UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:22-cv-00013

ANDREW GARLICK,
DR. THOMAS FOW, and
REBEKAH VOELKELT,

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF COLORADO,
TODD SALIMAN, in his official capacity as President of University of Colorado,
DONALD M. ELLIMAN, JR., in his official capacity as Chancellor of University of Colorado Anschutz Medical Campus,
MICHELLE MARKS, in her official capacity as Chancellor of University of Colorado Denver,

*Defendant*s.

Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction

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Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction

This case concerns the constitutionality of the University of Colorado ("**CU**") Vaccine Mandate (the "**CU Mandate**"), requiring students to take COVID vaccinations, despite their objection. The CU Mandate violates the liberty protected by the Fourteenth Amendment to the U.S. Constitution, which includes rights of bodily integrity and autonomy, and medical treatment choice. And the CU Mandates' Exemption Policy violates the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause of the First Amendment to the United States Constitution.

Plaintiffs' ("**Students**") refusal of the COVID vaccine is based on legitimate concerns including underlying medical conditions, having natural antibodies, and the risks associated with the vaccine, as well as sincerely held religious objections. The only way such rights can be infringed is for CU to justify its override of the student's choice within the boundaries of the U.S. Constitution, which it cannot do.

Students meet the requirements for a preliminary injunction: they are likely to succeed on the merits of their claims against the CU Mandate, they have irreparable harm if the injunction is not granted, legal remedies are inadequate, and the public interest favors Students.

Facts

A. The CU Mandate Overview and Implementation

On April 28, 2021, CU announced that these four campuses will require faculty, staff, and students to receive a COVID-19 ("**COVID**") vaccine for the fall 2021 semester. *Plaintiffs'*

Verified Complaint for Declaratory and Injunctive Relief, ECF No. 1, ¶¶ 19, 20. ("**Compl**."). While the CU Mandate applies generally to all campuses, each campus has campus-specific implementation. *Id*. ¶ 27. For example, each campus has determined its own processes for exemptions and has varying deadlines for complying with the CU Mandate. *Id*. Visitors on any CU campus are not required to show proof of vaccine. *Id*. ¶ 28.

CU Denver and CU Anschutz students were required to be vaccinated by August 23, 2021, and September 1, 2021, respectively. *Id*. ¶¶ 29, 41. There are limited exemptions available for religious, medical, or personal reasons (depending upon the campus) (*id.* ¶¶ 32, 44); but, CU Anschutz made clear that it would only grant religious exemptions for "a person's religious belief whose teachings are opposed to all immunizations, i.e., your religion teaches you and all other adherents that immunizations are forbidden under all circumstances[,]" *id*. ¶¶ 45, 238. However, on September 24, 2021, CU updated its policy to indicate that "[r]eligious accommodations are not currently available to students or applicants." *Id*. ¶ 46. Despite this change, religious exemptions are still available for employees. *Id*. There is no exemption for those with a natural immunity to COVID, including those who have previously been infected and fully recovered. *Id*. ¶¶ 38, 51.

There are strong consequences for those who refuse the vaccine (like termination, *see id*. ¶¶ 39, 53, 238-245) and, even if granted an exemption, Students are still subject to Extra Requirements like *inter alia* weekly mitigation testing, mandatory face masks, physical distancing, etc. *Id*. at ¶¶ 33-39, 47-53. There are no meaningful exemptions to these extra requirements and failure to comply results in disciplinary action. *Id*.

The CU Mandate does not provide a clear process as to how the decision to recommend the CU Mandate was made, nor does it state what evidence they relied upon. *Id*. ¶¶ 21-22. The CU Mandate also does not explain why such the CU Mandate is necessary given that the vast majority of students are already vaccinated, allowing CU's community to achieve herd immunity. *Id*. ¶¶ 23, 119-127. Finally, the CU Mandate does not explain why it was necessary to implement provisions which far exceed those imposed by the CDC or state and county authorities on the general public. *Id*. ¶¶ 24, 97-116.

B. Context Surrounding the CU Mandate

1. COVID "Vaccines" Are Not Vaccines in the Traditional Sense, but Operate Only as Medical Treatments or Therapeutics—Lessening Symptoms and Severity, but Not Preventing Infection or Transmission.

COVID vaccines are not "vaccines" in the traditional sense. *Id.* ¶ 55. The COVID injections use "gene-transfer technology[,]" which is a new technology not used in traditional vaccines. **Parks Decl.** ¶ 28, attached as **Exhibit 15**. Accordingly, the FDA classifies them as "CBER-Regulated Biologics" otherwise known as "therapeutics" which falls under the "Coronavirus Treatment Acceleration Program." Compl. ¶ 55. Moderna acknowledges that the FDA refers to the mRNA COVID vaccine as a "gene therapy." **Parks Decl.** ¶ 29; *see also* **McCullough Decl.** ¶ 29 (the COVID "vaccines" "are considered 'genetic vaccines' or vaccines produced from gene therapy ('GT') molecular platforms which according to US FDA regulatory guidance are classified as gene delivery therapies[.]"), attached as **Exhibit 16**.

The vaccine is misnamed since it neither prevents infection, re-infection, nor transmission of the virus, the key elements of a vaccine. Compl. ¶ 56. As shown below, the CDC has publicly

stated that the vaccine is effective in reducing the severity of the disease but not transmission, infection, or re-infection. *See infra* D.1. Accordingly, the injection is a medical treatment or therapeutic, not a vaccine in the traditional sense. Compl. ¶ 57.

Moreover, COVID vaccines differ significantly from traditional vaccines. First, traditional vaccines, such as those for Polio and Rotavirus, produce an immune response that is almost identical to the response the body would have to the full-strength virus. **Parks Decl. ¶** 13. Such vaccines composed of live, whole, weakened viruses, stimulate the body to produce antibodies that neutralize the virus in the blood and tissues. *Id.* They also properly train the immune system, since they are introduced at the same mucosal surfaces that the virus would normally infect. *Id*.

Second, because the COVID vaccines cause cells to reproduce one portion of the virus, the spike protein. Compl. ¶ 60. The vaccines induce the body to create spike proteins, causing a person to create antibodies only against this one limited portion (the spike protein) of the virus. *Id*. These vaccines "mis-train" the immune system to recognize only a small part of the virus (the spike protein). *Id*. at 61. Variants that differ, even slightly, in this protein, such as the Delta or Omicron variants,[1] are able to escape the narrow spectrum of antibodies created by the vaccines. *Id.*; *see also* **Parks Decl. ¶** 19.

[1] Currently, the Delta variant is the dominant strain of the virus circulating worldwide, but Omicron may replace it as the most dominant strain. **McCullough Decl. ¶** 39; *see also* **Bhattacharya Decl. ¶** 50, attached as **Exhibit 17**; While Omicron appears to have a larger number of spike protein mutations and is more transmissible than Delta, it is showing milder symptoms, less disease severity, and typically does not require treatment. **McCullough Decl. ¶** 15.

Third, the vaccines make people become dependent upon regular booster shots, because they have been "vaccinated" only against a tiny portion of a mutating virus. Compl. ¶ 62.This will lead to a constant need for booster shots as new variants of the COVID virus emerge. *Id*.

Fourth, the vaccines do not prevent infection in the nose and upper airways, and vaccinated individuals with breakthrough Delta have been shown to have much higher viral loads in these regions. *Id*. ¶ 63. This can lead to the vaccinated becoming "super-spreaders" as they carry extremely high viral loads. **Parks Decl.** ¶ 43; **McCullough Decl.** ¶ 1 (fully vaccinated persons can have much higher viral loads than the unvaccinated and spread Delta easily). It can also lead to the vaccinated being more likely to contract variants. **Parks Decl.** ¶ 20. One study showed that persons who were vaccinated were 13 times more likely to catch the Delta variant than those with natural immunity. *Id*.

To account for the COVID vaccines not qualifying as a "vaccine" in the traditional sense, the CDC changed its definition of "vaccination" in August 2021. *Id*. ¶¶ 58, 172, n. 13. The CDC previously described vaccination as: "the act of introducing a vaccine into the body to produce immunity to a specific disease." *Id*. Now, the definition has since been changed and reads: "the act of introducing a vaccine into the body to produce protection to a specific disease." *Id*.

So while CU refers to COVID "vaccines," Students show that all COVID "vaccinations" are, by traditional definitions, not vaccines which act to prevent infection and transmission of the virus. Instead, each of the COVID "vaccines" operate only as medical treatments or therapeutics—lessening symptoms and severity, but not preventing infection or transmission.

2. The CU Mandate is Contrary to the FDA Emergency Use Authorization

The CU Mandate does not comply with the critical informed consent principles that form the foundation for Emergency Use Authorization ("EUA"). Compl. ¶ 64, et seq. Contrary to the federal laws on providers that provide the vaccine to the general public, no CU student is given a true, voluntary option to accept or refuse the vaccine. *Id*.

a. Food and Drug Administration's Emergency Use Authorization

Currently, all but one of the publicly available COVID vaccines have not received full FDA approval, but only have received EUA.[2] *Id*. ¶ 64. Federal statute allows for a drug to receive EUA when federal officials conclude that drug "may be effective in diagnosing, preventing, or treating, [the disease at issue], and the known benefits of taking the drug outweigh the known risks [of the disease]" and there is no other no "adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition[.]" 21 U.S.C.A. § 360bbb-3(c); Compl. ¶ 67.

b. Informed Consent Requirements under EUA status

A vaccine receiving EUA requires complete, informed, and voluntary consent to ensure that individuals to whom the product is administered are informed

> (I) that the Secretary has authorized the emergency use of the product;
> (II) *of the significant known and potential benefits and risks of such* use, and of the extent to which such benefits and risks are unknown; and
> (III) *of the option to accept or refuse administration of the product*, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

[2] While one vaccine has been granted full approval, individuals choose which vaccine to receive (if any) based on a variety of reasons including the risks, side effects, development process, etc. So one having full approval does not negate the EUA issue. Moreover, Pfizer has not received full FDA approval for all contexts, as it still only has EUA for individuals under 16 and boosters. Compl. ¶ 64, n.7 & n.8.

Id. ¶ 68. This informed consent requirement only applies to *medical* providers, so the "consequences" of refusing the product must be interpreted to apply only to the *medical* consequences, not other types of consequences, like loss of employment or virtual expulsion from school. Compl. ¶¶ 70-71.

The threat of virtual expulsion from school for students who refuse to take the vaccine and who do not qualify for an exemption is not CU's attempt at garnering consent—it is coercion. *Id*. ¶ 71. In other contexts, even subtle, implied threats cannot constitutionally support "consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (coerced police searches unconstitutional); *see also, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (arbitration "is a matter of consent, not coercion"); **Ponesse Decl.** ¶ I.4 ("[V]accine mandates are, by definition, coercive immunization programs. They impose a consequence on persons who, in the absence of the threat of the loss of enrollment, would not voluntarily choose vaccination."), attached as **Exhibit 18**.

While CU is not a medical provider and is not subject to the FDA's informed consent requirement, the principles supporting EUA itself, as well as the informed consent law, supports true, voluntary consent from CU students—not coercion from CU's administration. Compl. ¶ 72.

3. The CU Mandate Is Contrary to Modern Medical Ethics

The FDA's informed consent requirement is based on the fundamental tenant of medical ethics which requires informed and voluntary consent to any procedure or drug that imposes a medical risk to an individual. *Id*. ¶ 76. "A person may freely choose to accept medical risks for the benefit of others . . . we don't harvest organs without consent, even if doing so would save

many lives. Those who make such sacrifices for others must truly be volunteers, not conscripts drafted by college administrators." *Id*. (citing Aaron Kheriaty and Gerard V. Bradley, *University Vaccine Mandates Violate Medical Ethics*).

According to Dr. Julie Ponesse, a Professor of Ethics, "[f]or a vaccine to be ethically justified, the disease for which vaccination is mandated must be a highly virulent pathogen which is a significant cause of morbidity and mortality, posing a substantial threat to all persons." **Ponesse Decl.** ¶ I.5(i) (discussing smallpox and Ebola with infection fatality rates of 30% and 50%, respectively).

In light of this, our society has resolved this medical ethics quandary in favor of mandatory vaccines in certain limited circumstances, but the specific contexts are critical.[3] Compl. ¶ 77. In elementary schools, pediatric vaccines are mandatory for illnesses that *pose significant medical risks to those children*, like polio or measles. *Id*. ¶ 78. Likewise, a college usually require its students to have been vaccinated against these illnesses. *Id*. Furthermore, the risks of side effects and serious complications from these types of mandatory vaccines are generally known due to long-time use and years of research on the specific population in question. *Id*. ¶ 79. Therefore, the risks of the diseases for these children far outweighs the risks of the vaccines. *Id*.

But here, the risk of serious morbidity and mortality from COVID for those under 30 is

[3] It is also important to note that "traditional vaccines . . . provided robust and durable immunity to the population[.]" **Parks Decl.** ¶ 11. The COVID vaccines provide no such robust or durable immunity, and are instead medical treatments.

close to zero. *Id.*; *see also*, *id*. ¶¶ 128-146. The known and unknown risks associated with COVID vaccines, particularly in those under 30, however, outweigh the risks to that population from the disease itself, by any rational measure. *Id.* ¶¶ 80, 176-188; **McCullough Decl.** ¶ 68. Moreover, people with higher risks of serious COVID complications, such as individuals over 60 and people with underlying health conditions, can choose to take the vaccine to protect themselves. Compl. ¶ 83. The much smaller subset of people who are at higher COVID risk who cannot safely receive the vaccine, can mitigate their risks by practicing social distancing, by wearing a mask, and by staying at home if they are able. *Id*. ¶ 84; *see also* **Bhattacharya Decl.** ¶¶ 44-49 (discussing multiple alternatives to vaccination mandates). So the CU Mandate is not ethically justified.

Additionally, according to Dr. Ponesse, "[m]andating vaccination would require that no effective, available, approved treatments exist to address the disease." **Ponesse Decl.** ¶ I.5(ii). But here, treatments are available. *Id*.; *see also infra*. C.2. (discussing treatments).

Finally, "protection of others," especially in the COVID context, does not relieve our society from the central canon of medical ethics requiring voluntary and informed consent. Compl. ¶ 85. And this, "protection of others" interest fails for another significant reason—vaccines do not prevent spread or transmission of the virus. *See id*. ¶¶ 154-164; *see also* **Ponesse Decl.** ¶ I.5(iii) (given that COVID-19 vaccines do not stop transmission, they must be regarded as akin to personal treatment and not public health measure).

Considering all of the above, together with the benefits and risks of the vaccine, Dr. Ponesse, like Students, determined that "ethical considerations . . . do not support mandating

COVID-19[.]" **Ponesse Decl.** ¶ I.5(iv).

