

5-20-2022

## COVID-“14-17”: A Case for Florida Teens to Choose the COVID Vaccine Without Requiring Parental Consent

Kait Ramsay

*Barry University School of Law*

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### Recommended Citation

Ramsay, Kait (2022) "COVID-“14-17”: A Case for Florida Teens to Choose the COVID Vaccine Without Requiring Parental Consent," *Child and Family Law Journal*: Vol. 10: Iss. 1, Article 1.

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### Cover Page Footnote

Kait Ramsay is a second-year law student at Barry University Dwayne O. Andreas School of Law, and an associate editor on Barry’s Child & Family Law Journal. Ms. Ramsay received her B.A. in English with a minor in Mass Communication from the University of North Florida. Before attending law school, Ms. Ramsay worked in the nonprofit and healthcare industries, primarily focused on serving children and families. After graduating law school and passing the bar, Ms. Ramsay plans to continue advocating for children and families as a Family Law Attorney in her home state of Florida. First, I would like to give a special thanks to CFLJ’s Faculty Sponsor Professor Sonya Garza, who has been instrumental in my research and writing process for this article, and CFLJ’s Editorial Board for selecting my note and facilitating the review process for publication. I would also like to thank my friends and family who have been incredibly supportive throughout my time in law school and working on my publication.

## COVID-“14-17”: A Case for Florida Teens to Choose the COVID Vaccine Without Requiring Parental Consent

*Kait Ramsay\**

### ABSTRACT

The novel COVID-19 pandemic has created a huge disruption to almost everyone, forcing many individuals to adapt to entirely new ways of life. In the United States, COVID safety protocols and restrictions, such as mask and vaccine mandates, have been met with huge political polarization and resistance.<sup>1</sup> Even as COVID variants have kept infections in a perpetual cycle of rising and falling, Florida has lifted mask mandates for businesses and schools, and its governor has been one of the largest vocal opponents to requiring vaccines for school

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<sup>1</sup> See generally *Political and Medical Trust Issues: Expert Panel Debates Why Some Americans Doubt the COVID Vaccine*, VANDERBILT UNIV. (Aug 20, 2021, 9:46 AM), <https://news.vanderbilt.edu/2021/08/20/political-and-medical-trust-issues-expert-panel-debates-why-some-americans-doubt-the-covid-vaccine/>; see also, e.g., *‘It’s Just Freedom of Speech’: Hundreds of Maskless Protesters Flood A1A, Discrediting Science Behind Face Coverings*, NBC MIAMI (April 10, 2021, updated April 10, 2021, 10:57 PM), <https://www.nbcmiami.com/news/local/its-just-freedom-of-speech-hundreds-of-maskless-protesters-flood-a1a-discrediting-science-behind-face-coverings/2425604/>.

attendance.<sup>2</sup> Furthermore, with the passing of Florida's Parental Consent for Health Care Services Law, any minors who wish to make the individual choice to get vaccinated against the virus must obtain the written consent of at least one parent.<sup>3</sup> The statutes create a huge barrier for kids who are eligible and want to get vaccinated against COVID, but whose parents are hesitant or unwilling to provide consent.

This note advocates for teens to choose the vaccine for themselves without requiring parental consent, as teens possess the competency to make their own health care decisions. Additionally, this article provides a statutory solution, which balances a minor's desire to get vaccinated and a parent's right to the care, custody, and control of their child. However, considering the unlikelihood of Florida's current legislature to pass an exception to the Parental Consent for Health Care Services Law, this note also explores a teen's ability to receive the vaccine through injunctive relief via the state's *parens patriae* authority.

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<sup>2</sup> See Sharon Bernstein, *Florida Bans Strict Vaccine Mandates in Schools and Businesses*, REUTERS (Nov. 18, 2021, 5:39 PM), <https://www.reuters.com/legal/government/florida-bans-strict-vaccine-mandates-schools-businesses-2021-11-18/>.

<sup>3</sup> FLA. STAT. ANN. § 1014.06 (West 2021).

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INTRODUCTION

As the end of the SARS-CoV-2 (hereinafter “COVID”) pandemic continues to move further out of sight, the American public is exhausted in navigating the ever-changing COVID safety protocols and restrictions. But even at the beginning of the pandemic, the virus sparked a national debate over the government’s power to restrict individual’s liberty in the name of public health concerns as both the federal and state governments implemented mask and quarantine mandates, travel restrictions, and

other interventions to slow the spread of COVID. Once vaccines were developed and available, naturally, the debate over their efficacy and safety, the government vaccine mandates, and even the decision whether or not to get a vaccine has become one of the most heated areas of discussion.

The argument grows more complex, and intense, with teenagers who are eligible to receive COVID vaccines but are still subject to their parents'<sup>4</sup> medical consent in most states.<sup>5</sup> Florida especially is one of the most complicated states grappling with COVID, with its revolving door of COVID cases<sup>6</sup> and stringent Parental Consent for Health Care Services Law.<sup>7</sup> Many teens want to receive the vaccine, despite their parents opposition,

In order to fully grasp all of the hurdles Florida teens face in receiving the vaccine this note with being with section II. Background covering the A. Legal Rights of Parents and Children, B. A Brief Synopsis of the COVID-19 Pandemic in the United States and Florida, and C. Vaccine Research and Development, Approval, and Reception. Section III with cover the issues of the Parental Consent for Health Care Services Law with the A. Semi-Autonomous State of Teens, B. Public Health Concerns, the C. Hurdles for Medical Providers, and the D. Current Options for Teens to Obtain the Vaccine without Parental Consent. The last section, IV. Solutions, will cover the possibilities of either implementing a A. Proposed Exception to the Parental Consent for Health Care Services Law or a B. *Parens Patriae* Test Case.

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<sup>4</sup> This author acknowledges that there are many different and complex family structures, which may or may not include a natural-born parent as the primary guardian with legal authority or capacity to consent to their child's medical services. However, "parent" or "guardian" will serve as a universal and inclusive terms to identify and refer to individuals with legal custody over a minor teen with rights or otherwise court appointed authority to make health decisions and provide medical consent on behalf of their child under Florida's Parental Consent for Health Care Services Law; See FLA. STAT. ANN. § 39.01(56) (West 2021).

<sup>5</sup> Stacy Weiner, *Teens and COVID-19 Vaccines: It's Complicated*, ASS'N OF AM. MED. COLLS. (Sept. 30, 2021), <https://www.aamc.org/news-insights/teens-and-covid-19-vaccines-it-s-complicated>.

<sup>6</sup> Florida Department of Health, *COVID-19 Weekly Situation Report: State Overview*, (May 6, 2022), [http://ww11.doh.state.fl.us/comm/\\_partners/covid19\\_report\\_archive/covid19-data/covid19\\_data\\_latest.pdf](http://ww11.doh.state.fl.us/comm/_partners/covid19_report_archive/covid19-data/covid19_data_latest.pdf)

<sup>7</sup> See FLA. STAT. ANN. § 1014.06 (West 2021).

## BACKGROUND

*A. Legal Rights of Parents and Children*

This section will summarize the constitutional rights of parents and families in the United States, and the specific rights of parents and children in Florida. There is undoubtedly a plethora of both social and legal rights parents have over their minor children, but this section will primarily focus on those rights which most directly impact a parent's rights to make health care and other decisions impacting their child's health and well-being.

## 1. Parents' Constitutional Rights

While many of the privacy rights families possess stem from the seminal *Griswold v. Connecticut*<sup>8</sup> and *Einstein v. Baird*<sup>9</sup> cases, the right to the care, custody, and control of one's child predates it by at least 40 years—a testament to how deeply woven parental rights are in the fabric of society. The first case to establish the parental right of care, custody, and control over their children arose from after an instructor from the Zion Parochial School was found in violation of a Nebraska statute prohibiting educators from teaching a student any language other than English before completing the eighth grade.<sup>10</sup> In determining whether or not the statute violated a parent's liberty and Due Process under the Fourteenth Amendment, Justice McReynolds delivered an emphatic opinion on the importance of education and development for children, stating that “corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.”<sup>11</sup>

But, Justice McReynolds continued, “the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, . . .; but the individual has certain fundamental rights which must be respected.”<sup>12</sup> Thus, the statute as it stood, infringed upon the parent's liberty, and Due Process under the

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<sup>8</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>9</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>10</sup> *Meyer v. Nebraska*, 262 U.S. 390, 396-97 (1923).

<sup>11</sup> *Id.* at 400.

<sup>12</sup> *Id.* at 401.

Fourteenth Amendment, in determining the education of his child.<sup>13</sup> Following, the ruling in *Meyer*, the Court affirmed in *Pierce v. Society of Sisters* that “[legislation may not] unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>14</sup> Furthermore, the Court underscored the role of parents in saying a child “is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>15</sup>

However, no rights are absolute, and the Supreme Court in *Prince v. Massachusetts* held while “[t]here is a private realm of family life which the State cannot enter . . . the family itself is not beyond regulation in the public interest. . . .”<sup>16</sup> In this case, a mother allowed her children to walk up and down sidewalks to sell religious materials in violation of Massachusetts’s child labor laws.<sup>17</sup> The mother claimed a religious exemption, stating her daughter was “exercising her God-given right and her constitutional right to preach the gospel, and no creature has a right to interfere with God’s commands.”<sup>18</sup> The Court, however, disagreed; “[a]cting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.”<sup>19</sup> But even with the caveats in place from the *Prince* ruling, overall, the Court has continued to affirm the position of parents, finding that there is a “presumption that fit parents [act] in the best interests of their children.”<sup>20</sup> Even in cases of unfit parents, the “fundamental liberty interest of natural parents . . . does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”<sup>21</sup>

The establishment to the right of privacy in *Griswold* adds another layer of protection for families, with the Supreme Court recognizing that “marriage lies within the zone of privacy created by several fundamental constitutional guarantees. . .” and a Connecticut statute preventing a

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<sup>13</sup> *Id.* at 399.

<sup>14</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).

<sup>15</sup> *Id.*

<sup>16</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>17</sup> *Id.* at 162.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 166.

<sup>20</sup> *Troxel v. Granville*, 530 U.S. 57, 57-8 (2000).

<sup>21</sup> *Santosky v. Kramer*, 455 U.S. 745, 754 (1982).

married couple from purchasing and using contraception was a violation to that right.<sup>22</sup> The Court acknowledge although the specific “right to privacy” does not appear in the Constitution, it is created through the culmination of various amendments.<sup>23</sup> For example:

The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>24</sup>

Therefore, the Court held:

[A] law which . . . seeks to achieve its goals by means having a maximum destructive impact upon [marriage]. Such a law cannot stand in light of the familiar principle that a “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”<sup>25</sup>

## 2. Teen’s Constitutional Rights

Later, the Court would use the *Griswold* decision to apply the right to privacy to both the “married and unmarried alike.”<sup>26</sup> With this framework in place, the Supreme Court would go on to rule in *Roe v. Wade*, affirmed by *Planned Parenthood v. Casey*, that based on a woman’s right to privacy, she also has the fundamental right to an abortion.<sup>27</sup> But the *Casey* ruling maintained the authority of states to

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<sup>22</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485-86. (1965).

