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<u>The Authority of Public Entities to Impose COVID-19 Related Regulations and Mandates to Provide Exemptions Therefrom and Related Liability Issues</u>

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. VACCINE MANDATES 1

A. Early Case Law Re: School Vaccine Mandates 1

B. States Have The Power to Decide What Vaccines Should Be Mandated By Schools 2

C. Nationwide Student Vaccine Mandate 2

D. Nationwide School Faculty Vaccine Mandates 3

E. Vaccine Mandates in the Workplace 3

F. Religious Exemptions From COVID-19 Vaccines 7

III. MASK MANDATES 10

A. Federal Mask Mandate In Public Transportation Declared Unlawful 10

B. Mask Mandate Challenges Under The Substantive Due Process Clause Of The Fourteenth Amendment 10

C. Confrontation Clause Challenges Related To Criminal Defendants 11

IV. SOCIAL DISTANCING 12

A. Civil Immigration Detainees 12

B. Prison Inmates 13

V. EVICTION MORATORIUMS 14

A. CONTRACTS CLAUSE 14

1. The Eviction Moratorium Did Not Violate The Contracts Clause 15

2. The Eviction Moratorium Was An “Appropriate And Reasonable Way To Advance A Significant And Legitimate Public Purpose.” 16

B. TAKINGS CLAUSE 17

1. Per Se Taking Or Physical Taking 17

2. Regulatory Taking 19

C. Due Process Clause 20

D. Preemption 20

VI. PUBLIC ENTITY LIABILITY FOR A “DANGEROUS CONDITION OF PUBLIC PROPERTY” 21

A. Government Code § 835 22

B. Elements Of A Dangerous Condition Claim 22

TABLE OF CONTENTS
(Continued)

Page

1. Was The Entity's Property A Dangerous Condition? 22
2. Did The Entity Create Or Have Notice Of The Alleged Dangerous Condition? 22
3. Did The Alleged Dangerous Condition Cause Plaintiff's Claimed Injuries? 23

C. Immunity 23
1. Discretionary Immunity 23
2. Mandatory Duties And Immunity 24

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I. INTRODUCTION

The purpose of this session is to provide a general overview of legal issues associated with legislative actions, ordinances and executive orders which impose mask mandates, social distancing, eviction moratoriums and vaccine mandates to combat COVID-19.

As we all know, COVID-19 is an extremely contagious virus that has resulted in more than 660 million confirmed cases and more than 6.7 million deaths globally to date[1]. In the United States alone, there are more than 100 million confirmed cases and more than 1 million deaths to date[2]. In order to minimize the harm brought on by the COVID-19 pandemic, both the federal government and local governments across the United States have taken a variety of actions to impose mask mandates, social distancing, eviction moratoriums and vaccine mandates. This session is to give the audience a better understanding of the public entities' rights, limitations, and potential liabilities in imposing such mandates.

II. VACCINE MANDATES

Vaccine mandates in the United States are not new requirements imposed upon individuals in order to be able to attend public school. However, during the COVID-19 pandemic, coronavirus vaccine requirements were imposed upon not only schools, but also places of employment. Different measures such as coronavirus testing, social distancing and mask mandates were also implemented to mitigate the spread of the coronavirus, and in some cases, as accommodations in lieu of vaccination. Coronavirus vaccine mandates have led to various legal challenges in the courts against the requirement in schools, public and private employment.

A. Early Case Law Re: School Vaccine Mandates

1. In *Abeel v. Clark* (1890) 84 Cal. 226, the State of California had implemented a law mandating vaccination of students for smallpox before their admission to public schools. An unvaccinated student sued the principal of the public school after he was denied admission to the school due to his vaccination status. The student challenged the validity of the State's vaccination act titled, " 'An act to encourge (*sic*) and provide for a general vaccination in the state of California.' " which required schools to exclude "any child or person who has not been vaccinated, until such time when said child or person shall be successfully vaccinated" unless a "practicing and licensed physician may certify that the child or person has used due diligence, and cannot be vaccinated…" (*Abeel v. Clark*, 84 Cal. at 227-228 [internal citations omitted].) The Court held that the vaccination act did not violate the State's Constitution because it was within the State's police power which gave the legislature "power to enact such laws as it may deem necessary, not repugnant to the constitution, to secure and maintain the health and prosperity of the state, by subjecting both persons and property to such reasonable restraints and burdens as will effectuate such objects." (*Id.* at

[1] See https://covid19.who.int/

[2] See https://covid.cdc.gov/covid-data-tracker/#datatracker-home

230.)

2. For similar reasons, in *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 25 S.Ct. 358, the United States Supreme Court held that a city could require its residents to be vaccinated against smallpox. (See also *Zucht v. King* (1922) 260 U.S. 174, 43 S.Ct. 24, [holding an ordinance excluding from the public schools or other places of education, children or other persons not having a certificate of vaccination does not confer arbitrary power, but only the broad discretion required for the protection of public health].)

B. States Have The Power to Decide What Vaccines Should Be Mandated By Schools

On October 20, 2022, the Centers for Disease Control and Prevention's ("CDC") Advisory Committee on Immunization Practices ("ACIP") added the COVID-19 vaccines to the recommended pediatric immunization schedule.[3] However, the ACIP serves only as a guideline and not a mandate because State governments retain the power to determine school immunization requirements within their jurisdictions. Recently, the California Court of Appeals for the Fourth Appellate District affirmed the States power in *Let Them Choose v. San Diego Unified School District* (2022) 85 Cal. App. 5th 693.

a. *Let Them Choose v. San Diego Unified School District* (2022) 85 Cal. App. 5th 693

In *Let Them Choose*, the school district imposed a coronavirus vaccination mandate for students ages 16 or older in order to attend school in-person and participate in extracurricular activities including sports. If the students failed to get vaccinated, they were involuntarily placed on independent study. The Court of Appeal affirmed the Superior Court's finding that the school district's vaccination mandate was preempted by State law because existing state statutes and regulations already mandated that students be vaccinated against other diseases.

Furthermore, the Court analyzed intrastate preemption jurisprudence and determined that the school district's policy was preempted by California law because the policy 1) contradicted existing statutes, and 2) purported "to regulate an area of law that the Legislature has 'fully occupied.'"[4] Thus, only the California Legislature has the authority to impose a COVID-19 vaccine mandate.

C. Nationwide Student Vaccine Mandate

1. According to a State tracker from the National Academy for State Health Policy, as of December 27, 2022, only the District of Columbia has enacted

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[3] https://nashp.org/states-address-school-vaccine-mandates-and-mask-mandates/

[4] *Let Them Choose*, 85 Cal. App. 5th 693 [Intrastate preemption occurs when a local law either " " ' " ' " 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' " ' " [citing] (*T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1116.]

COVID-19 vaccines mandate for students. It is to take effect in the 2023-2024 school year.[5]

2. California is the only state to have an "announced pending student COVID-19 vaccine mandate" which will take effect after July 1, 2023 when the California Department of Public Health is set to initiate the regulatory process for this requirement. The California student COVID-19 vaccine mandate will "only apply to students in age groups for which a COVID-19 vaccine has received full FDA approval."

3. Additionally, 21 states have implemented "a ban on student COVID-19 vaccine mandates." Those states are: Alabama; Arizona; Arkansas; Florida; Georgia; Idaho; Indiana; Iowa; Kansas; Michigan; Mississippi; Montana; New Hampshire; Ohio; Oklahoma; South Carolina; South Dakota; Tennessee; Texas; Utah; and West Virginia.

