
Are Vaccine Mandates Constitutional for K-12 Children? Perhaps.

BLOG | NOVEMBER 16, 2021

On October 1, 2021, California Governor Gavin Newsom^[1] announced that all schoolchildren in the state will be required to receive the COVID-19 vaccine once the vaccine receives full Food and Drug Administration (“FDA”) approval, but what does his proclamation mean for school-aged children across the nation? North Carolina Governor Roy Cooper has not made such a declaration, but if he does, will a mandate withstand constitutional scrutiny considering the recent ruling, detailed below, by the U.S. Court of Appeals for the Fifth Circuit?

In an opinion^[2] issued on November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit^[3] reaffirmed its decision to temporarily halt the November 4, 2021 mandate, imposed by the Occupational Safety and Health Administration (“OSHA”), that applies to employers with 100 or more employees. While the federal appellate court^[4] has yet to rule on the constitutionality of the mandate, the three-judge panel called the mandate “fatally flawed on its own terms” and a “one-size-fits-all sledgehammer,”^[5] which raises a similar question of whether the federal government or states could mandate the COVID-19 vaccine for Pre-K through grade 12 school admission.

Today, all fifty states require school-age children to be vaccinated for communicable diseases.^[6] COVID-19 clearly qualifies as a communicable disease. The Advisory Committee on Immunization Practices (“ACIP”) – a committee housed within the Centers for Disease Control and Prevention – issues recommendations for adult and pediatric vaccines in the United States. Most states today often rely on ACIP recommendations for school vaccination mandates. On November 2, 2021, the ACIP made an interim recommendation for use of the Pfizer-BioNTech COVID-19 vaccine in children aged 5–11 in the United States.^[7] While states have not yet imposed ACIP’s recommendation through a vaccination mandate, a school vaccination mandate may follow on the heels of the recent OSHA mandate.

North Carolina

In North Carolina, no child can attend a school (pre-K through grade 12), whether public, private or religious, or a child care facility, unless the parent, guardian, or responsible person presents a certificate of immunization to the school or facility indicating that the child received the required immunizations.^[8] Required immunizations include diphtheria, tetanus, whooping cough, poliomyelitis, red measles (rubeola) and rubella, and any “*other disease upon a determination by the North Carolina Commission for Public Health (“Commission”) that the immunization is in the interest of the public health.*”^[9] North Carolina does not currently require COVID-19 immunization for school-age children and the Commission, likewise, has made no attempt to require the COVID-19 vaccine for school admission. At present, the authority to add new vaccines to the required immunization list lies primarily with the state legislature, but if the Commission declares the COVID-19 vaccine to be in the “interest of the public health,” a vaccine mandate may be

imminent.

History of Constitutional Vaccination Mandates in the United States

Throughout United States history, cities and states typically imposed vaccine mandates through the legislative process, and not by executive action, since the United States Supreme Court (“Supreme Court”) routinely upholds vaccine mandates enacted by legislative action, as detailed in the chronological snapshot below.

- **1905:** The Supreme Court upheld a Massachusetts law that required a smallpox vaccination for the entire population under the state’s police powers[10] – police powers necessitated by a smallpox epidemic that posed an “imminent danger” and “threaten[ed] the safety of [society’s] members,” when there was “the pressure of great dangers,” and for an “epidemic that imperiled an entire population.” *Jacobson v. Massachusetts*, 197 U.S. 11, 29-30 (1905).
- **1922:** The Supreme Court upheld a city of San Antonio, Texas ordinance that mandated smallpox vaccination for school admission as a valid exercise of the state’s police power, since the school vaccination mandate did not confer arbitrary power, but “only th[e] broad discretion required for the protection of the public health.” *Zucht v. King*, 260 U.S. 174, 176-77 (1922).
- **1944:** The Supreme Court espoused that a parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened.” *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

The Supreme Court has made it clear that parental authority is not absolute, and freedom of religion does not give parents the “green light” to expose their children to a communicable disease. However, the uncertainty created by the FDA’s Emergency Use Authorization, and not full authorization, for the Pfizer-BioNTech COVID-19 vaccine for children 5-15 years of age, poses a constitutional dilemma for parents’ rights activists and the courts to debate.[11]

Scope of Parental Authority

Even though the Supreme Court has held school vaccination mandates constitutional in the past, without full FDA approval for the Pfizer-BioNTech COVID-19 vaccine for children aged 5-15 years, it is unclear how the Supreme Court may evaluate the merits of such a challenge. Parents would likely have the choice to opt-out of a mandate until the COVID-19 vaccine for school-age children receives full approval. Moreover, North Carolina law currently provides two exemptions from the statutory immunization requirements: (1) a religious exemption[12] that requires the submission of a written statement of religious belief and (2) a health exemption, which unlike the religious exemption, must be completed by a physician that certifies the immunization “is or may be detrimental to a person’s health.”[13] North Carolina does not currently offer a philosophical exemption for an individual who objects based on his or her personal, moral or other beliefs. However, House Bill 558, which was introduced in the North Carolina General Assembly on April 13, 2021, but garnered little attention, proposed to ban COVID-19 vaccination requirements for schools and child care facilities and add a philosophical exemption[14] to the immunization statutes. Therefore, a philosophical exemption may be on the horizon in the future.[15]

