal precedent. While there are certain to be legal challenges, most of the recent case law suggests that Vaccine Mandates are not going anywhere. However, until the current cases

---

<https://news.bloomberglaw.com/daily-labor-report/covid-19-vaccines-at-work-employer-mandates-explained> [<https://perma.cc/3TGH-PJGK>].

37. *Id.*

38. Robert Iafolla, *Vaccine Mandates Withstand Challenges as Suits Surge Across U.S.*, BLOOMBERG L. (Oct. 14, 2021, 5:31 AM), <https://news.bloomberglaw.com/daily-labor-report/vaccine-mandates-withstand-challenges-as-lawsuits-proliferate> [<https://perma.cc/RK5L-Y6VZ>].

39. Robert Iafolla, *Religious Vaccine Objections to Clash with Employer Defense*, BLOOMBERG L. (Dec. 28, 2020, 5:30 AM), <https://news.bloomberglaw.com/daily-labor-report/religious-vaccine-objections-to-clash-with-employer-defense> [<https://perma.cc/KD64-Y6BZ>].

40. Hayley Fowler, *Religious Exemptions to COVID Vaccine: What Counts, What Doesn't and How It Works*, MIA. HERALD (Nov. 23, 2021, 2:56 PM), <https://www.miami-herald.com/news/coronavirus/article255509366.html> [<https://perma.cc/54JP-V2R3>].

41. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977).

42. *Id.* at 84.

43. *Id.*

progress through the system to a final ruling on the merits, these issues remain uncertain.

### III. VACCINE PASSPORTS AND VACCINE PASSPORT BANS

On September 10, 2021, President Joe Biden announced plans for the Occupational Safety and Health Administration (OSHA) to require employers with one hundred employees or more to mandate either COVID-19 vaccination or regular testing for employees, thrusting the issue of Vaccine Passports to the forefront of America's political discourse.<sup>44</sup> Although called a "Vaccine Mandate," under the definitions set forth in this Comment, the proposed regulation functioned as a Vaccine Passport Requirement, compelling employers of a certain size to mandate vaccinations for employees.<sup>45</sup> Predictably, approximately six out of ten Republicans opposed the mandate and eight out of ten Democrats supported it.<sup>46</sup>

On January 13, 2022, the Supreme Court stayed enforcement of the OSHA mandate, agreeing that the challengers are likely to prevail on their claim that OSHA lacked authority under federal law to impose the mandate.<sup>47</sup> The Court noted that federal law authorizes OSHA "to set *workplace* safety standards, not broad public health measures."<sup>48</sup> It explained that while COVID-19 may occur in many workplaces, it is "not an *occupational* hazard . . . COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather."<sup>49</sup> Accordingly, the Vaccine Mandate significantly expanded OSHA's regulatory authority beyond mere occupational risks to broader public health risks without clear congressional authorization.<sup>50</sup>

---

44. See Shannon Pettypiece, *Biden Employer Vaccine Mandate Could be Finalized as Early as Next Week*, NBC NEWS (Oct. 13, 2021, 11:59 AM), <https://www.nbcnews.com/politics/white-house/biden-vaccine-mandate-could-be-finalized-early-next-week-n1281423> [<https://perma.cc/9JLV-8KP3>].

45. *Id.*

46. Scott Clement et al., *As Coronavirus Fears Spike, Biden's Ratings Sag and Workers Split on Vaccine Mandates*, *Post-ABC Poll Finds*, WASH. POST (Sept. 5, 2021, 12:01 AM), [https://www.washingtonpost.com/politics/post-abc-poll-coronavirus/2021/09/04/94add942-0cde-11ec-aea1-42a8138f132a\\_story.html](https://www.washingtonpost.com/politics/post-abc-poll-coronavirus/2021/09/04/94add942-0cde-11ec-aea1-42a8138f132a_story.html) [<https://perma.cc/UVX8-RSWK>].

47. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S.Ct. 661, 663 (2022) (per curiam).

