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COMMENTS

COLLEGE ATHLETES ROLLING UP THEIR SLEEVES: IS A MANDATORY COVID VACCINE POLICY CONSTITUTIONAL?

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INTRODUCTION

In little to no time, Coronavirus, also known as COVID-19 (Covid), overtook the United States and the rest of the world, forever changing how it functions. For much of 2020, the world stood at a complete standstill as schools shut down, sporting events came to an abrupt stop, and many individuals began to work from home. However, a sense of hope came when Covid vaccines developed and administered. Because of Covid vaccines, it has been safer for students to return to the classroom, individuals to their offices, and sporting events to resume. While many individuals have rolled up their sleeves to receive the initial vaccine and boosters, others have remained skeptical.

Included in the new sense of “normalcy” has been Covid vaccine mandates. In the United States, many places—including over eight hundred universities—have required individuals to be fully Covid vaccinated.¹ For example, schools

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1. Elissa Nadworny, *Full FDA Approval Triggers More Universities to Require the Covid-19 Vaccine*, NPR (Sept. 1, 2021, 8:29 AM), <https://www.npr.org/2021/09/01/1031385629/full-fda-approval-triggers-more-universities-to-require-the-covid-19-vaccine>.

like Marquette University,² University of Southern California,³ and Boston College.⁴ Other schools like the University of Connecticut, required that prior to the start of the 2021-2022 academic year, all students and faculty were required to be fully vaccinated unless an exemption was granted.⁵ Students and faculty who failed to comply with the policy were subject to penalties, including loss of on-campus privileges and additional sanctions.⁶ As a result of Covid vaccine mandates in the fall of 2021, Covid related deaths in the United States decreased by about five percent.⁷

While Covid vaccines have shown a reduced rate of deaths, many universities' Covid vaccine policies have sparked controversy.⁸ In particular, some have questioned whether a Covid-vaccine mandate can be applied to only a specific demographic—such as student-athletes. For example, at Western Michigan University (WMU), student-athletes have challenged the University's Covid vaccine mandate because of its applicability to *only* student-athletes.⁹ However this is just one example of Covid vaccine mandates challenged for violating the constitutional rights of students.

This Comment will focus on the constitutional challenges Covid vaccine mandates impose on intercollegiate athletes by focusing on First and Fourth

2. *Vaccine and Testing FAQ*, MARQ. UNIV., <https://www.marquette.edu/coronavirus/vaccine-faq.php> (last visited May 2, 2023) (requiring students “to upload proof . . . of the C[ovid]-19 vaccine and booster shot, based on eligibility . . .”).

3. *Covid-19 Vaccination Program*, UNIV. OF S. CAL., <https://policy.usc.edu/covid-19-vaccination-program/> (Nov. 17, 2022) (requiring “[a]ll university faculty, staff, and students . . . be up to date on their vaccinations for [Covid] unless they have an approved exemption because of a disability, medical contraindication, or sincerely held religious belief, practice, or observance . . .”).

4. *Letter From VP David Trainor and Dr. Douglas Comeau*, BOS. COLL. (Aug. 10, 2022), <https://www.bc.edu/content/bc-web/sites/bc-forward/updates/may-10-Letter-Trainor-Comeau.html> (“requir[ing] all students . . . who will be on campus for the fall semester to be fully vaccinated and have received a booster shot against C[ovid]-19.”).

5. *Wade v. Univ. of Conn. Bd. of Trs.*, 554 F. Supp. 3d 366, 372 (D. Conn. 2021).

6. *Id.*

7. See Sylvia Goodman, *Colleges' Vaccine Mandates Significantly Decreased Covid Deaths, Study Finds*, CHRON. HIGHER EDUC. (Aug. 1, 2022), <https://www.chronicle.com/article/colleges-vaccine-mandates-significantly-decreased-covid-deaths-study-finds> (citing Riley K. Acton et al., *The Effect of Vaccine Mandates on Disease Spread: Evidence from College COVID-19 Mandates* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30303, 2022) https://www.nber.org/system/files/working_papers/w30303/w30303.pdf).