4. The remainder of the States do not currently have a mandate or ban on student COVID-19 vaccine mandates. Although, Illinois, Louisiana, and New York previously had vaccination requirements, they have since all been terminated or been rescinded.

D. Nationwide School Faculty Vaccine Mandates

1. As of December 27, 2022, Oregon and the District of Columbia have enacted COVID-19 vaccine mandates for school faculty.

2. At least 14 states, have banned vaccine mandates on school faculty. Those states are: Arkansas; Florida; Georgia; Indiana; Kansas; Michigan; Mississippi; Montana; Ohio; South Carolina; Tennessee; Texas; Utah; and West Virginia.

3. The remainder of the states do not currently have a COVID-19 vaccine mandate or ban for school faculty. Although, California, Connecticut, Delaware, Hawaii, Illinois, New Jersey, New Mexico, New York and Washington previously had such vaccination requirements, they have since terminated or have been rescinded.

E. Vaccine Mandates in the Workplace

1. Federal Government Mandates

In response to the COVID-19 pandemic, the federal government in 2021 imposed several vaccine mandates on the workforce. Among those mandates are the federal contractor mandates, federal employee mandates, employers with 100 or more employees vaccination and testing mandates and Centers for Medicare and Medicaid Services' ("CMS") Medicare/Medicaid provider mandate. These federal "employment or workforce-based mandates [are] subject to accommodations required by federal law [and] either directly require certain employees to receive COVID-19

[5] https://nashp.org/states-address-school-vaccine-mandates-and-mask-mandates/

vaccinations or direct certain employers to impose a vaccination or vaccination-and-testing requirement on their employees or staff."[6] Like other COVID-19 vaccine mandates, these federal vaccination mandates have been legally challenged in the courts resulting in the mandates being "enjoined by courts either on a nationwide basis or only in certain states."[7]

a. Contractor's Mandate (Executive Order 14042-Ensuring Adequate COVID Safety Protocols for Federal Contractors)

By way of Executive Order 14042 ("EO 14042") through the Federal Property and Administrative Services Act, President Biden required that government contracts include a clause requiring federal contractors and subcontractors ensure their employees were fully vaccinated for COVID-19 by January 18, 2022 unless the employee legally qualified for an accommodation.[8] The mandate would effectively apply to State Universities and other entities which rely on funding from federal contracts.

The EO 14042 was legally challenged in various separate actions by several States and the Courts enjoined the mandate against those States. (*Missouri v. Biden* (E.D. Mo. 2021) 576 F. Supp. 3d 622, 635 [enjoining enforcement in Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming]; *Louisiana v. Biden* (W.D. La. 2021) 575 F. Supp. 3d 680, 695-696 [enjoining enforcement in Louisiana, Mississippi, and Indiana, and their agencies]; *Kentucky v. Biden* (E.D. Ky. 2021) 571 F. Supp. 3d 715, 735 [enjoining enforcement in Kentucky, Ohio, and Tennessee]; and *Florida v. Nelson* (M.D. Fla. 2021) 576 F. Supp. 3d 1017 [enjoining enforcement in Florida].)

On December 7, 2021, the Federal District Court in *Georgia v. Biden* (S.D. Ga. 2021) 574 F. Supp. 3d 1337, issued a nationwide injunction enjoining enforcement of the vaccine mandate against federal contractors. The Court held that when issuing EO 14042, the President exceeded the authority given to him by Congress through the Federal Property and Administrative Services Act. However, on August 26, 2022, the Eleventh Circuit Court of Appeals held the nationwide injunction was too broad and should be narrowed to only apply to the plaintiffs in that case which were the States of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, and West Virginia. (*Georgia v. Biden* (11th Cir. 2022) 46 F.4th 1283, 1287.

Subsequently, the Safer Federal Workforce Task Force, which was responsible for the enforcement of the mandate, updated its website on October 19, 2022 stating that despite the Eleventh Circuit "lifting of the nationwide bar to enforcement" of EO 14042, "at this time agencies should not: (1) take any steps to require covered contractors and subcontractors to come into compliance with previously issued Task Force guidance; or (2) enforce any contract clauses implementing Executive Order

[6] https://crsreports.congress.gov/product/pdf/LSB/LSB10681

[7] https://crsreports.congress.gov/product/pdf/LSB/LSB10681

[8] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/

14042."[9] Therefore, according to this latest update, the federal government has ceased enforcement of EO 14042 in its entirety.

b. Federal Employee Mandate (Executive Order 14043-Requiring Coronavirus Disease 2019 Vaccination for Federal Employees)

On September 9, 2021, President Biden issued Executive Order 14043 ("EO 14043") which required that all federal government employees be vaccinated against COVID-19, unless they qualify for an accommodation, "to promote the health and safety of the Federal workforce and the efficiency of the civil service."[10] As was the case with other vaccine mandates, EO 14043 was legally challenged, and on January 21, 2022, a District Court in Texas granted a nationwide injunction and enjoined enforcement of the mandate in *Feds for Med. Freedom v. Biden* (S.D. Tex. 2022) 581 F. Supp. 3d 826, 832.

In reaching its decision, the Court determined that President Biden had exceeded his authority in requiring, without authorization from Congress, that "millions of federal employees to undergo a medical procedure as a condition of their employment." (*Id.* at 829.)

The federal government appealed the decision to the Fifth Circuit Court of Appeals, arguing that federal employees challenging the mandate did not have standing to bring an action in federal district court and instead, were required to bring a complaint before a federal review board with the Civil Service Reform Act. (*Feds for Med. Freedom v. Biden* (5th Cir. 2022) 30 F.4th 503.) The Fifth Circuit agreed with the federal government and vacated the district court's preliminary injunction and remanded the case to the district court with instructions to dismiss the case based on a lack of jurisdiction.

However, on June 27, 2022, the Fifth Circuit vacated the panel ruling agreeing to hold a rehearing en banc. Thus, the injunction previously issued by the District Court remained in place. The Court held an en banc hearing on September 13, 2022 but did not state when a ruling would be issued. As of the date of this writing, a decision has not been issued by the Court. Therefore, the January 21, 2022 injunction enjoining enforcement of EO 14043 remains in place.

c. Employers with 100 or more employees vaccination and testing mandate (OSHA ETS)

In response to President Biden's announcement on September 9, 2021 that he planned to increase vaccinations among Americans by requiring employers with at least 100 employees to ensure their employees are fully vaccinated or present a negative test at least once a week, the federal Occupational Safety and Health Administration ("OSHA") issued an Emergency Temporary Standard ("ETS")

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[9] https://www.saferfederalworkforce.gov/contractors/

[10] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/

requiring all employers with at least 100 employees ensure all workers are fully vaccinated against COVID-19 or submit to weekly COVID-19 testing. (COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 FR 61402-01.) The ETS required that all employees be vaccinated unless the employee qualified for a medical or religious exemption. Exempt employees were required to participate in weekly testing and wear face coverings; or employees could either show proof of vaccination status or participate in weekly testing. (COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 FR 61402-01.)

Numerous legal challenges were filed against the ETS across the country. On November 12, 2021, the Fifth Circuit Court of Appeals issued an order staying enforcement of the ETS. (*BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.* (5th Cir. 2021) 17 F.4th 604.) Other legal challenges were consolidated for review before the Sixth Circuit Court of Appeals which then dissolved the Fifth Circuit's stay of the ETS on December 17, 2021. (*In re MCP NO. 165* (6th Cir. 2021) 21 F.4th 357.) Several emergency appeal applications were then immediately filed with the U.S. Supreme Court.