48. *Id.* at 666.

49. *Id.*

50. *Id.*

While the federal government may not have power to impose Vaccine Mandates in many contexts,<sup>51</sup> state governments have broader authority to do so under their general police powers, as *Jacobson* recognized.<sup>52</sup> This Part examines the distinct legal issues presented by Vaccine Passport Requirements and Bans imposed by state governments and concludes with an examination of the legal importance of a religious exemption.

#### A. Vaccine Passport Bans

It bears remembering that a Vaccine Passport Ban refers to a state or local regulation that forbids an entity from requiring proof of vaccination for entry or employment. The constitutional issues presented by such laws will be illustrated through Florida Statute Section 381.00316 and a case challenging that statute, *Norwegian Cruise Line Holdings v. Rivkees*.<sup>53</sup> Additionally, this Comment argues in Part IV that Vaccine Passport Bans appropriate a property owner's right to exclude, an essential property right.

Florida's Vaccine Passport Ban was at issue in the United States District Court for the Southern District of Florida in an action brought by Norwegian Cruise Lines.<sup>54</sup> The suit challenged the Florida statute on multiple constitutional grounds, asserting that the statute was repugnant to the First Amendment, the Dormant Commerce Clause, and the Fourteenth Amendment Due Process Clause.<sup>55</sup> In granting the plaintiff's motion for preliminary injunction, the court found the plaintiff was likely to succeed on the merits of its First Amendment<sup>56</sup> and Dormant Commerce Clause<sup>57</sup> claims. Reasoning that businesses are allowed to demand other forms of documentation from customers, such as a driver's license, the court deemed the law a content-based restriction on speech, which triggered strict scrutiny.<sup>58</sup> Additionally, the state failed to set forth any evidence of a real problem that

---

51. The same day the Supreme Court stayed the OSHA mandate, it declined to stay a Department of Health and Human Services mandate that required recipients of Medicare and Medicaid funding to ensure that staff members—unless exempt for religious or medical reasons—be vaccinated against COVID 19. *Biden v. Missouri*, 142 S. Ct. 647, 650 (2022) (per curiam). The Court reasoned that the vaccine mandate in this case was a permissible condition on receipt of federal funding because it was designed to protect patient health and safety. *Id.* at 4–5.

52. *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905).

53. *Norwegian Cruise Line Holdings v. Rivkees*, No. 21-22492-CIV, 2021 WL 3471585 (S.D. Fla. Aug. 8, 2021).

54. *Id.* at \*1.

55. *Id.*

56. *Id.* at \*17.

57. *Id.* at \*23.

58. *Id.* at \*9 n.31.

would justify even a *substantial* government interest.<sup>59</sup> However, the plaintiff did not argue, nor did the district court consider, the state law as an issue of an improper taking under the Fifth Amendment.

### B. Vaccine Passport Requirements

Vaccine Passport Requirements are not immune to legal challenge. In a recent New York case, seventeen healthcare professionals challenged a New York State Vaccine Passport Requirement for healthcare employees.<sup>60</sup> Unlike previous COVID-19 Vaccine Passport Requirements, this order excluded any religious exemptions.<sup>61</sup> Healthcare workers challenged the requirement on grounds that the statute was an unconstitutional infringement of their First Amendment guarantee of freedom of religion.<sup>62</sup> In issuing a preliminary injunction, the district court found that the plaintiffs were likely to succeed on the merits because the New York statute was preempted by Title VII of the 1964 Civil Rights Act.<sup>63</sup> However, on October 29, 2021, a three-judge panel for the Second Circuit Court of Appeals vacated the temporary injunction.<sup>64</sup>

A state-imposed Vaccine Passport Requirement for healthcare workers in Maine met a similar fate.<sup>65</sup> On October 20, 2021, on behalf of over two hundred healthcare workers, an application for injunction pending certiorari by the Supreme Court was filed.<sup>66</sup> The Maine regulation, which was issued

59. *Id.* at \*13.