History is replete with societies which violated this central tenet of medical ethics. Compl. ¶ 86. In 1932, the United States did not obtain informed consent from African Americans for a syphilis study in conjunction with the Tuskegee Institute. *Id*. The Tuskegee Study intentionally refused to reveal to the participants that they had syphilis, intentionally withheld information about widely available treatments, like penicillin, and intentionally failed to get their informed consent to participate in the study. *Id*. It took *forty years* for the U.S. government to put an end to the Tuskegee Study. *Id*. ¶ 87. The Tuskegee Study prompted then-President Bill Clinton to state, "with [scientific and technical changes] we must work harder to see that as we advance we don't leave behind our conscience. No ground is gained and, indeed, much is lost if we lose our moral bearings in the name of progress." *Id*. (citing Pres. Bill Clinton, *Apology For Study Done in Tuskegee*).

Of course, the historical example of the Tuskegee Study differs from the CU Mandate because CU has no intent to risk harm to its students and they are not conducting a "study," like Tuskegee did. And Students do not claim otherwise. However, the CU Mandate does not provide for voluntary and informed consent to the taking of the vaccination, a fundamental tenant of medical ethics, which the Tuskegee Institute also failed to do. Thus, the CU Mandate is contrary to modern medical ethics.

4. The CU Mandate is Contrary to the Common Law Right of Informed Consent

Individuals have a common-law right to informed consent for medical treatments, which

stems from a person's right to bodily integrity. *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 269 (1990). In discussing bodily integrity, the Supreme Court has observed, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id*. at 269. (citing *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, (1891)). But this notion is not limited to unwanted touching or the right to be left alone. Instead, the notion of bodily integrity is "embodied in the requirement that informed consent is generally required for medical treatment." *Id*. at 269.

The informed consent doctrine has been described as follows: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Id*. (citing *Schloendorff v. Soc'y of New York Hosp.*, 105 N.E. 92, 93 (1914)). Given its importance, the doctrine of informed consent has become "firmly entrenched in American tort law." *Id*. (citation omitted). But Courts have also continued to base a right to refuse medical treatment on the common-law right to informed consent. *Id*. (citing *inter alia Matter of Quinlan*, 355 A.2d 647 (S. Ct. NJ 1976), *Matter of Storar*, 420 N.E.2d 64, 68 (Ct. App. NY 1981)).

While informed consent gives rise to the notion that a patient has a right to consent to medical treatment, a logical and necessary corollary of the doctrine "is that the patient generally possesses the right not to consent, that is, to refuse treatment." *Id*. at 270. Accordingly, "the

common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." *Id*. at 277.

In sum, under the common-law right to informed consent, every adult of sound mind has the right to determine what shall be done or not done with his own body, including whether to receive or refuse a medical treatment or vaccine. The CU Mandate does not give Students the chance to refuse medical treatment. Thus, the CU Mandate is contrary to the common-law right to informed consent.

5. The CU Mandate Is Contrary to CDC's Recommendations for Use of COVID Vaccines

The CDC has acknowledged that adults in the eighteen to twenty-five years old demographic have a very low risk of adverse effects due to a COVID infection. *See* Compl. ¶¶ 97, 142, Tables B and C.

Unlike the CU Mandate, the CDC only suggests that individuals get vaccinated and does not *require* it, so the CU Mandate runs contrary to CDC recommendations. *Id*. ¶¶ 98-99. The CDC's guidance for unvaccinated people is to wear a mask, social-distance at least six feet apart from other individuals, avoid any sort of crowd whether it be outside or inside, get tested, sanitize often, and monitor health. *Id*. ¶ 98.

6. The CU Mandate is Contrary to Colorado State Requirements

The CU Mandate is contrary to Colorado recommendations, going significantly further than any recommendations from the State. *Id*. ¶¶ 100-109. In fact, the Governor stated that "the moment for extraordinary executive action has passed," and rescinded "all previous Executive

Orders issued due to COVID-19." *Id*. ¶ 101. Subsequent measures have been taken, but none mandating vaccination. *Id*. Accordingly, the State simply encourages citizens to get vaccinated, but does not require it. *Id*. ¶¶ 103-106. While there is a vaccine mandate for State employees, no such mandate exists for the general public. *Id*. ¶¶ 106-107.

7. The CU Mandate is contrary to Boulder County, El Paso County, Adams County, and Denver County's Recommendations

CU's campuses are located in Boulder County, El Paso County, Adams County, and Denver County. *Id*. ¶¶ 19, 110. Neither Boulder County, El Paso County, nor Adams County have any vaccine mandate. *Id*. ¶¶ 111-113. Of the four counties, only Denver County has issued a vaccine mandate for county *employees*. *Id*. ¶ 114. Denver County has not issued a vaccination mandate for the general public. *Id*. Accordingly, the CU Mandate is contrary to applicable county requirements—going significantly further than any of the relevant counties' recommendations and requirements. *Id*. ¶¶ 115-116.

C. Current Risk to CU Students of COVID Infection and Adverse Outcomes

1. Current State of the Pandemic

The CDC recently reported low COVID numbers—significantly lower than the peak of the pandemic. *Id*. ¶ 117. As shown above, in Colorado, Governor Polis has stated that Colorado "has made tremendous progress in terms of containing and treating infection and distributing the COVID-19 vaccine." *Id*. ¶¶ 101, 118. And that "the [time] for extraordinary executive action has passed." *Id.*

Additionally, many places are reaching herd immunity. *Id*. ¶ 119. Herd immunity "occurs

when a high percentage of the community is immune to a disease (through vaccination and/or prior illness), making the spread of this disease from person to person unlikely." *Id*. ¶ 120. The percentage level to qualify for herd immunity differs depending on the disease, ranging from as low as 60% for influenza to 95% for measles (which is one of the most transmissible infections and so requires a higher number of persons immune to reach herd immunity). *Id*. ¶ 121. For COVID, the estimate for herd immunity is around 70% (with some suggesting it may be as high as 85%). *Id*. ¶ 122.

In light of these estimates from leading experts, herd immunity has been reached at CU. *Id*. ¶ 123. CU, as a whole, has an average vaccination rate of 92.9%, well above any relevant range for COVID herd immunity. *Id*. ¶ 124. CU Anschutz has a vaccination rate of 99.5% and CU Denver has a vaccination rate of 94.3%. *Id*. ¶ 125. These numbers do not include those who have natural immunity, so those immune from the virus is actually much higher. *Id*. ¶ 126.

As the numbers continue to decline and herd immunity is reached, such draconian measures, requiring all students to be vaccinated, is not reasonable.

2. Risk to the College-Age Group from a COVID Infection is Extremely Low

Even if someone contracts the virus, the risk to college age students is extremely low. *Id*. ¶ 128. The hospitalization rate of College Age Students with COVID has never been more than 3 per 100,000 (or .003%) in Colorado. *Id*. ¶ 131. As of early December, in Colorado, the college age range has had a *total* of just 57 deaths involving a COVID infection, which the CDC states as Deaths with "confirmed or presumed COVID-19[,]" which includes co-morbidities. *Id*. ¶ 132. Because this number includes both confirmed and presumed COVID infections, it is extremely

likely that the amount of deaths *caused by* COVID is much lower for this age group. *Id*. This death rate accounts to a low .6% death rate of the total number of deaths in Colorado. *Id*. ¶ 133.

According to the CDC, the survivability of a COVID infection is extraordinarily high. Survival rates for ages 0-17 is 99.99%, 18-29 is 99.95%, 30-49 is 99.8%, 50-64 is 98.6%, and 65 and older is 90%. *Id*. ¶ 129. By comparison, the smallpox epidemic of the early 1900s had a fatality rate of roughly 30%. *Id*. ¶ 130.

Additionally, according to the CDC, the chance of someone over the age of 85 dying from COVID is approximately 370 times greater than those aged 18-29. Compl. ¶¶ 142, Table C, 143. And all the studies and reports show that those at the greatest risk for COVID-related hospitalizations and deaths are greater than 50 years. *Id*.; *see also* ¶ 142th, Table B.

The risk of asymptomatic spread is minimal. Per Dr. McCullough, "the epidemic spread of COVID-19, like all other respiratory viruses, is driven by symptomatic persons; asymptomatic spread is trivial and inconsequential." **McCullough Decl.** ¶ 23; *see also* **Bhattacharya Decl. ¶¶** 36-43 (asymptomatic spread is rare). "A rational and ethical prevention measure to reduce the spread of COVID-19 is the simple requirement that persons with active symptomatic, febrile (feverish) respiratory illnesses, like COVID-19, should isolate themselves." **McCullough Decl.** ¶ 23.

Finally, new successful treatments have been developed. Compl. ¶¶ 150-152 (detailing new successful treatment options); **McCullough Decl. ¶¶** 24-25 (detailing a treatment protocol which has lessened the rate of hospitalization and death by 85% in high-risk patients); *see also Does 1–3 v. Mills*, No. 21A90, 2021 WL 5027177, at *3 (U.S. Oct. 29, 2021) (Gorsuch, J.

dissenting) (stating that we have additional treatments available that were not available last year, and that other new treatments appear near.); **Zelenko Decl**., ¶¶ 8-9 (detailing the "Zelenko Protocol," a treatment plan focused on early intervention, which instructs moderate to high risk patients to take elemental zinc, Vitamin C, Vitamin D3, antibiotic (Azithromycin or Doxycycline), and Hydroxychloroquine and/or Ivermectin), attached as **Exhibit 19**. Using the "Zelenko Protocal," Dr. Zelenko has successfully treated thousands of COVID patients and is seeing no patient deaths utilizing this protocol. *Id*. at 9.

In sum, the risk for young people is near minuscule when they are not significantly affected by COVID, when herd immunity has been achieved, asymptomatic spread is rare, and when highly effective treatments have become available—making the CU Mandate unreasonable.

3. Risks to the College-Age Groups for other Causes.

This table shows the numbers of deaths for Colorado residents between the ages of 15 - 24 in 2019, for various non-COVID causes:

Cause of Death	**Number of Colorado Residents, Ages 15 - 24**
Suicide	186
Road Traffic Accidents	107
Poisonings	84
Homicide	61
Other Injuries	20
Congenital Anomalies	10

Id. ¶ 153, Table E.

Likewise, other sources reveal that the primary cause of death of college-age students is "unintentional injury." **Zelenko Decl**., ¶ 12. The second leading cause of death is suicide. *Id*. ¶ 12. Across the county, deaths from unintentional injury/accidents and suicide exceed COVID

deaths by tens of thousands. *Id.*

This data shows that the risk of death for college-age students from any number of causes unrelated to COVID far exceeds the risk of death from COVID.

D. Current Benefits and Risks of COVID Vaccinations to CU Students

1. Benefits of COVID Vaccination for CU Students

While the vaccine is 95% effective at preventing severe illness and death, it does not prevent infection or transmission of the virus. Compl. ¶ 154. It simply lessens the symptoms. *Id.* Indeed, the efficacy data from trials was based solely upon lessening symptoms, not transmission. Dr. Corey who oversaw the vaccine trials for the NIH COVID-19 Prevention Network said "the studies aren't designed to assess transmission. They don't ask that question and there's no information on this at this point in time." *Id.* at ¶ 55; **Parks Decl.** ¶ 34-36 (detailing that the studies were not designed to assess transmission, but were instead focused on symptom reduction—consistent with the "vaccines" being considered treatments and not vaccines). Even the CDC admits that vaccinated people can still become infected and that "[f]ully vaccinated people who do become infected can transmit it to others." *Id.* ¶ 156; *see also* **McCullough Decl.** ¶¶ 34-43 (vaccines do not stop transmission).

Additionally, the vaccines are ineffective against the Delta and Omicron variants.[4] **McCullough Decl.** ¶¶ 16, 39. Indeed, the CDC Director acknowledges that the vaccines do not stop the transmission of the Delta strain. Compl. ¶ 158 ("Our vaccines are working exceptionally

[4] The CDC estimated the Delta variant to be more than 99% of cases in August 2021; however, Omicron may be poised to replace Delta as the most dominant stain. *See* **McCullough Decl.** ¶¶ 15, 39.

well," [said Walensky] "They continue to work well for Delta, with regard to severe illness and death -- they prevent it. But what they can't do anymore is prevent transmission."); **Parks Decl.** ¶ 17 ("both NIAID Director Tony Fauci and CDC Director Rochelle Walensky confirm that these injections *cannot* stop the transmission of the Delta variant."), **Parks Decl.** ¶ 36; **McCullough Decl.** ¶ 15 ("The current predominant strain, Delta, [is] easily acquired, carried, and transmitted, amongst the vaccinated[] and none of the vaccines stop the transmission of Delta."); *id*. ¶ 15 (emerging data suggests that, like Delta, vaccinates do not stop the transmission of Omicron).

Dr. Fauci admitted that they have not proven whether the vaccine is effective against the new Omicron variant. Compl. ¶ 159. And researchers have found that the Omicron variant is making existing vaccines and boosters even less effective. *Id*. ¶ 160. In some cases, certain vaccines offered no protection against Omicron. *Id*. ¶¶ 160-161; *see also* **McCullough Decl.** ¶ 15.

Likewise, on November 12, 2021, CU admitted that "[y]ou can still acquire a COVID-19 infection and be infectious even if you are fully vaccinated." Compl. ¶ 162. CU's Senior Associate Dean for Clinics and Professional Practice went on to say:

> Vaccination means that you have received the vaccine; it does not mean that you are fully immunized to COVID-19. Remember, the vaccine is approximately 95% effective and the response varies in individuals. The vaccine does not prevent you from being infected and being infectious. It assists with the quality of your immune response and hopefully keeps you from becoming severely ill and shortens the time you may be infectious.

Id.

Even though CU Anschutz has a vaccination rate of 99.5%, CU also admitted that "[w]ith

the number of patients who come to the school and the current infection rate in the community there is every reason to believe there are patients and possibly faculty, staff, students and residents in the school who are infectious with COVID-19." *Id*. ¶ 163.

In light of the vaccines not stopping transmission, according to Dr. McCullough, the "absolute risk reduction of these vaccines is inconsequential[,]" making mass vaccination "wholly ineffective." **McCullough Decl.** ¶ 20.

Additionally, immunity from COVID vaccines decreases over time. *Id*. ¶¶ 165; **Bhattacharya Decl**. ¶¶ 21-27 (detailing the significant decrease in protection from vaccines over time). Because effectiveness wanes over time, boosters are proving necessary for the vaccinated. Compl. ¶ 166; **Parks Decl.** ¶¶ 43, 46.

And, not only does COVID vaccination not prevent transmission, some data suggests that vaccinated individuals may be more likely to transmit the virus to others when they contract a new variant. Compl. ¶ 167; **Parks Decl.** ¶ 43.