On January 13, 2022, the U.S. Supreme Court once again stayed the implementation of the ETS in a 6-3 decision, holding that the challengers were likely to succeed on their argument that OSHA lacked the statutory authority to publish the ETS. In its decision, the U.S. Supreme Court noted that OSHA is empowered to "set *workplace* safety standards, not broad public health measures." (*Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.* (2022) 595 U.S. _ [142 S. Ct. 661] [emphasis in original].) The Court reasoned that "[a]lthough COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most[]" because "COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather." (*Id.* emphasis in original.) The Court further reasoned that COVID–19 is a "universal risk [] no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases." (*Id.*) Therefore, the Court concluded that "[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization." (*Id.*) Subsequently, on January 25, 2022, OSHA announced its withdrawal of the ETS effective January 26, 2022.[11]

d. CMS's Medicare/Medicaid Provider Mandate Requiring Vaccination is Legal

On November 5, 2021, the Secretary of Health and Human Services which administers the Medicare and Medicaid programs, issued a new rule requiring all facilities participating in Medicare and Medicaid programs to ensure their employees were vaccinated against COVID-19 in order to continue receiving federal

[11] https://www.osha.gov/coronavirus/ets2

funding.[12] On January 13, 2022, the United States Supreme Court held "the Secretary did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID–19." (*Biden v. Missouri* (2022) 595 U.S. _ [142 S. Ct. 647, 653].)

2. Private Employer Vaccine Mandates

The U.S. Supreme Court's decision blocking OSHA's vaccine mandate for large employers does not prevent private employers from implementing a vaccine mandate in the workplace.[13] "[O]n July 6, 2021, the U.S. Department of Justice's Office of Legal Counsel issued a Memorandum Opinion concluding that section 564 of the Federal Food, Drug, and Cosmetic Act does not prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an" Emergency Use Authorization.[14] Nevertheless, States have the authority to prohibit employers from implementing vaccine or other mandates in the workplace.

As of December 27, 2022, only the State of Montana has banned private employer vaccine mandates. Utah, Arizona, Texas, Nebraska, Kansas, North Dakota, Arkansas, Mississippi, Alabama, Florida, Tennessee, South Carolina, West Virginia and Indiana require that employers allow at least medical and religious exemptions if they implement a vaccine mandate.[15]

F. <u>Religious Exemptions From COVID-19 Vaccines</u>

According to the Equal Employment Opportunity Commission ("EEOC"), an employer can impose COVID-19 vaccine mandates on their employees as long as they provide reasonable accommodations pursuant to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act ("ADA"), for some employees.[16] Reasonable accommodations may include religious exemptions.

1. Employer And Employee Guidelines To Follow When A Request For Exemption From Vaccination Requirements Is Made

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[12] Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 FR 61555-01

[13] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K

[14] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K

[15] https://nashp.org/state-efforts-to-ban-or-enforce-covid-19-vaccine-mandates-and-passports/

[16] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L

a. Job applicants and employees must make a request to their employer informing them that they want a reasonable accommodation or exemption based on their sincerely held religious beliefs, practices or observances.

“Employees do not need to use any ‘magic words,’ such as ‘religious accommodation’ or ‘Title VII’ but they do “need to explain the conflict and the religious basis for it.”[17]

b. Employers should assume “that a request for religious accommodation is based on sincerely held religious beliefs, practices, or observances.” However, an employer may objectively make limited factual inquiries and request additional supporting information regarding the “religious nature or the sincerity of a particular belief” on which the request is based.[18] Social, political, or economic views or personal preferences are not protected under Title IV.

c. An employer is required to “thoroughly consider all possible reasonable accommodations”[19] Reasonable accommodations include: telework, reassignment, wearing a face mask, social distancing from coworkers or non-employees, a modified shift, or periodic testing for COVID-19.[20]

An employer is not restricted “to only those means of accommodation that are preferred by the employee” or “to accommodate an employee's religious practices in a way that spares the employee any cost whatsoever.” (*Barrington v. United Airlines, Inc.* (D. Colo. 2021) 566 F.Supp.3d 1102, 1108 [internal quotations omitted].) Additionally, “employers are not obligated to create a position to accommodate an employee's religious beliefs.” (*Id.*)

Robinson v. Children's Hosp. Bos. (D. Mass. Apr. 5, 2016) No. CV 14-10263-DJC, 2016 WL 1337255, at *8 [“the combination of the Hospital's efforts—allowing [the plaintiff] to seek a medical exemption, providing her reemployment resources, granting [her] time to secure new employment and preserving her ability to return to the Hospital by classifying her termination as a voluntary

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[17] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L

[18] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L

[19] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L

[20] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

resignation—amounted to a reasonable accommodation under Title VII"].

d. But if an employer proves that it cannot provide a reasonable accommodation to an employee's request without an "undue hardship", it is not required to provide the accommodation.

2. Employer's Undue Hardship

a. If employer has "to bear more than a *de minimis* cost" it is an undue hardship. (*Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 84, 97 S.Ct. 2264, 2277.)

b. "Factors to be considered include 'the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation.'"[21]

3. Examples of undue hardship include:

a. Religious accommodation that "would violate federal law, impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work"[22]

b. *Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. at 83 [stating that Title VII did not require the employer "to carve out a special exception to its seniority system in order to help [the plaintiff] to meet his religious obligations"];

c. *Toronka v. Cont'l Airlines, Inc.* (5th Cir. 2011) 411 F. App'x 719, 725 [stating that "precedent is plain that an employer is not required to create a new job type to accommodate a disabled employee" under the ADA];

d. *Hoskins v. Oakland Cty. Sheriff's Dep't* (6th Cir. 2000) 227 F.3d 719, 730 [stating that "an employer's duty to reassign an otherwise qualified disabled employee does not require that the employer create a new job in order to do so"];

e. *Lee v. ABF Freight Sys., Inc.* (10th Cir. 1994) 22 F.3d 1019, 1023 ["The cost of hiring an additional worker or the loss of production that results from not replacing a worker who is unavailable due to a religious conflict can amount to undue hardship."];

f. *Barrington v. United Airlines, Inc.*, 566 F. Supp. 3d at 1109 [Plaintiff,

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[21] https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftnref250

[22] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L

an airlines Ramp Services Supervisor, requested a COVID-19 exemption for religious beliefs and as an accommodation, requested that she be required to periodical test for COVID-19, wear a mask, and or maintain social distance from others. Employer argued the accommodations would be burdensome because it would be required to hire or train additional employees and also cause a heavier workload and/or modify job duties for existing employees such as Human Resources. It further argued the accommodations were an undue burden because it would place other employees at greater risk of contracting COVID-19. The Court agreed that accommodations would be an undue burden.]

III. MASK MANDATES

Mask mandates are legal but States have the authority to allow them or ban them. According to the National Academy for State Health Policy State tracker, as of December 27, 2022, the states of Arizona, Oklahoma, Iowa, Tennessee and South Carolina attempted to implement a ban on school mask mandates for either K-12 school districts or both K-12 school districts and institutions of higher education. However, the bans were legally challenged and either struck down or temporarily suspended.[23] Nevertheless, some state bans on school mask mandates such as in Texas and Florida have withstood legal challenges.

