

IDAHO REJECTS A PRIVATE VACCINE PASSPORT BAN AMID NATIONAL DEBATE

PAUL DILLER*

PDILLER@WILLAMETTE.EDU

TABLE OF CONTENTS

I. INTRODUCTION.....	569
II. APRIL 7, 2021, IDAHO GOVERNOR BRAD LITTLE EXECUTIVE ORDER ON VACCINE PASSPORTS	572
III. VACCINE PASSPORTS IN IDAHO AND THE UNITED STATES	573
IV. MANY STATES BAN VOLUNTARY AND MANDATORY VACCINE PASSPORTS	575
V. IDAHO SENATE BILL NO. 1381 (2022).....	577
VI. THE PUBLIC ACCOMMODATIONS LAW CONTEXT	578
VII. CONCLUSION	580

I. INTRODUCTION

The SARS-CoV-2 virus, which causes coronavirus disease known as COVID-19, emerged in 2019 in and around the city of Wuhan in Hebei Province, in the People’s Republic of China.¹ It is possible that Covid was already in the United States in 2019

* Professor of Law and Roscoe C. and Debra H. Nelson Distinguished Faculty Scholar, Willamette University College of Law. My work on this article benefited from my prior experience in Idaho working on a Congressional campaign in 1996. For that I thank attorney Dan Williams, as well as Ralph and Marilyn Sword who generously hosted me for several months. During that time, I had the great privilege of meeting Bethine Church, the widow of Idaho Senator Frank Church, on several occasions. *See supra* note 48, *infra* (citing Senator Church’s support for the Civil Rights Act of 1964). The experience gave me a greater appreciation for the complexity of Idaho’s legal and political history, including the state’s leaders’ support for civil rights in the 1960s that I detail below.

1. OFF. OF THE DIR. OF THE NAT’L INTEL., UPDATED ASSESSMENTS ON COVID-19 ORIGINS 1, <https://www.dni.gov/files/ODNI/documents/assessments/Declassified-Assessment-on-COVID-19-Origins.pdf> (noting that “the first known cluster of COVID-19 cases [arose] in Wuhan, China in December 2019”). For simplicity’s sake, I will refer to both the virus and the disease it causes as “Covid” throughout the remainder of the article.

even before the first American case was reported on January 20, 2020.² During the course of the next several months, government officials in the United States—as in much of the rest of the world—responded to the virus’s spread with extraordinary measures such as mandatory business and school closures, mask mandates, and enforced physical distancing.³ Many such officials and their constituents viewed an effective vaccine or treatment that could neutralize Covid’s significant toll on public health as the only way out of continuing these extraordinary interventions.⁴

With funding from the federal government’s Operation Warp Speed, private industry relatively quickly submitted two vaccines against Covid to the Food and Drug Administration (FDA) for emergency use authorization (EUA).⁵ The FDA authorized, and the Centers for Disease Control and Prevention (CDC) recommended, two such vaccines in December 2020: those produced by Moderna (for ages eighteen and up) and a Pfizer-BioNTech joint venture (for ages sixteen and up).⁶ In late February 2021, the FDA and CDC granted similar authorization for ages

2. Keri N. Althoff et al., Antibodies to Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) in All of Us Research Program Participants, 2 January to 18 March 2020, 74 *CLINICAL INFECTIOUS DISEASES* 584, 588 (2022), <https://academic.oup.com/cid/article/74/4/584/6294073?login=false> (“[O]ur findings suggests [sic] that the virus may have been present in Illinois as early as 24 December 2019.”). “[D]ata suggest that SARS-CoV-2 infection was present in states [in January and February 2020] far from the initial hot spots considered to be points of entry to the United States (Seattle, Washington, and New York City, New York).” *Id.*

3. See Alexandra Skinner et al., *A Database of US State Policies to Mitigate COVID-19 and its Economic Consequences*, 22 *BMC PUB. HEALTH* 1124 (2022) (briefly reviewing such policies while discussing a comprehensive database of them); Olga Shvetsova et al., *Protective Policy Index (PPI) Global Dataset of Origins and Stringency of COVID 19 Mitigation Policies*, 9 *SCI. DATA* 319 (2022) (discussing a database of international Covid pandemic response measures).

4. See, e.g., Gary A Warner, *Oregon Set to Lift More COVID-19 Restrictions Friday*, *LEBANON EXPRESS*, June 3, 2020 (“[Oregon Governor Kate] Brown cautioned against the idea that the state could ‘return to normal’ . . . before a vaccine is found or a treatment that renders the virus less lethal.”).

