

May 25, 2021

Governor Kate Brown

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Sent via U.S. Mail and electronic communication: Governor'sOffice@leg.state.or.us

CC via Electronic Communication: Oregon Health Authority Director Patrick Allen, OHA.DirectorsOffice@state.or.us; Attorney General Ellen Rosenblum, doj.info@state.or.us.

Re: May 18, 2021 Interim Guidance for Fully Vaccinated Individuals

Dear Governor Brown:

I represent Oregon businesses and individuals who have been struggling to comply with your May 18, 2021 Interim Guidance for Fully Vaccinated Individuals (“Vaccine ID Mandate”).

Let me begin by telling you the story of HIC Inc., a business in Klamath County owned by RM. As has been true for many businesses through the state, the past fourteen months have been difficult financially for HIC Inc. Any further disruption of the business will likely end in RM being forced to close permanently. When the CDC guidelines¹ changed on May 13, 2021, HIC Inc. gladly allowed fully vaccinated patrons to enter their premises without facial coverings, and immediately saw a return of vitality in the business. But this lasted only a matter of days.

As of May 18, RM has been forced to again require all patrons to wear facial coverings because he is unable to afford a designated employee to check vaccine records at each entrance. Further, he would not presume to violate someone’s privacy by asking for proof of vaccination. His only realistic option is to require facial coverings for all patrons. Many of his patrons are understandably upset that they have to continue to wear masks, and RM has seen his business dwindle once again. He faces permanent closure.

I also represent MS, an individual who resides in Lane County. Eagerly anticipating the end of COVID-19 pandemic-related restrictions, he recently received his first of two shots of COVID-19 vaccination. MS is thirty-six years old, is in excellent physical health, and does not fear contracting COVID-19. He decided to get the vaccine because he “wishes to see life get back to normal.” For him, this includes being able to socialize and frequent business establishments without wearing a facial covering, social distancing, or having significant restrictions on group size. He hoped this would happen quickly if he, and others, got the vaccine.

¹ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>.

After you issued the Vaccine ID Mandate, MS became conflicted about whether to get the second shot of his vaccine. MS values his privacy, especially with regard to things such as his medical conditions and history, as well as his rights to freedom of expression and association. It is offensive to force him to show complete strangers working at stores his private information. In addition, most of the businesses MS frequents continue to require patrons to wear facial coverings whether or not they are vaccinated. Consequently, he says, now “nothing will change whether I am vaccinated or not.”

As long as the Vaccine ID Mandate remains in effect, MS is deprived of his primary motivation to complete his vaccination for COVID-19 because he will be required to wear a mask whether or not he is vaccinated. Again, most businesses respond to the Vaccine ID Mandate by simply requiring masks for all. Should the Mandate be lifted, MS has expressed his desire to complete his vaccination process.

The Vaccine ID Mandate implicates at least three constitutionally protected individual freedoms, and is unconstitutional for the reasons described below.

The Vaccine ID Mandate Violates the Right to Informational Privacy

The United States Constitution protects the “individual interest in avoiding disclosure of personal matters.” *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3rd Cir. 1980), *citing Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004) (“Individuals have a constitutionally protected interest in avoiding ‘disclosure of personal matters,’ including medical information.”) While the right to privacy is not absolute, the government must at least show “its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest.” *In re Crawford*, 194 F.3d 954, 959 (1999) (internal quotations omitted).

According to the State, the best way to protect people from COVID-19 is to get more of the overall population vaccinated.² Since the Vaccine ID Mandate *discourages* individuals from getting vaccinated by removing their main incentives for vaccination, the Vaccine ID Mandate cannot be narrowly tailored to meet the intended interest of getting more people vaccinated.

Nor can the government place an undue burden on individuals’ privacy by forcing them to disclose their private medical information. Under the Vaccine ID Mandate, an individual is forced to show proof of vaccination which includes (1) full name; (2) date of birth; (3) type of vaccination; (4) date of vaccination; (5) location of vaccination/name of health care provider. Whether or not someone has received the vaccine is highly personal, sensitive information in and of itself. Inclusion of location, date of birth, and healthcare provider creates a serious risk that personally identifying private information could be misused. Any number of possibilities exist for how unscrupulous individuals could access this information (as happens all the time with

²“Until we vaccinate enough Oregonians to stop the spread of COVID-19, we are going to have to continue to wear face coverings, keep our gatherings small, stay home when we’re sick, wash our hands often and physically distance from people we don’t live with.”
<https://covidvaccine.oregon.gov/>.

much less sensitive information such as credit card numbers), and there is significant potential for harm should the information be disclosed by them or even by the entity required to review the information. Further, the disclosure tends to undermine the relationship between patient and healthcare provider since there is a presumption that such information will remain private. Finally, there are no safeguards in the Mandate that would prevent unauthorized disclosure or misuse of the private information individuals are forced to disclose. For these reasons, the Vaccine ID Mandate places an undue burden on the right of privacy of the individuals who are forced to disclose their private information.