A. Federal Mask Mandate In Public Transportation Declared Unlawful

On February 3, 2021, the CDC published an Order that required "persons to wear masks over the mouth and nose when traveling on any conveyance (e.g., airplanes, trains, subways, buses, taxis, ride-shares, ferries, ships, trolleys, and cable cars) into or within the United States." (Requirement for Persons To Wear Masks While on Conveyances and at Transportation Hubs, 86 FR 8025-01.) In *Health Freedom Def. Fund, Inc. v. Biden* (M.D. Fla. 2022) 599 F. Supp. 3d 1144, 1155, plaintiffs challenged the mandate, alleging that it violated the Administrative Procedure Act ("APA"). The Court held "that the Mask Mandate exceed[ed] the CDC's statutory authority and violates the procedures required for agency rulemaking under the APA." (*Health Freedom Def. Fund, Inc. v. Biden,* 599 F. Supp. 3d at 1153.) Thus, the CDC rescinded its Mask Mandate effective April 18, 2022.[24]

Other legal challenges to mask mandates are premised under the United States Constitution.

B. Mask Mandate Challenges Under The Substantive Due Process Clause Of The Fourteenth Amendment

1. "To state a substantive due process claim, a plaintiff must allege (1) a valid liberty or property interest, (2) which the government infringed in an arbitrary or irrational manner." (*Health Freedom Def. Fund, Inc. v. City of Hailey, Idaho* (D. Idaho 2022) 590 F. Supp. 3d 1253, 1265 [citing *Vill. of Euclid, Ohio v. Ambler Realty Co.* (1926) 272 U.S. 365, 395, 47 S.Ct. 114,

[23] https://nashp.org/states-address-school-vaccine-mandates-and-mask-mandates/

[24] https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html

121.) A "fundamental" right receives greater protection under the U.S. Constitution and requires strict scrutiny. (*Washington v. Glucksberg* (1997) 521 U.S. 702, 720-21, 117 S.Ct. 2258, 2267–2268; *Plyler v. Doe* (1982) 457 U.S. 202, 216–17, 102 S.Ct. 2382, 2394–2395. If a fundamental right is not at issue, rational-basis scrutiny is appropriate. (*Id.*)

2. While there is a fundamental right to medical autonomy, mask-mandates are not a form of medical treatment that triggers a fundamental liberty interest. (*Health Freedom Def. Fund, Inc.*, 590 F. Supp. 3d 1253, 1266; see also *Forbes v. County of San Diego* (S.D. Cal., Mar. 4, 2021) 2021 WL 843175, at *5 [granting a motion to dismiss a due process challenge to California's statewide mask mandate because the mandate did not implicate "a fundamental liberty interest protected by the substantive component of the Due Process Clause"]; *Gunter v. N. Wasco Cnty. Sch. Dist. Bd. of Educ.* (D. Or. 2021) 577 F. Supp. 3d 1141, 1156 [noting "mask mandate no more requires a medical treatment than laws requiring shoes in public places or helmets while riding a motorcycle"]; *W.S. by Sonderman v. Ragsdale* (N.D. Ga. 2021) 540 F.Supp.3d 1215, 1218 ["Rational basis is the proper standard of review for the mask mandate. The mandate neither discriminates against a protected class nor infringes a fundamental right."]; *Miranda ex rel. M.M. v. Alexander* (M.D. La., Sept. 24, 2021) 2021 WL 4352328, at 4 [noting that "there is no fundamental constitutional right to not wear a mask"]; *Denis v. Ige* (D. Haw. 2021) 557 F.Supp.3d 1083 [dismissing a Fourteenth Amendment challenge to a statewide mask-mandate with prejudice because mask-mandates "do not infringe on fundamental rights"].)

3. Because mask mandates do not trigger a fundamental right, the rational basis standard of review is used. Rational-basis review is highly deferential to government action and easily met. (*Schweiker v. Wilson* (1981) 450 U.S. 221, 234, 101 S.Ct. 1074, 1082–1083.) Thus, many courts have upheld the constitutionality of mask mandate. (*See e.g. Health Freedom Def. Fund, Inc., I* 590 F. Supp. 3d 1253, 1268 ["there can be little doubt in this case that the City's mask mandate is rationally related to a legitimate government interest—that of the health and safety of its citizens."]; *Stepien v. Murphy* (D.N.J. 2021)574 F.Supp.3d 229, 239 ["Defendants' arguments [in support of mask mandates] easily clear the relatively low bar of rational basis scrutiny."; "There are numerous bases on which a policy maker could conclude that requiring students, teachers, staff, and visitors at New Jersey schools to wear masks is rationally related to the legitimate government purpose of inhibiting the spread of COVID-19."]; *Denis v. Ige* (D. Haw. 2021) 538 F. Supp. 3d 1063, 1081 ["Mask Mandates are rationally related to a legitimate government purpose"].)

C. <u>Confrontation Clause Challenges Related To Criminal Defendants</u>

Criminal defendants have alleged constitutional violations under the Confrontation Clause of the Sixth Amendment when courts require masks to be worn in court rooms. The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

1. No Constitutional Violation

In *People v. Lopez* (2022) 75 Cal. App. 5th 227, 232, Defendant alleged "the court violated his constitutional right to confront witnesses because the jury was unable to properly judge the credibility of the witnesses and could not assess his own demeanor throughout the trial, due to the face masks." Relying on *Maryland v. Craig* (1990) 497 U.S. 836, 110 S.Ct. 3157, the California Court of Appeals held the mask requirements did not violate the Confrontation Clause because the court's mask requirement "furthered the public policy of protecting against the substantial health risks presented by the COVID-19 virus, particularly in an indoor setting like a courtroom." (*Id*. at 234.) The Court also found that "the mask requirement did not meaningfully diminish the face-to-face nature of the witness testimony" because the jurors "could see the witnesses' eyes, hear the tone of their voices, and assess their overall body language". (*Id*. at 234.) Thus, the Court concluded the mask requirement in court did not violate the Confrontation Clause. (*See also State v. Daniels* (Tenn. Crim. A29, 2022) 2022 WL 2348234, at *6 [courtroom procedures requiring defendant and jurors to wear face masks during criminal trial did not violate the defendant's right to confront witnesses].)

IV. SOCIAL DISTANCING

Social distancing measures such as mandatory stay at home orders, traveler quarantines, closures of non-essential businesses, bans on large gatherings, school closures, and limits on public places are legal under the states police power. (*Givens v. Newsom* (E.D. Cal. 2020) 459 F. Supp. 3d 1302 [States stay at home order against public gatherings including denial of permit applications to hold protests and political rallies at the State Capitol did not violate plaintiffs' constitutional rights because State had authority under the police powers to promote public safety.]; but see *S. Bay United Pentecostal Church v. Newsom* (2021) 592 U.S. _ [141 S. Ct. 716]; *Harvest Rock Church, Inc. v. Newsom* (2021) _U.S._, 141 S. Ct. 1289, 1290, [State could not prohibit indoor worship services.].)

A. Civil Immigration Detainees

An immigration detainee's conditions of confinement claim is properly analyzed under the Due Process Clause of the Fifth Amendment. (*See E.D. v. Sharkey* (3d Cir. 2019) 928 F.3d 299, 306–07 [holding that immigration detainees are entitled to the "same due process protections" as pretrial detainees]. Under the Fifth Amendment's Due Process Clause, "a detainee may not be punished prior to an adjudication of guilt." (*See Bell v. Wolfish* (1979) 441 U.S. 520, 535, 99 S.Ct. 1861, 1872.) Moreover, a civil detainee cannot be subjected to conditions which amount to punishment. (*See King v. Cty. of L.A.* (9th Cir. 2018) 885 F.3d 548, 556-557.)

In the context of a Due Process Clause failure-to-protect claim, the Ninth Circuit declared in *Castro v. Cty. of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1071, that a "defendant's conduct must be objectively unreasonable," based on the facts and circumstance of each case. Whether a challenged condition amounts to punishment depends on whether it "is reasonably related to a legitimate government objective." (*Sharkey*, 928 F.3d at 307.) If it is not, then a court may infer "that the purpose of the governmental action is punishment that may not be constitutionally inflected upon detainees *qua* detainees." (*Id.* [quoting *Hubbard v. Taylor* (3d Cir. 2008) 538 F.3d 229, 232].)