<sup>23</sup> *Id.* at 484.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 485.

<sup>26</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>27</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

impose restrictions on abortion, so long as it does not cause an undue burden for women seeking abortion services:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.<sup>28</sup>

The Court found that a parental consent law, which might require a minor seeking an abortion to obtain the consent of their parent before receiving one was not an undue burden, so long as the statute provided an adequate judicial bypass mechanism.<sup>29</sup> The judicial bypass allows a minor to petition the court to grant the minor an abortion without the consent of their parent.<sup>30</sup> In these proceedings, a judge will rule based upon the mature minor doctrine which assess whether the minor is “mature and capable of giving informed consent and has in fact given her informed consent [to the abortion], or that an abortion would be in her best interests.”<sup>31</sup>

### 3. Parental Rights in Florida

While the Supreme Court has both established, and at times curtailed, the rights of parents and the family, most family laws are created and enforced by the states.<sup>32</sup> However, the Supremacy Clause of the Constitution dictates any state laws or regulations on the family (or any one person, for that matter) are preempted by federal statutes and the

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<sup>28</sup> *Id.* at 877.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Linda D. Elrod, *The Federalization of Family Law*, ABA (July 1, 2009), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol36\\_2009/summer2009/the\\_federalization\\_of\\_family\\_law/#:~:text=Historically%2C%20family%20law%20has%20been,generally%20decide%20family%20law%20cases.](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law/#:~:text=Historically%2C%20family%20law%20has%20been,generally%20decide%20family%20law%20cases.)

United States Constitution.<sup>33</sup> Therefore, in the State of Florida, “[p]arental authority over decisions involving their minor children derives from the liberty interest contained in the Fourteenth Amendment to the United States Constitution and the guarantee of privacy in article I, section 23 of the Florida Constitution.”<sup>34</sup> One unique feature of Florida’s Constitution is that it guarantees its citizens the right to privacy, unlike the federal government which relies on the penumbras framework in *Griswold*.<sup>35</sup> In Florida, “[e]very natural person has the right to be let alone and free from governmental intrusion into the person’s private life . . .”<sup>36</sup> In 2021, Florida passed House Bill 241 establishing a Parents’ Bill of Rights purporting to “[prohibit] the state, its political subdivisions, any other governmental entities and any other institutions from infringing upon the fundamental right of a parent to direct the upbringing, education, health care, and mental health of his or her minor child without demonstrating a compelling state interest for such actions.”<sup>37</sup>

Under this bill, medical professionals “may not provide or solicit or arrange to provide health care services or prescribe medicinal drugs to a minor child without first obtaining written parental consent.”<sup>38</sup> Otherwise, they will be guilty of a misdemeanor in the first degree.<sup>39</sup> This bill is generally supported by Florida case law, which provides “decisions regarding the care and upbringing of minor children will be left to the parents.”<sup>40</sup> However, under certain circumstances, a court may be able to override certain parental decisions:

Medical treatment may thus be rejected when the evidence is not sufficiently compelling to establish the primacy of the state’s interest, or that the child’s own welfare would be best served by such treatment. On the other hand, the parents’ wishes may be overcome when there is sufficient medical evidence to invoke the state’s *parens patriae* authority, and to establish that the child’s welfare will be best served by the disputed treatment.<sup>41</sup>

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<sup>33</sup> U.S. CONST. art. IV, para. 2.

<sup>34</sup> *Kirton v. Fields*, 997 So. 2d 349, 352 (Fla. 2008).

<sup>35</sup> *Griswold*, 381 U.S. at 484.

<sup>36</sup> FLA. CONST. art. I § 23 (West, Westlaw through Nov. 3, 1998 amendments).

<sup>37</sup> H.B. 241, 27<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess. (Fla. 2021).

<sup>38</sup> See FLA. STAT. ANN. § 1014.06 (West 2021).

<sup>39</sup> *Id.*

<sup>40</sup> *M.N. v. S. Baptist Hosp. of Fla., Inc.*, 648 So. 2d 769, 770 (Fla. Dist. Ct. App. 1994).

<sup>41</sup> *Id.* at 771.

Just as the Supreme Court found in the *Prince* case, Florida courts have found that *parens patriae* authority “may be invoked to limit parental authority when necessary to protect children.”<sup>42</sup> When considering whether or not to authorize court-ordered medical treatment for children, “the court must balance competing interests.”<sup>43</sup>

It must consider the parent's interest in making fundamental decisions about a child's care, the State's interest in preserving human life, and the child's own welfare and best interests in light of the severity of the child's illness, the likelihood of effectiveness of the proposed treatment, the child's chances of survival with and without such treatment, and the invasiveness and nature of the treatments with regard to its effect on the child.<sup>44</sup>

Furthermore, medical decisions regarding children only require the consent of one parent.<sup>45</sup> Even if medical professionals know of the protestation from the other parent; “[t]he bottom line is that health care providers are not required to referee parental disputes about medical care for their minor children, and may render medical care or treatment upon the consent of only one parent.”<sup>46</sup>

#### 4. Teen's Constitutional and State Rights in Florida

While parents and courts are mostly in control of the decisions kids and teens make over their own bodies, the Parental Consent for Health Care Services Law specifically provides that it does not relate to abortion services.<sup>47</sup> Florida's Parental Notice of and Consent for Abortion Act states that minors are able to obtain the consent of at least one of their parents before terminating their pregnancy without parental consent, given they are able to successfully petition the court for a judicial waiver.<sup>48</sup> Furthermore, while the Parental Consent for Health Care Services Law does not give any more explicit exceptions, it does state “except as otherwise provided by law or a court order, a provider, . . . may not allow a medical procedure to be performed on a minor child in

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<sup>42</sup> *Global Travel Mktg., Inc. v. Shea*, 908 So.2d 392, 399 (Fla. 2005).

<sup>43</sup> *In re D.G.*, 970 So. 2d 486, 490 (Fla. Dist. Ct. App. 2007).

<sup>44</sup> *Id.*

<sup>45</sup> *Angeli v. Kluka*, 190 So. 3d 700, 703 (Fla. Dist. Ct. App. 2016).

<sup>46</sup> *Id.*

<sup>47</sup> FLA. STAT. ANN. § 1014.06(4)(b), (5)(b) (West 2021).

<sup>48</sup> FLA. STAT. ANN. § 390.01114 (West 2020).

its facility without first obtaining written parental consent.”<sup>49</sup> Presumably, the catchall phrase “except as otherwise provided by law” encompasses all prior laws passed which specifically allow a minor to obtain medical treatment or service prior to the passage of Parental Bill of Rights.<sup>50</sup> These statutes allow minors to consent to and receive confidential testing for a sexually transmitted disease,<sup>51</sup> married, pregnant, or parent minors to receive information about “contraceptive information and services of a nonsurgical nature,”<sup>52</sup> and an unwed pregnant to receive prenatal care or the unwed minor mother may consent to care for their own child.<sup>53</sup>

*B. A Brief Synopsis of the COVID-19 Pandemic in the United States and Florida*

This next section aims to provide the reader with adequate context to understand the development of COVID both as a virus and pandemic, while primarily focusing on how the virus has impacted the American public and, more specifically, teens in Florida.

1. Beginnings of the Pandemic and the Governments’ Initial Responses

To begin, COVID was originally traced to the Wuhan Region of China in December 2019.<sup>54</sup> It quickly spread across the globe, and by February 2020 the United States had its first reported case.<sup>55</sup> Following the World Health Organization (WHO) classifying COVID-19 as a pandemic, then-President Donald Trump declared a national emergency in the United States.<sup>56</sup> Subsequently, states began “lockdowns,” invoking mandates to either fully or partially close businesses and schools in

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<sup>49</sup> § 1014.06(1).

<sup>50</sup> Jeff Scott, *Treating Minors Under Florida’s New ‘Parental Consent’ Law*, DADE CNTY. MED. ASS’N (July 12, 2021), <https://miamimed.com/news/572974/Treating-minors-under-Floridas-new-parental-consent-law.htm#:~:text=With%20the%20new%20parental%20consent,first%20obtaining%20written%20parental%20consent>.

<sup>51</sup> FLA. STAT. ANN. § 384.30 (West 2000).

<sup>52</sup> FLA. STAT. ANN. § 381.0051 (West 2012).

<sup>53</sup> FLA. STAT. ANN. § 743.065 (West 2020).

<sup>54</sup> David J. Sencer, *CDC Museum COVID-19 Timeline*, CDC, <https://www.cdc.gov/museum/timeline/covid19.html>, (last visited May 6, 2022), [hereinafter *CDC Timeline*].

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

compliance with the Center for Disease Control and Prevention (CDC) Recommendations.<sup>57</sup> Like many other states, schools in Florida shut down in March of 2020 for a predicted two weeks, hoping to slow the spread of the virus.<sup>58</sup> But as infections in the state and around the country increased, schools pushed back their return dates and implemented “Zoom classrooms” to combat students falling behind.<sup>59</sup> Florida Governor Ron DeSantis issued an executive stay-at-home order, encouraging senior citizens to refrain from leaving their residences and urging businesses to go online.<sup>60</sup> By mid-April, the governor announced that schools would remain closed for the rest of the academic year.<sup>61</sup> Shortly thereafter, most states saw widespread infection rates of COVID.<sup>62</sup>

## 2. Progression and Continued Handling of the Virus

In January 2021, almost a year after the initial outbreak of the virus, the country faced one of the largest waves of COVID.<sup>63</sup> The Biden Administration took office and began a new series of federal mandates to control the virus, including a vaccine mandate requiring government

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<sup>57</sup> *Id.*

<sup>58</sup> Jordan Bowen, *All Florida public schools to close for 2 weeks to limit coronavirus spread*, FOX 13 NEWS (March 13, 2020, 9:29 PM), <https://www.fox13news.com/news/all-florida-public-schools-to-close-for-2-weeks-to-limit-coronavirus-spread>.

<sup>59</sup> Ana Ceballos & Christine Sexton, *Florida public school campuses closed until April 15, state cancels all testing for K-12 schools*, FOX 13 NEWS (March 17, 2020, 10:25 PM), <https://www.fox13news.com/news/florida-public-school-campuses-closed-until-april-15-state-cancels-all-testing-for-k-12-schools>.

<sup>60</sup> Mary Ellen Klas & Steve Contorno, *Florida Gov. Ron DeSantis Issues Statewide Stay-at-Home Order*, TAMPA BAY TIMES (Apr. 1, 2020, last updated Apr. 4, 2020), <https://www.tampabay.com/news/health/2020/04/01/florida-gov-ron-desantis-issues-statewide-stay-at-home-order/>.

<sup>61</sup> J. Edward Moreno, *DeSantis announces K-12 schools will be closed for rest of school year in Fla.*, THE HILL (April 18, 2020, 5:20 PM), <https://thehill.com/homenews/state-watch/493504-desantis-announces-k-12-schools-will-be-closed-for-rest-of-school-year>.