8. See, e.g., Alexander C. Kafka, *The Vaccination Dilemma: Should Colleges Mandate Covid-19 Shots? Encourage? Incentivize? All of The Above?*, CHRON. HIGHER EDUC. (Apr. 19, 2021), <https://www.chronicle.com/article/the-vaccination-dilemma>; Jessica Dickler, *Students Protest Mandatory Covid Vaccinations at Colleges*, CNBC (May 19, 2021, 8:10 AM), <https://www.cnbc.com/2021/05/19/students-protest-mandatory-covid-vaccinations-at-colleges.html>; Ross Dellenger, *Big 12 Delivers a Clear Message to Athletes as Media Days Open: 'Get Vaccinated'*, SPORTS ILLUSTRATED (July 14, 2021), <https://www.si.com/college/2021/07/14/covid-19-vaccine-big-12-media-days-football>.

9. *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 730 (6th Cir. 2021).

Amendment rights and the challenges created when a Covid vaccine mandate is only applicable to student-athletes. Part I of the comment will focus primarily on the Covid Pandemic, vaccine development, and vaccine mandates. Part II will discuss the history of vaccine mandates in the United States. Part III will consider recent constitutional challenges to Covid mandates. Finally, Part IV will examine and propose a solution to a hypothetical scenario where a university implements a Covid vaccine mandate requiring only student-athletes to become vaccinated.

After consideration, when a Covid vaccine mandate requires only student-athletes to be vaccinated, it is likely unconstitutional under the First and Fourteenth Amendments. When a Covid vaccine mandate requires only a specific demographic, like intercollegiate athletes, to follow the mandate, it violates equal protection under the Fourteenth Amendment. Even if a university policy required the entire general university population to become vaccinated, the university would need to consider and respect religious—as well as other—Covid vaccine exemptions. Therefore, it is likely that a university or the NCAA would not be able to condition participation in intercollegiate athletics on an athlete’s Covid vaccination status.

I. THE COVID PANDEMIC

In early 2020, the world shut down nearly overnight as worldwide Covid infection rates became a startling reality. SARS-CoV-2, the virus responsible for Covid, spreads in three main ways:¹⁰

1. “[b]reathing in air when close to an infected person who is exhaling small droplets and particles that contain the virus.”¹¹
2. “[h]aving these small droplets and particles that contain virus land on the eyes, nose, or mouth, especially through splashes and sprays like a cough or sneeze.”¹²
3. “[t]ouching eyes, nose, or mouth with hands that have the virus on them.”¹³

10. *Frequently Asked Questions*, CTR. FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Ffaq.html [https://perma.cc/P66D-HXGC] (Aug. 16, 2021, 10:07 AM).

11. *Id.*

12. *Id.*

13. *Id.*

The first reported Covid infection was in December 2019 when people in the city of Wuhan, China, began to “experience the symptoms of an atypical pneumonia-like illness that [did] not respond well to standard treatments.”¹⁴ Then on January 20, 2020, the first Covid case was reported in the United States,¹⁵ and by March 11, 2020—after more than 118,000 cases worldwide—the World Health Organization announced that Covid was a Pandemic.¹⁶ Soon after, Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, warned, “[y]ou’ve got to be realistic. And you’ve got to understand that you [do not] make the timeline, the virus makes the timeline.”¹⁷ In a year alone, that timeline in the United States included 8.5 million infections and 225,000 deaths.¹⁸

A. Covid Vaccines

Knowing the severity and the startling infection rate, the world halted and patiently waited for infection rates to decrease, a vaccine to develop, and a return to a pre-pandemic world. Finally, in late 2020 and early 2021, the United States found a sense of hope as three vaccines were granted Emergency Use Authorization (EUA) by the United States Food and Drug Administration (FDA).¹⁹ Initially, individuals over the age of sixteen could receive Pfizer-BioNTech (Pfizer),²⁰ and individuals over the age of eighteen could receive Moderna²¹ or Johnson and Johnson’s Janssen (J&J).²² Now, Covid vaccines have become available for individuals as young as six months.²³ Moreover, at the

14. *CDC Museum Covid-19 Timeline*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/museum/time-line/covid19.html> (last visited May 2, 2023).

15. *Id.*

16. *Id.*

17. Dana B. Taschner & Ashley Atwood, *Covid-19: Legal Framework for Vaccine Distributions and Mandates*, 24 SMU SCI. & TECH. L. REV. 65, 65 (2021).