Whether a condition of confinement is reasonably related to a legitimate government objective turns on whether the condition serves a legitimate purpose and is rationally related to that purpose. (*See*

Hubbard, 538 F.3d at 232.) A petitioner can demonstrate that a challenged condition amounts to punishment if there is "an expressed intent to punish on the part of detention facility officials," if there is no "alternative purpose to which [the condition of confinement] may rationally be connected is assignable for it" *or* if the condition is "excessive in relation to the alternative purpose assigned [to it]."(*See Bell*, 441 U.S. at 538 [quoting *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, 168-69, 83 S.Ct. 554, 568.)

1. In *Juan E. M. v. Decker* (D.N.J. 2020) 458 F. Supp. 3d 244, 255, the court observed that courts within its district "have emphasized certain key factors in determining whether an immigration detainee's conditions of confinement amount to punishment during the current pandemic: namely, the detainee's health and the specific conditions at the facility at which he is detained."

2. "[M]any courts have found that insufficient jail action in light of the virus can serve as a basis for release ... while many others have found that, where the jail takes adequate precautions in light of a given petitioner's medical history, no such relief is warranted." (*Cristian R. v. Decker* (D.N.J. Apr. 28, 2020) Civ. No. 19-20861, 2020 WL 2029336, at *2.) *Compare Castillo v. Barr* (C.D. Cal. 2020) 449 F. Supp. 3d 915 [civil immigration detainees entitled to temporary restraining order to compel their release from immigration detention center under conditions which preventing them from maintaining social distance during pandemic]; *Bent v. Barr* (N.D. Cal. 2020) 445 F. Supp. 3d 408, 420 ["Courts have found a significant public interest in releasing ill and aging detainees and have accordingly ordered immediate release."]; *Ortuño v. Jennings* (N.D. Cal. Apr. 8, 2020) Case. No. 20-cv-2064-MMC, Docket No. 38, 2020 WL 1701724 [ordering release of certain immigration detainees due to the COVID-19 pandemic] *with Vazquez Barrera v. Wolf* (S.D. Tex. 2020) 455 F. Supp. 3d 330 [granting TRO to compel immediate release of a civil immigration detainee who has no history of violence from facility which did not provide access to masks, hand sanitizer or provide conditions allowing for social distancing and there was a significant risk of serious injury to detainees from COVID-19 exposure based on increased risk; denying the release of a civil immigration detainee who has a recent and violent criminal history because the public interest weighs against his release]; *Almeida v. Barr* (W.D. Wash. 2020) 452 F. Supp. 3d 978, 986 [denying TRO seeking release from the detention center when the detention center implemented robust measures to prevent the spread of COVID-19].)

B. <u>Prison Inmates</u>

"[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Farmer v. Brennan* (1994) 511 U.S. 825, 832, 114 S.Ct. 1970, 1976.) In its prohibition of "cruel and unusual punishments," the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. (*Id.*) The Amendment also imposes duties on these officials to provide humane conditions of confinement. (*Id.*) Prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must "take reasonable measures to guarantee the safety of the inmates." (*Id.*)

"To establish an Eighth Amendment violation based on a failure to prevent harm, the inmate must make both an objective showing that he is incarcerated under conditions posing a substantial risk of serious harm, and a subjective showing that the defendants demonstrated deliberate indifference' to inmate health or safety." (*Plata v. Newsom* (9th Cir. Apr. 25, 2022) No. 21-16696, 2022 WL 1210694, at *1 [internal citations omitted].) "Deliberate indifference is a high legal standard." (*Toguchi v. Chung* (9th Cir. 2004) 391 F.3d 1051, 1060.) Deliberate indifference is shown when the defendant provides medically unacceptable care in conscious disregard of an excessive risk to the plaintiff's health. (*Edmo v. Corizon, Inc.* (9th Cir. 2019) 935 F.3d 757, 786 [quoting *Hamby v. Hammond* (9th Cir. 2016) 821 F.3d 1085, 1092].) Disagreements about the best medical course of action do not qualify as deliberate indifference, negligence or malpractice. (*Plata*, 2022 WL 1210694, at *1.)

Courts seem to use a stricter standard to evaluate whether the conditions of confinement is constitutional. For example, in *Valentine v. Collier* (5th Cir. 2021) 993 F.3d 270, the Fifth Circuit reversed a district court's permanent injunction and held that the Texas Department of Corrections and the senior warden did not violate the Eighth amendment by failing to implement social distancing protocols in sleeping facilities. The Court recognized that there was a delay in facilitating social distancing for over one month, but nevertheless refused to conclude that the delay constituted a deliberate indifference to the inmates' health and safety. (*See also Matter of Pauley* (2020) 13 Wash. App. 2d 292, 466 P.3d 245 [holding that the prison inmate could not show that conditions of confinement violated the Eighth Amendment due to risks of COVID-19 exposure where the inmate failed to show that measures provided by Department of Corrections were inadequate even if the inmate was unable to social distance outside of cell.].)

V. EVICTION MORATORIUMS

In response to the coronavirus, in March 2020 Congress passed the Coronavirus Aid Relief, and Economic Security Act which "imposed a 120-day eviction moratorium for properties that participated in federal assistance programs or were subject to federally backed loans." (*Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.* (2021) _U.S._, 141 S. Ct. 2485, 2486.) After its expiration, Congress did not renew it but the CDC stepped in and imposed a broader moratorium that covered "all residential properties nationwide and imposing criminal penalties on violators." (*Id.*) The moratorium was subsequently extended and then renewed again by the CDC. (*Id.* at 2486–2487.) On August 26, 2021 the U.S. Supreme Court held that the CDC exceeded its authority and only Congress had the authority to extend the relief if it chose to do so. (*Id.* at 2490.)

As is the case with other COVID-19 related mandates, the States and local governments have power to enact eviction moratoriums. (See e.g. *Gonzales v. Inslee* (2022) 21 Wash. App. 2d 110, 504 P.3d 890; *Elmsford Apartment Associates, LLC v. Cuomo* (S.D.N.Y. 2020) 469 F.Supp.3d 148; *HAPCO v. City of Philadelphia* (E.D. Pa. 2020) 482 F.Supp.3d 337.)

A. CONTRACTS CLAUSE

The Contracts Clause provides that "No State shall ... pass any ... Law impairing the Obligation of Contracts." (U.S. Const. art. I, § 10, cl. 1.) A two-step test is used to evaluate whether a state law violates the Contracts Clause. (*Sveen v. Melin* (2018) _ U.S. _, 138 S.Ct. 1815,1821–22].) The first is "whether the state law has 'operated as a substantial impairment of a contractual relationship.'" (*Id.* [quoting *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 244, 98 S.Ct. 2716, 2722].) Courts consider "the extent to which the law undermines the contractual bargain, interferes

with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." (*Id.* at 1822.)

If the factors show a substantial impairment, then the second step is to analyze "the means and ends of the legislation." (*Id.*) The inquiry is focused on "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" (*Id.* [quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 411–412, 103 S.Ct. 697, 704].) A heightened level of scrutiny is applied when the government is a contracting party. (*Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (9th Cir. 2021) 10 F.4th 905, 913.) But when the government is not a party to the contract being impaired, courts defer to legislative judgment as to the necessity and reasonableness of a particular measure. (*Id.*) Therefore, a party challenging a law impairing private contracts bears the burden of establishing the unreasonableness of the law. (*Id.*; *See e.g. Baptiste v. Kennealy* (D. Mass. 2020) 490 F. Supp. 3d 353, 381-387 [holding that the plaintiff landlords were not likely to prove that Massachusetts' eviction moratorium violate Contracts Clause because the moratorium was temporary and courts gave deference to the judgment of elected officials when the state was not an interested party].)