<sup>62</sup> *CDC Timeline*, *supra* note 51.

<sup>63</sup> Michael Kunzelman, *Pandemic's deadliest month in US ends with signs of progress*, ABC 10 (Feb. 1, 2021 10:19 AM), <https://www.abc10.com/article/news/health/coronavirus/january-2021-deadliest-covid-19-month/507-dee84e9b-44d0-40ab-a55b-c2dd45871238>.

officials, military members, employers with over 100 employees, and medical providers receiving federal funding to either get vaccinated or be subjected to weekly testing.<sup>64</sup> Many opponents of the vaccine invoked both religious and/or medical exemptions to avoid mandated vaccines.<sup>65</sup> The Supreme Court eventually struck down the provision mandating employers under the Occupational Safety and Health Administration to require the vaccine for their employees.<sup>66</sup> But before the ruling was finalized, thousands of workers chose to resign or were fired from their positions in an effort to avoid the compulsory vaccine or weekly tests. On the state-level, many governors and legislatures have been hesitant to roll out large-scale vaccine mandates, and many have even backtracked their masking and social distancing requirements.<sup>67</sup> Florida does not require vaccines for government workers and prohibits private businesses from asking patrons for “vaccine passports” in order to enter their facilities.<sup>68</sup> Additionally, Governor DeSantis issued an executive order prohibiting schools from mandating vaccinations or masks for their students or staff.<sup>69</sup>

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<sup>64</sup> News Release, *The White House, Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies*, THE WHITE HOUSE (Nov. 4, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/>.

<sup>65</sup> See generally Deepa Shivarm, *1 in 10 Americans Say the COVID-19 Vaccine Conflicts with Their Religious Beliefs*, NPR (Dec. 9, 2021, 10:07 AM), <https://www.npr.org/2021/12/09/1062655300/survey-religion-vaccine-hesitancy-exemptions>.

<sup>66</sup> Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 666 (2022).

<sup>67</sup> See Associated Press, *2 of Florida's Largest School Districts Ease up on Masks*, U.S. NEWS (Oct. 31, 2021, 12:35 PM), <https://www.usnews.com/news/best-states/florida/articles/2021-10-31/2-of-floridas-largest-school-districts-ease-up-on-masks>.

<sup>68</sup> News Release, *Gov. Ron DeSantis, Governor Ron DeSantis Signs Landmark Legislation to Ban Vaccine Passports and Stem Government Overreach*, FLA. GOV. (May 3, 2021), <https://www.flgov.com/2021/05/03/governor-ron-desantis-signs-landmark-legislation-to-ban-vaccine-passports-and-stem-government-overreach/>.

<sup>69</sup> News Release, *Gov. Ron DeSantis, Governor DeSantis Issues an Executive Order Ensuring Parents' Freedom to Choose*, FLA. GOV. (July 30, 2021), <https://www.flgov.com/2021/07/30/governor-desantis-issues-an-executive-order-ensuring-parents-freedom-to-choose/>.

By August 2021 many areas of the country, including Florida experienced a downward trend in new COVID cases, but the new circulation of the Delta Variant caused a huge surge in COVID numbers.<sup>70</sup> Proponents of vaccines and masks called for the Governor to reinstate mask mandates and stay-at-home orders to curb the spread once again.<sup>71</sup> However, Governor DeSantis refused, despite another huge spike in cases and some dubbing “the Sunshine State the new epicenter of the virus in the United States.”<sup>72</sup> Florida infection rates continued to rise for a while, though, as some health experts purport, the combination of the “spread of disease, vaccinations, and other factors,” Florida was able to control the spread of the virus by November 2021.<sup>73</sup>

### 3. Most Recent Developments

However, by the time the holiday season was in full swing, the Omicron variant began circulating in Florida and across the country.<sup>74</sup> This particular variant was more infectious than both the original strain of COVID and Delta.<sup>75</sup> Individuals who got vaccinated were still susceptible to Omicron, even if they had received the CDC Recommended booster shot.<sup>76</sup> But those who were vaccinated generally

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<sup>70</sup> Ian Hodgson & Christopher O'Donnell, *Florida COVID deaths rise as delta spreads; infections hit 21,600 a day*, TAMPA BAY TIMES (Aug. 13, 2021, Updated Aug. 19, 2021), <https://www.tampabay.com/news/health/2021/08/13/florida-covid-deaths-rise-as-delta-spreads-infections-hit-21600-a-day/>.

<sup>71</sup> Lexi Nahl, *Calls for new mask mandates grow as COVID-19 cases climb*, CBS 12 NEWS (July 19, 2021), <https://cbs12.com/news/local/calls-for-new-mask-mandates-grow-amid-rising-coronavirus-cases-climb-across-the-country>.

<sup>72</sup> *Id.*

<sup>73</sup> Christopher Curley, *Florida Has One of the Lowest COVID-19 Case Rates: Here's Why*, HEALTHLINE (Nov. 9, 2021), <https://www.healthline.com/health-news/why-florida-now-has-the-lowest-covid-19-case-rate>.

<sup>74</sup> *Omicron Variant: What You Need to Know*, CDC, [https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html?s\\_cid=11734:omicron%20variant:sem.ga:p:RG:GM:gen:PTN:FY22](https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html?s_cid=11734:omicron%20variant:sem.ga:p:RG:GM:gen:PTN:FY22) (Updated Dec. 20, 2021).

<sup>75</sup> *Id.*

<sup>76</sup> See Herb Scribner, *Why Fully Vaccinated People Still Get the Omicron Variant*, DESERET NEWS (Jan. 5, 2022, 7:00 PM), <https://www.deseret.com/coronavirus/2022/1/5/22868312/why-fully-vaccinated-people-get-omicron-variant-symptoms>.

experienced less severe symptoms and avoided hospitalization.<sup>77</sup> Florida received its highest single-day infection rate report during the Omicron wave, but again, the state declined to issue new changes or protocols in controlling the spread.<sup>78</sup>

Throughout the pandemic, many individuals had difficulty grappling with the constant roller coaster experience COVID cases getting under control and then a new variant coming in and creating another surge, some of whom blamed political associations as one of the leading factors to a rise in local infection rates.<sup>79</sup> Nearly two years to the date of WHO declaring that the COVID spread had reached a pandemic, cases plummeted by 80% and much of the world returned to pre-pandemic life.<sup>80</sup> In contrast, China experienced a huge spike in cases in March 2022, imposing one of its largest lockdowns in a city of nine million residents.<sup>81</sup> Quickly, cases in China doubled basically overnight with the new variant dubbed “stealth Omicron.”<sup>82</sup> Just as soon as Americans began shedding their masks, experts were urging governments to prepare for the virus to reach back across the globe.<sup>83</sup> These variants seem likely to continue,<sup>84</sup> and experts are having trouble

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<sup>77</sup> Travis Caldwell et. al., *The Highly Contagious Omicron Variant Will 'Find Just About Everybody,' Fauci Says, But Vaccinated People Will Still Fare Better*, CNN NEWS (Jan. 12, 2022, 9:04 AM),

<https://www.cnn.com/2022/01/11/health/us-coronavirus-tuesday/index.html>.

<sup>78</sup> Jamal Thalji & Margo Snipe, *Florida Hits Record 42,600 Infections a Day as Omicron Rages*, TAMPA BAY TIMES (Dec. 31, 2021, Updated Dec. 31, 2021), <https://www.tampabay.com/news/health/2021/12/31/florida-hits-record-42600-covid-infections-a-day-as-omicron-rages/>.

<sup>79</sup> David Leonhardt, *Red COVID, an Update*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/briefing/red-covid-partisan-deaths-vaccines.html>.

<sup>80</sup> Gillian Flaccus et. al., *2 Years into Pandemic, World Takes Cautious Steps Forward*, ASSO'C. PRESS (Mar. 11, 2022), <https://apnews.com/article/covid-pandemic-two-years-later-1fe466bba2353cadde10e4fb40be025c>.

<sup>81</sup> *China locks down city of 9 million amid new spike in cases*, ASSO'C. PRESS (Mar. 11, 2022), <https://apnews.com/article/covid-health-china-changchun-fbe63032924a44e4f7874d0bf0a2988f>.

<sup>82</sup> *COVID-19 cases more than double in China's growing outbreak*, ASSO'C. PRESS (Mar. 15, 2022), <https://apnews.com/article/covid-business-health-china-beijing-944e4896f46aac1209b1e5c70593aca5>.

<sup>83</sup> See Mike Stobbe, *Experts worry about how US will see next COVID surge coming*, ASSO'C. PRESS (Mar. 25, 2022), <https://apnews.com/article/covid-science-health-pandemics-wastewater9b6589e908c8532db0922cc4ed3f3910>.

<sup>84</sup> Kathy Katella, *Omicron, Delta, Alpha, and More: What to Know About the Coronavirus Variants*, YALE MED. (Dec. 20, 2021),

predicting what the Summer 2022 COVID cases will look like and is “really dependent on a variant fully emerging.”<sup>85</sup>

### C. Vaccine Research and Development, Approval, and Reception

With the anticipation of COVID reaching the United States, biotech companies started researching and developing the vaccine early in the pandemic.<sup>86</sup> Following approval from the Food and Drug Administration, the Phase I human trial for the Moderna vaccine began in March 2020.<sup>87</sup> By April, the Trump Administration launched Operation Warp Speed (OWS) to facilitate a partnership between the CDC and private biotech companies to develop a safe and effective COVID vaccine as quickly as possible.<sup>88</sup> As part of OWS, candidates using different methods to trigger an immune response were selected to receive funding to research, develop, and help scale commercial manufacturing of the vaccine.<sup>89</sup> Both the U.S. government, with the aid of prominent donors, poured in billions of dollars to help fast track vaccine research.<sup>90</sup>

#### 1. Research and Development

The financial support allowed many companies and organizations to utilize an accelerated timeline to research, develop, and distribute the

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<https://www.yalemedicine.org/news/covid-19-variants-of-concern-omicron>; see also Associated Press, *Expect More Worrisome Variants After Omicron, Scientists Say*, U.S. NEWS (Jan. 15, 2022), <https://www.usnews.com/news/world/articles/2022-01-15/expect-more-worrisome-variants-after-omicron-scientists-say>.

<sup>85</sup> Adrianna Rodriguez, *What Will COVID-19 Look Like This Summer? Health Experts Say the Virus Won't Be Endemic, Yet.*, USA TODAY (May 9, 2022, 4:44 PM), <https://www.usatoday.com/story/news/health/2022/05/09/covid-endemic-what-experts-say-americans-should-expect-summer/9645556002/>.

<sup>86</sup> CDC Timeline, *supra* note 51.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> U.S. GOV'T. ACCOUNTABILITY OFF., GAO-21-319, OPERATION WARP SPEED: ACCELERATED COVID-19 VACCINE DEVELOPMENT STATUS AND EFFORTS TO ADDRESS MANUFACTURING CHALLENGES (2021).