The Vaccine ID Mandate Violates the Right to Be Free from Compelled Speech³

For individuals who are immune to COVID-19 whether through vaccination or through natural causes, being forced to wear a mask takes on increasingly political implications. According to the best available medical consensus, wearing a mask is not medically necessary for fully vaccinated individuals.⁴

A politically motivated action can be constitutionally protected speech where, as here, it is associated with a particular political message. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 736 (1969) (prohibition on armbands); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning of US flag). While the government may have a legitimate interest in propagating a particular message, a content-based restriction on speech, as well as all types of compelled speech, must be narrowly tailored to achieve a compelling government interest. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (a state cannot compel recital of the pledge of allegiance).

The Vaccine ID Mandate violates the freedom of speech in at least two ways: first, it requires speech by individuals who are forced to produce and show their vaccine ID cards. This is compelled speech. Second, individuals who choose not to show proof of vaccination are compelled to wear face masks, even if they are in fact vaccinated. Wearing a mask communicates a number of messages, for example: “That Covid poses a crisis so dire as to demand unprecedented government control of our lives and a transformation of the norms of interpersonal behavior.”⁵

Because there are many ways less burdensome to the freedom of speech for the State of Oregon to achieve its goal of increasing vaccinations, I urge you to consider rescinding the

³It should be noted that there are additional First Amendment implications for the Vaccine ID Mandate. Particularly, freedom of association is implicated when persons are required to provide names, addresses, etc. in order to exercise their right to associate with one another in a public place. *See e.g., NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 461 (1958) (requiring association to produce records including names and addresses of all members and agents was a denial of due process as entailing likelihood of a substantial restraint upon exercise by members of their right to freedom of association).

⁴ *See* CDC Guidance at note 1, above.

⁵ https://www.wsj.com/articles/face-masks-and-the-first-amendment-11621356093?mod=opinion_lead_pos10

Vaccine ID Mandate in favor of measures that will affirm the freedom of speech, association, and freedom from compelled speech.

The Vaccine ID Mandate Violates the Right to Equal Protection of the Law

The Vaccine ID Mandate results in two classes of citizens: (1) the vaccinated who are willing to waive their privacy and speech rights, and (2) everyone else. The guarantee of equal protection of law set forth in the Fourteenth Amendment requires, at a minimum, that a classification drawn by the government be “rationally related to a legitimate government interest.” *United States v. Navarro*, 800 F.3d 1104, 1113 (9th Cir. 2015) (quoting *United States v. Ruiz-Chairez*, 493 F.3d 1089, 1091 (9th Cir. 2007)). On its face, there is no rational basis justifying better treatment for those surrendering their constitutional rights, as opposed to those who assert those rights.

Meeting this test also requires a determination of (1) whether there is a legitimate purpose for the regulation, and (2) whether the challenged classification promotes that purpose.” *Jackson Water Works, Inc. v. Pub. Utils. Comm’n of State of Cal.*, 793 F.2d 1090, 1094 (9th Cir. 1986) (internal citations omitted). The government’s justification for the law “may not rely on factual assumptions that exceed the bounds of rational speculation.” *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012) (citing *Lewis v. Thompson*, 252 F.3d 567, 590 (2d Cir. 2001)).

From the beginning of the COVID-19 pandemic, the emergency that justified each of the executive orders and regulations that have been promulgated by Governor Brown, is the fact that there is no cure or vaccine for COVID-19.⁶ But that is no longer the case. There is an effective vaccine for COVID-19, and nearly forty percent of qualified adults have gotten the vaccine throughout the United States.⁷ Within the State of Oregon, the statistics for fully vaccinated individuals are currently at 40.19 percent. *Id.*

The government has a legitimate interest in slowing COVID-19’s spread throughout the community, preventing new infections, and, ultimately in increasing the number of persons who become fully vaccinated. However, the Vaccine ID Mandate fails to promote the government’s interests. It results in fewer persons choosing to become vaccinated since, as MS puts it, “it doesn’t make a difference.” It should also be noted that neither the Federal Government nor any other US State has enacted a mandate of the Vaccine ID Mandate’s scope. Oregon stands alone in choosing to ignore individual rights in this way.

The State of Oregon has not produced any evidence that ties the Vaccine ID Mandate to the desired outcome, nor is it likely to be able to do so. The weight of scientific evidence is that (1) the best way to end the COVID-19 pandemic is to get more people vaccinated, and that (2)

⁶ In June 2020, the Oregon State Supreme Court upheld the Governor’s authority to implement mandates by executive order under her emergency powers. The Court noted “It is unknown how long those [substantial consequences for individuals and entire economies] will last, just as it is unknown how long it will be before there is a cure or vaccine for COVID-19” *Elkhorn Baptist Church v. Brown*, 366 Or. 506, 509 (2020). But now, nearly a year later, it is known that there is not just one but three effective vaccines for COVID-19.

⁷ See <https://coronavirus.jhu.edu/vaccines/us-states>.

fully vaccinated people are not at risk for COVID-19 infection or for spreading the disease. Both common sense and experience teach that getting back to a semblance of normalcy is the best motivator for people to take the vaccine.

In sum, the Vaccine ID Mandate does incalculable harm to individuals and businesses within the State of Oregon without furthering the goal of defeating COVID-19. I ask that you immediately rescind the Vaccine ID Mandate and seek to find alternative ways to promote health for all Oregonians. Alternatively, I ask that you provide a response to this letter and an explanation of the significant governmental interests that are furthered by the Vaccine ID Mandate. I respectfully request any such response by June 8, 2021.

Respectfully,



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