Finally, the vaccines do not promote the public health. Compl. ¶ 168. The American Public Health Association explains, "Public Health promotes and protects the health of people and communities where they live, learn, work and play. *Id*. ¶ 169; *see also* **Ponesse Decl.** ¶ 7 ("public health is concerned with promoting and protecting the health of populations[.]"). "While a doctor treats people who are sick, those of us working in public health try to prevent people from getting sick or injured in the first place." Compl. ¶ 169. Thus, public health professionals promote vaccines for "vaccine-preventable diseases that can be a threat to our health." *Id*. ¶ 170

This understanding of public health is long-standing. For instance, in 1920, public health

was defined as:

> the science and art of preventing disease, prolonging life, and promoting physical health and efficiency through organized community efforts for the sanitation of the environment, the control of community infections, the education of the individual in principles of personal hygience, the organization of medical and nursing service for the early diagnosis and preventive treatment of disease, and the development of the scoial machinery which will ensure to every individual in the community a standard of living adequate for the maintenance of health.

Id. ¶ 171.

As shown above, prior to August of this year, the CDC described vaccination in conformance with the traditional understanding that vaccines are a public health measure: "the act of introducing a vaccine into the body to produce immunity to a specific disease." However, the CDC recently changed the definition to "the act of introducing a vaccine into the body to produce protection to a specific disease." *See supra* ¶¶ 58, 172.[5]

Despite the CDC's efforts to re-define "vaccine" and "vaccination," the COVID vaccines cannot qualify as a public health measure because they do not prevent transmission, sickness, illness, or produce immunity. *Id*. ¶ 173; **Parks Decl.** ¶ 11 ("there are no public health similarities between traditional vaccines that provide robust and durable immunity and the COVID-19 injections.") Accordingly, the COVID vaccines are properly understood as a medical treatment. Compl. ¶ 174; **Ponesse Decl.** ¶ I.5(iii) ("as the COVID-19 vaccines are not stopping transmission they must be regarding as akin to personal treatment and not public health measure.").

[5] Likewise, the definition of "vaccine" was changed from "a product that stimulates a person's immune system to produce immunity to a specific disease, protecting the person from that disease[]" to "[a] preparation that is used to stimulate the body's immune response against diseases." Compl. ¶ 172, n. 13.

Even assuming the CU Mandate is constitutional, which Students do not concede, the only ethical and constitutional justification for the CU Mandate would be the protection of others in the face of overwhelming danger to public safety. That is simply not the case here. The vaccines offer some protection from serious illness and death for the person who receives the vaccine. But the vaccine does not prevent the person who received the vaccine from contracting COVID or transmitting it to others, nor protect the public health. The CU Mandate is no longer about the broader public health, but about overriding an individual's choice of bodily integrity, autonomy, and of medical treatment choice without a countervailing, and substantial, danger to others to justify such an intrusion.

2. Known Risks of COVID Vaccination for CU Students

Even though the vaccines may be successful in preventing severe illness and death, they do not come without risk. Comp. ¶¶ 176-188. As more and more people are taking the vaccine, the risks are becoming apparent, especially for those under 30. *Id.* These risks include myocarditis, Bell's Palsy, Pulmonary Embolus, Pulmonary Immunopathology, severe allergic reaction causing anaphylactic shock, hormone issues, fever, swelling. *Id.*; *see also* **Parks Decl.** ¶¶ 21-22 (discussing the risks of cardiovascular damage and thrombosis); **Zelenko Decl.** ¶¶ 12-13 (detailing significant risks of blood clots, inflammation, myocarditis, etc.); **Cole Decl.** ¶ 11-13 (detailing the risks of stroke, heart failure, blood clots, brain disorders, convulsions, seizures, inflammation of the brain and spinal cord, life-threatening allergic reactions, autoimmune diseases, arthritis, miscarriage, infertility, rapid-onset muscle weakness, deafness, blindness, narcolepsy, cataplexy, neurological injuries, Guillain-Barre Syndrome, etc.); **McCullough Decl.**

¶¶ 31-33; 46-49 (describing risks associated with the spike protein, including blood clots, damaged blood vessels, myocarditis (which may lead to permanent heart damage or death), etc. and finding that emerging trends show "that the vaccine is especially risky for those aged 12-29."); **McCullough Decl. ¶¶** 52-56 (discussing myocarditis and other health risks).

According to the CDC's VAERS (Vaccine Adverse Reaction Event Recording System),[6] there have been significantly higher reports of deaths and adverse events with the COVID vaccines than with all prior vaccines over the last 20 years combined. **Cole Decl**. ¶ 8-9, attached as **Exhibit 20**. As of December 13, 2021, VAERS reported 19,886 COVID-19 vaccine deaths associated with COVID vaccines. *Id*. at 9; *see also* **Parks Decl. ¶** 22-27 (detailing the 19,886 deaths, 35,009 severe allergic reactions (including 8,432 anaphylactic events), 9,977 heart attacks, 16,918 reports of acute myocarditis/pericarditis, and 34,717 incidences of thrombocytopenia associated with the COVID injection, and other reports/monitoring of adverse reactions); **Bhattacharya Decl. ¶¶** 12, 28-30 (detailing minor side effects from the vaccines like pain and swelling at vaccination site versus severe reactions like anaphylactic reactions, clotting abnormalities, myocarditis, pericarditis, and Guillain-Barre Syndrome); **McCullough Decl.**

[6] VAERS is "the nation's early warning system, used to monitor adverse events that happen after vaccination…[the] CDC and FDA review the reports for unusual patterns that might indicate a vaccine safety problem needing deeper investigation." **Cole Decl.** ¶ 8 (citing Centers for Disease Control and Prevention, *CDC Monitors Health Reports Submitted After COVID-19 Vaccination to Ensure Continued Safety*, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/pdfs/vaccin-safety-monitoring.pdf). While VAERS is "the nation's early warning system," it under captures adverse events. *Id*. at 19; **Parks Decl.** ¶ 23 (according to a study by Harvard Pilgrim Health System, VAERS reports only captured about 1% of adverse vaccine adverse reactions). This means that adverse events are even more prevalent that VAERS reports. *Id*.

¶¶ 46-48 (detailing the "19,886 COVID deaths, 102,857 hospitalizations, 104,217 urgent care visits, 148,181 office visits, 16,918 cases of myocarditis/pericarditis, and 32,644 permanently disabled persons reported after the COVID-19 vaccines[.]"). Adverse events from COVID vaccines account for 99% of all adverse event reports from December 2020 through December 2021. **McCullough Decl.** ¶ 48.

In the United States, there have been hundreds of cases of myocarditis among those under 30. Compl. ¶ 182. In fact, the FDA found that people 12-24 account for 8.8% of the vaccines administrated, but 52% of the cases of myocarditis and pericarditis reported. *Id*. ¶ 183. The risk is so prevalent that CDC now has a warning about myocarditis on its website. *Id.* at ¶ 184.

There are also a host of unknown side effects that may exist as the vaccine has only gone through human testing for a limited time. *Id.* ¶ 188. According to Dr. Cole, the "vaccines" "have not had the proper testing for mutagenicity, teratogenicity, genotoxicity, or oncogenicity to determine whether or not the vaccines will change human genetic material, reduce fertility or cause cancer." **Cole Decl**. ¶¶ 7, 18; *see also* **McCullough Decl.** ¶¶ 27-28 ("COVID-19 clinical investigation has provided no meaningful risk mitigation for subjects" and skipped necessary testing for "genotoxity, mutagenicity, teratogencity, and oncogenicity."); **McCullough Decl.** ¶ 29 (long-term testing is necessary for these types of gene therapies); **Parks Decl.** ¶ 12 ("Vaccines typically undergo years of research and observation, long term animal studies, then smaller human studies, to ensure that they do not select for more virulent strains or cause serious short-term or long-term health consequences, before being released to the public at large. These safeguards have been eliminated with the COVID-19 shots."); **Parks Decl.** ¶ 32-33 (discussing

the lack of long-term monitoring for the new gene therapies); **Zelenko Decl.** ¶ 13 (Long-term studies to determine cancer risk and immune risk have not been done, nor have any longitudinal studies been done to determine the implications on fertility or birth defects of COVID-19 vaccine use); **Bhattacharya Decl.** ¶ 29 ("There is still the possibility of severe side effects that have yet to be identified[.]"); **Bhattacharya Decl.** ¶ 33-35 (the vaccines have not been tested for risks in certain sub-groups, like those with Multiple Sclerosis or pregnant women, so the risks for such groups are unknown.). Contrary to this rushed testing and lack of long-term data, according to Dr. Zalenko, "[v]accines which are, by definition, given to healthy persons, are typically studied for years to rule out: oncogenicity (cancer causing), and immunogenicity (immune related disorders) as well as autoimmune disorders, neurological diseases, and tumor development." **Zelenko Decl.** ¶ 13.

Finally, vaccine recipients who survive short-term adverse events are at increased risk of long-term morbidity and mortality. Cardiac conditions might lead to lifetime medications, cardio defibrillators, and even heart transplantation. **Cole Decl**. ¶ 12; **McCullough Decl.** ¶¶ 32, 52. The five-year survival rate is 50% after heart failure. **Cole Decl**. ¶ 12; **McCullough Decl.** ¶ 52. This complication from post-vaccine induced myocarditis would markedly reduce the lifespan of a young adult. **Cole Decl**. ¶ 12; **McCullough Decl.** ¶ 52.

Given that college-age students already do not typically experience severe illness or death from COVID, the vaccine already unnecessary for them, and the risks are significant.

3. Known Risk of Administering Covid Vaccinations to CU Students Who Have Already Had a COVID Infection

Additionally, there are emerging studies showing that the vaccine causes increased side effects in people who have already had COVID. Compl. ¶¶ 189-191; According to Dr. Bhattacharya, "[s]ome clinical evidence indicates that those who have recovered from COVID-19 could have a *heightened* risk of adverse effects compared with those who have never had the virus." **Bhattacharya Decl.** ¶ 32 (emphasis in original). *See also* **McCullough Decl.** ¶¶ 59-60 (those with natural immunity were excluded from the trials and may have higher risks of side effects). Despite this, CU does not have an exemption for those who have already had COVID. Compl. ¶¶ 38, 51.

4. Comparison of Immunity Conferred by a Previous COVID Infection and by the COVID Vaccination

The vaccine is not necessary for those who have already had COVID. As in the past, having a virus like COVID gives the person infected natural antibodies that have proven to be just as effective as the COVID vaccine in preventing reinfection. *Id.* ¶¶ 192-204. Some suggest that natural immunity is superior to vaccine-induced immunity—offering both robust and durable immunity. **Parks Decl**. ¶¶ 42-48; **McCullough Decl.** ¶¶ 61-65. There are multiple reasons that natural immunity is superior. First, "it produces sterilizing immunity which prevents viral transmission, and second, because once individuals have contracted and recovered from natural infection with SARS-CoV-2, they have durable immunity to not just the current variants circulating, but likely to all future variants as well." *Id*. Those with natural immunity "develop antibodies against all components of the virus, making it almost impossible for the virus to "out-mutate" their immunity." **Parks Decl**. ¶ 42.

Others suggest natural immunity offers at least equivalent, if not greater, protection than the vaccines. **Bhattacharya Decl. ¶¶** 11, 17. Accordingly, vaccination for those with natural immunity is unnecessary and only adds risk without benefit. *See also id.* ¶¶ 14-27 (detailing the durable protection from natural immunity versus the limited and waning protection from vaccines).

In contrast, protection from COVID "vaccines," "which only utilize the spike protein to generate antibodies, is neither complete nor durable." **Parks Decl. ¶** 43. According to Dr. Parks, "[w]hen the virus mutates such that several portions of the spike protein are different, the immune systems of the vaccinated may no longer recognize it because their antibodies can no longer bind to the new mutant variant." *Id.* As such, "several studies have recently been published showing that variants are mutating quickly in ways that allow them to escape the neutralizing antibodies in the vaccinated." *Id.* This has lead to the "vaccines" having very limited ability to protect against new strains, like Delta. *Id.* Accordingly, "vaccination" will not stop the spread of variants. *Id.*; *see also supra* pp. 17-22 (experts affirming this conclusion by confirming that the vaccine does not protect against the new variants). And vaccinated individuals may even be more likely to spread variants to others. **Parks Decl. ¶** 43. Finally, vaccines only offer protection for a limited amount of time. **Bhattacharya Decl. ¶¶** 21-27.

5. Comparison of Risks of COVID Vaccinations with Vaccinations for Other Infectious Diseases

The COVID vaccines cause a significantly higher incidence of adverse reactions, injuries, reactions, and deaths than any prior vaccines on the market, and, therefore, pose a significant

health risk to recipients, who are, by definition, healthy when they receive the COVID vaccines.

These risks are greater than previous common vaccines such as the meningicoccal meningitis vaccine. Compl. ¶ 206. According to the VAERS system, there had been just one death associated with the meningitis vaccine, and the most common symptoms are headache, fever, and injection site pain. *Id.* ¶ 169-170; **Cole Decl. ¶¶** 15-16 (detailing no deaths from meningococcal vaccine from 1999-2019 for 18-29 year olds and the minor side effects); **McCullough Decl.** ¶ 50 (same). These relatively minor symptoms are far less dangerous and life-threatening than myocarditis. *See also* Compl. ¶ 209, Table G (detailing the minor adverse events with the flu vaccine over the past 20 years).

On the contrary, just in Colorado, there have been 12 cases of arthralgia, 35 hospitalizations, 14 life-threatening events, 9 cases of mycarditis, 3 cases of anaphylaxis/severe allergic reaction, 5 cases of blindness, and 2 cases of bell's palsy—as a result of the COVID vaccine for 18-29 year olds. *Id.* ¶ 209, Table G.

Indeed, some research suggests that the level of adverse reaction to the COVID vaccine is similar to the levels of *all other vaccines* from 1990 to today. *Id.* ¶ 210. The COVID vaccine is no where near the level of safety as other vaccines, making the CU Mandate irrational and unnecessary.

E. Factual Allegations of Students

1. Plaintiff Andrew Garlick

Plaintiff Andrew Garlick is a Junior at CU. He is currently taking online classes through the UC Denver Campus. *Id.* ¶ 213. Mr. Garlick objects generally to the CU Mandate. *Id.* ¶ 214.

He objects to taking the Vaccine, given the known and unknown risks associated with it, the extremely minimal risk of COVID to his age group, the efficacy of the vaccines against infection and spread, and the natural immunity he has from a prior infection. *Id.* Mr. Garlick is particularly worried about the side effects of the vaccine including *inter alia* any heart issues, fertility issues, etc. *Id.* ¶¶ 214-215. He also has a history of anaphylaxis from a peanut allergy, which gives him greater concerns and fears of the side effects. *Id.* ¶ 216. Finally, Mr. Garlick believes that he has natural immunity from a prior COVID infection, making the vaccine unnecessary. *Id.* ¶ 217.