<sup>90</sup> See e.g. Arianna Brockington, *Dolly Parton Reflects on Helping Fund COVID Vaccine: "I Knew Something Bad Was on the Rise,"* HOLLYWOOD REP. (Aug. 18, 2021, 2:31 PM), <https://www.hollywoodreporter.com/news/music-news/dolly-parton-covid-vaccine-donation-1234999525/>.

vaccine.<sup>91</sup> Under a typical timeline, researchers spend five to ten years “assess[ing] whether the vaccine is safe and efficacious in clinical trials, complete the regulatory approval processes, and manufacture sufficient quantit[ies] of vaccine doses for widespread distribution.”<sup>92</sup> Generally speaking, a vaccine would first undergo a preclinical trial phase where the vaccine is administered to and observed in animals.<sup>93</sup> Next, the vaccine would be tested on humans in three clinical trial phases:

Phase I starts with a few dozen participants to observe short-term results and efficacy.

Phase II increases the number of volunteers while focusing on targeted populations of a specific age or sex.

Phase III, the final phase, contains tens of thousands of participants who are randomly selected to receive a placebo or the viral vaccine and then observed for both long and short-term effects.<sup>94</sup>

After testing, the vaccine would be submitted for the regulatory approval process by the FDA; and once received, manufacturing efforts would be scaled-up to begin distribution.<sup>95</sup>

With the accelerated timeline, some COVID vaccine developers combined clinical trial phases I and II, and phases II and III.<sup>96</sup> According to the John Hopkins University of Medicine, “[b]ecause of the high number of new cases of COVID-19 in many places, differences in disease risk between those who received the viral vaccine and those who received the placebo or comparison vaccine can be measured more quickly than in the absence of a pandemic.”<sup>97</sup> However, observation of

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<sup>91</sup> *Vaccine Research and Development: Typical Timeline*, JOHN HOPKINS UNIV., <https://coronavirus.jhu.edu/vaccines/timeline#:~:text=Typical%20Timeline,vaccine%20doses%20for%20widespread%20distribution> (last visited May 7, 2022, [hereinafter *Typical Timeline*]).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Vaccine Research and Development: Typical Timeline*, JOHN HOPKINS UNIV., <https://coronavirus.jhu.edu/vaccines/timeline#:~:text=Typical%20Timeline,vaccine%20doses%20for%20widespread%20distribution> (last visited May 7, 2022, [hereinafter *Typical Timeline*]).

the participants will continue for another two to four years to further study the long- and short-term effects.<sup>98</sup>

## 2. COVID Vaccine Approval Process

The COVID vaccine was initially given an Emergency Use Authorization (“EUA”) by the FDA.<sup>99</sup> The FDA may approve a vaccine on an EUA-basis “to help strengthen the nation’s public health protections against chemical, biological, radiological, and nuclear (CBRN) threats, including infectious diseases, by facilitating the availability and use of medical countermeasures (MCMs) needed during public health emergencies.”<sup>100</sup> For a medical product to obtain an EUA, the secretary of Health and Human Services must declare: first, circumstances exist to warrant the EUA and second, the medical product itself meets a certain set of criteria.<sup>101</sup>

The circumstances which warrant a medical product to receive an EUA are only present if there has been:

- (1) A determination by the Secretary of Homeland Security that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a CBRN agent(s);
- (2) A determination by the Secretary of Defense that there is a military emergency, or a significant potential for a military emergency, involving a heightened risk to United States military forces of attack with a CBRN agent(s);
- (3) A determination by the Secretary of HHS that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of United States citizens living abroad, and that involves a CBRN agent or agents, or a disease or condition that may be attributable to such agent(s); or
- (4) The identification of a material threat, by the Secretary of Homeland Security pursuant to section 319F-2 of the Public Health Service (PHS) Act, that is sufficient to affect

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Guidance Document: Emergency Use Authorization of Medical Products and Related Authorities*, FDA (Jan. 2017), <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/emergency-use-authorization-medical-products-and-related-authorities#euas>.

<sup>101</sup> *Id.*

national security or the health and security of United States citizens living abroad.<sup>102</sup>

Then the medical product must meet the following list of criteria:

(a) [T]here is a serious or life-threatening disease or condition; (b) the product “may be effective” to prevent, diagnose, treat, etc. the serious or life-threatening disease or condition; (c) the benefit of the medical product outweighs its inherent risks, and; (d) there are no other adequate or approved alternatives in addressing the serious or life-threatening disease or condition.<sup>103</sup>

“May be effective” is a lower standard the FDA requires for a medical product’s “effectiveness” approval, which “involve product-specific and circumstance-dependent determinations of risks and benefits” to treat the disease or condition.<sup>104</sup>

Following the guidelines above, the Pfizer and BioNTech vaccine was the first to receive an EUA after a huge push from the Trump Administration.<sup>105</sup> Quickly thereafter, Johnson & Johnson’s Janssen (hereinafter J&J) and Moderna vaccines were approved for an EUA. Pfizer was the first vaccine to receive full-use authorization for adults and adolescents 16 and older, with an EUA for children five to 15.<sup>106</sup> Since then, Moderna has also been approved for full-use by adults only.<sup>107</sup> The FDA had originally planned to authorize Pfizer for children under the age of five but changed its decision to wait for more data.<sup>108</sup> As of March 2022, Moderna purports its vaccine is safe and effective for

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See Laurie McGinley et al, *FD authorizes the first coronavirus vaccine, a rare moment of hope in the deadly pandemic*, WASH. POST (Dec. 12, 2020), <https://www.washingtonpost.com/health/2020/12/11/trump-stephen-hahn-fda-covid-vaccine/>.

<sup>106</sup> Dania Nadeem, *Pfizer files for full FDA approval of COVID-19 vaccine in adolescents*, REUTERS (Dec. 16, 2021, 5:54 PM), <https://www.reuters.com/business/healthcare-pharmaceuticals/pfizer-files-full-fda-approval-covid-19-vaccine-adolescents-2021-12-16/>.

<sup>107</sup> Matthew Perrone, *US gives full approval to Moderna’s COVID-19 vaccine*, ASSO’C. PRESS (Jan. 31, 2021), <https://apnews.com/article/coronavirus-pandemic-moderna-vaccine-approved-dc6f5ac9eeb31667d5a28f0954335b65>.

<sup>108</sup> Lauran Neergaard & Mathew Perrone, *In reversal, FDA puts brakes on COVID shots for kids under 5*, ASSO’C. PRESS (Feb. 11, 2022), <https://apnews.com/article/coronavirus-pandemic-science-business-health-coronavirus-vaccine-c283d0644db46578f18b0b1aa1bfb9a0?utm>.

children under six, though it has not been approved for such use by the FDA under either a EUA or a full-use authorization.<sup>109</sup>

### 3. Reception by the American Public

From the inception of the COVID vaccines, the American public has experienced a wide range of responses to the virus.<sup>110</sup> Some experts a person's willingness to get the vaccine depends almost entirely on their political affiliation: with Republicans falling into a camp of no-vaccines and Democrats falling into the other camp of pro-vaccines.<sup>111</sup> However, many prominent Republicans have touted vaccines as a safe and effective measure against COVID.<sup>112</sup> Most notably, Republican President Trump showed his support for the vaccine in saying, ". . . the results of the vaccine are very good, and if you do get (COVID), it's a very minor form. People aren't dying when they take the vaccine."<sup>113</sup>

But it's important to note that vaccine skepticism and hesitancy has predated the COVID-19 pandemic; in fact, the Supreme Court faced a vaccine skeptic in the case of *Jacobson v. Massachusetts* almost a century ago.<sup>114</sup> During the smallpox epidemic, the Commonwealth of Massachusetts required the "vaccination and revaccination of all the inhabitants thereof, and . . . [w]hoever being over twenty-one years of

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<sup>109</sup> Lauran Neergaard, *Moderna says its low-dose COVID shots work for kids under 6*, ASSO<sup>'</sup>C. PRESS (Mar. 23, 2022), <https://apnews.com/article/moderna-low-dose-vaccine-children-c7702f93e863d74b712791b55e54bdc1>.

<sup>110</sup> See generally Vivian Zayas, *How people react to the threat of disease could mean COVID-19 is reshaping personalities*, THE CONVERSATION (May 4, 2020, 8:10 AM), <https://theconversation.com/how-people-react-to-the-threat-of-disease-could-mean-covid-19-is-reshaping-personalities-137366>.

<sup>111</sup> William A. Galston, *For COVID-19 vaccinations, party affiliation matters more than race and ethnicity*, BROOKINGS (Oct. 1, 2021), <https://www.brookings.edu/blog/fixgov/2021/10/01/for-covid-19-vaccinations-party-affiliation-matters-more-than-race-and-ethnicity/>.

<sup>112</sup> See Allan Smith & Alex Seitz-Wald, *How Biden, Republicans and public health leaders are trying to persuade GOP skeptics to get their Covid vaccinations*, NBC NEWS (Mar. 14, 2021, 7:02 AM), <https://www.nbcnews.com/politics/politics-news/how-biden-republicans-public-health-leaders-are-trying-convince-gop-n1260061>.

<sup>113</sup> Veronica Stracqualursi & David Wright, *Trump Touts effectiveness of Covid-19 vaccine*, CNN POLITICS (Dec. 24, 2021, 9:44AM), <https://www.cnn.com/2021/12/23/politics/trump-vaccine-covid-effectiveness/index.html>.

<sup>114</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit \$5.”<sup>115</sup> The plaintiff, a man over the age of 21, refused to be vaccinated while continuing to mingle amongst the population, asserting that the statute “opposed . . . the spirit of the Constitution.”<sup>116</sup> The plaintiff attempted, but was not allowed by the lower court, to offer proof of “propositions all relate[d] to alleged injurious or dangerous effects of vaccination” by medical professionals similarly opposed to the smallpox vaccine.<sup>117</sup> The Supreme Court ruled that the lower court did not err in omitting the plaintiff’s experts in light of the fact that:

[M]embers of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox; that, while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity.<sup>118</sup>

Today, with the creation of the Internet and rise of social media, the Anti-Vaccination Movement has developed into a community comprising of thousands of members, who can exchange information and theories from across the globe.<sup>119</sup> Some of these members are known as “Anti-Vaxxers,”<sup>120</sup> who are individuals coming from different professions and lifestyles who ardently oppose vaccinations and question the scientific research, their efficacy, and governing bodies overseeing

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<sup>115</sup> *Id.* at 12.

<sup>116</sup> *Id.* at 22.

<sup>117</sup> *Id.* at 23.

<sup>118</sup> *Id.* 23-24.

<sup>119</sup> See generally Vincent Iannelli, *History of the Anti-Vaccine Movement*, VERY WELL HEALTH (June 3, 2021), <https://www.verywellhealth.com/history-anti-vaccine-movement-4054321>.