18. *Id.*

19. *CDC Museum Covid-19 Timeline*, *supra* note 14.

20. *FDA Takes Key Action in Fight Against COVID-19 by Issuing Emergency Use Authorization For First COVID-19 Vaccine*, U.S. FOOD & DRUG ADMIN. (Dec. 11, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19>.

21. *Moderna COVID-19 Vaccines*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/moderna-covid-19-vaccines> (last visited May 2, 2023).

22. *Janssen COVID-19 Vaccine*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/janssen-covid-19-vaccine> (last visited May 2, 2023).

23. *Overview of COVID-19 Vaccines*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/overview-COVID-19-vaccines.html> (Nov. 1, 2022).

time this comment was written, four vaccines have been approved for use in the United States.²⁴

The vaccine works by introducing an individual's body to T-lymphocytes and B-lymphocytes, which creates a "memory system" for the body to fight off the virus in the future.²⁵ The Centers for Disease Control (CDC) recommends that the best way to fight against Covid is for individuals over the age of six months to stay up to date on their Covid vaccines, including vaccine boosters.²⁶ This includes getting two primary doses of either Pfizer, Moderna, or Novavax.²⁷ For J&J, only one primary dose of the vaccine is needed.²⁸ After the primary dose(s), at least one booster shot is recommended and a second booster for those over the age of sixty-five, anyone in high transmission areas, or people who have a compromised immune system.²⁹ While some remain skeptical about how effective a new Covid vaccine is, research has shown the Covid vaccine provides greater immunity than a previous Covid infection and provides greater protection from becoming seriously ill.³⁰

B. Covid and Intercollegiate Athletics

With Covid vaccines administered, the world was able to return to a life similar to that of a pre-pandemic. In the United States, when university students returned to in-person instruction, there was an additional push for intercollegiate athletics to resume as they were pre-pandemic. However, as the fall 2021 season quickly approached, athletic directors became concerned how to keep student athletes healthy.³¹ An additional fear was if student-athletes did not become vaccinated, Covid would once again disrupt entire seasons, just as it did in 2020.³² To help settle the uneasy concern many universities were facing, the NCAA proposed guidelines for vaccinated and unvaccinated athletes.³³ For

24. *Id.* (describing the four types of Covid vaccines: Pfizer, Moderna, J&J, and Novavax).

25. *Understanding How COVID-19 Vaccines Work*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/how-they-work.html> (Feb. 3, 2023).

26. *COVID-19 Vaccines Effectiveness*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html> (Mar. 23, 2023).

27. *Stay Up to Date With COVID-19 Vaccines Including Boosters*, CTR. FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fvaccines%2Fdifferent-vaccines.html (Apr. 6, 2023).

28. *Id.*

29. *Id.*

30. *COVID-19 Vaccine Effectiveness*, *supra* note 26.

31. Dellenger, *supra* note 8.

32. *Id.*

33. *COVID-19 and Fall Sports Participation*, NCAA (Aug. 2021), https://ncaaorg.s3.amazonaws.com/ssi/COVID/SSI_2021FallSportsParticipation.pdf.

unvaccinated student-athletes, the NCAA proposed those athletes be routinely tested throughout the fall semester, while fully vaccinated student-athletes would be exempt unless they presented symptoms or were in close contact with an individual who was Covid positive.³⁴ Moreover, the NCAA authorized a university's ability to require unvaccinated student-athletes to wear masks and remain physically distant during team events, compared to vaccinated student-athletes who only were required to wear masks during indoor team activities.³⁵ These NCAA guidelines created an incentive for student-athletes to become vaccinated without mandates. In fact, in July 2021, the Big 12 Conference reported that most of their member schools' football teams were at least seventy-five percent vaccinated.³⁶ As a result of vaccinated student-athletes, the uneasy feeling many athletic directors faced was curbed.