60. See Artemis Moshtagian et al., *Judge Suspends NY State Vaccine Mandate for Health Care Workers Who Claim Religious Exemption*, CNN (Sept. 14, 2021, 8:25 PM), <https://www.cnn.com/2021/09/14/us/new-york-covid-vaccine-mandate-lawsuit/index.html> [https://perma.cc/9NMD-UAAV].

61. *Dr. A. v. Hochul*, No. 21-CV-1009, 2021 WL 4189533, at \*1 (N.D.N.Y. Sept. 14, 2021), *rev'd and vacated sub nom.* *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021).

62. *Id.*

63. Brian J. Clark & Sarah Fucci, *Federal Judge Temporarily Blocks New York Vaccine Mandate for Health Care Workers Seeking Religious Exemptions*, VENABLE LLP (Oct. 13, 2021), <https://www.venable.com/insights/publications/2021/09/federal-judge-temporarily-blocks-new-york-vaccine> [https://perma.cc/4NMW-UQ2P].

64. See *We the Patriots USA, Inc.*, 17 F.4th at 266. See also, Rob Frehse, *New York State Health Care Workers Will No Longer Have Religious Exemption to Covid-19 Vaccine Mandate, Court Rules*, CNN (Oct. 29, 2021, 10:29 PM), <https://www.cnn.com/2021/10/29/us/ny-state-health-care-workers-religious-exemption-ruling/index.html> [https://perma.cc/BX4Z-4S4U].

65. See *Maine Health Care Workers Return to U.S. Supreme Court*, LIBERTY COUNS. (Oct. 20, 2021), <https://lc.org/newsroom/details/102021-maine-health-care-workers-return-to-us-supreme-court-1> [https://perma.cc/GZV8-NWHM].

66. *Id.*

as an Executive Order by the Governor, required all healthcare workers to be vaccinated and did not provide a religious exemption.<sup>67</sup> The Supreme Court denied a grant of injunctive relief by a vote of six to three.<sup>68</sup> In dissent, Justice Gorsuch, joined by Justices Thomas and Alito, pointed out that because the law allowed for secular medical exemptions while not allowing for sincerely held religious objections, the mandate was likely to trigger strict scrutiny.<sup>69</sup> Justice Gorsuch noted, “The State allows those invoking medical reasons to avoid the vaccine mandate on the apparent premise that these individuals can take alternative measures . . . to safeguard their patients and co-workers. But the State refuses to allow those invoking religious reasons to do the very same thing.”<sup>70</sup> Justice Gorsuch concluded that “[t]his case presents an important constitutional question, a serious error, and an irreparable injury” and that he “would grant relief.”<sup>71</sup>

### C. *The Legal Significance of a Religious Exemption*

Contrast the legal significance of a religious exemption in the New York and Maine cases with the recent Indiana District Court holding in *Klaassen v. Trustees of Indiana University*.<sup>72</sup> There, the district court, while deciding a motion for a preliminary injunction, considered the question of whether an Indiana University Vaccine Mandate was constitutional.<sup>73</sup> Eight students challenged the mandate, claiming that it violated the Fourteenth Amendment’s Due Process Clause.<sup>74</sup> The Vaccine Mandate in question had multiple exemptions, including one for a religious objection.<sup>75</sup> However, students receiving an exemption were subject to additional safety requirements, including increased testing, masking, and quarantining.<sup>76</sup> In denying a motion for a temporary injunction, the court determined the students were unlikely to succeed on the merits of their Fourteenth Amendment claim.<sup>77</sup> While acknowledging the plaintiffs’ right to refuse unwanted medical treatment, the court found that the Vaccine Mandate in question left students

---

67. *Id.*

68. *See* *Does v. Mills*, 142 S. Ct. 17 (2021), *denying cert. to* 16 F.4th 20 (1st Cir. Oct. 19, 2021).