Conclusion

In sum, based on Supreme Court precedent, a COVID-19 immunization requirement for school-age children may withstand constitutional scrutiny, but will likely depend on the entity that imposes the mandate. If the State of North Carolina (or a municipality) imposes a mandate by legislative action, the mandate will likely survive constitutional muster based on the broad police power granted to states to ensure public health and safety, especially in emergency situations, like the COVID-19 pandemic. However, if the governors or President Biden choose to act by executive action, the mandate will likely face the same legal challenges encountered by the recent OSHA vaccination mandate for large private employers. Additionally, the FDA has granted full approval to Pfizer-BioNTech's two-dose vaccine for individuals aged 16 and up, which raises a separate question of whether states and school districts will treat high schoolers age 16 and over differently than children 15 and under, who would be required to receive a vaccine granted emergency authorization status. While it remains undecided how the Supreme Court may evaluate a COVID-19 immunization mandate, discussions regarding public health necessity, familial and personal privacy, liberty interests, proportionality, and whether the mandate serves as a reasonable means of stopping the spread of COVID-19 will likely dominate the conversation.

[1] Tim Fitzsimons, *California to Require Covid Vaccine for Schoolchildren, Newsom Announces*, NBC News (Nov. 1, 2021), <https://www.nbcnews.com/news/us-news/california-require-covid-vaccine-public-schoolchildren-newsom-announces-n1280602>.

[2] *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab*, No. 21-60845, 2021 WL 5279381 (5th Cir. Nov. 12, 2021).

[3] The U.S. Court of Appeals for the Fifth Circuit, which is based in New Orleans, includes the following states: Mississippi, Louisiana, and Texas. The Fifth Circuit first halted the OSHA emergency rule on November 6, 2021.

[4] The Judicial Panel on Multidistrict Litigation expects to conduct a multi-circuit lottery on or around November 16, 2021 to determine which U.S. Court of Appeals will hear the challenges to the OSHA's emergency rule, since challenges have been filed in nearly every circuit court. *See* 28 U.S.C. § 2112(a)(3). Under federal law, when multiple lawsuits "involving one or more common questions of fact are pending in different districts," the petitions are consolidated and heard by one circuit court chosen at random. *See* 28 U.S.C. § 1407(a). Each court receives only one entry in the lottery, regardless of the number of petitions pending before each court.

[5] *BST Holdings, L.L.C.*, 2021 WL 5279381, at *3-4.

[6] *See* James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 833 (2002).

[7] Kate R. Woodworth et al., *The Advisory Committee on Immunization Practices' Interim Recommendation for Use of Pfizer-BioNTech COVID-19 Vaccine in Children Aged 5–11 Years — United States, November 2021*, Centers for Disease Control and Prevention (Nov. 12, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7045e1.htm>.

[8] N.C. Gen. Stat. § 130A-155(a).

[9] N.C. Gen. Stat. Ann. § 130A-152(a).

[10] “Police powers” refers to the authority the Constitution reserves to the states and includes “reasonable regulations established directly by legislative enactment as will protect the public health and the public safety[.]” 197 U.S. at 25.

[11] On May 10, 2021, the FDA expanded its Emergency Use Authorization for the Pfizer/BioNTech COVID-19 vaccine to include children aged 12-15. On October 29, 2021, the FDA granted Emergency Use Authorization for the Pfizer-BioNTech COVID-19 vaccine for children aged 5–11 years. On August 23, 2021, the FDA granted full approval to Pfizer-BioNTech’s two-dose vaccine for individuals ages 16 and up.

[12] N.C. Gen. Stat. § 130A-157.

[13] N.C. Gen. Stat. § 130A-156.

[14] Section 2.1 of House Bill 558 proposes to amend Article 6 of Chapter 130A to include a philosophical exemption as follows – “The moral, philosophical, or other personal beliefs of many citizens are contrary to the immunization requirements contained in this Chapter. All citizens have a right to expect that their personal privacy rights, particularly in the area of personal health, will be protected by this State. Therefore, the matter of whether a person chooses for oneself, for one’s children, or for anyone for whom that person stands in loco parentis, to receive a vaccine or not to receive it, shall remain a private matter, not to be violated. Because the requirement of a written statement of the moral, philosophical, or personal beliefs and opposition to the immunization requirements would violate those privacy rights, no such statement shall be required of anyone, nor shall the question of whether such an affected person has received an immunization be asked of anyone as a condition of attending any college, university, public or private school (Pre-K through 12), or child-care facility.”

[15] House Bill 558 did not survive the crossover deadline – the date in which a bill not related to taxes or spending must have passed either the House or Senate chamber to be eligible for consideration during the 2021-2022 legislative session. Therefore, House Bill 558 will lie dormant during the remainder of the two-year legislative session but may be revived in the next legislative session.

CONTACT US

Phone: 919-782-6860

Fax: 919-782-6753

OFFICE

Young Moore and Henderson, P.A.

3101 Glenwood Ave. Suite 200

Raleigh, N.C. 27612

MAILING ADDRESS

Young Moore and Henderson, P.A.

P.O. Box 31627

Raleigh, N.C. 27622-1627