<sup>120</sup> This author acknowledges that there is a wide variety of individuals with different levels of fervor and beliefs who are hesitant in receiving vaccines. “Anti-Vaccination” or “Anti-Vaxxers” for the purposes of this paper specifically refers to those who either strongly align, purport theories, or utilize sources or materials heavily associated with or circulated within the Anti-Vaccination movement.

vaccination research, development, and distribution.<sup>121</sup> The modern movement stems from various social media groups and other organizations.<sup>122</sup> One of the most common theories amongst Anti-Vaxxers is that there is a link between vaccinations and autism in children, which was first published in a now-retracted paper by *The Lancet*.<sup>123</sup> These theories have largely been discredited or do not have enough support in the scientific community to gain legitimacy.<sup>124</sup> However, such theories have continued to circulate online and have exponentially increased with the introduction of the COVID vaccines.<sup>125</sup> While these theories generally originate from popular Anti-Vaxx groups, the online circulation of these theories spread rapidly to mainstream social media users and the public at large.<sup>126</sup> Social media sites such as

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<sup>121</sup> Deborah Weatherspoon, *Understanding Opposition to Vaccines*, HEALTHLINE (Sept. 15, 2017), <https://www.healthline.com/health/vaccinations/opposition>.

<sup>122</sup> See generally Staci L Benoit & Rachel F. Mauldin, *The “anti-vax” movement: a quantitative report on vaccine beliefs and knowledge across social media*, BMC PUB. HEALTH (2021), <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-021-12114-8>.

<sup>123</sup> Julia Belluz, *Research fraud catalyzed the anti-vaccination movement. Let’s not repeat history.*, VOX (Mar. 5, 2019, 12:06 PM), <https://www.vox.com/2018/2/27/17057990/andrew-wakefield-vaccines-autism-study>.

<sup>124</sup> See generally, *COVID-19 Vaccine Myths Debunked*, MAYO CLINIC HEALTH SYS. (Sept. 2, 2021), <https://www.mayoclinichealthsystem.org/hometown-health/featured-topic/covid-19-vaccine-myths-debunked>; see also, e.g. Cathy Cassata, *Doctors Debunk 9 Popular COVID-19 Vaccine Myths and Conspiracy Theories*, HEALTHLINE (June 22, 2021), <https://www.healthline.com/health-news/doctors-debunk-9-popular-covid-19-vaccine-myths-and-conspiracy-theories>.

<sup>125</sup> See Malaka Gharib, *WHO Is Fighting False COVID Info on Social Media. How’s That Going?*, NPR (Feb. 9, 2021), <https://www.npr.org/sections/goatsandsoda/2021/02/09/963973675/who-is-fighting-false-covid-info-on-social-media-hows-that-going>; see also, e.g., Steve Stecklow & Andrew Macaskill, *The ex-Pfizer scientist who became an anti-vax hero*, REUTERS (Mar. 18, 2021, 11:00 AM), <https://www.reuters.com/investigates/special-report/health-coronavirus-vaccines-skeptic/>.

<sup>126</sup> See generally Daniel Funke, *COVID, Vaccine Misinformation Spread by Hundreds of Websites, Analysis Finds*, USA TODAY (Sept. 8, 2021, 12:15 AM),

Instagram, Twitter, and TikTok began placing warning labels on posts about COVID-related topics to combat misinformation.<sup>127</sup>

But many Americans who are hesitant of vaccines do not identify as Anti-Vaxx and hold legitimate concerns over vaccine efficacy, allergies, and side-effects.<sup>128</sup> For instance, in April 2021, the FDA and CDC put a pause on the J&J vaccine distribution after an initial six cases reported dangerous blood clots as a side effect of the vaccine.<sup>129</sup> This was a huge blow to the American trust and roll out of the vaccine.<sup>130</sup> Following the reported cases, the FDA and CDC conducted an investigation to find that out of the 6.8 million doses administered there were only a total of 15 cases of blood clotting linked to the J&J vaccine.<sup>131</sup> The FDA and CDC conducted a full safety review of the cases and concluded that the J&J vaccine should resume its normal distribution.<sup>132</sup> Additionally, some teenagers developed heart inflammation as a side-effect of the vaccine.<sup>133</sup> However, many of these teens' inflammation subsided on their own, and no teens died or were admitted to an intensive care unit.<sup>134</sup> There are numerous other potential side effects or other complications that may happen due to the COVID

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<https://www.usatoday.com/story/tech/news/2021/09/08/covid-vaccine-misinformation-spread-websites-analysis-finds/5732789001/>.

<sup>127</sup> Nandita Krishnan et al., *Examining How Various Social Media Platforms Have Responded to COVID-19 Misinformation*, 2 HARV. KENNEDY SCH. MISINFORMATION REV. 1, 2 (Dec. 2021).

<sup>128</sup> Derek Thompson, *Millions Are Saying No to the Vaccines. What Are They Thinking?*, THE ATLANTIC (May 3, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/the-people-who-wont-get-the-vaccine/618765/>.

<sup>129</sup> *FDA and CDC Lift Recommended Pause on Johnson & Johnson (Janssen) COVID-19 Vaccine Use Following Thorough Safety Review*, FDA (Apr. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-and-cdc-lift-recommended-pause-johnson-johnson-janssen-covid-19-vaccine-use-following-thorough>, [hereinafter *FDA J&J Safety Review*].

<sup>130</sup> See generally, *How The J&J Pause Affects the Total Vaccination Effort*, KHN (Apr. 15, 2021), <https://khn.org/morning-breakout/how-the-jj-pause-affects-the-total-vaccination-effort/>.

<sup>131</sup> *FDA J&J Safety Review*, *supra* note 126.

<sup>132</sup> *Id.*

<sup>133</sup> *Heart inflammation, COVID-19 and the rare side effects of the vaccine*, UC DAVIS HEALTH (Sept. 2, 2021), <https://health.ucdavis.edu/news/headlines/heart-inflammation-covid-19-and-the-rare-side-effects-of-the-vaccine/2021/09>.

<sup>134</sup> *Id.*

vaccines,<sup>135</sup> but, generally speaking, health complications and death are much more likely to occur in someone who contracts COVID versus someone who receives the vaccines.<sup>136</sup>

To quash some of the misinformation and fears about the vaccine, the Biden Administration launched a major, national campaign to educate the public and encourage people to get vaccinated.<sup>137</sup> As a part of this directive, the Administration made a direct appeal to get young people more excited to get vaccinated by employing the help of celebrities, like singer and actress Olivia Rodrigo, to promote the vaccine.<sup>138</sup> Furthermore, President Biden rolled out COVID.org as a one-stop website for resources and updates about the virus.<sup>139</sup> Companies and major corporations also joined in the campaign, offering free services, products, and food to customers who can show proof of their recent

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<sup>135</sup> See *Possible Side Effects After Getting a COVID-19 Vaccine*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/expect/after.html> (last updated Jan. 12, 2022); see also, *Allergic Reactions after COVID-19 Vaccination*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/allergic-reaction.html> (last updated Feb. 3, 2022); see also, *Myocarditis and Pericarditis*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/myocarditis.html> (last updated Nov. 12, 2021).

<sup>136</sup> See Jason P. Block et. al., *Cardiac Complications After SARS-CoV-2 Infection and mRNA COVID-19 Vaccination — PCORnet, United States, January 2021–January 2022*, CDC (Apr. 1, 2022), [https://www.cdc.gov/mmwr/volumes/71/wr/mm7114e1.htm?s\\_cid=mm7114e1\\_x](https://www.cdc.gov/mmwr/volumes/71/wr/mm7114e1.htm?s_cid=mm7114e1_x); See also Jorge L. Ortiz et. al., *Boosted Americans 97 times less likely to die of virus than unvaccinated; DC predicts 75,000 more deaths by Feb. 26: Live COVID-19 updates*, USA TODAY, <https://www.usatoday.com/story/news/health/2022/02/02/covid-cases-mandates-vaccines-deaths/9308759002/> (last updated Feb. 2, 2022, 6:51 PM).

<sup>137</sup> See Carol E. Lee, *Biden Administration Kicks Off National Vaccination Outreach Campaign*, NBC NEWS (Mar. 26, 2021, 6:30 PM), <https://www.nbcnews.com/politics/white-house/biden-administration-formally-launches-national-vaccination-outreach-campaign-n1262236>.

<sup>138</sup> *Olivia Rodrigo: Pop Princess Pushes President's Plan for More Jobs*, BBC NEWS (July 15, 2021), <https://www.bbc.com/news/entertainment-arts-57841649>.

<sup>139</sup> Zeke Miller, *Biden Receives 2nd Booster, Presses Congress on Virus Funds*, ASSO<sup>’</sup>C. PRESS (Mar. 30, 2022), [https://apnews.com/article/biden-covid-business-health-united-states-762d03274aac3b09c78dc70b81354d59?utm\\_medium=AP&utm\\_](https://apnews.com/article/biden-covid-business-health-united-states-762d03274aac3b09c78dc70b81354d59?utm_medium=AP&utm_)

vaccination.<sup>140</sup> State governments have gone so far as to offer cold hard cash to encourage individuals to receive the vaccines.<sup>141</sup> Potentially as a result of these efforts or other motivating factors, about 81.8% of the population has received at least one dose of the vaccine.<sup>142</sup> But many of the vaccines now require a booster shot after six months of the individual being fully vaccinated, and there is some speculation that a second shot is soon to follow.<sup>143</sup>

#### ISSUE

The issue many teens in Florida face, is that given the lenient COVID safety protocols in throughout the state and inside public schools compounded by the fact that the pandemic is in many ways unpredictable, they may want to get vaccinated.<sup>144</sup> However, with the Parental Consent for Health Care Services Law, some teens might not be able to get their parent's consent despite the teens being informed and mature enough to consent obtain the vaccine.<sup>145</sup> This is only exacerbated

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<sup>140</sup> See Zee Krstic, *All the COVID-19 Vaccine Card Free Treats and Discounts You Can Snag Now*, GOOD HOUSEKEEPING (Apr. 30, 2021), <https://www.goodhousekeeping.com/life/a36137436/covid-19-vaccine-card-free-deals-discounts/>.

<sup>141</sup> See Lauren Frias, *Here Are All the States Offering Cash Prizes as an Incentive to Get the COVID-19 Vaccine*, BUS. INSIDER (June 3, 2021, 6:57 PM), <https://www.businessinsider.com/states-offering-cash-as-incentive-to-get-covid-19-vaccine-2021-5>.

<sup>142</sup> *COVID Data Tracker*, CDC, [https://covid.cdc.gov/covid-data-tracker/#vaccinations\\_vacc-people-onedose-pop-5yr](https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-onedose-pop-5yr) (last visited May 7, 2022), [hereinafter *COVID Data Tracker*].

<sup>143</sup> *COVID News: New C.D.C. Data Adds to Evidence that Boosters' Protection Against Severe Covid Plunges After Four Months*, N.Y. TIMES (Feb. 11, 2022, updated Feb. 21, 2022), <https://www.nytimes.com/live/2022/02/11/world/covid-19-tests-cases-vaccine/new-cdc-data-adds-to-evidence-that-boosters-protection-against-severe-covid-plunges-after-four-months?smid=url-copy>.