II. HISTORY OF VACCINE MANDATES IN THE UNITED STATES

While in the United States Covid vaccine mandates has raised arguments as unconstitutional, vaccine mandates are not a novel concept. In fact, the Supreme Court in 1905 held that vaccine mandates were constitutional.³⁷ In *Jacobson v. Massachusetts*, the City of Cambridge, Massachusetts enforced a smallpox vaccine mandate requiring all those individuals to be vaccinated or forfeit five dollars.³⁸ The only exception applied to children who presented a signed physician order stating that they were not qualified for the vaccine.³⁹ Furthermore, the vaccine mandate was in accordance with Massachusetts law, which provided that a city or town could enforce a vaccination mandate if it was necessary for the public's health and safety.⁴⁰ However, Jacobson, a citizen of Cambridge, refused the vaccine arguing that the mandate was unconstitutional under the Fourteenth Amendment.⁴¹

In determining the vaccine mandate was constitutional, the Court first determined that states have broad police powers to enforce laws that were for the general benefit of the population's health and safety.⁴² Furthermore, while Jacobson argued that his liberty was burdened, the Court determined that liberty is not absolute as it is "a fundamental principle that persons and property are

34. *Id.*

35. *Id.*

36. Dellenger, *supra* note 8.

37. *See generally* *Jacobson v. Mass.*, 197 U.S. 11 (1905).

38. *Id.* at 12-13.

39. *Id.* at 12.

40. *Id.*

41. *Id.* at 14.

42. *Id.* at 24-25.

subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state”⁴³ Thus, the Court held that under the broad police powers a state holds, Massachusetts was able to allow for or prohibit vaccine mandates.⁴⁴ Additionally, the Court held that because the vaccine mandate was equally applicable to those in similar conditions, there was no equal protection violation.⁴⁵ Thus, where a vaccine mandate is in the best interest of the general population’s health and safety and the mandate is not arbitrary or oppressive, it does not violate an individual’s constitutional rights.⁴⁶

Then, seventeen years later in *Zucht v. King*, the United States Supreme Court again heard a case involving vaccine mandates, but this time on proof of vaccinations.⁴⁷ In the City of San Antonio, Texas, a policy was in place which required proof of a child’s vaccination status prior to attending school.⁴⁸ As a result, a lawsuit commenced challenging the policy for depriving the plaintiff of her due process rights.⁴⁹ Relying on their holding in *Jacobson*, the Court determined that because of the state’s broad police power to implement vaccine mandates, “a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations should become operative.”⁵⁰ Furthermore, municipalities may delegate officials with the broad discretion to apply and enforce health laws.⁵¹ Finally, the exercise of police powers does not amount to an equal protection violation.⁵² For those reasons, the Court held that a policy was not arbitrary and thus was constitutional.⁵³

III. VACCINE MANDATES TODAY

While it has been determined that at the state level, there are broad police powers to implement or bar vaccine mandates,⁵⁴ the question becomes tougher

43. *Jacobson v. Mass.*, 197 U.S. 11, 26 (1905).

44. *Id.* at 24-25; see also Scott Bomboy, *Current Constitutional Issues Related to Vaccine Mandates*, NAT’L CONST. CTR. (Aug. 6, 2021), <https://constitutioncenter.org/blog/current-constitutional-issues-related-to-vaccine-mandates>.

45. *Jacobson*, 197 U.S. at 30.

46. *Id.* at 30-31, 38-39.

47. See *Zucht v. King*, 260 U.S. 174, 175 (1922).

48. *Id.*

49. *Id.*

50. *Id.* at 176.

51. *Id.*

52. *Id.* at 176-77.

53. *Zucht v. King*, 260 U.S. 174, 176-77 (1922).

54. Bomboy, *supra* note 44.

on if a federal government would be able to impose a vaccine mandate, except in limited circumstances such as immigrants who have requested United States Citizenship, military personnel, or federal employees.⁵⁵

Regardless, nearly a century after *Jacobson* and *Zucht*, vaccine mandates are still in place across the United States, including universities which require vaccinations against common illnesses.⁵⁶ Therefore, while Covid vaccine mandates at universities have seemed “out of the ordinary,” a mandate is not actually a novel concept. However, a problem has arisen when universities require a Covid vaccination for specific demographics, such as an entire student body or just intercollegiate student-athletes.⁵⁷ As a result, some have challenged whether a university can require student-athletes’ to become vaccinated.⁵⁸