5. See generally Moncef Slaoui & Matthew Hepburn, Developing Safe and Effective Covid Vaccines—Operation Warp Speed’s Strategy and Approach, 383 *NEW ENG. J. MED.* 1701 (2020); see also Elizabeth Cohen, Moderna Applies for FDA Authorization for Its Covid-19 Vaccine, *CNN* (Nov. 30, 2020, updated 7:42 PM EST), <https://www.cnn.com/2020/11/30/health/moderna-vaccine-fda-eua-application/index.html> (noting that “Moderna is the second company,” after Pfizer on November 20, 2020, “to apply to the FDA for emergency use authorization for a coronavirus vaccine”).

6. *FDA Takes Additional Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for Second COVID-19 Vaccine*, U.S. FOOD & DRUG ADMIN. (Dec. 18, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid>; *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>.

eighteen and up to the Janssen Covid vaccine, created by a subsidiary of Johnson & Johnson; unlike the two previously authorized vaccines, Janssen's was authorized as one, rather than two, shots.⁷

As supply began to catch up to, and then eventually surpass, demand for these long-awaited shots in the United States, certain businesses and entities began, in the spring and summer of 2021, requiring that patrons and visitors demonstrate proof of Covid vaccination in order to enter their facilities or use their services.⁸ These policies have been called "vaccine passports," or "proof of vaccination" requirements.⁹ Because the vaccines were not immediately authorized for those under sixteen years of age, facilities requiring proof of vaccination sometimes, but not always, made exceptions for minors;¹⁰ some such entities also exempted persons with medical reasons for not taking the Covid vaccination.¹¹ In many instances, businesses required a recent negative Covid test for those seeking an

7. FDA Issues Emergency Use Authorization for Third COVID-19 Vaccine, U.S. FOOD & DRUG ADMIN. (Feb. 27, 2021), <https://www.fda.gov/news-events/press-announcements/fda-issues-emergency-use-authorization-third-covid-19-vaccine>.

8. See, e.g., Morgan Wolfe, *Salt Lake Bar Requiring Vaccine Proof for Entry*, KSL TV (May 13, 2021, 1:16 AM), <https://ksltv.com/462030/salt-lake-bar-requiring-vaccine-proof-for-entry/>. Earlier on, at least anecdotally, a higher percentage of businesses imposing some form of Covid-related requirement for entry allowed a proof of a recent negative Covid test as an alternative to proof of vaccination for *any* customer, not just those seeking an exemption. E.g., Hannah Albertine, *Some NYC Restaurants Are Requiring Proof of Vaccination for Indoor Reservations*, THE INFATUATION: NEW YORK (May 27, 2021), <https://www.theinfatuation.com/new-york/features/some-nyc-restaurants-are-requiring-proof-of-vaccination-for-indoor-reservations>.

9. See Paul Diller, *Municipal Vaccine Passport Regimes in the United States: A European Import Spreads Widely*, 45 FORDHAM INT'L L. J. 639, 639 (2022); see also Sebastián Guidi et al., *Depolarizing the COVID Vaccine Passport*, 131 YALE L. J. F. 1010, 1010 n.1 (2022) (noting that terms such as "COVID passports," "immunity passports," and "COVID passes" have been used for "vaccine passports").

10. E.g., Jane Recker & Jessica Sidman, *These DC-Area Restaurants and Bars Require Proof of Covid-19 Vaccination*, WASHINGTONIAN (July 30, 2021), <https://www.washingtonian.com/2021/07/30/dc-area-restaurants-and-bars-require-proof-of-covid-19-vaccination/> (citing one restaurant, 2Amys, as requiring proof of vaccination for indoor dining but restricting "[u]nvaccinated—including children who aren't eligible ... to the outdoor patio").

11. See, e.g., Laura Hayes, *The D.C. Cafes, Bars, and Restaurants Requiring Proof of Vaccination*, WASH. CITY PAPER (July 30, 2021), <https://washingtoncitypaper.com/article/526138/the-d-c-cafes-bars-and-restaurants-requiring-proof-of-vaccination/> (listing two restaurants as requiring documentation for those seeking a medical exemption from the businesses' vaccine passport requirements).

exemption from proof-of-vaccination rules, or required the unvaccinated to eat outside.¹²