69. *Mills*, 142 S. Ct. at 18 (Gorsuch, J., dissenting).

70. *Id.* at 19.

71. *Id.* at 22.

72. *Klaassen v. Trs. of Ind. Univ.*, 549 F. Supp. 836, 842 (N.D. Ind. 2021), *vacated as moot*, 24 F.4th 638 (7th Cir. 2022).

73. *Id.*

74. *Id.* at 843.

75. *Id.* at 848.

76. *Id.* at 849.

77. *Id.* at 897.

with many options, not just forced vaccination.<sup>78</sup> The court pointed out that “[r]easonable social policy is for the state legislatures . . . and for the People to demand through their representatives.”<sup>79</sup>

Before deciding whether to order a preliminary injunction, the district court first had to determine the level of scrutiny to apply to the mandate, an issue that was unresolved because *Jacobson* was decided before the current levels of constitutional review were created.<sup>80</sup> After a lengthy analysis of “*Jacobson* as a precursor to . . . the modern tiers of constitutional scrutiny, the unconstitutional conditions doctrine, and the First Amendment as applied through the Fourteenth Amendment . . .”, the court concluded that the mandate should be subject to rational basis review.<sup>81</sup> This is legally significant because rational basis review requires only: (1) a rational basis for concluding that the regulation in question affects a substantial government interest, and (2) a reasonable connection between the means chosen and the government interest.<sup>82</sup> The Court denied the students’ application for emergency injunctive relief in August 2021.<sup>83</sup>

In sum, Vaccine Mandates in public schools, health care, and private employment settings seem to be on solid legal ground, supported by a long line of both precedent and historical practice. And as mentioned above, their support is strengthened greatly if the regulation in question provides an exemption for sincerely held religious beliefs. However, Vaccine Passports and Passport Bans face more potential legal roadblocks on grounds including the Dormant Commerce Clause, the First Amendment, and, as will be discussed in the next Part, the Takings Clause.

---

78. *Id.*

79. *Id.*

80. Mohapatra, *supra* note 24, at 1744.

81. *Klaassen*, 549 F. Supp. 3d at 871.

82. *See, e.g.*, *Armour v. City of Indianapolis*, 566 U.S. 675, 681 (2012). A law that involves neither a fundamental right nor a suspect classification is constitutional as long as “there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.” *Id.* (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)).

83. Jon Brodtkin, *Students’ Plea to Block Indiana U. Vaccine Mandate Rejected by Justice Barrett*, ARS TECHNICA (Aug. 13, 2021, 3:18 PM), <https://arstechnica.com/tech-policy/2021/08/indiana-u-vaccine-rule-survives-first-scotus-test-of-a-covid-vaccine-mandate/> [<https://perma.cc/6FBY-8JUJ>].

## IV. PROPERTY LAW, THE TAKINGS CLAUSE, AND THE RIGHT TO EXCLUDE

While Vaccine Passport Requirements and Bans have been challenged on various legal grounds, current scholarship and case law have yet to examine this issue through the lens of property law. Property is defined as “the rights in a valued resource such as land, chattel, or an intangible.”<sup>84</sup> Property is often described as a “bundle of sticks” with each “stick” representing a specific right, such as the right to use, transfer, and exclude.<sup>85</sup> While property rights are generally an issue of state law, the United States Constitution does protect those rights through the Takings Clause of the Fifth Amendment, which states: “[N]or shall private property be taken for public use, without just compensation.”<sup>86</sup> This Part begins with an examination of the Takings Clause and the distinction between a physical, per se taking and a regulatory taking. It continues with a discussion of the importance of the “right to exclude” as illustrated by the Court’s decision in *Cedar Point Nursery v. Hassid*.<sup>87</sup> This Part concludes by arguing that by appropriating a property owner’s right to exclude, Vaccine Passport Requirements and Bans are a physical, per se taking under the Court’s Takings Clause jurisprudence.