1. The Eviction Moratorium Did Not Violate The Contracts Clause

a. In *Williams v. Alameda County* (N.D. Cal., Nov. 22, 2022, No. 3:22-CV-01274-LB) 2022 WL 17169833, the Court held that an eviction moratorium did not substantially impair the plaintiffs' contractual rights because (1) the moratorium at issue did not relieve tenants from the obligation to pay rent or stop unpaid rent from accruing, and the moratorium was not permanent; (2) the moratorium did not interfere with the landlords' reasonable expectations because of the "long history of regulations governing the landlord-tenant relationship and of Supreme Court cases upholding eviction moratoria;" and (3) the moratorium did not prevent landlords from safeguarding their contractual rights because they can still sue for breach of contract.(*Id.* at *14.)

b. In contrast, the Eighth Circuit reached a different conclusion in *Heights Apartments, LLC v. Walz* (8th Cir. 2022) 30 F.4th 720[25]. There, Minnesota Governor Walz signed a few Executive Orders ("EOs") which placed a moratorium on residential evictions in an effort to allow households to remain sheltered during the peacetime emergency and threatened criminal sanctions on landlords who violated the terms. *Id.* at 724. Heights Apartments LLC alleged the EOs unlawfully prevented it from excluding tenants who breached their leases, intruded on its ability to manage its private property, and interfered indefinitely with its collection of rents. The government moved to dismiss the complaint.

[25] Note that *Heights Apartments* is not a facial challenge as in *Williams*. The EOs in *Heights Apartments* had been voided by the Minnesota Legislature at the time of this opinion. Therefore, Heights' challenges to the now-voided EOs are moot to the extent they seek to enjoin the EOs and declare them invalid. But because Heights requested relief in the form of money damages, the Court considered the case as to its remaining claims.

The Eighth Court of Appeals held that because the plaintiff had alleged the EOs precluded it from exercising its right to exclude others and regain possession of its premises, the plaintiff plausibly pleaded that the EOs substantially impaired its contractual bargain with its tenants. *Id.* at 729. The Court also held that nothing in Minnesota law or Supreme Court precedent would have made the extent and reach of the EOs foreseeable to Heights notwithstanding the regulations in the residential housing industry. *Id.* Specifically, the Court pointed out that the EOs were exercise of executive power (as opposed to legislative authority) and had no definite termination dates. *Id.* at 730.

2. The Eviction Moratorium Was An "Appropriate And Reasonable Way To Advance A Significant And Legitimate Public Purpose."

a. In *Apartment Association of Los Angeles County., Inc. v. City of Los Angeles,* 10 F.4th 905, 913-914, the Ninth Circuit affirmed the denial of a motion for a preliminary injunction against the eviction moratorium. After "assuming without deciding that the eviction moratorium [was] a substantial impairment", the Court concluded that the eviction moratorium constituted an appropriate and reasonable way to advance a significant and legitimate public purpose given the challenges presented by COVID-19. (*Id.*) The Court stated that the government fairly tied the eviction moratorium to its stated goal of preventing displacement from homes, which could exacerbate the public health-related problems stemming from the COVID-19. (*Id.* at 914.) The Court refused to second-guess the City's determination that the eviction moratorium constitutes the most appropriate way of dealing with the problems identified, particularly based on modern Contracts Clause cases in the face of a public health situation like COVID-19. (*Id.*)

b. Similarly in *Williams*, 2022 WL 17169833, at *15, the Court held that the plaintiffs failed to meet their burden to show the eviction moratorium was unreasonable on its face because the government reasonably tied the moratorium to its stated goals, which were to reduce the transmission of COVID-19, promote housing stability during the COVID-19 pandemic and prevent avoidable homelessness. The Court also held that the moratorium was on its face temporary because it expired 60 days after the expiration of the Local Health Emergency. (*Id.*)

c. In contrast, in *Heights Apartments* (8th Cir. 2022) 30 F.4th 720, 731[26]. 731, the Court concluded that the Heights Apartments LLC alleged sufficient facts demonstrating that the Governor's Executive Orders were not reasonably tailored to advance the public purpose. In this regard, Heights

[26] Note that *Heights Apartments* is not a facial challenge as in *Williams*. The EOs in *Heights Apartments* had been voided by the Minnesota Legislature at the time of this opinion. Therefore, Heights' challenges to the now-voided EOs are moot to the extent they seek to enjoin the EOs and declare them invalid. But because Heights requested relief in the form of money damages, the Court considered the case as to its remaining claims.

Apartments LLC alleged that it could not evict tenants when they materially breached the lease for reasons unrelated to the nonpayment of rent, such as operating a car and boat shop on the premises, holding raucous parties, and creating nuisances that drove other rent-paying tenants to move. *Id*. Thus, the Court held that the EOs were not reasonably tailored to the public purpose of combating COVID-19.

B. TAKINGS CLAUSE

The Takings Clause "provides that private property shall not 'be taken for public use, without just compensation.' " (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 536, 125 S.Ct. 2074, 2080, [quoting U.S. Const. amend. V].) It applies to the states through the Fourteenth Amendment. (*Cedar Point Nursery v. Hassid* (2021) _U.S._, 141 S. Ct. 2063, 2071.)

There are two kinds of takings: (1) physical or per se takings; and (2) regulatory takings. (*Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency* (2002) 535 U.S. 302, 321, 122 S.Ct. 1465, 1478; *Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893, [there are "at least two discrete categories of regulatory action [that are] compensable without case-specific inquiry into the public interest advanced in support of the restraint," including physical invasions of property and the denial of "all economically beneficial or productive use" of property].)

1. Per Se Taking Or Physical Taking

Generally, a physical or "per se" taking means "a direct government appropriation or physical invasion of private property." (*Lingle* 544 U.S. at 537.) The Ninth Circuit has consistently held that laws governing the landlord-tenant relationship are not subject to a categorical per se takings analysis. (*Ballinger v. City of Oakland* (9th Cir. 2022) 24 F.4th 1287, 1292 [the Supreme Court "has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails"].) Legislative enactments "regulating the economic relations of landlord and tenants are not per se takings." (*Id.* at 1293 [citing *FCC v. Fla. Power Corp.* (1987) 480 U.S. 245, 252, 107 S.Ct. 1107, 1112].)

a. In *Gallo v. D.C.* (D.D.C. June 21, 2022) No. 1:21-CV-03298 (TNM), 2022 WL 2208934, at *8-9, the Court distinguished *Cedar Point Nursery v. Hassid* (2021) 141 S. Ct. 2063, 2072[27] and followed *Yee v. City of Escondido, Cal.* (1992) 503 U.S. 519, 112 S.Ct. 1522,[28] to hold there was no per se taking

[27] In *Cedar Point*, "[a] California regulation grant[ed] labor organizations a 'right to take access' to an agricultural employer's property in order to solicit support for unionization." (*Cedar Point*, 141 S. Ct. at 2069.) Two growers challenged the regulation, arguing it constituted a per se physical taking under the Fifth and Fourteenth Amendments. (*Id.* at 2070.) The Court agreed. Noting that "[t]he right to exclude is one of the most treasured rights of property ownership," the Court held that "[w]henever a regulation results in a physical appropriation of property, a per se [physical] taking has occurred." (*Id.* at 2072 [internal citation omitted].)