Mr. Garlick also has a sincerely held religious objection to receiving the COVID Vaccine. *Id.* ¶ 218. However, because Mr. Garlick could not get an exemption that would alleviate his harms—still requiring him to subject to the Extra Requirements—his only option to continue his education was to participate in a fully online program. *Id.*

Despite being fully online, Mr. Garlick continued to receive multiple e-mails inquiring about his vaccination status. *Id.* ¶ 219. He was able to obtain an exemption from the Extra Requirements *only if* he was in a "fully online [program] and won't step on campus for any reason this semester[.]" *Id*.

Mr. Garlick's participation in a fully online program is causing significant harm to him. *Id.* ¶¶ 220-227 (detailing the specific harms he is experiencing). Mr. Garlick misses the social interaction associated with in-person learning and wants to be able to take advantage of certain classes and experiences available in-person at CU. *Id.* ¶ 228. To alleviate his harms, Mr. Garlick desires to return to on-campus/in-person education as soon as possible. *Id*. He would do so immediately, so long as his views, beliefs, and rights to bodily integrity, bodily autonomy, and

medical treatment choice are respected. *Id.*

2. Plaintiff Dr. Thomas Fow

Plaintiff Dr. Thomas Fow is a licensed dentist and a terminated student from the Graduate Periodontics Program at CU. *Id.* ¶ 229. Dr. Fow objects generally to the CU Mandate. *Id.* ¶ 230. He objects to taking the Vaccine, given the known and unknown risks associated with it, the extremely minimal risk of COVID to his age group, the efficacy of the vaccines against infection and spread, and the natural immunity he has from a prior infection (making the vaccine unnecessary for him). *Id*. Dr. Fow further objects to CU dictating his medical treatment, despite not being his doctor or a medical professional. *Id.* ¶ 231.

Dr. Fow also has a sincerely held religious objection to receiving the COVID Vaccine. *Id.* ¶ 232. Accordingly, he applied for a religious exemption from CU, which was denied (despite previously seeking and receiving and exemption for Summer semester). *Id.* ¶¶ 232-245.

In its denial, CU stated that religious exemptions are only available for a "religious belief whose teachings are opposed to all immunizations, i.e., your religion teaches you and all other adherents that immunizations are forbidden under all circumstances." *Id.* ¶ 238. CU further stated that:

> When asked to explain how your religious beliefs prevent you from receiving the COVID-19 vaccine, you responded that you object based on your belief that the COVID-19 vaccines were developed from human cell lines derived from abortion.
>
> The basis for your objection to vaccination against COVID-19 is of a personal nature and not part of a comprehensive system of religious beliefs.
>
> Having considered your exemption request and the campus COVID-19 vaccination policy, your request is not approved.

Id.

Dr. Fow was given the following options: **(1)** receive the vaccine, **(2)** withdraw, **(3)** request a leave of absence, or **(4)** be dismissed from the school. *Id.* ¶ 239. But following a referral to the Student Performance Committee, Dr. Fow was placed on an involuntary personal leave until he complied with the CU Mandate. *Id.* ¶¶ 241-243. Just two days later, Dr. Fow received a follow up e-mail from the Dean of the School of Dental Medicine, indicating that, because of his non-compliance, he would be disenrolled on September 28, 2021. *Id.* ¶ 244.

At this time, Dr. Fow is unclear whether he has been disenrolled from the school or is on a one-year personal leave. *Id.* ¶ 245. Regardless of the phrasing of his termination, Dr. Fow has been, *inter alia*, **(1)** terminated from his program, **(2)** is not permitted to continue his education, **(3)** is not permitted to continue patient care, and **(4)** has been restricted from being on campus. *Id.*

Dr. Fow desires and intends to continue his education in the Graduate Periodontics Program at CU, so long as his views, sincerely held religious beliefs, and rights to bodily integrity, bodily autonomy, and medical treatment choice are respected. *Id.* ¶ 246.

3. Plaintiff Rebekah Voelkelt

Plaintiff Rebekah Voelkelt is a deferred student of CU. *Id.* ¶ 247. She intends to continue her education at CU when and if the CU Mandate is lifted or enjoined. *Id.*

Ms. Voelkelt objects generally to the CU Mandate. *Id.* ¶ 248. She objects to taking the Vaccine, given the known and unknown risks associated with it, the extremely minimal risk of COVID to her age group, and the efficacy of the vaccines against infection and spread. *Id.* Ms.

Voelkelt is particularly worried about the side effects of the vaccine including *inter alia* any heart issues, fertility issues, etc. *Id.* ¶ 249. She is also concerned about her significant family history of reactions to vaccines. *Id.* ¶ 250.

Ms. Voelkelt also has a sincerely held religious objection to receiving the COVID Vaccine, given the use of aborted fetal tissue[7] used to make the vaccines. *Id.* ¶ 252. However, because Ms. Voelkelt could not get an exemption that would alleviate her harms—still requiring her to subject to the Extra Requirements—and because the exemption required the disclosure of her private information, she felt that her only option was to defer her education for the year. *Id*.

Miss Voelkelt intends to continue her education at CU, so long as her views, sincerely held religious beliefs, and rights to bodily integrity, bodily autonomy, and medical treatment choice are respected. *Id.* ¶ 256.

For all of the reasons above, all Students object to the Mandate. *Id.* ¶ 257. They also object to CU's Mandate on the basis that all but one of the vaccines have only received Emergency Authorization from the FDA. *Id.* ¶ 258. None are willing to take a "vaccine" while it is only approved under that Emergency Authorization. *Id.* Students should not be required to put their health at risk (given the known and unknown risks of the Vaccine) in order to comply with the Mandate and object to doing so. *Id.* ¶ 259. Students are irreparably harmed by the Mandate and have no adequate remedy at law. *Id.* ¶¶ 260-261.

[7] Fetal tissue derived from an abortion was used in the production of the Johnson & Johnson vaccine, and was used in the research and testing for the Pfizer and Moderna vaccines. *See* **Bhattacharya Decl.** ¶¶ 59-60.

Argument

A party seeking a preliminary injunction must establish that: (1) its claim has a likelihood of success on the merits; (2) it will suffer irreparable harm; (3) that the balance of injuries tips in its favor; and (4) the injunction is not adverse to the public interest. *See Schrier vv. University of Co.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (citing *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003)).

The Tenth Circuit uses a liberal standard for "probability of success on the merits" *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980). The circuit's standard is such that where the movant establishes that the three "harm" factors tip decidedly in its favor, the movant need only show "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Id.* (internal citations omitted); *see also Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992); *Otero Sav. & Loan Ass'n v. Fed. Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981); *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 358 (10th Cir. 1986).

The CU Mandate should be enjoined. Students meet the requirements for a preliminary injunction: they are likely to succeed on the merits of their case, they have irreparable harm if the injunction is not granted, the balance of injuries tips in Students favor, and the public-interest favors the Students.

I. Students Are Likely To Prevail on the Merits.

The Supreme Court has developed doctrines to protect the infringement of constitutional rights of bodily integrity, autonomy, and of medical treatment choice, and the scrutiny level that should be applied to protect these constitutional rights, depending on the context involved. A heightened level of scrutiny should apply to Students' Fourteenth Amendment liberty claim because the individual rights to bodily integrity, autonomy, and of medical treatment choice involved here are fundamental and no limiting context to those fundamental rights, such as the context within a prison, applies to the CU Mandate. Since CU cannot prove that the CU Mandate survives heightened scrutiny, the Students are likely to prevail upon the merits of their claim that the CU Mandate violates their liberty interests protected by the Fourteenth Amendment to the United States Constitution.

The CU Mandate's Exemption Policies violate the Establishment Clause's prohibition on the government requiring those holding religious beliefs to "be responding to the commands of a particular religious organization" in order to claim its protection, *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 834 (1989), and the "the clearest command of the Establishment Clause [ ] that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). These impermissible violations of the Establishment Clause are directly tied to "excessive entanglement" by the government in religion.

The CU Mandate's Exemption Policies violate the Free Exercise Clause by giving preferential treatment to certain religions and thereby burdening the free exercise of other religions by forcing Students to forgo that religion or its commands at the cost of a benefit.

Specifically, by offering religious exemptions only to those whose religions it deems worthy, CU violates "[t]he free exercise [clause's] promot[ion of] the inviolability of *individual conscience*" by failing to "recogniz[e] that *private choice* . . . should form the basis for religious conduct and belief." *Int'l Soc. for Krishna Consciousness, Inc. v. Barber,* 650 F.2d 430, 438 (2d Cir. 1981) (citation omitted). Furthermore, both in attaching a benefit to the religions it deems worthy (and no others), *and* attaching said benefit to medical claims (but not *some* religious claims), CU violates the Free Exercise Clause's prohibition on "indirect coercion or penalties on the free exercise of religion," *Dahl v. Bd. of Trustees of W. Michigan Univ.*, No. 21-2945, —— F.4th ——, 2021 WL 4618519, at *2 (6th Cir. Oct. 7, 2021) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012, 2022 (2017)), forcing students to "choose between their religious beliefs and receiving a government benefit," *Trinity Lutheran*, 137 S. Ct. at 2023.

The CU Mandate's Original Exemption Policy permits CU to excessively entangle itself in the evaluation of the validity of a student's religious belief, it does not permit a student's individual conscience or private choice to form the basis for a religion it deems worthy of an exemption, and it forces Students to choose between their religious beliefs and receiving a government benefit. For these and all foregoing reasons, CU's Exemption Policies cannot survive the strict scrutiny required under either an Establishment Clause or a Free Exercise Clause claim.

The CU Mandate's Exemption Policies, on their face, are neither neutral nor generally applicable. The Exemption Policies give CU the power to evaluate whether a religious claimant is really "worthy" or not, and then empowers the university to discriminate on the basis of that

religion. The CU Mandate's Exemption Policies create a formal mechanism for granting exceptions to the CU Mandate. All of these consequences of CU's Exemption Policies as they relate to religion make them subject to the strict scrutiny required by the Equal Protection Clause of the Fourteenth Amendment. CU cannot survive such strict scrutiny because it fails both the "compelling interest" and "narrow tailoring" prongs on multiple grounds.

CU forces Students to make a choice: retain your rights to bodily integrity, autonomy, and of medical treatment choice, and your free and unencumbered religious rights *or* attend CU, which you are otherwise entitled to do. CU is not permitted under the U.S. Constitution to force such a choice on Students.

A. The CU Mandate and Exemption Policies Applied to the CU Mandate Are Unconstitutional Conditions.

Students allege that the CU Mandate violates Students' constitutional rights under the First and Fourteenth Amendments to the United States Constitution. First, their rights to bodily integrity and autonomy, and of medical treatment choice are violated by CU's threat of a "loss of an education," if the student does not comply with its CU Mandate. Next, their rights to be free from government establishment of religion and government infringement upon their free exercise of religion are violated by the Exemption Policies applied to the CU Mandate. While CU might argue that Students are misplaced in relying on the unconstitutional conditions doctrine, this doctrine protects individuals from government coercion—recognizing that the government cannot coerce individuals to give up their constitutional rights by threatening the loss of a discretionary benefit. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 607 (2013) (collecting cases).

It is well established that "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1983). This principle "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 570 U.S. at 604 (collecting cases). Put simply, this doctrine stands for the premise that the government cannot do indirectly what it is not permitted to do directly under the Constitution.

Here, CU is doing exactly that—trying to control students' medical treatment choices and religious liberties—by coercing students to give up their rights to bodily integrity and autonomy, and to medical treatment choice and their religious rights in exchange for the discretionary benefit of matriculating at CU. Even if "someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury," *Id*. at 607. The U.S. Supreme Court has "often concluded that denials of government benefits were impermissible under the unconstitutional conditions doctrine," *id*. at 606, even where there is "no entitlement to that benefit." *Id*. at 608. This is the situation here.

CU is coercing Students to submit to forced medical treatment in exchange for the discretionary benefit of matriculating at CU. Some might argue that the unconstitutional condition doctrine doesn't apply here because CU sets all sorts of requirements for matriculation, such as paying tuition that obviously wouldn't violate the Takings Clause. But those are false analogies against the application of the doctrine here—this is not anything close to the bargain-for-exchange of paying tuition or completing calculus assignments—no one questions CU's right to directly require such things of its students, so those types of requirements could not be viewed

as unconstitutional conditions if indirectly imposed as a condition of enrollment. But if CU decided to force students (whether sexually active or not) to take birth control against their will (based upon the chance sexual activity could lead to unplanned pregnancies impacting others), the direct constitutional violation would (hopefully) be clear. Therefore, CU could not indirectly implement such a draconian birth control policy as a "condition" of matriculation at CU. Students recognize forced birth control is a hyperbolic example, but the fact remains that CU cannot force medical treatments upon its students directly without their consent. Thus, it cannot do so indirectly, by threatening virtual expulsion unless the Students "agree" to give up their right to refuse medical treatment.

B. *Jacobson* and *Zucht* do not control–*Cruzan* and subsequent forced medical treatment cases do.

Our constitutional history and heritage have repeatedly indicated that rigorous scrutiny must be applied when bodily integrity and autonomy is involved. "'[N]o right is held more sacred, or is more carefully guarded,…than the right of every individual to the possession and control of his own person.'" *Cruzan*, 497 U.S. 261 at 269 (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Such was the case at common law "unless by clear and unquestionable authority of law." *Id.* "The logical corollary of [this doctrine was] that a patient generally possesse[d] the right… to refuse treatment." *Id.* This principle was so deeply recognized in Anglo-American law that "no order to inspect [a party's] body…[had] been made, or even moved for, in any of the English courts of common law, at any period of their history." *Union Pac.*, 141 U.S. at 253; *see also* Judge Thomas Cooley, *Cooley on Torts* 29 (1st ed. 1888) (stating that "the right to one's person may be said to be a right of complete immunity"). It took

nearly a century for any court in the United States to issue an order "for the inspection of the body of [a] plaintiff in [a legal action.]" *Union Pac.*, 141 U.S. at 255 (citing an 1868 case from New York: *Walsh v. Sayre*, 52 How. Pract. 334). Even this case was subsequently overruled. *Id.* (citing *Roberts v. Ogdensburgh & Lake Champlain Railroad*, 29 Hun, 154).

1. *Jacobson's* application of rational basis review has come under scrutiny by the Court in recent decisions.

In order for the CU Mandate to be deemed unconstitutional under rational basis review, Students would bear the burden to negate every conceivable basis which might support it. *See F.C.C. v. Beach Commc'ns, Inc,* 508 U.S. 307, 313-14 (1993). Because of this standard, laws and regulations analyzed using this extremely deferential standard are almost never found to be unconstitutional. Students contend an extremely deferential legal standard that virtually never results in a regulation being found unconstitutional provides nearly carte blanche plenary power to the government, no matter the gloss of "reasonableness" that must be applied.