A. *The Takings Clause: Physical Versus Regulatory Takings*

The Takings Clause, incorporated against state governments through the Fourteenth Amendment,<sup>88</sup> does not prohibit the taking of private property for public use, but rather applies a condition on such takings.<sup>89</sup> Explicit in the text of the Takings Clause,<sup>90</sup> as affirmed by the Supreme Court, is the requirement that property must be taken for a “public use.”<sup>91</sup> The Court has interpreted “public use” very broadly. As recently as 2005, the Court equated the term to public *purpose* while stressing the importance of

---

84. *Property*, BLACK’S LAW DICTIONARY (11th ed. 2019).

85. *Id.*

86. U.S. CONST. amend. V, cl. 5.

87. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

88. *See, e.g., Chicago B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 234 (1897) (holding that “the prohibitions of the fourteenth amendment extended to ‘all acts of the state, whether through its legislative, its executive, or its judicial authorities’” (quoting *Scott v. McNeal*, 154 U.S. 34, 45 (1894))).

89. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005).

90. U.S. CONST. amend. V, cl. 5.

91. *See Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161 (1896) (“The use for which private property is to be taken must be a public one . . .”).

deference to the judgment of the legislature when addressing the issue.<sup>92</sup> Moreover, the Court has held that the Takings Clause protects real property, chattels,<sup>93</sup> and intangible property interests such as contract rights<sup>94</sup> and trade secrets.<sup>95</sup>

Traditionally, the Court has separated takings into two categories: physical takings and regulatory takings.<sup>96</sup> A physical taking—also known as a *per se* taking—occurs when the government seizes or encroaches upon private property for its own proposed use.<sup>97</sup> Examples include when the government “appropriat[es] an easement”<sup>98</sup> or condemns property.<sup>99</sup> In contrast, a regulatory taking occurs when government actions do not physically occupy the property but still limit its use to such an extent that a taking occurs.<sup>100</sup> Examples of a regulatory taking include zoning and land-use restrictions that limit the economic use of real property.<sup>101</sup>

Originally, the Court interpreted the concept of physical takings narrowly, holding that the Takings Clause applied only to “a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power.”<sup>102</sup> However, the Court has never held it necessary that the property be “absolutely taken.”<sup>103</sup> Therefore, “overflowing land by backing the water on it was considered as ‘taking’ it[.]”<sup>104</sup> Later, the Court interpreted a physical taking as one in which “inroads are made upon an owner’s use of [the property] to an extent that . . . a servitude has been acquired . . . .”<sup>105</sup>

92. *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (“Without exception, our cases have defined [‘public purpose’] broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”).

93. *Horne v. Dep’t of Agric.*, 576 U.S. 350, 358 (2015) (“Nothing in the text or history of the Takings Clause . . . suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.”).

94. *Lynch v. United States*, 292 U.S. 571, 579 (1934).

95. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984).

96. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071–72 (2021).

97. *Id.* at 2071.

98. *Id.* at 2073.

99. *Id.* at 2076.

100. *Id.* at 2072.

101. *Id.*

102. *See Legal Tender Cases*, 79 U.S. 457, 551 (1870) (holding that the loss in value to legal contracts that occurred incident to the Legal Tender Act authorizing the use of the dollar for payment of all just debts was not “prohibited by the spirit of the fifth amendment”).

103. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179 (1871).

104. *Id.* at 178.

105. *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

Although older cases denied the right of compensation for regulatory takings,<sup>106</sup> in 1922 the Court established the principle that “if regulation goes too far it will be recognized as a taking[.]”<sup>107</sup> In the landmark case *Pennsylvania Coal Company v. Mahon*, the Court held unconstitutional a state statute prohibiting subsurface mining in residential areas where it created a danger of subsidence.<sup>108</sup> The grantee homeowners in the case had purchased land by deeds that reserved subsurface mining rights to grantor coal companies.<sup>109</sup> Additionally, the grantees contractually assumed the risk and waived all claims for future damages arising from such operations.<sup>110</sup> The state statute thus deprived the grantor coal companies of the entire value of their subsurface rights.<sup>111</sup> The Court observed that “[f]or practical purposes, the right to coal consists in the right to mine it[.]” and that by making it “commercially impracticable to mine[.]” the statute had “very nearly the same effect for constitutional purposes as appropriating or destroying it.”<sup>112</sup> While acknowledging the issue was a “question of degree—and therefore cannot be disposed of by general propositions[.]”<sup>113</sup> the Court concluded the regulation had gone too far and was a taking.<sup>114</sup>