[28] In *Yee*, owners of mobile home parks challenged a local rent control ordinance. (*Id.* at 522.) The park owners contended that the interplay of a California mobile home law and the rent control ordinance "amount[ed] to a physical occupation of their property." (*Id.*) The park owners argued

because Gallo invited the nonpaying tenant onto his property in the first place. The Court also noted that the moratorium did not stop rent from accruing. (*Id.* at *10.)

b. Similarly in *Williams*, 2022 WL 17169833, at *9-11, the Court held the eviction moratoria did not constitute a per se taking on its face because (1) the challenged moratoria were not indefinite on their face because they were in place until the local emergency ended; (2) even assuming that the moratoria were permanent on their face, they would not deprive landlords of all economically beneficial uses of their property because tenants still have contractual obligation to pay back rent; (3) the moratoria are subject to certain exceptions, such as Ellis Act evictions; (4) the moratoria apply to "residents" so they do not on their face allow "squatters" to occupy rental units without paying rent; and (5) the moratoria applied to tenants already invited to the landlords' property and provide exceptions to the moratoria. (*Id.* at *9-12; *see also Baptiste* (D. Mass. 2020) 490 F. Supp. 3d 353, 387-388 [holding that the plaintiff landlords were not likely to prove that Massachusetts' eviction moratorium violated the Takings Clause under per se taking because the landlords voluntarily rented their properties to their tenants].)

In contrast, following *Cedar Point, supra*, _ U.S. _, 141 S. Ct. 2063, the Eighth Circuit Court of Appeals held that the Governor's EOs constituted per se taking in *Heights Apartments,* 30 F.4th at 733. The Court stated that "[w]henever a regulation results in a physical appropriation of property, a per se taking has occurred." (*Heights Apartments, supra,* at 733 [citing *Cedar Point Nursery, supra,* at 2072].) The Eighth Circuit Court of Appeals further stated that "[i]t [was] immaterial whether the physical invasion is 'permanent or temporary,' 'intermittent as opposed to continuous,' or whether the government is directly invading the land or allowing a third party to do so." (*Id.*) Additionally, the Court specifically distinguished *Yee,* 503 U.S. 519, 112 S.Ct. 1522, in that the EOs forbade the nonrenewal and termination of ongoing leases, whereas the landlords in *Yee* sought to exclude future or incoming tenants.[29] (*Id.*)

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that the rent control ordinance "transferred a discrete interest in land—the right to occupy the land indefinitely at a submarket rent—from the park owner to the mobile homeowner. [The park owners] contend[ed] that what ha[d] been transferred from park owner to mobile homeowner [was] no less than a right of physical occupation of the park owner's land." *Id.* at 527. The Court disagreed and noted that the park owners "voluntarily rented their land to the mobile home owners." The Court also stated that "the existence of the transfer in itself does not convert regulation into physical invasion.... Because [the park owners] voluntarily open[ed] their property to occupation by others, [the park owners] cannot assert a per se right to compensation based on their inability to exclude particular individuals." (*Id.* at 529–31.)

[29] Note that this argument is rejected in *Gallo*, 2022 WL 2208934, at *9 ("[*Heights Apartments*], then, chose to follow *Cedar Point* rather than *Yee* because it misinterpreted the *Yee* plaintiffs' claims.")

2. Regulatory Taking

A "regulatory taking" occurs when a government regulation "goes too far." (*Pa. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415; 43 S.Ct. 158, 159, ["The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."].) "In contrast to a physical taking, a regulatory taking occurs where government regulation of private property is so onerous that its effect is tantamount to a direct appropriation or ouster." (*Rancho de Calistoga v. City of Calistoga* (9th Cir. 2015) 800 F.3d 1083, 1088–89 [internal citations omitted].) "To determine whether a use restriction effects a taking, [the Supreme] Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." (*Cedar Point Nursery* 141 S. Ct. at 2072 [citing *Penn Cent. Transp. Co. v. City of New York* (1978) 438 U.S. 104, 124, 98 S.Ct. 2646, 2659].)

a. In *Gallo v. D.C.*, *supra*, 2022 WL 2208934 at *10-11, the Court held the plaintiff landlord's evidence did not meet the high standard of "striking evidence of economic effects" although the Court recognized the moratorium harmed him financially. In this regard, the Court noted that the landlord could have recovered some of his losses by setting up a Payment Plan Program account.(*Id*. at *10.) The Court also stated that the moratorium lasted only during the public health emergency and 60 days after. (*Id*.)

As to the investment-backed expectation factor, the Court noted that the renting industry is highly regulated by legislature, particularly during times of emergency. (*Id.* at *11.) Because of the history of regulation in this business and of the avenues to recoup some of his losses, the Court declined to find a frustration of his investment-backed expectations. (*Id*.)

The "the character of the District's actions" factor "depends both on whether the government has legitimized a physical occupation of the property, and whether the regulation has a legitimate public purpose." (*Gallo,* 2022 WL 2208934, at *11.) Because the District's actions legitimized a temporary physical occupation of the property but only by individuals whom landlords had invited onto their property, and because the legislation had a legitimate public purpose, the Court held this factor weighed favorably to the government. (*Id*.) Considering all three factors, the Court concluded that there was no regulatory taking. (*Id*. at *8-11; *See also Baptiste* (D. Mass. 2020) 490 F. Supp. 3d 353, 388-390 [holding that the plaintiff landlords were not likely to prove that Massachusetts' eviction moratorium violate the Taking Clause under regulatory taking after balancing the three factors in *Penn Central*. Specifically, the moratorium 1) did not have a significant economic impact because of its temporary duration; 2) significantly interfered with landlords' reasonable investment backed expectations because of COVID-19's unprecedence; 3) promoted the public good and the government itself did not appropriate plaintiffs' property for its own use].)

b. By contrast, in *Heights Apartments,* 30 F.4th at 734, the Court held that the landlord plaintiff sufficiently plead "the economic impact of the regulation" factor and "interference with reasonable investment-backed

expectations" factor because the EOs deprived landlord plaintiff of "receiving rental income and managing property according to the leases' terms and Minnesota law" and because "no landlord could have reasonably expected regulations of the duration and extent present in the EOs." As to "the character of the District's actions" factor, the Court stated that the benefit of EOs were not sufficiently broad (only benefit residential renters) and thus, the landlord plaintiff had sufficiently alleged that the EOs may constitute a regulatory taking. (*Id.* at 735.)

C. Due Process Clause

The Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333, 96 S.Ct. 893, 901.)

a. In *Williams*, 2022 WL 17169833, at *17, the Court rejected plaintiffs' argument that the moratoria facially violated the 14th Amendment's Due Process Clause. The Court distinguished *Chrysafis v. Marks* (2021) 141 S. Ct. 2482 where the Supreme Court enjoined part of New York's COVID-19 eviction moratoria because that law allowed tenants to certify as a defense to an eviction proceeding that they suffered a financial hardship due to COVID-19 and generally precluded a landlord from contesting that certification and denied the landlord a hearing. (*Id.* at *16.) The Court held that the challenged moratoria did not deny landlords a hearing or preclude landlords from contesting facts asserted by tenants and that landlords were free to evict tenants under the exceptions provided by the moratorium. The Court also considered favorably to the government the fact that the eviction moratoria were set to expire at the end of local emergencies. (*Id.*)

D. Preemption

"Whether a California state law preempts a local law is governed by Article XI, section 7 of the California Constitution, which states that '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.' " (*First Resort, Inc. v. Herrera* (9th Cir. 2017) 860 F.3d 1263, 1279 [quoting Cal. Const. art. XI, § 7].) California law conflicts with local ordinances when the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 893, 897.)