A. Covid Vaccine Mandates Under the Fourteenth Amendment

Section One of the Fourteenth Amendment states:

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁵⁹

Despite the U.S. Supreme Court’s holdings in *Jacobson* and *Zucht*, the Supreme Court has not heard a case on Covid vaccine mandates being unconditional when applied to student bodies, but lower courts have. In *Klaassen v. Trustees of Indiana University*, eight students at Indiana University challenged the university’s Covid policy which required students to have their full Covid vaccination unless a medical or religious exemption was granted.⁶⁰ Specifically, the students argued that the mandate violated the Due Process Clause of the Fourteenth Amendment.⁶¹ However, the Seventh Circuit denied finding a Fourteenth Amendment violation for two reasons.⁶² First, Indiana University allowed students who had a medical or religious belief to submit an

55. *Id.*

56. *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021).

57. *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 730 (6th Cir. 2021).

58. *Id.*

59. U.S. CONST. amend. XIV, § 1.

60. *Klaassen*, 7 F.4th at 592.

61. *Id.*

62. *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021).

exemption from the vaccine mandate.⁶³ Furthermore, there was no evidence that accommodations were not being made by Indiana University; students granted an exemption were just required to wear masks and be tested for Covid.⁶⁴ Additionally, the state of Indiana did not have a vaccine mandate for the general population.⁶⁵ Thus, students who wished to remain unvaccinated had the option to attend another university.⁶⁶ Furthermore, the court acknowledged that a “university may decide what is necessary to keep other students safe in a congregate setting[,]” and that “[h]ealth exams and vaccinations against other diseases . . . are common requirements”⁶⁷ Therefore the court determined that there were no merits to the student’s claim of the Fourteenth Amendment, and their request for an injunction was denied.⁶⁸

Similarly, in *Children’s Health Defense, Inc., v. Rutgers, the State University of New Jersey*, students at Rutgers University alleged that the Covid vaccine mandate violated their Fourteenth Amendment rights under New Jersey’s State Constitution and therefore was unconstitutional because it pressured students to become vaccinated in order to return to campus.⁶⁹ Among other allegations, the students argued that requiring students to be fully vaccinated violated their Fourteenth Amendment rights to informed consent, the right to refuse medical treatment, and equal protection.⁷⁰ Relying on the U.S. Supreme Court decision in *Jacobson*, the District Court of New Jersey found that the students’ claim had no merit.⁷¹ First, relying on *Jacobson*, the court determined that while there is a right to informed medical treatment, that right is not absolute.⁷² Second, it is not for the courts to determine what type of protection is necessary to combat Covid, but instead is best left to the legislature.⁷³ Additionally, due to the severity of Covid, there is a real relation between requiring the Covid vaccination and the need to protect the health and safety of the public.⁷⁴ Finally, the court acknowledged that Rutgers University had exemptions for the Covid policy and that there was no penalty or sanction

63. *Id.*

64. *Id.*

65. *Id.* at 593.

66. *Id.*

67. *Id.*

68. *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 594 (7th Cir. 2021).

69. *Child. Health Def., Inc. v. Rutgers State Univ. of N.J.*, No. 21-15333, 2021 WL 4398743, at *1 (D.N.J. Sept. 27, 2021).

70. *Id.* at *2.

71. *Id.* at *5.

72. *Id.*

73. *Id.*

74. *Id.*

for refusing to show any vaccination verification.⁷⁵ Thus, the court determined that the student's claims had no merit.⁷⁶

B. Covid Vaccine Mandates Under the First Amendment

In addition to Fourteenth Amendment claims, Covid vaccine mandates has raised challenges for violating individuals' First Amendment rights. The First Amendment is incorporated through the Fourteenth Amendment⁷⁷ and states that "[c]ongress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁷⁸ Furthermore, an individual's free exercise right may be directly or indirectly burdened.⁷⁹ Indirect burden may occur through "coercion or penalties on the free exercise of religion, and not just outright prohibitions."⁸⁰ Moreover, where a policy "forces a person to choose between observing her religious belief and receiving a generally available government benefit for which she is otherwise qualified burdens her free exercise rights."⁸¹ However, if a law is neutral and generally applicable, it may not be unconstitutional even if an individual is burdened.⁸² But where a policy allows for individualized exemptions, it is not neutral and generally applicable, it must survive strict scrutiny.⁸³ Through a strict scrutiny lens, there must be a compelling interest that is narrowly tailored to achieve that interest.⁸⁴