<sup>144</sup> See Jan Hoffman, *As Parents Forbid Covid Shots, Defiant Teenagers Seek Ways to Get Them*, N.Y. TIMES (June 26, 2021, updated Sept. 30, 2021), <https://www.nytimes.com/2021/06/26/health/covid-vaccine-teens-consent.html>.

<sup>145</sup> WEINER, *supra* note 2 (“How did experts conclude that 14-year-olds are capable of health decisions?”

Most people cite studies that assessed the performance of participants of various ages — like 9, 14, 18, and 21 — according to several standards of competency to consent. For example, researchers studied how volunteers responded to hypothetical medical vignettes. In the studies, researchers found that 14-year-olds didn't differ significantly from 18- and 21-year-olds in their ability to

by the fact that Governor DeSantis has continuously opposed school districts from requiring masks, going so far as to threaten to withhold funds from districts and officials who have self-imposed mask mandates<sup>146</sup> and encourage teens not to wear masks.<sup>147</sup> The ban on mask mandates was upheld by the First District Court of Appeals, and school districts that originally implemented their own masking requirements for students, folded in order to receive the previously withheld funds.<sup>148</sup>

While teens and families are still able to choose whether or not they wish to wear a mask at school,<sup>149</sup> data has shown that the mask mostly prevents the wearer from transmitting COVID to others, and very little data showing the mask protects the actual wearer from contracting COVID from non-mask wearers.<sup>150</sup> This means that even if students exercise their individual choice in wearing a mask to school absent other social distancing measures, without the efforts of all classmates and teachers, teens remain vulnerable to COVID.<sup>151</sup> To gain another layer of protection, many teens are getting vaccinated, and some are even trying

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demonstrate cognitive abilities important to showing competence — but the 9-year-olds did differ”).

<sup>146</sup> Jessica Lipscomb, *Florida Gov. Desantis threatens to hold school leaders' pay if they require masks: financial consequences*, WASH. POST (Aug. 10, 2021, 4:02 AM), <https://www.washingtonpost.com/nation/2021/08/10/desantis-threatens-school-salaries-mask-mandates-florida/>.

<sup>147</sup> See, *Florida Gov DeSantis Berates Kids for Wearing Masks*, ASSOC. PRESS (Mar. 02, 2023, 11:00 AM), <https://apnews.com/article/coronavirus-pandemic-health-tampa-ron-desantis-university-of-south-florida-a6b5dbae5a5e31b3fd3beef62ebee6e8>.

<sup>148</sup> Ryan Dailey, *Feud ends between Florida, federal government over school mask mandates*, NEWS SERV. FL (Dec. 16, 2021, 2:35 PM), <https://www.clickorlando.com/news/2021/12/16/feud-ends-between-florida-federal-government-over-school-mask-mandates/>.

<sup>149</sup> Tim Kephart, *Gov. DeSantis signs exec. order allowing only parents to choose if kids wear masks at schools*, ABC (July 30, 2021, 11:43 AM), <https://www.abcactionnews.com/news/state/gov-desantis-to-sign-exec-order-allowing-only-parents-to-choose-if-kids-wear-masks-at-schools>.

<sup>150</sup> See Harvard Medical School, *Preventing the spread of the coronavirus*, HARV. HEALTH PUB. (Oct. 13, 2021), <https://www.health.harvard.edu/diseases-and-conditions/preventing-the-spread-of-the-coronavirus#:~:text=We've%20known%20for,%22maskless%22%20hamsters>.

<sup>151</sup> See generally Claire Wolters, *How Effective Is a Face Mask Against COVID-19 if You're the Only One Wearing It?*, VERY WELL HEALTH (Jan. 03, 2022), <https://www.verywellhealth.com/face-mask-effectiveness-covid-5214491>.

to find loopholes or other workarounds Parental Medical Consent Laws.<sup>152</sup> This next section will discuss the numerous public policy and legal reasons as to why teens should be able to make their own choice to become vaccinated such as teens' precarious semi-autonomous position in society, the increasing public health concerns, and the hurdles Florida's Parental Consent for Health Care Services Law creates for medical providers.

*A. The Semi-Autonomous State of Teens*

Most adolescents experience an ongoing paradox: on one hand they are still very much subject to their parents' whims like young children, but on the other they are expected to act and abide by adult rules and codes of conduct.<sup>153</sup> As a result, teens make a huge impact on the economy, military, and tax revenue;<sup>154</sup> but they still are not given the rights or privileges to make decisions about their own bodies, with limited exceptions.<sup>155</sup> In many ways, these exceptions epitomize the paradox. For example, in the instance of abortion, the Supreme Court ruling *Casey* makes it clear that the parents, and the state for that matter, have the authority to restrict or permit their teen's choice in receiving an abortion.<sup>156</sup> But the fact that the Court requires states to provide minors with a judicial bypass option in order to forego parental consent laws<sup>157</sup> inherently acknowledges the fact that teens are capable of being mature

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<sup>152</sup> HOFFMAN, *supra* note 141; *see also* Ali Gostanian & Corky Siemaszko, *Faced with anti-vaccination parents, teens are helping one another get Covid shots*, NBC NEWS (May 23, 2021, 4:30 AM), <https://www.nbcnews.com/news/us-news/faced-anti-vaccination-parents-teens-are-helping-each-other-get-n1268093>.

<sup>153</sup> *See* Suzanne Milne Alexander, *Too Much Protection and, at the Same Time, Not Enough: Inconsistent Treatment of Adolescents by the Supreme Court*, 53 DEPAUL L. REV. 1739, 1770 (2004).

<sup>154</sup> *See* Miles Bryan, *Teens as 'essential' workers: How high schoolers stepped up for family during COVID-19*, WHYY (June 5, 2020), <https://whyy.org/articles/teens-as-essential-workers-how-high-schoolers-stepped-up-for-family-during-covid-19/>.

<sup>155</sup> *See* ALEXANDER, *supra* note 150.

<sup>156</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992).

<sup>157</sup> *Id.*

and well-informed enough to make decisions about their own bodies and parents may not always have their own child's best interest in mind.<sup>158</sup>

Interestingly, several of Florida's exceptions to the parental consent law are based on the technical status of a minor,<sup>159</sup> contradictory to the ruling in *Casey*, which obliges teens to go through a long and thorough examination by a judge in a court of law.<sup>160</sup> In instances where a pregnant minor can receive information about contraception without their parent's consent,<sup>161</sup> a teenage girl who suddenly finds herself pregnant is not demonstrably more equipped to receive information about contraceptives than another teenage girl who is also sexually active by virtue of the pregnant teenager having a fertilized egg attached to her uterine wall.<sup>162</sup> Preparing teens to deal with their health and its effects on others, especially in the face of COVID, gives adolescents the opportunity to have ownership and control over their own bodies which in turn helps the community at large.<sup>163</sup> At the end of the day, teenagers become young adults. These young adults will be required to become vaccinated for school, military enlistment, and employment, all of which may be delayed; especially since a two-series vaccination like Pfizer takes a minimum three weeks to become fully vaccinated.<sup>164</sup>

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<sup>158</sup> It is important to note that the judicial bypass system is one that many see as deeply flawed and even arbitrary in its application. See Angela Bonavoglia, *Kathy's Day in Court*, MOD. FAM. L. 74, 74-76 (7th ed. 2020).

<sup>159</sup> See FLA. STAT. ANN. § 384.30 (West 2000); see also FLA. STAT. ANN. § 381.0051 (West 2012); see FLA. STAT. ANN. § 743.065 (West 2020).

<sup>160</sup> *Casey*, 505 U.S. at 877.

<sup>161</sup> FLA. STAT. ANN. § 381.0051 (West 2020).

<sup>162</sup> There is also the additional argument that information about contraception is probably more effective for teens who are sexually active before they become pregnant or contract an STD; see Kaitlyn Pangburn, *It's No "Minor" Issue: Reframing Traditional Understandings of Minors' Right to Bodily Autonomy and Freedom of Sexual Decision-Making How Minors' Reproductive Rights Fall Short Compared to Their Own Right to Sexual Freed*, 29 S. CAL. REV. L. & SOC. JUST. 107, 129 (2019).

<sup>163</sup> See generally Ross D. Silverman et. al., *Vaccination over Parental Objection — Should Adolescents Be Allowed to Consent to Receiving Vaccines?*, 381 NEW ENG. J MED. 104 (2019).

<sup>164</sup> *COVID-19: Frequently Ask Questions*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html> (last visited May 7, 2022).

*B. Public Health Concerns*

While the virus was mostly present among adults at the beginning of the pandemic, cases among minors began spiking with new variants and accounted for “approximately 22% of positive COVID-19 cases reported to date, and hospitalizations among this population have recently spiked.”<sup>165</sup> Teens, being extremely social creatures, will almost inevitably continue to gather for social events and parties, with or without COVID protections.<sup>166</sup> Kids who attend “super spreader” events,<sup>167</sup> can easily turn around and go to schools with other teens who try to maintain safety protocols. For example, in August 2021 “[m]ore than 5,000 students and hundreds of employees in a single Florida school district have tested positive for Covid-19 or may have been exposed to the coronavirus.”<sup>168</sup>

Historically, the legislature has found one way to combat the spreading of communicable diseases by providing confidential medical care to teens that does not require their parents’ consent.<sup>169</sup> This was evidenced by the HIV/AIDS epidemic ravaging the population—

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<sup>165</sup> Larissa Morgan et al., *COVID-19 Vaccination of Minors Without Parental Consent*, JAMA PEDIATRICS (Jan. 1, 2022), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2782024>.

<sup>166</sup> See Sheena Jones & Mirna Alsharif, *Parents cooperating with health officials after New Jersey teen party leads to Covid-19 cluster*, CNN NEWS (July 25, 2020, 6:20 AM), <https://www.cnn.com/2020/07/24/us/coronavirus-cluster-nj-teen-party/index.html>; see also, Julia Marnin, *Teenage Parties Prompt Nearly 1,200 COVID Cases, Put Almost 5K in Quarantine*, NEWSWEEK (June 28, 2021, 2:53 PM), <https://www.newsweek.com/teenage-parties-prompt-nearly-1200-covid-cases-puts-almost-5k-quarantine-1604899>; see also, Tamar Lapin, *Florida teen went to large church party two weeks before dying of coronavirus*, N.Y. POST (July 6, 2020, 11:23 PM), <https://nypost.com/2020/07/06/florida-teen-attended-church-party-two-weeks-before-covid-19-death/>.

<sup>167</sup> See, *What is a Super Spreader Event?*, BETH ISRAEL LAHEY HEALTH (Feb. 23, 2021), <https://coronavirus.bilh.org/blog/what-is-a-super-spreader-event/>.

<sup>168</sup> Tim Fitzsimons, *Over 5,000 Students Quarantine or Isolate Because of Covid in Florida School District*, NBC NEWS (Aug. 16, 2021, 8:18 PM), <https://www.nbcnews.com/news/us-news/over-5-000-students-quarantine-or-isolate-due-covid-single-n1276933>.