In later cases, the Court has struggled to determine exactly where the line lies between a regulation and a taking.<sup>115</sup> In the seminal case *Penn Central Transportation Company v. City of New York*, the Court, while acknowledging that regulatory takings cases require “essentially ad hoc, factual inquiries,”<sup>116</sup> laid out a framework for determining when a regulatory taking had occurred.<sup>117</sup> The Court instructed that “[i]n deciding whether a

106. See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887) (holding that a ban on the manufacture of liquor was not a taking that would entitle the owner of a liquor manufacturing plant to just compensation).

107. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922).

108. *Id.* at 412–13.

109. *Id.* at 412.

110. *Id.*

111. *Id.* at 413.

112. *Id.* at 414 (quoting *Commonwealth v. Clearview Coal Co.*, 100 A. 820, 820 (Pa. 1917)).

113. *Id.* at 416.

114. *Id.* at 414–15.

115. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

116. *Id.*

117. *Id.* (identifying as “factors that have particular significance” in the analysis of a regulatory taking “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the government action”).

particular governmental action has effected a taking, [courts should] focus[] . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.”<sup>118</sup> Providing clarity to its holding, the Court noted that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a *physical invasion* by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>119</sup>

Physical, per se takings and regulatory takings are distinct legal issues and applying reasoning from one line of casework to the other is inappropriate.<sup>120</sup> In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court considered whether a three-year moratorium on development, instituted while the government devised a plan for building regulations to protect Lake Tahoe’s uniquely clear water, constituted a taking under the Fifth Amendment.<sup>121</sup> In evaluating the claim, the Court clearly distinguished between physical and regulatory takings, noting:

Our jurisprudence involving . . . physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by “essentially ad hoc, factual inquiries,” . . . designed to allow “careful examination and weighing of all the relevant circumstances.”<sup>122</sup>

The Court went on to summarize takings jurisprudence:

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. Similarly, when the

118. *Id.* at 130–31.

119. *Id.* at 124 (internal citation omitted) (emphasis added).

120. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 323 (2002) (noting that “[t]his longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa”).

121. *See id.* at 307 (quoting President Clinton describing Lake Tahoe as a “national treasure that must be protected and preserved” and Mark Twain describing Lake Tahoe as “not merely transparent, but dazzlingly, brilliantly so”).

122. *Id.* at 322 (first quoting *Penn Cent.*, 438 U.S. at 124; and then quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring)).

government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, or when its planes use private airspace to approach a government airport, it is required to pay for that share no matter how small. But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent; that bans certain private uses of a portion of an owner's property; or that forbids the private use of certain airspace does not constitute a categorical taking . . . . This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.<sup>123</sup>

This distinction between a *per se* and a regulatory taking is legally significant because a *per se* taking, no matter how small, constitutes a categorical taking and as such, requires that the government pay just compensation.<sup>124</sup> A regulatory taking, on the other hand, is accomplished through different governmental schemes, applies a distinct body of case law, and relies upon the specific facts of a particular case.