While the U.S. Supreme Court has not heard a case involving vaccine mandates infringing on student-athletes First Amendment rights, lower courts have. In *Dahl v. Board of Trustees of Western Michigan University*, Western Michigan announced their Covid policy via text message stating that "to maintain full involvement in the athletic department" student-athletes were required to be fully vaccinated against Covid-19.⁸⁵ Additionally, WMU would consider "[m]edical or religious exemptions and accommodations . . . on an

75. *Child. Health Def., Inc. v. Rutgers State Univ. of N.J.*, No. 21-15333, 2021 WL 4398743, at *5 (D.N.J. Sept. 27, 2021).

76. *Id.* at *8.

77. *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 731 (6th Cir. 2021).

78. U.S. CONST. amen. I.

79. *Dahl*, 15 F.4th at 731.

80. *Id.*

81. *Id.*

82. *Id.* at 733.

83. *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 733 (6th Cir. 2021).

84. *Id.* at 734-35.

85. *Id.* at 730.

individual basis.”⁸⁶ Shortly after the policy was announced, sixteen student-athletes submitted religious exemptions and were either denied or ignored.⁸⁷ Thus, the sixteen student-athletes alleged that University officials violated their First Amendment rights, particularly under the Free Exercise Clause.⁸⁸ The district court granted a preliminary injunction allowing the athletes to participate without being vaccinated but were required to follow additional safeguards, such as wearing masks and taking Covid tests.⁸⁹ However, following the preliminary injunction, WMU officials asked for a stay on the injunction and proceedings, resulting in the Sixth Circuit of Appeals analyzing the merits of the student-athletes’ free exercise claim.⁹⁰

First, the Sixth Circuit Court of Appeals determined that WMU had burdened the student-athletes by essentially giving them an ultimatum: either get vaccinated or cease any participation in intercollegiate athletics.⁹¹ Unlike the non-athletes on campus, the athletes were penalized for refusing to violate their sincerely held religious beliefs.⁹² Therefore, because the athletes’ participation in intercollegiate athletics was conditioned on becoming vaccinated against their own sincerely held religious beliefs, WMU had created a burden for those student-athletes.⁹³

Next, the court determined that because WMU’s mandate had a system in place for individualized exemptions, it was not generally applicable and had to survive strict scrutiny.⁹⁴ In analyzing the policy, the court determined that while fighting Covid is a compelling interest, WMU’s policy was not narrowly tailored for two reasons.⁹⁵ First, WMU’s policy did not apply to unvaccinated non-student-athletes even though unvaccinated students pose just as much of a risk as a student-athlete with a religious exemption would.⁹⁶ Second, the court concluded that the policy was not narrowly tailored because WMU’s policy was “more severe” than other universities with Covid policies.⁹⁷ While WMU provided an affidavit stating that “Covid[] vaccines [were] the most effective

86. *Id.*

87. *Id.*

88. *Id.*

89. *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 730 (6th Cir. 2021).

90. *Id.*

91. *Id.* at 732.

92. *Id.*

93. *Id.*

94. *Id.* at 733.

95. *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 735 (6th Cir. 2021).

96. *Id.*

97. *Id.* at 735 (noting “several other universities grant exemptions from their C[ovid]-19 mandates.”).

and reasonable way” to combat Covid, the court determined that WMU likely violated the student-athletes’ First Amendment rights.⁹⁸ Thus, the court determined that while some Covid policies applicable to student-athletes may be constitutional but those policies must allow for individualized exemptions.⁹⁹ Because that was not the case, the court upheld the preliminary injunction.¹⁰⁰

IV. COVID VACCINES: CONSTITUTIONAL OR NOT?

Covid has completely changed how the United States and the rest of the world operates. As the world has tried to find a new normal, Covid vaccines have allowed people to return to their offices, students to return to in-person instruction, and athletes and spectators have been able to enjoy sports again. With the popularity of intercollegiate athletics among athletes, fans, and universities, it has remained important that intercollegiate athletes remain safe by protecting themselves, their teammates, and their competition from Covid by becoming vaccinated. However, can it be required?