<sup>169</sup> Janine P. Felsman, *Eliminating Parental Consent and Notification for Adolescent HIV Testing: A Legitimate Statutory Response to the AIDS Epidemic*, 5 J.L. & POL'Y 339, 340 (1996).

especially the youth—during the ‘80s and ‘90s.<sup>170</sup> Legislatures recognized how important it was to track this life-threatening virus, and how parental consent laws created a barrier for teens to access care and testing because of their deeply held interest in keeping their sex lives and STD status confidential from their parents.<sup>171</sup> Many of the fears were, again, due to the political, religious, and social landscape regarding sex and sexuality during this time period.<sup>172</sup> There have been many comparisons between the COVID and AIDs epidemic in the media and amongst online debaters.<sup>173</sup> But the main point to derive from this is that bringing a realistic approach to a crisis, such as providing confidential medical services to teens, can reduce the number of infection rates and help better deal with communicable diseases.<sup>174</sup>

Furthermore, “children with underlying medical conditions are at increased risk for getting very sick [from COVID] compared to children without underlying medical conditions.”<sup>175</sup> Not only are immunocompromised teens recommended to get vaccinated, but they are also recommended to receive a third dose as “vaccine effectiveness for the general population is more than 90%, this figure is about 59% to 72% for people who are immunocompromised.”<sup>176</sup> Some pediatricians have

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Reuters Fact Check, *Fact Check-Misleading Comparison Between COVID-19 and Diseases such as AIDS, Chlamydia and Ebola*, (Aug. 6, 2021, 4:55 AM), <https://www.reuters.com/article/factcheck-covid-aids/fact-check-misleading-comparison-between-covid-19-and-diseases-such-as-aids-chlamydia-and-ebola-idUSL1N2PD0LO>; While there are some valid comparisons, it is important to acknowledge that these two viruses do not come with the same context or struggles the LGBTQ+ community faced in their fight for recognition and treatment during this time of crises; *see generally HIV Stigma and Discrimination*, CDC, <https://www.cdc.gov/hiv/basics/hiv-stigma/index.html#:~:text=HIV%20discrimination%20is%20the%20act,with%20someone%20living%20with%20HIV> (last visited May 7, 2022).

<sup>174</sup> FELSMAN, *supra* note 166.

<sup>175</sup> *Medical Conditions*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#ChildrenAndTeens> (last updated Feb. 25, 2022).

<sup>176</sup> Melissa Jenco, *CDC: Immunocompromised people 12 and older should get third COVID-19 shot*, AM. ACAD. PEDIATRICS (Aug. 13, 2021), <https://publications.aap.org/aapnews/news/17106>.

concerns, however, that a teen's ability to circumvent their parents' wishes "runs the risk of damaging the family unit."<sup>177</sup> But under these circumstances, not getting a vaccine could be extremely harmful and "adolescents need not be harmed by parental decisions that are based on misinformation or disinformation. Allowing adolescents to consent to vaccination despite persistent parental resistance facilitates access to a medically recommended and evidence-based treatment."<sup>178</sup>

### C. Hurdles for Medical Providers

Even beyond COVID considerations, the Parental Consent for Health Care Services Law is problematic for a variety of reasons: first, the law provides that the medical provider must obtain "written parental consent" to proceed with a medical procedure.<sup>179</sup> Previously, there was an implied consent for medical providers to perform a service when the parent was simply in the room during the appointment.<sup>180</sup> Now, there is a question of whether the medical provider will need to stop an appointment, have the parents sign a consent form, and then have the medical professional administer the procedure.<sup>181</sup> Not only does this become very cumbersome, it also creates more of a transactional relationship between a medical professional and their patient.<sup>182</sup>

Traditionally, "common law courts rarely intervened in the affairs of parents and their children on behalf of legal strangers."<sup>183</sup> As a result of this neglect from the legal and medical fields, child abuse did not become a national issue until the 1960s and '70s, with physicians becoming some of the first champions for neglected and abused children.<sup>184</sup> Today, medical professionals are mandatory reporters, and often are the first line of defense for child abuse or neglect given their

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<sup>177</sup> Leah Campbell, *At What Age Should Kids Be Making Their Own Medical Decisions?*, HEALTHLINE (June 27, 2019), <https://www.healthline.com/health-news/at-what-age-should-children-be-allowed-to-make-their-own-medical-decisions>.

<sup>178</sup> *Id.*

<sup>179</sup> See FLA. STAT. ANN. § 1014.06 (West 2021).

<sup>180</sup> SCOTT, *supra* note 47.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> John Dewitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 Fam. L.Q. 163, 167 (2002).

<sup>184</sup> John E.B. Myers, *A Short History of Child Protection in America*, 42 Fam. L.Q. 449, 454 (2008).

position in oftentimes being able to see the physical injuries of abuse.<sup>185</sup> But the medical consent law prohibits the even the “solicitation” of medical services to minors without written parental consent.<sup>186</sup> In a case where a teen is uncertain about their choice to become vaccinated, the way the law is written, it does not seem their medical provider can even have a conversation about the vaccine with their patients if the parents do not provide written consent.<sup>187</sup> If a medical provider does have that conversation, they are subject to a misdemeanor in the first degree.<sup>188</sup> These measures insulate the relationship between medical providers and their minor patients, giving less of an opportunity for the professionals to uncover and address the abuse of children or have conversations about a minor’s basic health needs and questions.

*D. Current Options for Teens to Receive the Vaccine in Florida Without Parental Consent*

With the current options available to teens, there may be some ways teens can obtain a vaccine without the consent of one or both of their parents.<sup>189</sup> However, these options are only available to select groups of teenagers and come with their own risks or simply fall short in providing a comprehensive solution.<sup>190</sup> But it is important to acknowledge and explore these options below, even if none of them “carry the day,” in order to understand why a more comprehensive solution is needed in allowing teens to consent to their own vaccines.

1. Traveling Out of State

Many Americans participate in the trend of medical tourism, which is the process of traveling to circumvent medical laws or systems.<sup>191</sup> People are willing to embark on long journeys to seek medical care for a variety of reasons, including an inability to afford healthcare in the

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<sup>185</sup> See generally, *Medical Responses to Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/responding/collabresponse/medical/> (last visited May 7, 2022).

<sup>186</sup> See FLA. STAT. ANN. § 1014.06 (West 2021).

<sup>187</sup> SCOTT, *supra* note 47.

<sup>188</sup> FLA. STAT. ANN. § 1014.06(5) (West 2021).

<sup>189</sup> See HOFFMAN, *supra* note 141.

<sup>190</sup> *Id.*

<sup>191</sup> *Medical Tourism: Travel to Another Country for Medical Care*, CDC, <https://wwwnc.cdc.gov/travel/page/medical-tourism> (last visited May 7, 2022),

United States, laws which prevent access to care for abortions or other procedures, or lack of adequate care within their community.<sup>192</sup> Teens with access to a vehicle or other transportation methods could elect to travel to a state that has no parental consent requirement and get vaccinated.<sup>193</sup> For example, Florida's neighboring state of Alabama allows any minor 14 and above to consent to a vaccine without permission from their parents.<sup>194</sup> Not only have some teens already traveled to states without parental consent laws to receive a COVID vaccine, but other teens have also started collective initiatives to provide a comprehensive list of all the states' medical consent laws to encourage their peers to do the same.<sup>195</sup>

However, there is a huge risk in teens traveling far distances to simply get a vaccine as motor vehicle crashes are the second leading cause of death for teens in the United States.<sup>196</sup> The CDC encourages parental involvement and communication with their teens to help them gain the experience and skills to become excellent drivers.<sup>197</sup> If teens are going against their parents' wishes in driving across state lines to receive a vaccine, it becomes more difficult for teens to communicate with their parents.<sup>198</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> GOSTANIAN, *supra* note 149; *see also*, Nina Feldman, *This 16-Year-Old Wanted to Get the COVID Vaccine. He Had to Hide it From His Parents*, NPR (Feb. 16, 2022, 5:08 AM), <https://www.npr.org/sections/health-shots/2022/02/16/1074191656/this-16-year-old-wanted-to-get-the-covid-vaccine-he-had-to-hide-it-from-his-pare>.

<sup>194</sup> ALA. CODE § 22-8-4 (2022).

<sup>195</sup> Katie Reilly, *When Parents Said No to Their Kids Being Vaccinated, This Teenager Created VaxTeen. It's Now More Crucial Than Ever*, TIME (July 22, 2021, 5:10 PM), <https://time.com/6082966/vaxteen-covid-19/>.

<sup>196</sup> *Teen Drivers: Get the Facts*, CDC, [https://www.cdc.gov/transportationsafety/teen\\_drivers/teendriversonfactsheet.html](https://www.cdc.gov/transportationsafety/teen_drivers/teendriversonfactsheet.html) (last visited May 7, 2022).

<sup>197</sup> *Parents Are the Key to Safe Teen Drivers*, CDC, <https://www.cdc.gov/parentsarethekey/index.html#:~:text=One%20of%20the%20most%20important,drivers%20safe%20on%20the%20road> (last visited May 7, 2022).

<sup>198</sup> *See generally* FELDMAN, *supra* note 190.

## 2. Teens of Divorced or Unmarried Parents Advocating for Themselves During Child Custody Disputes

Once a family is in the court system, judges in the State of Florida have the power and ability to award parents the power for the care, custody, and control in the best interest of the child.<sup>199</sup> There have been many child custody disputes around the county surrounding the COVID vaccine.<sup>200</sup> Previously, the Fourth District Court of Appeals awarded ultimate health care decisions to a father who wanted his child to be vaccinated, despite the mother's protestations for religious reasons.<sup>201</sup> When determining custody, which includes health care decision-making, courts in Florida may consider "[t]he reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference."<sup>202</sup> This means a teenager would most likely be able to advocate for themselves in order to receive the vaccine.

But these custody disputes can create a hostile family dynamic, such as in a particularly contentious case from Ontario, Canada, a 13-year-old boy, who was represented by an attorney, initially said he wanted to receive the COVID vaccine.<sup>203</sup> By the time the court was ready to hear the case, the teen changed his mind, and said he wanted to wait until 2023 to have a full list of options of the vaccine and did not "want to die."<sup>204</sup> Upon review of the evidence and testimony, the court found that the boy's mother, and a doctor hired by her, had influenced the child into backtracking his decision.<sup>205</sup> The judge, following the best interest of the child standard (which is also used the United States), ordered the teen to be vaccinated and gave sole health care decision-making to the child's father.<sup>206</sup> This case is emblematic of the strain custody hearings place on families, and how parents may lose sight of a child's best and individual interest in making decisions about their own bodies.

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<sup>199</sup> FLA. STAT. ANN. § 61.13 (West 2021).

<sup>200</sup> See Vipal Monga, *Divorced Parents Fight Over Their Kids' Covid-19 Vaccination*, WALL ST. J. (Feb. 3, 2022, 5:30 AM), <https://www.wsj.com/articles/covid-19-vaccinations-for-kids-spark-battles-between-divorced-parents-11643884208>.