"The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Big Creek Lumber Co. v. Cnty. of Santa Cruz* (2006) 38 Cal. 4th 1139, 1149.) " 'Absent a clear indication of preemptive intent from the Legislature,' California courts presume that a local law in an area of traditional local concern 'is not preempted by state statute.' " (*Id.*)

In *Williams*, 2022 WL 17169833, at *18–21, the Court held that the City's and County's eviction moratoria were not preempted by State law because local governments have traditionally exercised

control over the landlord-tenant relationship and public-health issues; the moratoria did not "mandate what state law expressly forbids, or forbid what state law expressly mandates"; and because California law allowed cities and counties to enact just-cause eviction rules that provide more protections to renters if the municipalities satisfy certain conditions. (*Id*. at *18–19.)

The Court also held that the State had not fully occupied the area of the law concerning COVID-19 eviction moratoria. (*Id*. at *20.) Local law intrudes on an area "fully occupied" by California state law "when the [l]egislature has expressly manifested its intent to 'fully occupy' the area" or when the legislature has impliedly occupied the area based on one of the following indicia: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 898.)

Here, the Court found that the state legislature acknowledged the existence of local laws concerning eviction restrictions in response to COVID-19, declined to completely preempt those laws, and affirmatively allowed localities to enact or amend local eviction rules to provide more protections to renters. (*Williams*, 2022 WL 17169833, at *20.) Thus, the Court concluded that the state had not "fully and completely covered" the area or partially covered it "in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." (*Id*.) Nor did the Court find any basis for the proposition that an eviction moratorium on government housing in certain municipalities would have a significant effect on transient citizens or an effect that would outweigh the local impact. Thus, the Court concluded that the California state's COVID-19 housing legislation did not preempt the moratoria of the City or the County. (*See also Arche v. Scallon* (Cal. App. Dep't Super. Ct. 2022) 82 Cal. App. 5th Supp. 12 [holding the LA County's eviction moratorium was not preempted by California's COVID-19 Tenant Relief Act because the Act contains an exception for local ordinances that require just cause for termination of residential tenancies and because the moratorium was more protective than the Act].)

The Court also concluded that the eviction moratoria did not conflict with the Ellis Act. (*Williams*, 2022 WL 17169833, at *20-21.) The Ellis Act provides that no statute, ordinance, or regulation "shall ... compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease." (Cal. Gov't Code § 7060(a).) The moratoria in *Williams* contain exceptions for eviction under the Ellis Act. (*Williams, supra*, at *20.) Because the Court reasoned that the County's moratorium applied only to evictions based on nonpayment of rent due to the COVID-19-related causes and not to Ellis Act evictions, the Court held that the Ellis Act did not preempt the County's eviction moratorium. (*Id.* at *21.)

VI. <u>PUBLIC ENTITY LIABILITY FOR A "DANGEROUS CONDITION OF PUBLIC PROPERTY"</u>

A dangerous condition of public property is a potential basis for a government tort claim where an injury occurs on the property of a public entity caused by such a dangerous condition. Where a public entity fails to adopt restrictive measures mandated by Public Health Authorities or other governmental entities in order to prevent the spread of a disease such as COVID-19, an injured

party, at least theoretically, could claim that the public entity should be liable in tort for allowing the presence of a dangerous condition on its property where such restrictions are not present.

A. Government Code § 835

Government Code § 835 provides, in relevant part:

A public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

B. Elements Of A Dangerous Condition Claim

1. Was The Entity's Property A Dangerous Condition?

a. Meaning of Dangerous Condition

California Government Code section 830(a): "Dangerous condition' means a condition property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

2. Did The Entity Create Or Have Notice Of The Alleged Dangerous Condition?

a. Notice of Dangerous Condition

Dangerous condition liability can be shown by the public entity's notice of the condition and failure to take corrective action. A public entity has actual notice of a dangerous condition if it has actual knowledge that the condition exists and knew or should have known of its dangerous character. (Gov. Code, § 835.2 subd. (a).) A public entity has constructive notice of a dangerous condition if it is established that the condition existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. (Gov. Code, § 835.2 subd. (b).)

3. Did The Alleged Dangerous Condition Cause Plaintiff's Claimed Injuries?

a. Causation

The dangerous condition must be a major factor in causing or contributing to the harm caused by the dangerous condition.

> "To summarize: 'If the risk of injury from third parties is in no way increased or intensified by a condition of the public property ... courts ordinarily decline to ascribe the resulting injury to a dangerous condition of the property. In other words, there is no liability for injuries caused solely by acts of third parties. [Citations.] Such liability can arise only when third party conduct is coupled with a defective condition of property.'" (*Zelig v. County of Los Angeles* (2002) 27 Ca1.4th 1112, 1137.)

C. Immunity

1. Discretionary Immunity

(a) Government Code § 815.2 (b) provides, in relevant part that "a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

(b) Government Code § 820.2 provides that a "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

(c) Government Code § 855.4 also provides that:

Neither a public entity nor a public employee is liable for an injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community if the decision whether the act was or was not to be performed was the result of the exercise of discretion vested in the public entity or the public employee, whether or not such discretion be abused.

(i) In *Wright v. City of Los* Angeles (2001) 93 Cal.App.4th 683, 690, the court held that the governmental immunity applies when a child playing in an abandoned publicly owned hospital contracted a fatal virus and died. In finding that Government Code section 855.4 was applicable to public

property, the court stated that:

> … to hold that the immunity provided by Section 855.4 is not applicable to public property would be to subject public health facilities and all other owners of any public property, improved or unimproved, *to be sued for failure to adequately keep the facility or unimproved property germ, bacteria and virus-free*. There is no showing that this was the intent of the Legislature in the statutory scheme of … Sections 835 and 855.4. *The presence of germs, bacteria and viruses and the like, many of which are microscopic, and which may or may not be contained in saliva, animal droppings, or any multitude of other forms, upon the vast public property of this state, cannot be viewed as liability events,* without some specifically stated intent of the Legislature. (Emphasis added.)

(ii) Also, please note the Law Revision Commission comment to section 855.4 specifically applies that code section to situations similar to the COVID-19 pandemic:

> This section declares a specific rule of discretionary immunity for acts or omissions relating to quarantines or other measures for the prevention or control of disease.

(d) With respect to a public entities adoption of COVID restrictions, it would appear that any discretionary restrictions, or non-mandatory "guidance" would be governed by a discretionary standard, and thus governmental immunity appear to be implicated where a public entity fails to adopt discretionary restrictions or guidance.

2. Mandatory Duties And Immunity

a. "[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (Gov. Code, § 815.6.)

b. "Government Code section 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability; and (3) breach of

the mandatory duty must be a proximate cause of the injury suffered." (*State of California v. Superior Court* (1984) 150 Cal.App.3d 848, 854, citations omitted; *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498-499.) ("*Haggis*")

c. For Government Code § 815.6 to apply, the enactment at issue must be obligatory or mandatory rather than permitted or authorized. (*Haggis, supra,* 22 Cal.4th at p. 498; see also *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 862-863 [statutes and regulations requiring levee projects be designed and constructed in accordance with a federal manual did not create a mandatory duty in levee maintenance].)

d. Where COVID restrictions and regulations are required by an enactment to be adopted and utilized by a public entity, the failure of the public entity to adopt such restrictions would appear to implicate the mandatory duty exception to immunity. However, it appears the vast majority or such restrictions are no longer mandatory.

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