While participation in intercollegiate athletics is not a protected right under the United States Constitution.¹⁰¹ There is a liberty interest while participating in intercollegiate athletics to not be treated arbitrarily or capriciously.¹⁰² If an athlete is being treated arbitrarily or capriciously, it is enough to trigger a judicial review for a substantive due process challenge.¹⁰³ However, as determined in *Jacobson* and *Zucht*, vaccine mandates are not novel and when generally applicable and tailored to promote public safety and welfare, it will be held to be constitutional.¹⁰⁴ In *Jacobson*, the vaccine mandate was found constitutional when applied under the state’s police power to enforce a vaccine that is in the best interest of the general public’s health and safety.¹⁰⁵ Then, in *Zucht*, the Supreme Court reaffirmed *Jacobson* in holding that vaccine mandates are enforceable when applied using State police power for the general public’s health and safety.¹⁰⁶ However, both *Zucht* and *Jacobson* are distinguishable

98. *Id.* at 735.

99. *Id.* 736.

100. *Id.*

101. *Colo. Seminary (Univ. of Denver) v. NCAA.*, 417 F. Supp. 885, 887 (D. Colo. 1976), *aff’d*, 570 F.2d 320 (10th Cir. 1978); *Richard v. Perkins*, 373 F. Supp. 2d 1211, 1219 (D. Kan. 2005); *see also* MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 134 (5th ed. 2020).

102. MITTEN ET AL., *supra* note 101, at 134.

103. *Id.* at 141; *Richard*, 373 F. Supp. 2d at 1219-20.

104. *Jacobson v. Mass.*, 197 U.S. 11, 26-27, 31-32, 34-35, 38 (1905); *Zucht v. King*, 260 U.S. 174, 176-77 (1922).

105. *Jacobson*, 197 U.S. 11 at 26-27, 31-32, 34-35, 38.

106. *Zucht*, 260 U.S. at 176-77.

from a Covid vaccine mandate because when a university implements a mandate only for student-athletes, it is no longer applicable to those in similar situations. Moreover, the federal government is not involved when a university creates a Covid vaccine mandate. Finally, a Covid vaccine mandate may treat student-athletes in a way that is arbitrary or capricious. Therefore, when a university implements a Covid vaccine mandate in a way that is arbitrarily or capriciously, it is likely to be unconstitutional.

A. Likelihood of a Student-Athlete' Success in Fourteenth Amendment Claim

For a student-athlete to challenge a vaccine mandate as unconstitutional under the Fourteenth Amendment would require a student-athlete to show that they were deprived of life, liberty, or property without proper procedural and substantive due process.¹⁰⁷

While the U.S. Supreme Court has not heard a case involving universities requiring student-athletes to become Covid vaccinated, lower courts have heard similar cases that involve a university's general student body. In *Klaassen*, where a Covid vaccine mandate applied to an entire student body, the Seventh Circuit determined it was constitutional.¹⁰⁸ However, this decision is distinguishable from a mandate only applicable to student-athletes. This is because when the Covid vaccine mandate only requires vaccinations for student-athletes, the policy is no longer applicable to an entire student body. Instead, student-athletes become a carve out and treated differently because of their athlete status. Therefore, their athlete status at a university becomes conditioned on their vaccination status which ultimately gives student-athletes three choices: (1) get vaccinated; (2) forfeit their ability to compete at the university; or (3) transfer to a different university that does not have a vaccine mandate for student-athletes. Based on how lower courts ruled, it is likely that the U.S. Supreme Court would also determine that a Covid vaccine mandate that is applicable only to student-athletes would be unconstitutional under the Fourteenth Amendment.