Justice Gorsuch, concurring in *Roman Catholic Diocese v. Cuomo*, agreed and highlighted this sea-change, noting that *Jacobson* was a "modest decision" and not "a towering authority that overshadows the Constitution during a pandemic." 141 S. Ct. 63, 71 (2020). Regarding *Jacobson*'s modest nature, Justice Gorsuch observed that it was over a century old and involved: (1) an old mode of analysis instead of modern constitutional review;[8] (2) a "bodily-

[8] "Substantive due process" was not recognized in legal text books until the 1930s and did not appear in U.S. Supreme Court cases until the 1950's. *See generally*, G. Edward White, *The Constitution and the New Deal* 259 (2000); *Republic National Gas v. Oklahoma*, 334 U.S. 62, 90 (1948) (J. Rutledge, dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 277 (1952) (J. Reed, concurring). Incorporation of the Bill of Rights, upon which substantive due process against the States is based, did not begin until 1925. *See Gitlow v. New York*, 268 U.S. 652 (1925). So *Jacobson* did not employ substantive due process analysis, which modern constitutional jurisprudence requires. *See generally Cnty. of Butler v. Wolf*, 486

integrity" right emanating from the Fourteenth Amendment that was asserted to "avoid not only the vaccine but *also* the $5 fine (about $140 today) *and* the need to show he qualified for an exemption," *id.* at 70 (emphasis in original), and (3) "an imposition on [Jacobson's] claimed right to bodily integrity [that] was avoidable and relatively modest." *Id.* at 71.[9] He further remarked that "no Justice now disputes any of these [three] points," none argued that normal constitutional rules should not apply in a pandemic. Chief Justice Roberts agreed, downplaying an earlier comment in concurrence citing *Jacobson* to the effect that such matters are usually left to the states. *Id.* at 71.

Roman Catholic Diocese was preceded by a similar case—*Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (denying injunctive relief to church occupancy limits). There, Justice Alito dissented, joined by Justices Thomas and Kavanaugh, noting that "at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules," "[b]ut a public health emergency does not give . . . public officials *carte blanche* to disregard the Constitution as long as the medical problem exists." *Id.* at 2605. Rather, "[a]s more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights." *Id.* Which, of course, is the precise situation here.

Justice Alito's dissenting view was essentially adopted by *Roman Catholic Diocese*,

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F. Supp. 3d 883, 897 (W.D. Pa. 2020).

[9] *Cf. Jacobson*, 197 U.S. at 39 ("We now decide only that the statue covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.").

meaning that "blunt rules" may be permitted initially, but fine-tuning to actual scientific evidence is then required—requiring an *evidence-focused* inquiry in judicial review. Applying the normally-required, current jurisprudence in that case required the government to justify itself under strict scrutiny, which eschews blunt rules and requires narrow tailoring to the least restrictive means to further a compelling interest.

Despite the government's interest in public health during a pandemic, *Roman Catholic Diocese* required *normal* scrutiny levels instead of defaulting to *Jacobson*'s analysis. Thus, the lower courts are bound to analyze the contexts in which heightened scrutiny applies to cases involving bodily integrity and autonomy, and of medical treatment choice, unless a case using rational basis review directly applies—here, the oft-cited precedent justifying rational basis review does not apply to this case.

Two precedents are most often cited to support vaccine mandates. *Jacobson v. Commonwealth of Massachusetts*, which involved a question of whether a state's police powers extended to forcing citizens to take a small pox vaccine or pay a small one-time fine, *see* 197 U.S. 11, 30 (1905), and *Zucht v. King*, which affirmed a public school's ability to require vaccinations for deadly diseases common among school-age children. 260 U.S. 174, 176-177 (1922). At first glance, *Jacobson* and *Zucht* seem directly on point to the question in front of this Court. However, relying on these precedents here presupposes that the underlying reason why the Court affirmed the states' police powers in those cases is equivalent to the attainable outcome if CU retains similar police powers. This presupposition fails, which means that the controlling precedent is not *Jacobson* and *Zucht*, but rather *Cruzan*, which controls on questions involving

forced medical treatment.

2. CU's erroneous presuppositions regarding its CU Mandate do not support rational basis review generally afforded to vaccine mandates for public health.

Competent individuals have a "constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan*, 497 U.S. 261 at 278. *Jacobson* and *Zucht* both involved the state's use of its police power to implement public health measures to control the spread of deadly diseases among the population subject to the vaccination mandates.

Thus, the Court's jurisprudence, in *Jacobson* and *Zucht*, concerns vaccines used as a public health measure to prevent the transmission of a disease. As the American Public Health Association explains, "Public Health promotes and protects the health of people and communities where they live, learn, work and play. While a doctor treats people who are sick, those of us working in public health try to prevent people from getting sick or injured in the first place." Compl. ¶ 169. Thus, public health professionals promote vaccines for "vaccine-preventable diseases that can be a threat to our health." *Id*. ¶ 170. This understanding of public health is long-standing. for instance, in 1920, public health was defined as:

> the science and art of preventing disease, prolonging life, and promoting physical health and efficiency through organized community efforts for the sanitation of the environment, the control of community infections, the education of the individual in principles of personal hygience, the organization of medical and nursing service for the early diagnosis and preventive treatment of disease, and the development of the scoial machinery which will ensure to every individual in the community a standard of living adequate for the maintenance of health.

Id. ¶ 171.

Prior to August of this year, the CDC defined "vaccine" in conformance with the

traditional understanding that vaccines are a public health measure: "a product that stimulates a person's immune system to produce immunity to a specific disease, protecting the person from that disease." *Id*. ¶ 172, n. 13. However, the CDC recently changed the definition of "vaccine" to "[a] preparation that is used to stimulate the body's immune response against diseases." *Id*. Thus, the CDC eliminated the public health component of producing "immunity to a specific disease, protecting the person from that disease." *Id.* As a result, the CDC's revised definition of vaccine no longer conforms with the understanding that *Jacobson* and subsequent cases assumed, that a vaccine is a public health measure, which is why the court afforded the government great deference. The evidence supports that COVID vaccines should not be viewed as a public health measure to prevent the spread of disease, but as a medical treatment designed to provide therapeutic benefits to the individual who contracts COVID. *See supra* pp. 3-6.

And for constitutional review, the difference between a public health measure and a medical treatment is critical. Constitutional jurisprudence over the last century shows that courts historically grant higher deference (and rational basis review) to decisions to mandate vaccines that are public health measures, but not to forced medical treatments. The reasons for this different treatment is rooted in the differences in purpose behind such mandates. A personal decision to refuse a "vaccine" that is a medical treatment does not create a risk to other people to whom the disease might spread. *See Jacobson*, 197 U.S. at 35 (holding deference applies to those requirements "adapted to prevent the spread of contagious diseases"). Instead, declining medical treatment impacts only the health of the individual refusing the medical treatment.

The COVID vaccine appears to be effective at mitigating symptoms, hospitalizations and

deaths, as all medical treatments and prophylactics do, but it does not prevent individuals from either getting or transmitting the COVID virus. *Supra* p. 17-22. According to CDC Director Rochelle Walensky, "what [the COVID vaccines] can't do anymore is prevent transmission." *Id.* p. 18, Compl. ¶ 158. And Dr. Fauci admitted that they have not proven whether the vaccine is effective against the new Omicron variant. *Supra* p. 18, Compl. ¶ 158.

Using *Jacobson*, and its deferential standard, as controlling precedent requires this Court to base its analysis on the supposition that these products would be effective in meeting CU's stated goal of slowing the spread of the COVID virus and thereby protecting the public at large. However, that presupposition is inaccurate, and the COVID vaccines are properly understood as a medical treatment.

3. Constitutional jurisprudence related to forced medical treatment, outside of the penal context, requires heightened scrutiny.

When medical treatment has been **mandated** by the government, contrary to the decision of the person, such mandates uniformly require heightened scrutiny.[10] *See, e.g., Cruzan,* 497 U.S. at 278 (right to consent to or refuse medical treatment for incompetent person); *Humphrey v. Cody*, 405 U.S. 504 (1972); *Vitek v. Jones*, 445 U.S. 480 (1980) (involuntary commitment of mentally ill patients for medical treatment); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Sell v. United States*, 593 U.S. 166, 186 (2003) (pre-trial forced administration of antipsychotic drugs).[11]

[10] Students refrain from exclusively using the term strict scrutiny because the medical treatment cases did no always specifically define the scrutiny level applied. However, this line of jurisprudence makes clear that rational basis is not applied in this context, and the Court most often applies a strict scrutiny analysis regardless of label.

[11] During modern times, the Court has also applied heightened scrutiny when an important personal choice has been **prohibited** by the government. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479

Further, the Court's recent constitutional jurisprudence gives greater weight to the protection of bodily integrity and autonomy, and of medical treatment choice than it did a century ago.[12]

These mandate cases are directly applicable to this case, which uniformly have required heightened scrutiny. *Rochin v. California*, 342 U.S. 165, 207 (1952) (applying a "narrow scrutiny" in reversing a conviction based upon evidence obtained through stomach pumping); *Humphrey*, 405 U.S. at 504 (applying a standard more rigorous than rational basis in a case concerning involuntary commitment to a mental hospital for treatment); *Vitek*, 445 U.S. at 495 (holding that notwithstanding "strong" state interest in segregating and treating mentally ill patients, liberty interests protected by the due process clause are entitled to strong constitutional protection); *Riggins,* 504 U.S. at 135 (holding that only an "essential" or "overriding" state interest would overcome a claimant's "interest in avoiding involuntary administration" of drugs); *Sell*, 539 U.S. at 179 (holding that states must demonstrate an "*important* governmental interest" and means that are both "necessary significantly to further" that interest to require involuntary administration of antipsychotic drugs) (emphasis in the original).

The only exception to the application of heightened scrutiny is in the context of convicted inmates in prison—in this context alone, the Court's precedent supports the application of rational basis review. Even within the prison context, the Court recognized that inmates still

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(1965) (contraception); *Roe v. Wade*, 410 U.S. 113 (1973), modified by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (abortion), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriage). Students do not analyze these cases further but acknowledge their importance in constitutional jurisprudence tangentially relevant here.

[12] *See* Weiler, *Bodily Integrity: A Substantive Due Process Right to Be Free from Rape by Public Officials*, 34 Calif. West. L. Rev. 591, 596-604 (1998) (compilation and analysis of modern bodily integrity and autonomy cases).

"possess a significant liberty interest in avoiding the unwanted administration of…drugs," *Washington v. Harper*, 494 U.S. 210, 222 (1990), but recognized these rights must be balanced with the "legitimate penological interest." *Id.* at 223. Consequently, the Court applies only rational basis review for inmates in prison, but nowhere else.

The inescapable understanding derived from these cases is that this Court must require a heightened level of scrutiny where, as here, Students are not prisoners. It cannot be the case that prisoner rights are equal with or greater than rights possessed by free citizens. *Wolfe v. McDonnell*, 418 U.S. 539, 555 (1974) (holding that "[l]awful imprisonment necessarily makes unavailable many rights and privileges," and that a prisoner's rights "may be diminished by the needs and exigencies of the institutional environment"). As the Supreme Court's decisions in the medical treatment mandate cases, and in *Harper* and *Wolfe,* make clear: rational basis scrutiny is only applied to rights concerning bodily integrity and autonomy, and of medical treatment choice within the prison context. Outside this context, the Constitution demands a higher level of scrutiny.

Significant, even compelling, rights of bodily integrity and autonomy, and of medical treatment choice are infringed here, requiring heightened, even strict scrutiny, that have been recognized since *Jacobson*. *Jacobson* recognized the danger that forced vaccinations, that were within the government's police powers, could be *exercised* in violation of federal constitutional law, here the rights of bodily integrity and autonomy and medical treatment choice, "in . . . an arbitrary, unreasonable manner," or in a way to go "beyond what [i]s reasonably required for the safety of the public." 197 U.S. at 28. This left the judicial review of the *exercise* of those police

powers to subsequent courts.

Further, any argument that if the *Jacobson* Court had viewed the Massachusetts vaccination requirement as implicating a fundamental right of bodily integrity and autonomy necessitating heightened scrutiny under the common law it would have so held, forgets several key points. It ignores that: (1) the *Jacobson* Court believed the vaccine to be a public health measure, where an important government interest in protecting others from the spread of a deadly disease was obvious; (2) the reality that, in the *Jacobson* era, the Court was much more deferential to the government in areas potentially implicating individual rights;[13] and (3) the substantive due process body of constitutional law, including recognizing substantial constitutional protection for the right of bodily integrity and autonomy, including medical treatment choice, was not developed until much later. *See Griswold*, 381 U.S. at 479.

Thus, since the COVID vaccines do not prevent transmission and acquiring of the COVID disease, but treats its effect, the CU Mandate must analyze its constitutionality as a forced medical treatment. That analysis requires heightened scrutiny.

C. Under Heightened Scrutiny, the Burden Shifts to CU to Justify its CU Mandate.

The Supreme Court signals that heightened scrutiny is applied by:

(1) either the description of the right involved (i.e., "fundamental," "significant liberty interest");

(2) the weight of the government interest that is needed to overcome the right (i.e.

[13] Such that the Fourteenth Amendment jurisprudence was in its infancy. Consider that "[t]he Privileges or Immunities Clause was an empty vessel [] State were not bound by the Bill [of] Rights [a]nd separate was [still] equal." Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 Buff. L. Rev. at 9 (2021).

"essential" or "overriding"); or

(3) the procedural burdens placed on the government when acting to advance its interest (i.e., "clear and convincing evidence" or robust procedural requirements).

In these instances of heightened scrutiny, the key difference is the shift in the burden of proof to the government, from the Plaintiff, to justify its mandate.

If rational basis review applies, "the burden is on the one attacking [the regulation] to [negate] every conceivable basis which might support it." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). However, *Griswold*, *Roe*, *Casey*, *Glucksberg*, *Obergefell*, *Cruzan*, *Rochin*, *Humphrey*, *Vitek*, *Riggins* and *Sell* all required the *government*, not the challenger, to prove it meets the heightened standard of review for interference with the individual's right to bodily integrity and autonomy and medical treatment at issue. Because the government held the burden of proof in these cases, the Court necessarily applied heightened scrutiny, regardless of the exact language used to describe the scrutiny level.

Two levels of heightened scrutiny exist—intermediate scrutiny and strict scrutiny. Under intermediate scrutiny, the Court applies a "rigorous standard of review" that requires "the State [to] demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgments of" the right. *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 197 (2014). Under strict scrutiny, the government has the burden of proof to establish the law is necessary to advance a compelling governmental interest by narrowly tailored and least restrictive means. *Sherbert v. Verner*, 374 U.S. 398 (1963). Both levels of heightened scrutiny impose on CU the burden of proof which must be required here.