II. APRIL 7, 2021, IDAHO GOVERNOR BRAD LITTLE EXECUTIVE ORDER ON VACCINE PASSPORTS

Like many other states', Idaho's first legal foray into the regulation of vaccine passports came via gubernatorial executive order. On April 7, 2021, Idaho Governor Brad Little, invoking his authority as head of the executive branch under Idaho's constitution and statutes, promulgated an order whereby he forbade state entities from (1) conditioning access to state facilities or services on an individual demonstrating proof of having received a Covid vaccine; (2) producing and issuing a Covid vaccine passport; and (3) providing information regarding an individual's Covid vaccine status to any person, entity, or government for inclusion in a Covid vaccine passport program.¹³ Although no jurisdiction in the United States was requiring Covid vaccine passports at the time, some foreign governments, such as Israel and Denmark, had instituted such policies.¹⁴ Moreover, in the United States, some states had begun efforts to facilitate the use of proof-of-vaccination requirements in public and private facilities by developing and releasing smartphone applications ("apps") that would allow businesses and other public accommodations to screen potential customers for their vaccine statuses.¹⁵ These apps often also allowed persons to display Covid test results, and emerged alongside private competitors that developed initially to facilitate meeting international travel requirements.¹⁶

Unlike other governors' similar prohibitions on vaccine passports, Little's April 2021 executive order did not expressly rely on emergency authority, ensuring that it would last beyond the end of the public health emergency he had declared for

12. See, e.g., *id.* (listing several restaurants as allowing customers to present a negative Covid test (in some cases specifying a polymerase chain reaction (PCR) test), usually from within 72 hours before entry, as an alternative to proof of vaccination); Recker & Sidman, *supra* note 10.

13. Exec. Dep't, State of Idaho, Exec. Ord. No. 2021-04, Banning Vaccine Passports (2021) [hereinafter EO No. 2021-04].

14. Guidi et al., *supra* note 9, at 1012–13 & nn. 12–15 (discussing other countries' use of vaccine passports, including Israel and Denmark).

15. See, e.g., Sharon Otterman, *Will the Excelsior Pass, New York's Vaccine Passport, Catch On?*, N.Y. TIMES (Aug. 19, 2021) (noting that New York's Excelsior Pass was "the first and only government-issued vaccine passport in the country" when introduced in March 2021).

16. See Tariro Mzezewa, *Coming Soon: The 'Vaccine Passport,'* N.Y. TIMES, (July 20, 2021), <https://www.nytimes.com/2021/02/04/travel/coronavirus-vaccine-passports.html>.

Covid.¹⁷ Moreover, it is not obvious from the order's text that Little's executive order would extend to local entities. It appears, however, that Little intended for his order to bind state universities and colleges.¹⁸ The text of the order makes clear that, unlike some other governors', Little's did not seek to regulate the behavior of *private* entities in any way.¹⁹

III. VACCINE PASSPORTS IN IDAHO AND THE UNITED STATES

Sometime after Little's order, in August 2021, a restaurant in Boise may have been the first business in the state to require proof of vaccination of customers.²⁰ Soon thereafter, in September 2021, a Boise music festival, Treefort, required proof of vaccination as the Delta variant of Covid gained prevalence.²¹ With the arrival of

17. Little's public health emergency for Covid began on March 13, 2020. EXEC. DEP'T, STATE OF IDAHO, PROCLAMATION, March 13, 2020, (proclaiming initial Covid emergency for thirty days), and lasted until April 15, 2022. *Public Health Disaster Emergency Declaration to End April 15*, OFF. OF THE GOVERNOR OF IDAHO, Mar. 8, 2022, (indicating intent to end Idaho's public health emergency for Covid on April 15, 2022).

18. See, e.g., Royce McCandless, *ASUI Calls for Gov. Brad Little to Rescind Executive Order*, THE ARGONAUT (Sept. 17, 2021), <https://www.uiargonaut.com/2021/09/17/asui-calls-for-gov-brad-little-to-rescind-executive-order/> (asserting that under Little's order, "[a]s a publicly funded university, the University of Idaho has since been unable to mandate vaccines"). In addition, while Governor Little was out of Idaho in October 2021, Lieutenant Governor Janice McGeachin issued her own executive order banning vaccine passports at K–12 schools and universities. EXEC. DEP'T, STATE OF IDAHO, EXEC. ORD. NO. 2021-13, BANNING VACCINE PASSPORTS AND MANDATORY TESTING (2021). In rescinding this order immediately upon his return, Little asserted that McGeachin's order was "redundant." EXEC. DEP'T, STATE OF IDAHO, EXEC. ORD. NO. 2021-14, REPEALING EXECUTIVE ORDER NO. 2021-13 (2021), https://gov.idaho.gov/wp-content/uploads/2021/10/eo-2021-14_rev.pdf.