#### *B. The Right to Exclude*

As previously described, the concept of property rights as a "bundle of sticks" characterizes property as a bundle of freely alienable rights,<sup>125</sup> examples of which include the independent rights to possess, use, and exclude.<sup>126</sup> Of particular interest for the discussion of Vaccine Passports and Bans is the right to exclude, as illustrated by the following hypothetical: a local restaurant is owned by a sixty-eight-year-old woman who suffers from an autoimmune disease and severe allergies. The business owner wishes to exclude unvaccinated patrons from entering the restaurant by requiring patrons who dine in to provide proof of COVID-19 vaccination to reduce the risk that she herself is infected. She plans on accommodating unvaccinated patrons by providing delivery and to-go food orders. However, under a state-issued Vaccine Passport Ban, her right to exclude unvaccinated patrons is appropriated. This is legally significant because many property scholars consider the right to exclude fundamental to the concept of

---

123. *Id.* at 322–23 (internal citations omitted).

124. *Id.* at 322.

125. Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 877 (2013).

126. *Id.* at 878.

property,<sup>127</sup> with one prominent scholar describing the right as follows: “Give someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right and they do not have property.”<sup>128</sup>

In a recent case considering a California state regulation, the Supreme Court endorsed the fundamental nature of the right to exclude.<sup>129</sup> In *Cedar Point Nursery v. Hassid*, the Court considered whether a California regulation granting labor unions a “right to take access” to an agricultural employer’s private property was repugnant to the Fifth Amendment.<sup>130</sup> The regulation allowed union organizers access only during non-working hours and capped access at a maximum of 360 hours per year.<sup>131</sup> The essential question under the Takings Clause is “whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner’s ability to use his own property.”<sup>132</sup> The Court further noted that whenever “[g]overnment action . . . physically appropriates property[, it] is no less a physical taking because it arises from a regulation.”<sup>133</sup> In classifying the ordinance in question as a physical, per se taking, the Court noted that “[r]ather than restraining the growers’ use of their own property, the regulation appropriates for the enjoyment of third parties the owners’ right to exclude.”<sup>134</sup> The Court went on to describe the right to exclude as a fundamental element of property rights.<sup>135</sup> Based on this reasoning, the Court held that the regulation in question was a physical, per se taking under the Takings Clause of the Fifth Amendment.<sup>136</sup>

The decision is not without critics, including some Justices. In dissent, Justice Breyer pointed out that the regulation does not appropriate but rather temporarily regulates a landowner’s right to exclude.<sup>137</sup> He argued that precedent limits per se takings to “two narrow categories”: (1) when the government directly appropriates private property for its own use; and (2) when the government causes a *permanent* physical occupation of private

---

127. See, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

128. *Id.*

129. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

130. *Id.* at 2069.

131. *Id.*

132. *Id.* at 2072.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 2079–80.

137. *Id.* at 2081 (Breyer, J., dissenting).

property.<sup>138</sup> Justice Breyer argued that, based on precedent, this distinction between a temporary and permanent restriction should be outcome-determinative.<sup>139</sup> Considering the potential permanence of Vaccine Passport Requirements and Bans given the indefinite nature of the COVID-19 pandemic, such governmental regulations could fit squarely within the ambit of the majority's determination that a physical, *per se* taking has occurred.

While a Vaccine Passport Ban may appear to merely regulate the right to exclude, this Comment contends that, under the Court's reasoning in *Cedar Point*, such a law represents a physical, *per se* taking. In *Cedar Point*, the regulation in question compelled a property owner to allow Union representatives onto the owner's private property.<sup>140</sup> Here, a Vaccine Passport Ban would compel a property owner to allow unvaccinated people onto the owner's private property. In both cases, the law in question does not merely regulate, but rather physically invades the property by appropriating a property owner's right to exclude.<sup>141</sup> Additionally, the permanent nature of the physical invasion is more significant in the case of Vaccine Passport Bans, lending more support to the theory presented.

Similarly, the guarantee to the free exercise of any right inherently includes a guarantee not to exercise such right.<sup>142</sup> For example, the Court has long held that the freedom of speech guaranteed by the First Amendment also guarantees a right not to speak.<sup>143</sup> The right to exclude others from one's property is no different. Some scholars theorize that a primary reason we guard the right to exclude is to empower owners with the right to include whomever they choose.<sup>144</sup> Justices have also stressed this point, noting in *Minnesota v. Carter*, a Fourth Amendment case, that "[t]he power to exclude implies the power to include."<sup>145</sup> Vaccine Passport Requirements and

138. *Id.* at 2082 (Breyer, J., dissenting).