Sell is the latest and most comprehensive case establishing a strict scrutiny framework for

government medical treatment mandates and its analysis. Describing the *Sell* test as a strict scrutiny test is fair since it contains all of the essential elements of strict scrutiny, i.e. a protected constitutional right, a sufficiently important state interest to overcome the right, narrow tailoring and less restrictive means, and the requirement that the government must prove it all. First, the *Sell* Court found that an individual has a constitutionally protected liberty "interest in avoiding involuntary administration of antipsychotic drugs"—an interest that only an "essential" or "overriding" state interest might overcome, 539 U.S. at 178-79 (citing *Riggins*, 504 U.S. at 134, 135), and only if the "involuntary medication will significantly further the concomitant state interests." *Id.* at 181. Furthermore, the government must show "the efficacy, the side effects, the possible alternatives, and the medical appropriateness" of the course of treatment, "sufficient to overcome the individual's protected interest in refusing it." *Id*. at 183. And finally, the government had the burden to prove that the "current circumstances" justifies overriding a person's right to refuse medication. *Id*. at 186. This surely describes strict scrutiny which should be applied here. And the *Sell* test is not used within "the penal framework"—Sell was in a mental hospital awaiting trial, not a convicted felon in prison, like *Harper.* That is why *Sell* applied heightened scrutiny, not *Harper*'s rational basis. Surely a medical treatment choice by law-abiding adults, like Students, is entitled to at least the same respect as a medical treatment decision by a person with severe mental illness awaiting trial.

Sell's strict scrutiny test for medical treatment decisions has been applied beyond the narrow confines of involuntary administration of drugs to a mentally ill defendant facing criminal charges in order to render that defendant competent to stand trial. Multiple circuits have applied

the *Sell* test in various contexts. *See, e.g., United States v. Seaton*, 773 F. App'x 1013 (10th Cir. 2019); (applying *Sell*'s analysis to forced administration of antipsychotic drugs to render defendant competent to be sentenced); *Witt v. Department of the Air Force*, 527 F.3d 806, 817-821 (9th Cir. 2008) (applying *Sell*'s heightened scrutiny analysis to discharge of Air Force nurse for homosexual relationship); *Russell v. Richards*, 384 F.3d 444, 450 (7th Cir. 2004) (applying *Sell* to involuntary administration of delousing shampoo to inmates). Thus *Sell* provides the framework for the heightened scrutiny analysis of the CU Mandate and requires CU prove that its CU Mandate is justified.

D. Under Heightened Scrutiny, Under the Current Circumstances, and as Applied to this Age Group, CU Cannot Prove That its Interests Outweigh the Students' Constitutional Rights.

With heightened scrutiny, CU is required to justify its CU Mandate, and Students will be likely succeeded on the merits. Emerging facts continue to undermine CU's rationale for its CU Mandate. Since heightened scrutiny applies, the court should consider both the strength of the government's interest and the tailoring of its regulations to the current stage of the pandemic.

1. Currently, CU's Interest in Public Health and Safety Is Not Compelling Enough to Justify the CU Mandate.

It has been assumed that stopping the spread of COVID was a compelling interest that justified draconian government restrictions. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (J. Gorsuch, concurring). Conversely, that assumption has been based in another critical assumption—that the spread of COVID will lead to increased hospitalizations and death. After all, no precedent establishes that the government has the authority to mandate extraordinary measures to prevent the common cold or flu, but only serious diseases that result in

significant injury and death.

As the mortality rate of a disease increases, so does the government justification for restrictive measures. For instance, *Jacobson*'s smallpox had a case fatality rate (CFR) approaching 30%, across all age groups. Compl. ¶ 130.[14] For those ages 20-49, the chance of dying from COVID is extremely low. *Id*. ¶¶ 128-146.

COVID's low death rate, especially for college-aged students, does not justify the CU Mandate.

2. CU's Interest in "Stemming the Spread of COVID-19" Cannot be Achieved by the CU Mandate so It Is Not a Compelling Interest that Could Justify its CU Mandate.

"As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights." *Calvary Chapel Dayton Valley,* 140 S. Ct. at 2605 (J. Alito, dissenting). Just as the Court recognized that Sell's condition must be evaluated given his current circumstances, *Sell*, 539 U.S. at 186, as the science around the pandemic evolves, the legal landscape surrounding it evolves as well.

Whether stemming the spread of COVID is a compelling interest or not, the evidence suggests that stemming the spread may no longer be an achievable goal, no matter what the

[14] Of course, there will be vaccine mandates that survive heightened scrutiny, even strict scrutiny. A mandate for the smallpox vaccine would be one example. With a CFR of over 30% across all age groups and a vaccine that was safe, effective, and had been in use then for over 100 years, the government's justification for a vaccine mandate would satisfy the heightened scrutiny required. In comparison, COVID has an extremely low risk of death among all age groups, especially among college-aged students. The COVID vaccines are novel with risks that are yet to be fully understood. These differences show why the government cannot satisfy its burden of heightened scrutiny here.

vaccination status of Students. Emerging data from around the world suggests that vaccination does not prevent the spread of COVID, particularly against COVID variants, but may only lessen the severity of symptoms among those who do contract it. Compl. ¶¶ 154-164. For college-aged students, the risk of severe COVID consequences, such as hospitalizations and death, are already near zero without vaccination. *See id*. ¶¶ 128-146. . Therefore, lessening the risk of death for college-aged students is not a compelling interest.

Under the proper standard of review, CU cannot prove that it has a sufficient government interest at this stage in the pandemic for this age group. Given the lack of serious danger COVID poses to college-age students, the relatively low hospitalization and death rates, even with the Delta variant, the CU Mandate is not justified as applied to this age group. Additionally, CU cannot prove that the CU Mandate would stop the spread of COVID[15] and, in the alternative, lessening the risk hospitalization and death from COVID for this age group is not a compelling interest, when severity of the infection for this age group is already minimal and deaths almost nonexistent.

E. The CU Mandate Is Not Narrowly Tailored.

1. Older People, Who Are Not Subject to the CU Mandate, Are at a Much Greater Risk of Adverse Effects of a COVID Infection than Young People, Who Are the Ones Subject to the CU Mandate.

The CU Mandate irrationally requires the younger student population to receive the

[15] CU has recently acknowledged as much by mandating that all CU students, including those who have been vaccinated were masks indoors on campus and stating that "[y]ou can still acquire a COVID-19 infection and be infectious even if you are fully vaccinated." Compl. ¶¶ 34-37, 47-50, 162.

vaccine, but the older population is at the greatest risk of severe effects from a COVID infection. As shown above, older people can be up to 370 times more likely to die from COVID than the student population. Compl. ¶¶ 142-143. Therefore, mandating the vaccine for the younger, student age population, rather than those much older, is not narrowly tailored to protect public health and safety.

2. The CU Mandate Is Not the Least Restrictive Means to Protect Health and Safety.

Existing measures (including voluntary vaccination, masking, social distancing, sanitizing, and testing) have already returned citizens largely to the *status quo ante*, so continuing such measures, rather than adding a vaccination mandate, would be the least restrictive means of accomplishing CU's goal.

Additionally, CU has failed to prove that the vaccines are sufficiently safe and effective to justify mandating their use for this age group. There are emerging risks of the COVID vaccines, including some that primarily effect students. *See* Compl. ¶¶ 176-187. Emerging questions exist about the COVID vaccines effectiveness, particularly against COVID variants. *Id*. ¶¶ 154-164. Since CU has mandated the vaccines, substituting themselves for students and their attending physicians, it is CU's burden to prove that the vaccines are safe and effective for this age group, which they have failed to do.

The CU Mandate is thus not the least restrictive means to accomplish CU's interest in public health and safety.

F. The CU Mandate's Exemption Policies Violate the Establishment Clause.

Over 50 years ago, the Supreme Court noted, "'[I]t is too late in the day to doubt that the

liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege' as opposed to a right." *Dahl*, 2021 WL 4618519, at *2 (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). Thus, regardless of whether a benefit, privilege, or right is at stake, the government is required to afford, "at a minimum, . . . equal treatment [to] all religious faiths without discrimination or preference." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008).

1. Denominational Discrimination is Forbidden by the First Amendment.

These First Amendment principles, which are incorporated against the states through the Fourteenth Amendment, are not novel, but have been with us since the founding. "Free exercise . . . can be guaranteed only when" the government affords *all* "religions the very same treatment given to small, new, or unpopular denominations." *Larson v. Valente*, 456 U.S. 228, 245 (1982). This idea was born well "[b]efore the Revolution, [when] religious establishments of differing denominations were common throughout the Colonies," *id.* at 244, with these "denominations" being different branches of the same tree, Christianity, such that Baptists in colonial Massachusetts "chafed under" what John Adams called "the most mild and equitable establishment of religion that was known in the world, if indeed [it] could be called an establishment," *id.* at 244 n.19 (citing B. Bailyn, The Ideological Origins of the American Revolution 248 (1967)).[16]

This mindset was rooted in the bedrock principles upon which American independence

[16] This "establishment" was the established Congregational (a Christian denomination) church at the time. Bailyn at 255 n.23.

was based:

> If Parliament had lacked the authority to tax unrepresented colonists, then by the same token the newly independent States should be powerless to tax their citizens for the support of a denomination to which they did not belong. The force of this reasoning led to the abolition of most denominational establishments at the state level by the 1780's, and led ultimately to the inclusion of the Establishment Clause in the First Amendment in 1791.

Id. at 244–45 (citations omitted).

That the state may not purport to determine which denominations—that is, which *subsets* of belief *within a given faith*—are acceptable and which are not has been recognized over and over again by the Supreme Court and lower courts throughout the nation, as will be shown.

This does not mean, of course, that First Amendment protections apply to proffered beliefs which are "obvious[] shams," *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994), but they *do* flow not only to the denominational level, but to even the furthest iteration, the individual. As such, courts have made it clear that one need not "be responding to the commands of a particular religious organization" in order to claim First Amendment protection. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 834 (1989).

Rather, it is simply "a sincerely held religious belief . . . [that] entitle[s] one to invoke First Amendment protection." *Id.*; *see also, e.g.*, *Colorado Christian Univ. v. Weaver*, 534 F.3d at 1266 (holding that "interdenominational discrimination" is a "[v]iolation of the Equal Protection and Free Exercise Clauses"); *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715–16 (1981) (reversing finding that plaintiff's beliefs constituted "personal," rather than "religious," belief on the basis that another person of the same religion had differing beliefs: "Intrafaith differences . . . are not uncommon among followers of a particular creed . . . . [T]he

guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."); *Ford v. McGinnis*, 352 F.3d 582, 590 (2nd Cir. 2003) ("the question whether Jackson's beliefs are entitled to Free Exercise protection turns on whether they are 'sincerely held,' not on the 'ecclesiastical question' whether he is in fact a Jew under Judaic law") (quoting *Jackson v. Mann*, 196 F.3d 316, 321 (2nd Cir. 1999)).

Accordingly, when the 10th Circuit addressed precisely this issue, considering a Colorado statute that provided "scholarship money to students who attend sectarian—but not 'pervasively' sectarian—universities," it ruled, "Colorado necessarily and explicitly discriminates among religious institutions, extending scholarships to students at some religious institutions, but not those deemed too thoroughly 'sectarian' by governmental officials." *Colorado Christian Univ.*, 534 F.3d at 1258. The 10th Circuit then compared the statute under consideration there with the statute overturned in "the leading case on denominational discrimination, *Larson v. Valente*, in which the Court invalidated a Minnesota statute" that was "not simply a facially neutral statute," for it "impos[ed] special registration requirements on any religious organization that did not 'receive[] more than half of [its] total contributions from members or affiliated organizations.'" *Id.* at 1259 (citing *Larson*, 456 U.S. at 231–32). For this reason, the 10th Circuit found that the statute's "interdenominational discrimination" "could not be justified" "on any plausible level of scrutiny." *Id.* at 1266, 1269.

And because the state may not do indirectly what it is prohibited from doing directly, it may not "effectively distinguish" between religions by instituting rules directly contemplating religion but distinguishing based not on credal content, but other criteria. *Larson*, 456 U.S. at 246

n.23 (explaining that a statute providing an exemption only to religious organizations receiving over half of their total contributions from members or affiliated organizations implicated Establishment Clause); *see also Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1348 (4th Cir. 1995) (Luttig, J., concurring) (noting that the "statute at issue in *Larson* did not even mention a particular religion by name," but the Court nonetheless "summarily" found that it "clearly grant[ed] denominational preferences"); *Colorado Christian Univ.*, 534 F.3d at 1259 (rejecting argument that a religiously discriminatory law "distinguishe[d] not between types of religions, but between types of institutions"; stating that law discriminating based on "pervasiveness" of religiosity was even more problematic than law at issue in *Larson*).

2. Strict Scrutiny Generally Applies to First Amendment Violations.

While the First Amendment does not absolutely prohibit every burden on the exercise of religion, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Notably, this rigorous scrutiny applies even if a facially discriminatory policy is "in fact executed" in a seemingly neutral way, such as refusing to grant *any* exemptions. *See Dahl*, 2021 WL 4618519 at *4. The Supreme Court has made it clear that "the policy itself" must be "put front and center." *Id.* "*The creation of a formal mechanism for granting exceptions renders a policy not generally applicable*, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1879 (2021) (cleaned up) (emphasis added)

(further noting that a statute's provision of exemptions for "good cause" was such a mechanism). "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990)).

"Violations of the Equal Protection and Free Exercise Clauses are generally analyzed in terms of strict scrutiny, under which discrimination can be justified only if it is narrowly tailored to achieve a compelling state interest," but, the 10th Circuit has clarified, certain "Establishment Clause violations . . . are usually flatly forbidden without reference to the strength of governmental purposes." *Colorado Christian Univ.*, 534 F.3d at 1266 (citations omitted). Thus, regardless of whether a claim arises under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause, when the government "discriminat[es] on the basis of religion, including interdenominational discrimination," strict scrutiny applies, *id.*, *unless* the claim "involv[es] other Establishment Clause issues, such as excessive entanglement," which are "unconstitutional without further inquiry," *id.* (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987)).

The interest served by a governmental rule subject to strict scrutiny must, according to the Supreme Court, be an interest "of the highest order." *Fulton,* 141 S. Ct. at 1881; *see also United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002) ("the [Supreme] Court defined a compelling interest as 'only those interests of the highest order'") (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

And for such a rule to be found narrowly tailored, the government must show that it "is

the least restrictive means" of achieving the interest. *Thomas v. Rev. Bd. of Indiana Security Div.*, 450 U.S. 707, 718 (1981).

3. The Establishment Clause Prohibits Religious Preference by Government.

These principles have broad implications for the Establishment Clause.

a. Such Distinction Triggers, If Not Strict Scrutiny, Even More Severe Treatment.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson,* 456 U.S. at 244; *Colorado Christian Univ.,* 534 F.3d at 1260 (noting the government is not "permitted to make a value judgment . . . favoring some religions over others").

More broadly, "explicit and deliberate [governmental] distinctions between different religious organizations," *Colorado Christian Univ.,* 534 F.3d at 1259, burden the Establishment Clause and trigger strict scrutiny due to lack of neutrality, *id.* at 1266.