19. EO No. 2021-04, *supra* note 13. In Florida and Montana, governors issued executive orders that banned private vaccine passports. *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, NAT'L ACAD. FOR STATE HEALTH POL'Y, (Apr. 5, 2023), <https://nashp.org/state-efforts-to-ban-or-enforce-covid-19-vaccine-mandates-and-passports/>; STATE OF MONT., OFF. OF THE GOVERNOR, EXEC. ORD. NO. 7-2021, EXECUTIVE ORDER PROHIBITING VACCINE PASSPORTS (2021) (prohibiting "Montana businesses . . . from requiring patrons or customers to provide any documentation certifying COVID-19 vaccination or post-transmission recovery to gain access to, entry upon, or service from the business"); STATE OF FLA., OFF. OF THE GOVERNOR, EXEC. ORD. NO. 21-81(2020) (similar language as Montana).

20. Katija Stjepovic, *Downtown Boise Restaurant Requires Proof of COVID-19 Vaccination or Negative Test*, KTVB7 (Aug. 26, 2021, 5:18 PM), <https://www.ktvb.com/article/news/local/208/downtown-boise-restaurant-require-proof-covid-19-vaccination-or-negative-test/277-bb2eda53-f4c6-4616-a446-b36be72bbb5d>.

21. Mariah Hebbeln, *Treefort Music Festival Now Requiring Proof of COVID-19 Vaccination for September Event*, TOTALLY BOISE (Aug. 11, 2021), <https://totallyboise.com/Local-Stories/ArticleID/2769/Treefort-Music-Festival-Now-Requiring-Proof-of-COVID-19-Vaccination>.

the highly transmissible Omicron variant in December 2021, the use of vaccine passports spread more widely around the nation.²² As late as February 2022, even with Omicron fading, “[s]everal events and activities” and music festivals in the Boise area required proof of vaccination, although this practice was “certainly less common in Idaho than in other states.”²³

In August 2021, New York City became the first United States government to impose a jurisdiction-wide, mandatory vaccine mandate on a wide variety of businesses and public accommodations akin to the rules adopted by Israel and Denmark previously.²⁴ Mayor Bill de Blasio promulgated the rule—called “Key to NYC”—by emergency executive order.²⁵ Key to NYC also included a limited employment vaccine mandate: the very entities to which the customer vaccination mandate applied were required to ensure that their employees were vaccinated.²⁶ Several U.S. cities and counties, in addition to Puerto Rico and the District of Columbia, followed New York City and promulgated their own similar mandates.²⁷ In all, twenty-two cities and counties ultimately adopted such policies, making for twenty-five jurisdictions in total including those mentioned above.²⁸ *Not one state*, however, adopted a similar mandatory vaccine passport policy, even though some

22. See Diller, *supra* note 9, at 644.

23. Isabella Fox, *Boise State Students Share Their Thoughts on the COVID Vaccine*, THE ARBITER (Feb. 28, 2022), <https://arbiteronline.com/2022/02/28/boise-state-students-share-their-thoughts-on-the-covid-vaccine/>.

24. Diller, *supra* note 9, at 640 (discussing Israel’s Green Pass and Denmark’s vaccine passport); *id.* at 643 (discussing New York City’s adoption of its vaccine passport program).

25. The City of N.Y. Off. of the Mayor, Emergency Exec. Ord. No. 225, Key to NYC: Requiring COVID-19 Vaccination for Indoor Entertainment, Recreation, Dining and Fitness Settings (2021).

26. *Id.* § 1 (“[A] covered entity shall not permit a patron, full- or part-time employee, intern, volunteer, or contractor to enter a covered premises without displaying proof of vaccination and identification bearing the same identifying information as the proof of vaccination.”). In December 2021, Mayor de Blasio—again by emergency executive order—announced a vaccine mandate that applied to all private sector employers and employees who worked in person. THE CITY OF N.Y. OFF. OF THE MAYOR, EMERGENCY EXEC. ORD. No. 317 (2021). This employment mandate came on top of a mandate for city workers that Mayor de Blasio’s Health Commissioner had decreed months earlier, with the mayor’s endorsement. See THE CITY OF N.Y. OFF. OF THE MAYOR, EMERGENCY EXEC. ORD. No. 83, AMENDMENT AND PARTIAL REPEAL OF EXECUTIVE ORDER 78 WITH RESPECT TO REQUIRING VACCINATION OR TESTING FOR CITY EMPLOYEES AND CERTAIN CONTRACTORS (2021) (repealing in part prior mayoral order, from August 2021, that had required city workers and contractors to vaccinate against Covid or test regularly in light of health commissioner order requiring vaccinations for same group); COMM’R OF HEALTH & MENTAL HYGIENE, ORDER OF THE COMMISSIONER OF HEALTH & MENTAL HYGIENE TO REQUIRE COVID-19 VACCINATION FOR CITY EMPLOYEES AND CERTAIN CITY CONTRACTORS (2021).