139. *Id.* at 2083 (Breyer, J., dissenting) ("Our cases draw a distinction between regulations that provide permanent rights of access and regulations that provide nonpermanent rights of access. They either state or hold that the first type of regulation is a taking *per se*, but the second kind is a taking only if it goes 'too far.'").

140. *Id.* at 2069.

141. *See id.* at 2080 ("The access regulation amounts to simple appropriation of private property.").

142. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.").

143. *Id.* ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

144. Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U.L. REV. 1, 13 (1983).

145. *Minnesota v. Carter*, 525 U.S. 83, 107 (1998) (Ginsberg, J., dissenting).

Bans implicate this exact situation: passport bans infringe directly on the property owners right to exclude the unvaccinated, while passport requirements do not allow a property owner to include those she might wish to (i.e., unvaccinated patrons). Because vaccine requirements and bans effectively usurp the property owner's right to exclude or include, Vaccine Passport Requirements and Bans represent physical, per se takings and must be evaluated under the Court's physical takings line of cases.

Finally, unlike the regulation in question in *Cedar Point*, both Vaccine Passport Requirements and Bans can result in direct financial damages.<sup>146</sup> In *Cedar Point*, access for union representatives was limited to non-working hours and capped at a maximum of 360 hours per year.<sup>147</sup> However, a Vaccine Passport Requirement would force a business to turn away unvaccinated patrons, resulting in a direct loss of sales.<sup>148</sup> Similarly, a Vaccine Passport Ban could result in scaring away those people most concerned with contracting COVID-19, also resulting in a potential loss of business. Given the permanent nature of the appropriation of a property owner's right to exclude coupled with the potential for direct financial damages, Vaccine Passport Requirements and Bans represent clear violations of the Takings Clause under the Court's holding in *Cedar Point*.

#### CONCLUSION

As the COVID-19 pandemic begins to subside, the legal issues created are sure to persist in courts for years to come. Both state and private-sector Vaccine Mandates, provided such mandates include reasonable waivers for religious and medical exemptions, will likely survive forthcoming legal challenges. However, Vaccine Passport Requirements and Bans face a much less certain legal future. In addition to First Amendment and substantive due process claims, property owners negatively affected by such regulations should include Fifth Amendment claims in legal challenges. By appropriating a property owner's right to exclude, arguably the most important property right, such laws are physical, per se takings, repugnant to the Fifth Amendment and thus, unconstitutional.

---

146. See, e.g., Matthew Boyle & Bloomberg, *Companies Expect to Lose up to 8% of Their Workforces due to Vaccine Mandates*, FORTUNE (Oct. 21, 2021, 10:16 AM) <https://fortune.com/2021/10/01/companies-expect-to-lose-up-to-8-percent-of-their-workforces-due-to-vaccine-mandates/> [<https://perma.cc/4Q6G-4WZU>]; Peter Romeo, *Majority of Restaurants Have Lost Business Under San Francisco's Vaccine Mandate*, REST. BUS. (Sept. 23, 2021) <https://www.restaurantbusinessonline.com/operations/majority-restaurants-have-lost-business-under-san-franciscos-vaccine-mandate> [<https://perma.cc/Y7QT-7CE6>].

147. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069 (2021).

148. Romeo, *supra* note 146.

*John A. Kuzora* \*\*

---

\*\* John A. Kuzora, a second-year student staff member of the *Campbell Law Review*, submitted this Student Comment for publication in December of 2021 and passed away on January 6, 2022. This Comment, while his original work, has been edited by the Volume 44 *Campbell Law Review* editorial staff with the assistance of John's faculty advisor, Professor E. Gregory Wallace.