While a government rule may "aid" religion without contravening the Establishment Clause *if* the aid has a secular purpose *and* neither advances nor inhibits religion, it may *not* do so in a manner that causes "excessive entanglement" between the state and religion. *Walz v. Tax Commission*, 397 U.S. 664, 672–675 (1970).

As the Tenth Circuit has explained, this prohibition on "excessive entanglement" means the state may not "monitor[] or second-guess[] . . . religious beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits." *Colorado Christian Univ.*, 534 F.3d at 1261. Establishment Clause violations involving "excessive entanglement . . . [are] unconstitutional without further inquiry." *Id.* at 1266.

And even if there is no excessive entanglement, the state must still treat all religions equally in the offer of aid. "The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position." *United States v. Ballard*, 322 U.S. 78, 87 (1944).

b. "Religion" May Not Be Narrowly Defined by Government.

Nor is preferential treatment of one religion or another vindicated by the claim that the disfavored religion is no religion at all: as explained, ample case law demonstrates that one need not "be responding to the commands of a particular religious organization" in order to claim First Amendment protection. *Frazee*, 489 U.S. at 834.

Accordingly, courts have repeatedly recognized that states that afford a vaccine exemption to those sincerely holding certain religious beliefs, while denying the same benefit to others sincerely holding disfavored religious beliefs, violate the protection of the Establishment Clause. *E.g.*, *Davis v. State*, 294 Md. 370, 381 (1982) (finding unconstitutional an exemption for adherents of a "*recognized* church or religious denomination" because it failed to "encompass personal religious beliefs . . . which are not associated with any church or denomination. . . . [This] statutory exemption . . . 'ignore[s] the historic position of our country on this issue since its founding.'" (emphasis added) (citing *United States v. Seeger*, 380 U.S. 163, 180)); *Kolbeck v. Kramer*, 202 A.2d 889, 893 (N.J. Super. Ct. 1964), modified on other grounds and "preserved," 46 N.J. 46, 214 A.2d 408 (1965) ("[m]embership in a recognized religious group cannot be required as a condition of exemption from vaccination."). This includes a very recent Circuit Court's denial of a motion to stay a preliminary injunction issued to enjoin state university

"officials from enforcing [a COVID] vaccine mandate against plaintiffs" who claimed the mandate violated their free exercise rights, *Dahl*, 2021 WL 4618519 at *1, *5 (October 7 decision applying strict scrutiny and finding that "defendants likely violated plaintiffs' First Amendment rights").

The state may not do indirectly what it is prohibited from doing directly. It may not directly discriminate between religions, and it may not "effectively distinguish" between religions by instituting rules directly contemplating religion but distinguishing based not on credal content, but other criteria. *Larson*, 456 U.S. at 246 n.23 (explaining that a statute providing an exemption only to religious organizations receiving over half of their total contributions from members or affiliated organizations implicated Establishment Clause); *see also Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d at 1348 (Luttig, J., concurring) (noting that the "statute at issue in *Larson* did not even mention a particular religion by name," but the Court nonetheless "summarily" found that it "clearly grant[ed] denominational preferences"); *Colorado Christian Univ.*, 534 F.3d at 1259 (rejecting argument that a religiously discriminatory law "distinguishe[d] not between types of religions, but between types of institutions"; stating that law discriminating based on "pervasiveness" of religiosity was even more problematic than law at issue in *Larson*).

4. CU's Exemption Policies Violate The Establishment Clause in Multiple Ways.

In the present case, CU's discrimination under the Original Exemption Policy "is expressly based on the . . . religiosity of the [students]," meaning the "Colorado [University rule] seems even more problematic than the Minnesota law invalidated in *Larson*," which "at least was

framed in terms of secular considerations." *Id.* at 1259. And in the updated September 24 Exemption Policy, under which religious accommodations are not available to students but are available to employees, *supra* p. 2, CU disfavors those religions practiced by students while favoring those practiced by employees, "effectively distinguishing" between the two sets of religions. *See Larson*, 456 U.S. at 246 n.23. And both Exemption Policies discriminate against religion by denying religious exemptions while broadly permitting medical exemptions. For these reasons alone, the Exemption Policies are not neutral or generally applicable.

But CU further violates the Establishment Clause, for under the Original Exemption Policy, CU students had to have a religiosity of a very certain sort to qualify: it required students to adhere to a denomination whose "teachings are opposed to *all* immunizations." Email from Associate Dean for Student Affairs and Admissions to Dr. Fow (Sept. 7, 2021), Ex. 8 (emphasis added).

This is true despite the fact that the very existence of denominations within Christianity demonstrates that different Christians have different Christian beliefs, such as Dr. Thomas Fow's belief—as explained to CU in the religious exemption form he submitted, Fow Religious Exemption From COVID-19 Vaccination Requirement Form (Sept. 8, 2021), Ex. 9—that the Bible teaches that "all abortion is an abomination" and that receiving abortion-aided vaccines is therefore "a direct opposition and violation of the word of God": Colorado University has determined that the only worthy denomination is one that rejects *all* immunizations.

Nor mind the fact that different immunizations have different characteristics and thus may be subject to different religious considerations: CU determined that a belief that different

immunizations should be considered differently was not worthy.

On a more basic level, CU determined that only religions that have recognized "teachings" were permissible—which is to say that it provided exemptions only to those "responding to the *commands* of a *particular* religious organization," *Frazee*, 489 U.S. at 834 (emphases added).

Dr. Fow received no notice of the implementation of the September 24 Exemption Policy, nor did CU communicate to him any indication that the denial of his exemption request had been or would be rescinded or reconsidered in light of CU's adoption of the September 24 Exemption Policy. Thus, the harm done to him remains—and is equal under the equally problematic September 24 Exemption Policy, with its "effective discrimination" between the religions of students and those of teachers.

As such, Colorado University infringes on the Establishment Clause.

"The University's mandatory vaccination policy offers exemptions based on a person's religious belief whose teachings are opposed to all immunizations, i.e., your religion teaches you and all other adherents that immunizations are forbidden under all circumstances." Exemption Denial (Sept. 9, 2021), Ex. 10.; *see also* Email from Associate Dean for Student Affairs and Admissions to Dr. Fow (Sept. 7, 2021), Ex. 8 (same: "The University only recognizes religious exemptions based on a religious beliefs [sic] whose teachings are opposed to all immunizations," and further noting, "The University has asked school administrators to speak with specific individuals to see if the policy is clear, and to confirm that all religious exemptions follow the prescribed criteria," describing this once more as "the University's policy").

This description of the Original Exemption Policy could not be more clear: only adherents to religions with recognized, particular teachings qualify, and further, only adherents to religions whose teachings are opposed to *all* immunizations qualify.

a. "Particular Religious Organization" and "Official Preference" Violations

The Original Exemption Policy, then, violates the Establishment Clause's prohibition on the government requiring those holding religious beliefs to "be responding to the commands of a particular religious organization" in order to claim its protection. And the September 24 Exemption Policy, which gives preference to employees' religions over students' religions, *and* the Original Exemption Policy, violate its "clearest command," "that one religious denomination cannot be officially preferred over another." *Larson,* 456 U.S. at 244, whether by directly distinguishing or "effectively distinguishing" by establishing criteria other than credal content—here, whether the religious adherent is a student or a teacher—that is nonetheless aimed at religion, *see id*. at 246 n.23.

b. Excessive Entanglement Violation

Finally, the Original Exemption Policy violates the Establishment Clause's prohibition of excessive entanglement, for in its attempt to delve into—rather, to answer—the "ecclesiastical question" of which religions are true religions to which believers may adhere and thus qualify for an exemption, CU "monitors . . . religious beliefs and practices," "second-guessing" those that (in its view) do not oppose *all* immunizations, "as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits." *Colorado Christian Univ.*, 534 F.3d at 1261. This is precisely the sort of "trolling through a person's or institution's religious beliefs" that the

rule against excessive entanglement prohibits. *Id*. at 1261.

Indeed, Dr. Fow advised CU that he is "a faithful, practicing Christian" who believes the Bible, which he views as "the inerrant word of God," teaches that "all abortion is an abomination" and that, as such, "any vaccine containing aborted human fetal cells or tissue, . . . any vaccine having origins from a human aborted fetus, or . . . any vaccine in which its protein was tested using the cell line from an aborted human fetus" "is a direct opposition and violation of the word of God." Fow Religious Exemption From COVID-19 Vaccination Requirement Form (Sept. 8, 2021), Ex. 9.

To this, CU responded, "The basis for your objection to vaccination against COVID-19 is of a personal nature and not part of a comprehensive system of religious beliefs," Exemption Denial (Sept. 9, 2021), Ex. 10, thereby purporting to have monitored Christian religious beliefs and practices deeply enough to be able to conclusively determine that there is no Christian denomination that holds the beliefs espoused by Dr. Fow.

This is precisely the sort of excessive entanglement prohibited by the First Amendment. The entanglement presented here—with CU essentially inquiring into the good faith of Dr. Fow's claim that his objection was religion, and into this claim's relationship with the Christian faith—is exactly what the Court warned against in *Catholic Bishop*, in which it found that NLRB oversight of Catholic schools would result in "significant risk" of excessive entanglement whenever the schools claimed that "challenged actions were mandated by their religious creeds" because such oversight would then "involve *inquiry into the good faith of the position asserted* by the clergy-administrators *and its relationship to the school's religious mission*." *N.L.R.B. v.*

Catholic Bishop, 440 U.S. 490, 502 (1979).

5. The Court Must Apply Strict Scrutiny (or More Severe Treatment), Which the Exemption Policies Cannot Survive.

a. Application of Strict Scrutiny

For all of the reasons above, regardless of whether these facially discriminatory Exemption Policies were "in fact executed" in a seemingly neutral way (i.e., granting no religious exemptions), *see Dahl*, 2021 WL 4618519 at *4, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable," *Fulton*, 141 S. Ct. at 1879 (2021). Nor, as also explained above, are the policies neutral. Accordingly, due to their violation of the Establishment Clause, strict scrutiny must be applied to the September 24 Exemption Policy and to the Original Exemption Policy, to the extent it did *not* create excessive entanglement.

b. Excessive Entanglement Renders Government Rules Unconstitutional Without Further Inquiry

But the Original Exemption Policy *did* create excessive entanglement. "Supreme Court precedent[] precludes [CU from] [discriminating] on the basis of intrusive judgments regarding contested questions of religious belief or practice." *Colorado Christian Univ.*, 534 F.3d at 1261.

Such "intrusions" are what courts often refer to as "excessive entanglement." *Walz*, 397 U.S. at 672–675. Such entanglement is prohibited on all fronts: "Under the First Amendment, the government is not permitted to have an ecclesiology, or to second-guess the ecclesiology espoused by our citizens." *Colorado Christian Univ.*, 534 F.3d at 1265. As the Supreme Court has stated, "[i]t is not only the conclusions reached by the [government] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings

and conclusions." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. at 502.

As such, because it authorized government actors to "troll[] through a person's [such as Dr. Fow's] or institution's [such as Christianity's] religious beliefs," *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality), to determine whether those beliefs were legitimately "Christian," the Original Exemption Policy permitted "the *exact* kind of questioning into religious matters which *Catholic Bishop* specifically sought to avoid," *University of Great Falls v. NLRB*, 278 F.3d 1335, 1353 (D.C.Cir. 2002), *as cited by Colorado Christian Univ.*, 534 F.3d at 1264 (emphasis in original).

Because the Original Exemption Policy permits excessive entanglement, on that ground alone it is "unconstitutional without further inquiry," without even the minimal chance of salvation afforded by a strict scrutiny analysis, *Colorado Christian Univ.*, 534 F.3d at 1266 (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. at 339).

Even if this were not the case, however, the Original Exemption Policy's violation of the Establishment Clause would still make it, along with the September 24 Exemption Policy, subject to strict scrutiny, which they cannot survive.

c. CU Has No Compelling Interest in Its Exemption Policies

In applying strict scrutiny, the first consideration is the "compelling interest" prong, under which the Exemption Policies utterly fail.

CU alleges, "The University adopted its COVID-19 Vaccination Policy for the purpose of protecting the health and safety of the campus community" (Exemption Denial (Sept. 9, 2021),

Ex. 10). And "[t]he purpose of th[e] [September 24 Exemption] [P]olicy is to protect the health and safety of the University of Colorado Anschutz Medical Campus . . . community, including all faculty, staff, students, [and others associated with the campus]." *COVID-19 Vaccination Requirement and Compliance*, University of Colorado Anschutz Medical Campus (Sept. 24, 2021), https://www.ucdenver.edu/docs/librariesprovider284/default-document-library/3000-facilities-management/3012---covid-19-vaccination-requirement-and-compliance.pdf?sfvrsn=3e48cbba_2 (last visited Dec. 31, 2021). But CU has a high vaccination rate and a higher number of those immune from the virus, Compl. ¶¶ 124–126.

For these and other reasons, it is not reasonable to require all students to be vaccinated, *see e.g.*, *id.* ¶¶ 154–175; and adding to these reasons, there is an extremely minimal risk of COVID to CU students, college students don't generally spread COVID to the community, and treatments have improved drastically, making the CU Mandate irrational and unreasonable, *id*. ¶¶ 128-152.

For these reasons alone, the Exemption Policies do not serve an interest "of the highest order," *Lukumi,* 508 U.S. at 2234; *Does 1–3 v. Mills*, No. 21A90, 595 U.S. ____ (2021), 2021 WL 5027177, at *3–4 (U.S. Oct. 29, 2021) (Gorsuch, J. dissenting) ("[C]ivil liberties face grave risks when governments proclaim indefinite states of emergency," and therefore where there were already high vaccination rates in the fields affected by vaccination mandate, the state's "decision to deny a religious exemption . . . doesn't just fail the least restrictive means test, it borders on the irrational").

But the Exemption Policies fail under the "compelling interest" prong for another,

simpler reason, because we must also ask the more specific question of "whether [CU] has . . . an interest *in denying an exception*," *Fulton*, 141 S. Ct. at 1871, to those of unworthy religions. *See also Mills*, 2021 WL 5027177 at *3 (Gorsuch, J. dissenting) (the Supreme "Court has made plain that only the government's . . . asserted interests as applied to the parties before it count," rather than the interests as expressed at an "artificially high," "society-wide level of generality") (emphasis removed) (citation omitted). "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Fulton*, 141 S. Ct. at 1871.

Here, the Exemption Policies do just that, offering exemptions for medical and *some* religious reasons, while denying exemptions to adherents of religions not deemed worthy. There is no reason to believe that the "damage" caused by those who *are* exemption-eligible under the Exemption Policies would be less than that caused by those of disfavored religions if they were granted exemptions, and CU can "offer[] no compelling reason" for doing precisely what the First Amendment prohibits. *Fulton*, 141 S. Ct. at 1882; *see also Mills*, 2021 WL 5027177 at *2 (Gorsuch, J. dissenting) (where state provided broad medical exemption from vaccination requirement, but no religious exemption, "[t]hat kind of double standard is enough to trigger at least a more searching (strict scrutiny) review").