27. Diller, *supra* note 9, at 642–44 (listing United States jurisdictions with mandatory vaccine passport regimes).

28. *Id.*

states were very aggressive with respect to vaccination in other regards, imposing vaccination mandates on state, local, and health-care workers by executive order and administrative rule.²⁹

The twenty-five United States jurisdictions' mandatory vaccine passport policies varied to some extent along a variety of metrics, such as to which exact types of businesses they applied, how and to what extent they applied to minors, the extent to which they recognized or required accommodation for medical or religious exemptions and the process for demonstrating such, and means and severity of enforcement.³⁰ By March of 2022, with the waning of the Omicron variant, every one of the twenty-five jurisdictions repealed its proof-of-vaccination requirements for public accommodations, though many kept other requirements, such as for employment or entering school buildings, for much longer.³¹

IV. MANY STATES BAN VOLUNTARY AND MANDATORY VACCINE PASSPORTS

At the same time that dozens of governments were mandating “vaccine passports,” several states concerned about their use banned them. Throughout 2021 and 2022, eight states—Alabama, Florida, Iowa, Montana, North Dakota, South Dakota, Texas, and Utah—banned most or all privately owned public accommodations from requiring proof of Covid vaccination as a condition of entry

29. See, e.g., *Johnson v. Brown* (D. Or. 2021) (rejecting challenge to governor’s executive order requiring state executive branch employees to be vaccinated and state agency order requiring health-care workers and school employees and visitors to be vaccinated).

30. Diller, *supra* note 9, at 644–45 (discussing variations among the regimes).

31. See, e.g., Katie Teague & Peter Butler, *Big Cities Drop Vaccine Requirements as COVID Cases Fall*, CNET (Feb. 20, 2022), <https://www.cnet.com/health/vaccine-mandates-cities-lift-requirements-as-covid-cases-drop/> (“Over the past week, Boston, Washington, DC, Philadelphia, Seattle and Minneapolis/St. Paul all lifted their vaccine requirements or announced imminent end dates.”). New York City, for instance, retained its mandate that all visitors to public schools show proof of vaccination against Covid, as well as its mandate for city workers to be vaccinated against Covid, well into 2023. See Reema Amin, *COVID Vaccine Mandate Dropped for City Employees, Visitors to NYC Public Schools*, CHALKBEAT NEW YORK (Feb. 6, 2023, 12:29 PM), <https://ny.chalkbeat.org/2023/2/6/23588165/ny-vaccine-mandate-covid-visitors-schools-employees-adams> (reporting on Mayor Eric Adams announcing the end of these rules). See Nat’l Restaurant Ass’n, *State and Local Mask Mandates and COVID-19 Related Requirements* (updates as of June 9, 2023), <https://restaurant.org/nra/media/downloads/pdfs/business/covid-19-state-and-local-mask-mandates.pdf> (listing repealed mandates).

or service.³² Some of these eight states, as well as several other states, also restricted vaccine passports in some of the ways Governor Little did by executive order, such as by prohibiting state agencies from requiring proof of vaccination to enter government buildings or to receive services, and by prohibiting state and local governmental entities from issuing vaccine identification cards.³³ Unlike the states in which a state-issued vaccination proof app could facilitate “voluntary” vaccine passports by businesses and other entities, the states that prohibited such governmental apps made it *more* difficult for private entities to limit entry to their premises or provision of their services on the basis of vaccination status, or at least ensured that the government played no role in facilitating such. Many states also sought to ban *employer* use of vaccine mandates for employees. Most states that legislated in this regard limited these prohibitions to governmental entities only; but others, such as Montana, extended them to many private workplaces as well.³⁴