<sup>201</sup> *Winters v. Brown*, 51 So. 3d 656, 658 (Fla. Dist. Ct. App. 2011).

<sup>202</sup> § 61.13(3)(i).

<sup>203</sup> *Saint-Phard v. Saint-Phard*, 2021 CANLII 6910, para. 13 (Can. O.N. S.C.).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at para. 17.

<sup>206</sup> *Id.* at para. 3.

### 3. Obtaining One-Parent Consent

Teens are only required to obtain the consent of one of their parents, regardless of the other parent's objection.<sup>207</sup> Married parents do not see eye-to-eye on every single facet of the care, custody, and control of their children, and martial conflicts have been on the rise with the pandemic.<sup>208</sup> Many attorneys have seen an uptick in divorces, and discord over parents' deciding whether or not to vaccinate their children.<sup>209</sup> While this may present a teen with the opportunity to seek the consent of one parent and get vaccinated, a teen attempting to circumvent one parent's authority with another's may cause even more conflict in a home if there is already a volatile relationship between parents.<sup>210</sup>

#### SOLUTIONS

Ultimately, the solution which would provide the most teens the greatest freedom in choosing whether to get a COVID vaccine would be for the legislature to write an exception to the Parental Consent for Health Care Services Law.<sup>211</sup> However, Governor DeSantis and the current Florida legislature, are the ones who drafted, voted on, and rolled the law in its current form. Therefore, this next section will explore both the ideal solution of creating an exception for the Parental Consent for Health Care Services Law that would allow teenagers to consent to their own vaccines and a *parens patriae* case for teens who desperately need the vaccine but cannot access any of the current solutions discussed above.

#### *A. Ideal Solution to Allow Teens in the State of Florida to Get Vaccinated Without Requiring Parental Consent*

One of the many reasons why the Parental Bill of Rights was passed, was to further uphold the "fundamental right of parents to direct

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<sup>207</sup> *Angeli v. Kluka*, 190 So. 3d 700, 703 (Fla. Dist. Ct. App. 2016).

<sup>208</sup> Holly Ellyatt, *Arguing with Your Partner over Covid? You're Not Alone, with the Pandemic Straining Many Relationships*, CNBC (Jan. 21, 2022, 3:02 AM), <https://www.cnbc.com/2022/01/21/covid-has-put-pressures-and-strains-on-relationships.html>.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> See generally, Lois A. Weithorn & Dorit Rubinstein Reiss, *Providing Adolescents with Independent and Confidential Access to Childhood Vaccines: A Proposal to Lower the Age of Consent*, 52 CONN. L. REV. 771 (2020).

the upbringing, education, and care of their minor children.”<sup>212</sup> An exception to the statute could provide an effective yet encompassing mechanism to strike the right balance between a parent’s rights to their minor and teens’ interests in exercising their bodily autonomy.<sup>213</sup> Currently, many of the medical exceptions to parental consent in Florida depend on either the minor’s martial, emancipation, or marital status, unless a minor is seeking an abortion, then the court considers a list of criteria before ruling whether the minor may receive one.<sup>214</sup> However, if an exception was predicated on Florida’s abortion “mature minor doctrine” it would invoke too many varying factors that would require the court’s intervention with varying outcomes.<sup>215</sup>

For context, to procure an abortion without parental consent in Florida, a court must find “by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy.” The court considers factors such as the minor’s:

- (a) Age. (b) Overall intelligence. (c) Emotional development and stability. (d) Credibility and demeanor as a witness. (e) Ability to accept responsibility. (f) Ability to assess both the immediate and long-range consequences of the minor's choices. (g) Ability to understand and explain the medical risks of terminating her pregnancy and to apply that understanding to her decision.<sup>216</sup>

The issue with this version of the mature minor doctrine is that it requires a court to determine whether a teen should get a vaccination based on a list of factors. This has created a lot of hurdles for teens creating riskier pregnancies and a courtroom experience surrounding “fear, tension, anxiety, and shame among minors, causing some who are mature, and some whose best interests would have been served by abortion to ‘forego the bypass option and . . . carry to term.’”<sup>217</sup> Moreover, some judges apply these factors inconsistently or unfairly; for instances, a Florida judge recently refused to allow a teenage girl to get an abortion because of her C-average GPA.<sup>218</sup> While this ruling was

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<sup>212</sup> FLA. STAT. ANN. § 1014.02 (West 2021).

<sup>213</sup> See WEITHORN, *supra* note 208 at 850-51.

<sup>214</sup> FLA. STAT. ANN. § 390.01114(6)(c)(1)(a)-(g). (West 2020).

<sup>215</sup> See WEITHORN, *supra* note 208 at 850.

<sup>216</sup> § 390.01114(6)(c)(1)(a)-(g).

<sup>217</sup> D. Kelly Weisberg, *Modern Family Law* 84-85 (7th ed. 2020).

<sup>218</sup> Anne Branigin, *How hard is it to get a court-approved abortion? for one teen, it came down to GPA*, WASH. POST (Jan. 27, 2022, 11:07 AM),

overturned,<sup>219</sup> cases which directly impact the health, safety, and future of teens are innately time sensitive, and should not be so dependent on the whims of certain judges.

Instead, the exception should consider the utilizing “Rule of Sevens” framework, which utilizes a child’s age, rather than the list of criteria or varying life circumstances, to determine a child’s capacity to consent to medical treatment.<sup>220</sup> Under the Rule of Sevens, children:

- (1) Under the age of 7 there is no capacity, and the physician must have parental consent to treat (unless a statutory exception applies).
- (2) Between the ages of 7 and 14, there is a rebuttable presumption that there is no capacity, and a physician generally should get parental consent before treating (unless a statutory exception applies).
- (3) Between the ages of 14 and 18, there is a rebuttable presumption of capacity, and the physician may treat without parental consent unless the physician believes that the minor is not sufficiently mature to make his or her own health care decisions.<sup>221</sup>

The Rule of Sevens provides a narrower framework for the legislature and would allow minors to freely consent to their own medical care, rather than having to create a judicial mechanism for them to receive the vaccine. The rebuttable presumption would then allow a recourse for parents who still ardently oppose the vaccine for their child. Additionally, the Rule of Sevens naturally encompasses Florida’s mature minor doctrine as it considers a teens’ development and capacity considering their age and circumstances. Lastly, this would also authorize medical providers to at least educate minors about the vaccine to have a more informed decision about their vaccination. Not only would this approach give health care professionals the freedom to treat and care for teenage patients, but it also provides a balance for parents and other individuals concerned about physicians overstepping their role as medical providers.

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<https://www.washingtonpost.com/lifestyle/2022/01/27/florida-abortion-judicial-bypass-case-gpa/>.

<sup>219</sup> *Id.*

<sup>220</sup> *Cardwell v. Bechtol*, 724 S.W.2d. 739 (Tenn. 1987).

<sup>221</sup> *Id.*

*B. Using the Parens Patriae Doctrine as an Alternative Solution to the Legislature Passing an Exception to the Parental Consent for Health Care Services Law*

As stated above, parents in the state of Florida generally have the right to the care, custody, and control of their child, but “the constitutional right to be a parent without State interference is that as between the parent and the child the ultimate welfare of the child must be controlling.”<sup>222</sup> Generally speaking, when it comes to vaccines, the *parens patriae* authority has usually been utilized by the courts in cases where schools are seeking to enforce vaccines mandates as a requirement for a child’s attendance.<sup>223</sup> But courts in the state of Florida, have also invoked the *parens patriae* authority for children seeking life-saving treatments.<sup>224</sup> In these cases, the court typically steps in when a child is facing neglect and requires necessary medical treatment.<sup>225</sup> Necessary medical treatment is defined as “care which is necessary within a reasonable degree of medical certainty to prevent the deterioration of a child’s condition or to alleviate immediate pain of a child.”<sup>226</sup> Of course, “the state’s interest diminishes as the severity of an affliction and the likelihood of death increase.”<sup>227</sup> Furthermore, “the state may override the fundamental liberty interest in the parent-child relationship only when there is a sufficiently compelling state interest.”<sup>228</sup>

Following the *parens patriae* criteria, a case could be made that a teen who is (1) medically fragile or an underlying condition making the teen more susceptible to both contract and die from COVID, (2) whose parents have disregarded their child’s medical needs and do not take adequate measures to ensure their child’s safety; and (3) is living in a pandemic with few options for school choice and their school COVID protocols would require a vaccine against their parents’ wishes for their

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<sup>222</sup> 25 FLA. JUR. 2D FAM. L. § 93 (2022).

<sup>223</sup> Marjorie A. Shields, Annotation, *Power of Court or Other Public Agency to Order Vaccination over Parental Religious Objection*, 94 A.L.R.5th 613 (2001).

<sup>224</sup> *E.g.* One court ordering the blood transfusion of an infant against the wishes of Jehovah’s Witness parents. *J.V. v. State*, 516 So. 2d 1133, 1133 (Fla. Dist. Ct. App. 1987); *see also e.g.* Another court ordering cancer treatment and therapy for an infant. *In re D.G.*, 970 So. 2d 486, 487 (Fla. Dist. Ct. App. 2007).

<sup>225</sup> *In re D.G.*, 970 So. 2d at 489-90.

<sup>226</sup> *Id.* at 489.

<sup>227</sup> *M.N. v. S. Baptist Hosp. of Fla., Inc.*, 648 So. 2d 769, 771 (Fla. Dist. Ct. App. 1994).

<sup>228</sup> *Id.*

best chance at survival against COVID. For certain populations with underlying conditions, such as “obesity, diabetes with complications, and anxiety and fear-related disorders had the strongest association with death.”<sup>229</sup> Moreover, while it is never a certainty whether or not someone will contract a communicable disease, once a person has the virus, it would be too late to administer a preventative measure which could have “prevent[ed] the deterioration of a child's condition.”<sup>230</sup> Lastly, the state has a compelling interest in preserving life and protecting the community at large, and being vaccinated against COVID is most effective and easiest preventative measure against the virus.<sup>231</sup>

#### CONCLUSION

The COVID pandemic is an ever-changing, ever-evolving, ever-developing situation with information being thrown at the American public at all times. Political divides and social inequities have created such an uproar surrounding the virus, and none of this has helped in aiding in eradicating the virus from the country. Teens have legitimate interest in protecting themselves against the virus, while parents have a fundamental right to the care, custody, and control of their teens. To balance the interests of parents concerned about the safety and efficacy of the vaccine and teens who wish to obtain it, Florida’s legislature should allow for teenagers, who are becoming increasingly independent, the freedom to be informed and decide about their own vaccination status.

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<sup>229</sup> *Underlying Medical Conditions Associated with Higher Risk for Severe COVID-19: Information for Healthcare Professionals*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html#:~:text=Certain%20underlying%20medical%20conditions%20increased,a%20condition%20increased%20with%20age> (last updated Feb. 15, 2022).

<sup>230</sup> *In re D.G.*, 970 So. 2d at 489.

<sup>231</sup> *How to Protect Yourself & Others*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>, (last updated Feb. 25, 2022),