The Supreme Court has very recently reiterated, in the COVID context, that for the government to successfully show its "interest in reducing the spread of COVID," "it must show that the religious exercise at issue is more dangerous than" other permitted activities when the same precautions are applied to both. *Tandon v. Newsom,* 141 S. Ct. 1294, 1297 (April 9, 2021);

see also United States v. Friday, 525 F.3d 938, 958 (10th Cir. 2008) ("Underinclusiveness suggests that the government's 'supposedly vital interest' is not really compelling."). In this case, that means CU must show that the "activity" (being on campus) of an unvaccinated adherent of an "unworthy" religion is more dangerous than the "activity" (being on campus) of an unvaccinated person granted an exemption for a medical or worthy religious reason.

No such fantasy can be conjured: CU cannot make such a showing. *See Mills*, 2021 WL 5027177, at *2 (Gorsuch, J. dissenting) (government may not "blithely assume those claiming" an exemption for a favored reason "will be more willing to wear protective gear, submit to testing, or take other precautions than someone seeking" an exemption for a disfavored reason).

Indeed, there is not even a rational basis for such discrimination. Nothing about "the characteristics" of adherents of unworthy religions "rationally justify denying to [them] what would [and has already been] permitted to [individuals] occupying the same site" for the same purposes. *City of Cleburne, Tex.v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (Equal Protection case holding that zoning ordinance excluding group home for the intellectually disabled was not rationally related to a legitimate interest since such homes would not pose a special threat to the City's interest).

Accordingly, under multiple "compelling interest" inquiries, the Exemption Policies fail.

d. The Exemption Policy is Not Narrowly Tailored

The Exemption Policies likewise fail under the "narrow tailoring" prong. The question here is whether CU's "conduct is narrowly tailored to achieve" its purported "interest in denying exception[s]" to some religious adherents but not to others. *Fulton*, 141 S. Ct. at 1881.

"Narrow tailoring requires the government to demonstrate that a policy is the 'least restrictive means' of achieving its objective." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (quoting *Thomas*, 450 U.S. at 718). "[T]he government must show that it 'seriously undertook to address the problem with less intrusive tools readily available to it.'" *Agudath Israel of Am.*, 983 F.3d at 633 (quoting *McCullen v. Coakley*, 573 U.S. 464, 494 (2014)).

CU cannot adequately explain why the exemptions that must be granted for medical or *some* religious reasons cannot similarly be granted to all with sincere religious objections. Nor can CU show that it gave "sufficient weight to rules in other jurisdictions" in order to arrive at a properly tailored path forward. *See Mast v. Fillmore Cnty., Minnesota*, 141 S. Ct. 2430, 2433 (2021) (Gorsuch, J., concurring) ("It is the government's burden to show [such] alternative[s] won't work; not the [challenger's] to show [they] will"); *see also McCullen v. Coakley,* 573 U.S. at 494 (government must "show[] that it considered different methods that other jurisdictions have found effective").

Finally, as with the "compelling interest" analysis, underinclusiveness is an important consideration in the "narrow tailoring" analysis. In *Colorado Christian Univ.*, "Colorado['s] [challenged provisions] d[id] not stop students from taking scholarship money to religious universities," but only "from taking scholarship money to a narrow set of them that state officials regard as too pervasively so." *Colorado Christian Univ.*, 534 F.3d at 1268. Such "underinclusiveness undermine[d] the [government's] claim of narrow tailoring." *Id.* (citing *Friday*, 525 F.3d at 958).

Because, as noted above, CU cannot show that the "activity" (being on campus) of an

unvaccinated adherent of an "unworthy" religion is more dangerous than the "activity" (being on campus) of an unvaccinated person granted an exemption for a medical or "worthy" religious reason, the Exemption Policies are not narrowly tailored according to the "underinclusive" test. Accordingly, under multiple "narrow tailoring" inquiries, the Exemption Policies fail.

The Exemption Policies are neither neutral nor generally applicable. They run afoul, on multiple grounds, of the Establishment Clause. The Original Exemption Policy specifically violates the Establishment Clause by causing excessive entanglement of government in religion, which renders it unconstitutional without further inquiry.

Furthermore, because the Exemption Policies fail both the "compelling interest" prong of strict scrutiny and the "narrow tailoring" prong of strict scrutiny, both on multiple grounds, they cannot survive strict scrutiny. Accordingly, the Exemption Policies are unconstitutional under the Establishment Clause.

G. The CU Mandate's Exemption Policies Violate the Free Exercise Clause.

"Th[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245; *see also Lukumi*, 508 U.S. at 532–33; *Larson*, 456 U.S. at 246 (citing *Abington School District v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg J., concurring)).

While the government "establishes" a religion by giving it preferential treatment, it burdens the free exercise of religion by coercing those of a given religion to forego that religion or its commands as the cost of a benefit.

As with the Establishment Clause, the Free Exercise Clause's protections are not limited

to religions that possess a certain degree of "religiosity." Instead, the Supreme Court has adopted "a more subjective definition of religion, which examines an individual's inward attitudes towards a particular belief system." *Int'l Soc. for Krishna Consciousness, Inc.,* 650 F.2d at 439 (citing *Ballard*, 322 U.S. at 86 and *Thomas v. Rev. Bd.*, 101 S. Ct. 1425, 1429 (1981)).

Therefore, because "[t]he free exercise of religion promotes the inviolability of individual conscience . . . *private choice,* not official coercion, should form the basis for religious conduct and belief." *Id.* at 438 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring)); *see also id.* at 439 (noting that First Amendment's goals "can best be satisfied if any belief that is *arguably religious* is considered 'religious' for the sake of free exercise analysis") (emphasis added).

In short, when the state picks and chooses between favored and disfavored systems of belief, "truly religious" and "non-legitimate" (or simply "personal") belief systems, even if it does not "directly" burden religious freedom in the same way that (for example) criminalization of "a particular faith or religious practice" would, *Dahl*, 2021 WL 4618519 at *2 (citing *Smith,* 494 U.S. at 877–78), it nonetheless impermissibly imposes "indirect coercion or penalties on the free exercise of religion," *id.* (quoting *Trinity Lutheran Church of Columbia, Inc.,* 137 S. Ct. at 2022.

"Accordingly, a policy that forces a person to choose between observing her religious beliefs and receiving a generally available government benefit for which she is otherwise qualified burdens her free exercise rights." *Id.* (citing *Fulton*, 141 S. Ct. at 1876; *Trinity Lutheran,* 137 S. Ct. at 2023). Such "[v]iolations of the . . . Free Exercise Clause[] are generally

analyzed in terms of strict scrutiny." *Colorado Christian Univ.*, 534 F.3d at 1266.

1. CU's Exemption Policies Violate the Free Exercise Clause in at Least Two Ways.

In a case of this nature, Free Exercise Clause violations go hand-in-hand with Establishment Clause violations. Specifically, by offering religious exemptions only to those whose religions it deems worthy—whether under the Original Exemption Policy's acceptance only of religions that prohibit *all* vaccinations or the September 24 Exemption Policy's distinguishing between religions practiced by students and religions practiced by employees, under which students continue to suffer the same harm—CU violates "[t]he free exercise [clause's] promot[ion of] the inviolability of *individual conscience*" by failing to "recogniz[e] that *private choice* . . . should form the basis for religious conduct and belief." *Int'l Soc. for Krishna Consciousness*, 650 F.2d at 438 (citation omitted).

Furthermore, in attaching a benefit to the religions it deems worthy and no others—whether by discriminating between religions that prohibit *all* vaccines and those that do not, or between the religions of students and those of employees—the Exemption Policies are not neutral. They violate the Free Exercise Clause's prohibition on "indirect coercion or penalties on the free exercise of religion," *Dahl*, 2021 WL 4618519 at *2 (quoting *Trinity Lutheran*, 137 S. Ct. at 2022), forcing students to "choose between their religious beliefs and receiving a government benefit," *Trinity Lutheran*, 137 S. Ct. at 2023.

And the Exemption Policies are not generally applicable, as both provide exemptions for medical reasons and *some* religious reasons.

2. The Court Must Apply Strict Scrutiny, Which the Exemption Policies Cannot Survive.

For all of the reasons above, regardless of whether these facially discriminatory Exemption Policies were "in fact executed" in a seemingly neutral way (i.e., granting no religious exemptions), *see Dahl*, 2021 WL 4618519 at *4, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable," *Fulton*, 141 S. Ct. at 1879 (2021). Nor, as also explained above, are the Exemption Policies neutral. "Th[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause," *Larson*, 456 U.S. at 245.

The Exemption Policies' violation of the Free Exercise Clause means they are subject to strict scrutiny. As explained above, they fail in numerous ways under both the "compelling interest" prong and the "narrow tailoring" prong. Because the Exemption Policies fail both the "compelling interest" prong of strict scrutiny and the "narrow tailoring" prong of strict scrutiny, both on multiple grounds, they cannot survive strict scrutiny.

H. The CU Mandate's Exemption Policies Violate the Equal Protection Clause.

"[I]nterdenominational discrimination" is a "[v]iolation of the *Equal Protection and* Free Exercise Clauses." *Colorado Christian Univ.*, 534 F.3d at 1266. Just as "law[s] burdening religious practice that [are] not neutral or not of general application must undergo the most rigorous of scrutiny," *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546, so must violations of the Equal Protection Clause's similar requirement "that all persons similarly situated should be treated alike," *City of Cleburne, Tex.*, 473 U.S. at 439. *See also Colorado Christian Univ.*, 534 F.3d at 1259, 1266 ("explicit and deliberate distinctions between different religious

organizations" burden the Equal Protection Clause, triggering strict scrutiny due to lack of neutrality).

Because CU infringes on Establishment and Free Exercise Clause protections in multiple ways, it likewise infringes on the parallel protections of the Equal Protection clause.

By violating the Establishment Clause's prohibition on the government requiring those holding religious beliefs to "be responding to the commands of a particular religious organization" in order to claim its protection, *Frazee*, 489 U.S. at 834, and by violating the "the clearest command of the Establishment Clause," "that one religious denomination cannot be officially preferred over another," *Larson,* 456 U.S. at 244, and by excessive entanglement, the Exemption Policies violate the "parallel" protections of the Equal Protection Clause, *Colorado Christian Univ.*, 534 F.3d at 1257.

By violating the Free Exercise Clause's promotion of "the inviolability of individual conscience" and engaging in "official coercion . . . [in] religious conduct and belief," *Int'l Soc. for Krishna Consciousness*, 650 F.2d at 438 (citations omitted), the Exemption Policies "[v]iolat[e] . . . Equal Protection." *Colorado Christian Univ.*, 534 F.3d at 1266.

Regardless of whether the discriminatory Exemption Policies were "in fact executed" in a seemingly neutral way (i.e., granting no religious exemptions), *see Dahl*, 2021 WL 4618519 at *4, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable," *Fulton*, 141 S. Ct. at 1879 (2021). Nor are the Exemption Policies neutral.

Because the Exemption Policies are neither neutral nor generally applicable, but run afoul, on multiple grounds, of the Equal Protection Clause, and because they fails both the

"compelling interest" and "narrow tailoring" prongs of strict scrutiny on multiple grounds and therefore cannot survive strict scrutiny, the Exemption Policies are unconstitutional under the Equal Protection Clause.

II. Students Have Suffered Irreparable Harm.

To constitute irreparable harm, an injury must be certain, great, actual "and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). To the extent that a plaintiff establishes a constitutional harm, the law presumes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (First Amendment political association); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 & n. 2 (10th Cir. 2001); *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); 11 A Wright & Miller, Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary.").

Given that Students constitutional rights are being violated, they have established irreparable harm.

III. The Balance of Equities Tips in Students Favor.

Since Students are likely to succeed on the merits of their claim, the balance of harms does not need to favor them as strongly. *See Legacy Church, Inc. v. Kunkel*, 472 F. Supp. 3d 926, 1062 (D.N.M. 2020), aff'd sub nom. *Legacy Church, Inc. v. Collins*, 853 F. App'x 316 (10th Cir. 2021). Nevertheless, Students have shown that the balance of harm tips in their favor, where their constitutional rights are being violated, which is a significant harm.

In contrast, CU will experience no harm if the mandate is enjoined. First, vaccines do not stop transmission so the CU Mandate is not promoting public health on CU's campuses. Second, CU has already reached herd immunity, so the mandate is unnecessary. Third, CU already allows exemptions for certain persons, so allowing additional persons to attend without the vaccine would not harm CU. Finally, the public can protect themselves from the COVID virus by voluntary vaccination, social distancing, and masking.

IV. A Preliminary Injunction Is Not Adverse to the Public Interest.

Given the significant constitutional injury here, the public interest favor Students.

Students have shown that CU is unreasonably infringing on their constitutional rights when the correct constitutional standard is employed, so enjoining that violation is in the public interest.

In contrast, the public loses nothing if the CU Mandate is enjoined. As shown above, CU's Mandate does not protect the public health, so the public is at no greater risk if the CU Mandate is enjoined. Additionally, voluntary vaccination is available for anyone that desires to get vaccinated. So a preliminary injunction would not be adverse to the public interest.

Conclusion

For the reasons detailed herein, this Court should find that heightened scrutiny applies to the CU Mandate since it violates Students' constitutional rights to bodily integrity and autonomy and medical treatment choice, so that CU must prove that its Mandate is justified. Likewise, this Court should find that CU failed to prove that the CU Mandate is justified under heightened scrutiny. Finally, this Court should find that the CU Mandate is unconstitutional.

The CU Mandate's Exemption Policies are neither neutral nor generally applicable. They run afoul, on multiple grounds, of the Establishment and Free Exercise Clauses. The Original Exemption Policy specifically violates the Establishment Clause by causing excessive entanglement of government in religion, which renders it unconstitutional without further inquiry.

Furthermore, because the Exemption Policies fail both the "compelling interest" prong of strict scrutiny and the "narrow tailoring" prong of strict scrutiny, both on multiple grounds, they cannot survive strict scrutiny. Accordingly, the Exemption Policies are unconstitutional under the Establishment and Free Exercise Clauses, failing both strict scrutiny and (as to the Original Exemption Policy) the Establishment Clause's "excessive entanglement" inquiry.

Because the Exemption Policies are neither neutral nor generally applicable, but run afoul, on multiple grounds, of the Equal Protection Clause, and because they fail both the "compelling interest" and "narrow tailoring" prongs of strict scrutiny on multiple grounds and therefore cannot survive strict scrutiny, the Exemption Policies are also unconstitutional under the Equal Protection Clause.

Accordingly, the Court should find the CU Mandate unconstitutional and enjoin its enforcement.

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Respectfully Submitted,

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Certificate of Service

I hereby certify that on January 4, 2022, I served the foregoing document to the following non-CM/ECF participants via U.S. first class mail:

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