32. Act of May 24, 2021, No. 493, § 1(d), 2021 Ala. Laws (codified at ALA. CODE § 22-11B-5 (2023)); Act of May 3, 2021, § 18(1), 2021 Fla. Laws ch. 8 (codified as amended at FLA. STAT. § 381.00316 (2023)); Act of May 20, 2021, § 2(1), 2021 Iowa Acts ch. 141 (codified at IOWA CODE § 27C.2 (2023)); Act of May 7, 2021, § 1(1)(c), 2021 Mont. Laws ch. 418 (codified at MONT. CODE ANN. § 49-2-312 (2023)); Act of May 10, 2021, ch. 204, § 1 (codified at N.D. CENT. CODE § 23-12-20 (2023)); Act of Apr. 25, 2022, § 9(A), 2022 S.C. Acts 1552, 1556 (to be repealed December 31, 2023; *id.* § 12 (noting that the bill is “repealed on December 31, 2023, unless reauthorized by the General Assembly”)); Act of June 16, 2021, § 14(c), 2021 Tex. Sess. Law Serv. ch. 863 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. § 161.0085 (West 2023)); Act of Mar. 15, 2023, § 1(2), 2023 Utah Laws ch. 275 (codified at UTAH CODE ANN. § 13-7-5 (2023)). Of the eight laws, five—Florida, Iowa, North Dakota, South Carolina, and Texas—apply to Covid immunization only, while the other three—Alabama, Montana, and Utah—apply to vaccinations generally. *See id.* With respect to the venues or entities covered, some states exempted health care facilities. *See, e.g.,* IOWA CODE § 27C.2 (2022) (exempting “health care facility” from type of “business” to which prohibition on vaccine passports applies).

33. For surveys of the various state policies, see *State Government Policies About Vaccine Requirements*, BALLOTPEDIA, [https://ballotpedia.org/State_government_policies_about_vaccine_requirements_\(vaccine_passports\)](https://ballotpedia.org/State_government_policies_about_vaccine_requirements_(vaccine_passports)) (Mar. 15, 2023). See also *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, Nat’l Acad. for State Health Pol’y (NASHP), <https://nashp.org/state-efforts-to-ban-or-enforce-covid-19-vaccine-mandates-and-passports/> (Apr. 5, 2023).

34. *See* BALLOTPEDIA, *supra* note 33; NASHP, *supra* note 33. Several states did not ban private employer Covid vaccine mandates *per se*, but rather aggressively required exemptions for reasons that go beyond federal law, such as philosophical or moral beliefs, or because an individual has “natural immunity” from Covid due to a prior infection. BALLOTPEDIA, *supra* note 33; NASHP, *supra* note 33. According to the NASHP, Montana was the only state to ban private employer vaccination mandates outright; *see id.*; MONT. CODE ANN. § 49-2-312(1)(b) (2023) (“[I]t is an unlawful discriminatory practice for . . . an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the

V. IDAHO SENATE BILL NO. 1381 (2022)

The Idaho Senate introduced Senate Bill number 1381 (SB 1381) on March 7, 2022.³⁵ Ironically, this bill emerged just as the twenty-five jurisdictions with mandatory vaccine passport rules were rescinding them, and many businesses that had voluntarily adopted vaccine passports were also winding down those policies.³⁶ Within three days of SB 1381's introduction, the Senate Judiciary Committee referred the bill out with a "do pass" recommendation, and a mere five days later, on March 15, 2022, the Senate passed the bill 24 to 11.³⁷ The Idaho House of Representatives passed the bill a mere three days later, on March 18, 2022, by a vote of 45 to 23.³⁸ Governor Little, however, vetoed the bill on March 28, 2022, and the senate attempt to override his veto passed 21 to 14, but fell short of the 24 votes necessary to override the veto.³⁹ The original House vote had only amounted to 64 % of the chamber, so perhaps the override would have been unsuccessful regardless. Regardless, clearly Governor Little's message resonated with just enough of the bill's original supporters in the Senate to cause them to change their minds.

Governor Little's veto message stressed his "belief that businesses should be left to make decisions about the management of their operations and employees with limited interference from government."⁴⁰ This strain of libertarian thinking permeated much of the "red state" opposition to both vaccine passport bans and bans on employer vaccine mandates where such opposition took hold. In several states, while there was often agreement among many elected officials (generally Republicans) that vaccine passports—as well as employer Covid vaccination mandates—were a malign phenomenon, there was frequent internecine disagreement over whether government ought to intervene to ban either practice. In addition to Idaho, similar disputes played out in Indiana, New Hampshire, and

person's vaccination status or whether the person has an immunity passport . . .") (invalidated by Mont. Med. Ass'n v. Knudsen, 645 F. Supp. 3d 999 (D. Mont. 2022)), *appeal docketed*, No. 23-35014 (9th Cir. Jan. 9, 2023). A federal district court held that the Americans With Disabilities Act and a Centers for Medicare and Medicaid Services interim rule preempted the Montana law as applied to "health care settings"; Montana is appealing the decision to the Ninth Circuit as of this writing. *Id.*

35. S.B. 1381, 66th Leg., 2d Reg. Sess. (Idaho 2022).

36. See Nat'l Restaurants Ass'n, *supra* note 31; Diller, *supra* note 9, at 644.

37. 2022 *Legislation*, IDAHO LEGISLATURE, <https://legislature.idaho.gov/sessioninfo/2022/legislation/s1381/> (last visited Apr. 22, 2023).