B. Likelihood of a Student-Athlete's Success in First Amendment Claim

Similar to any Fourteenth Amendment claim, the Supreme Court has not heard a case on whether a Covid vaccine policy that only requires student-athletes to have their Covid vaccination infringes on their First Amendment rights. However, lower courts have addressed when Covid vaccine mandates violate student-athletes First Amendment Rights. In *Dahl*, the Court determined

107. MITTEN ET AL., *supra* note 101, at 134.

108. *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593-94 (7th Cir. 2021).

that WMU infringed upon student-athletes' First Amendment rights because religious exemptions were not considered.¹⁰⁹ Furthermore, the court determined that when a vaccine mandate provides for individualized exemptions, the mandate is not facially neutral or generally applicable, and must survive strict scrutiny.¹¹⁰ Additionally, where a law is not facially neutral, religious exemptions must be granted unless there is a compelling reason not to do so.¹¹¹ As the court determined, fighting Covid is a compelling interest, but when non-athletes are not required to be vaccinated, a university's interest is not narrowly tailored.¹¹²

As lower courts have, the United States Supreme Court would likely also hold that a university policy requiring student-athletes to be fully Covid vaccinated would infringe upon student-athletes First Amendment rights. This is because, like in *Dahl*, a vaccine mandate carved out for student-athletes alone, would likely not survive strict scrutiny because it would not be narrowly tailored to achieve that goal. Additionally, where a university were to have a vaccine mandate applicable to an entire student body, the university should still consider exemptions on an individualized basis. Failure to do so would likely infringe upon students' First Amendment rights. When a vaccine mandate is applicable to an entire student body, the court is more likely to find that a university has a compelling interest in protecting an entire university community from Covid, and that interest is narrowly tailored by requiring the entire university to be vaccinated—not just student-athletes.

V. THE FUTURE OF COVID VACCINE MANDATES

The Covid pandemic has drastically changed how the entire world operates but with the development and administration of vaccines, the world has regained a sense of normalcy. Part of this pre-pandemic normalcy has included fans returning to sporting events, coaches to coaching, and student-athletes to competing. However, while the Covid vaccine has made it safer for individuals enjoy sporting events, many have remained skeptical about the vaccine, its safety, its overall effectiveness, and if it is even constitutional to have a mandate in the first place—especially when the mandate is only applicable to certain demographics.

In a hypothetical scenario where a university conditions a student-athlete's ability to compete for the school on their Covid vaccination status, it will likely

109. *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 735-36 (6th Cir. 2021).

110. *Id.* at 733.

111. *Id.*

112. *Id.* at 735.

unconstitutional. In particular, the university's policy will violate the First and Fourteenth Amendments of the U.S. Constitution. Where a vaccine mandate only requires student-athletes to become vaccinated, they are treated differently than others who are similarly situated; thus, violating the Fourteenth Amendment's equal protection right. Instead, the best the university could do is strongly encourage student-athletes to become vaccinated, but they could not condition athletes' participation on their status.

Instead, the university could implement a vaccine mandate on an entire university community, including student-athletes, non-athletes, employees, etc. However, if the university were to take this route, it would need to honor exemptions, such as for medical or religious reasons. If not, it is likely that the vaccine mandate would be unconstitutional under the First Amendment. An additional alternative that the university could do, instead of implementing a student-athlete only vaccine mandate, is to have a policy for vaccinated and unvaccinated athletes—similar to what the NCAA has proposed.¹¹³ In this possible solution, a university could implement different requirements for unvaccinated athletes versus vaccinated athletes, such as unvaccinated athletes are subject to being Covid tested every week. Additionally, a university could require unvaccinated athletes to wear a mask when they are indoors. Both possible solutions would help limit universities to protect athletes, fans, and competitors while ultimately achieving the goal of stopping the spread of Covid.

CONCLUSION

As many places in the United States continue to utilize vaccine mandates, at the collegiate level, universities must be careful if they implement similar mandates. While combating Covid is a universal concern, in the United States, universities must be mindful that a mandate that conditions a student-athletes participation on their vaccination status, will likely be unconstitutional. Specifically, a court would likely find that under the Fourteenth Amendment student-athletes were being treated differently than those non-athletes who are similarly situated on campus as students. Furthermore, a university that fails to consider in good faith religious and medical exemptions, infringes on the First Amendment rights of students. Instead, universities should consider university wide Covid vaccine policies and have procedures in place, as the NCAA has suggested. By following procedures in place by the NCAA, universities can follow guidelines that offer protection for unvaccinated and vaccinated student-athletes, without conditioning their participation in athletics on a vaccinations tatus.

113. *COVID-19 and Fall Sports Participation*, *supra* note 33.