38. *Id.* Two members of the House were absent for this vote.

39. *Id.*

40. Letter from Gov. Brad Little to Lt. Gov. Janice McGeachin, President of the Senate (Mar. 28, 2022) (explaining veto of SB 1381).

Oklahoma, among other places.⁴¹ Democratic officials were generally more sanguine about vaccine passports and employer vaccination requirements—indeed, many Democratic governors and mayors imposed such requirements on public employees—and frequently echoed Governor Little in invoking the authority of private businesses to decide for themselves with whom to do business and whom to employ in rejecting bans on such policies.⁴²

VI. THE PUBLIC ACCOMMODATIONS LAW CONTEXT

The divide regarding whether government should regulate the practices of private businesses with respect to whom they employ or serve goes back decades. Focusing on public accommodations, the common law has a long history of regulating businesses' practice in this regard.⁴³ Civil rights legislation built on this contested historical practice by limiting the authority of businesses and entities, as owners of private property, to exclude certain persons from their premises or services for certain reasons.⁴⁴ Race, national origin, religion, gender, and disability are the most well-known bases of prohibited exclusion and/or required accommodation, but the various federal, state, and local antidiscrimination laws now include several other categories for mandatory inclusion: sexual orientation, gender identity, height, weight, appearance, prior offender status, political beliefs, and veteran status, to name some.⁴⁵ All throughout, going back to the opposition to the seminal 1964 Civil Rights Act ("CRA"), opponents of the various limitations on the right to exclude or choose with whom one does business have invoked the libertarian notion that government should stay out of the decisions of private

41. Kathryn Watson, *GOP governors' split on private COVID vaccine mandates highlights changing Republican base*, CBS NEWS (January 11, 2022, 1:03 PM), <https://www.cbsnews.com/news/covid-vaccine-mandate-republican-governors-private-businesses/>.

42. See, e.g., Brittany Breeding, *Bill would ban vaccine mandates in South Carolina*, FOX 28 SAVANNAH (Dec. 9, 2021), <https://fox28savannah.com/news/local/bill-to-ban-vaccine-mandates-in-south-carolina> (quoting Democratic state representative Todd Rutherford as saying, "We need to let businesses decide who needs to be vaccinated and who does not," in debating bill making workers eligible for unemployment if they refused a private employer's vaccine mandate).

43. See Paul A. Diller, *Training a Public Accommodations Lens on Vaccine Passports*, 27 LEWIS & CLARK L. REV. 523, 551-60 (2023) (discussing the common-law regime as applied to voluntary vaccine passports).

44. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1412-39 (1996) (discussing how federal and state civil rights statutes limit business owners' rights to exclude whom they choose to serve).

45. See *id.* at 1413-15; *State Public Accommodations Laws*, NAT'L CONF. STATE LEGISLATURES (NCSL), <https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws> (June 25, 2021) ("All [45] states with a public accommodation law prohibit discrimination on the grounds of race, gender, ancestry and religion."); Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1147-50 (2012) (discussing the various categories protected by local antidiscrimination laws).

entities.⁴⁶ In certain contexts, such as nonprofit associations, the Supreme Court has even found this right to be rooted in the First Amendment's freedom of association.⁴⁷

In Idaho specifically, the state's legal and political history did not reflect the libertarian notion that government should not interfere with private businesses that serve the public. For instance, Idaho's entire Congressional delegation—two senators and two representatives—voted for the CRA, which their Southern counterparts opposed as an infringement on private property rights.⁴⁸ In addition to passing its own employment discrimination law in 1961, three years before the passage of the CRA (which also prohibited employment discrimination),⁴⁹ Idaho also enacted its own public accommodations (and housing) antidiscrimination law—the Idaho “Human Rights Act” (IHRA)—in 1969.⁵⁰ The current version of the IHRA bans discrimination in public accommodations on the basis of race, color, religion, sex, national origin, and in many instances, age or disability.⁵¹ Idaho, therefore, did not come into Covid with the legacy of those states that so ardently opposed the CRA that they never passed statutes of their own prohibiting racial or ethnic discrimination in public accommodations—Alabama, Georgia, Mississippi, North Carolina, and Texas.⁵² Alabama and Texas, therefore, could not and did not build on

46. See Eduardo M. Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PENN. L. REV. 1095, 1116–17 (2007) (discussing Southern opposition to the 1965 CRA).

47. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (reversing state supreme court decision that prohibited Boy Scouts, as a “public accommodation,” from excluding gay scout master, on the grounds that such an application of New Jersey’s antidiscrimination law violated the organization’s freedom of association protected by the First Amendment).

48. See Peñalver & Katyal, *supra* note 46, at 1116–17 (discussing Southern opposition to the CRA); *H.R. 7152 (Jul. 2, 1964)*, <https://www.govtrack.us/congress/votes/88-1964/h182> (July 7, 2023) (demonstrating that Idaho representatives Compton White and Ralph Harding, both Democrats, voted in favor of the CRA, and that ninety-four of the 126 votes against came from representatives from former Confederate states); *H.R. 7152*, <https://www.govtrack.us/congress/votes/88-1964/s409> (July 7, 2023) (demonstrating that Idaho senators Frank Church (Democrat) and Leonard Jordan (Republican) both voted in favor of the CRA, and that twenty-one of the twenty-two senators from former Confederate states voted against it, out of a total of twenty-seven opponents).

49. Fair Employment Practices Act, No. 217, § 3, 1961 Idaho Sess. Laws 573.

50. 1969 Idaho Sess. Laws ch. 459 (codified as amended at Idaho Code Ann. § 67-5909 (West 2023)).

51. *Id.*

52. NCSL, *supra* note 45 (“Five states—Alabama, Georgia, Mississippi, North Carolina and Texas—do not have a public accommodation law for nondisabled individuals.”). Nor did Idaho, as far as I am

a pre-existing public accommodations regime by codifying a ban on Covid vaccine discrimination.

The Democratic and “left”-leaning defense of business autonomy raised in the context of vaccine passports is inconsistent with prior arguments in other contexts.⁵³ This inconsistency may be a “one-off” due to the potency of Covid fear among Democrats and “liberals,” but it might also signal a new acceptance of private power among the “left.” On the “right,” the argument in favor of limiting private business may connect to the notion of a more muscular and meddlesome conservatism now ascendant in some circles. This idea holds that private entities, including universities and corporations, are so overtaken with certain “leftist” (or “woke”) values that government can no longer afford to stay neutral; it must interfere to level the playing field.⁵⁴

VII. CONCLUSION

In rejecting a ban on Covid vaccine passports in privately owned or operated public accommodations, Idaho landed in the traditional conservative libertarian camp even if its own history is not so firmly implanted there. Despite two contiguous neighbors, Montana and Utah, passing such bans, the power of the Idaho governor’s office to veto legislation,⁵⁵ combined with the two-thirds threshold required to override a gubernatorial veto, may ensure that Idaho remains in this traditional libertarian camp with respect to Covid (or other) vaccine passports until at least 2027.⁵⁶ By that point, the issue of vaccine passports may have faded from public salience.

aware, have a law that authorized places of public accommodations to choose their customers at will with no limitations, as several states still do. Singer, *supra* note 44, at 1438–39 (citing such laws in Arkansas, Delaware, Florida, Mississippi, and Tennessee, and noting that all have been superseded by subsequent state statutes except for Mississippi’s law, which is undermined but not eviscerated by federal law).

53. Of course, the orientation of the Democratic party changed drastically over time; in 1964, most opponents of the CRA were Democratic Southerners. See roll call votes cited in note 48, *supra*.

54. See, e.g., Elizabeth Zerofsky, *How the American Right Fell in Love with Hungary*, N.Y. TIMES MAG., Oct. 19, 2021 (surveying such views among “the postliberal right” “a loose constellation of conservatives with a variety of unorthodox ideas”).

55. See IDAHO CONST. art. IV, § 10 (describing the governor’s veto power).

56. *Id.* In requiring two-thirds of legislators of each house to override a veto, Idaho’s threshold is higher than that of approximately a dozen states, some of which require a mere majority and others of which require three-fifths. See *The Book of the States*, 53 COUNCIL OF STATE GOV’TS, THE BOOK OF THE STATES 71 (2021 ed.).