

ESSAY

MUNICIPAL VACCINE PASSPORT REGIMES IN THE UNITED STATES: A EUROPEAN IMPORT SPREADS WIDELY

*Paul Diller**

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I. INTRODUCTION

Since the COVID vaccine rollout began over one year ago, various governments around the world have implemented regulatory schemes that have required visitors to public accommodations to provide proof of vaccination as a condition to entry. A smartphone app that functions as a “vaccine passport” may qualify as proof of vaccination, which is why these schemes are sometimes referred to by that term.¹ For ease of reference, this Essay will use the term “vaccine passport” to refer generally to

* Visiting Professor, Lewis & Clark Law School; Professor, Willamette University College of Law. Fordham Int’l Law Journal symposium Feb. 2022. I thank Rosie Lutz for outstanding research assistance.

1. *Vaccine Passport*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/vaccine%20passport> [https://perma.cc/9GVV-SEE2] (defining “vaccine passport” as “a physical or digital document providing proof of vaccination against one or more infectious diseases (such as COVID-19)”).

such schemes, even if there is substantial variation among them in specifics like the ages of people to whom they apply, the kind of venues in which they are applicable, whether they require a booster shot, and other details.

Israel was the first country to adopt a vaccine passport system in January 2021.² Its program, called the Green Pass, allowed those who were (then) “fully vaccinated” to access public accommodations such as gyms, restaurants, hotels, theaters, and music venues.³ Denmark followed suit in March 2021, and several other European countries followed with their regimes taking effect in the summer of 2021 and beyond. These regulations were in conjunction with the rollout of the European Union’s Digital COVID Certificate, which was designed primarily for cross-border movement.⁴ France’s and Italy’s vaccine passport systems sparked widespread protests by residents concerned about the privacy, autonomy, and liberty implications of such requirements.⁵ Italy’s vaccine passport regime, like that of some other nations, was

2. Anna Rouw et al., *Key Questions about COVID-19 Vaccine Passports and the U.S.*, KFF, Apr. 15, 2021, <https://www.kff.org/coronavirus-covid-19/issue-brief/key-questions-about-covid-19-vaccine-passports-and-the-u-s/> [<https://perma.cc/RTD6-7ZZ7>].

3. See Talya Porat et al., “Vaccine Passports” May Backfire: Findings from a Cross-Sectional Study in the UK and Israel on Willingness to Get Vaccinated Against COVID-19, 9 *VACCINES* 902 (2021) (saying that Israel rolled out its “green passes” in January 2021).

4. *Id.* Italy and France were the first two big movers on vaccine passports on the continent after Denmark. See Nick Kostov & Eric Sylvers, *France, Italy Require COVID-19 Passes for Restaurants, Bars*, WALL ST. J. (Aug. 10, 2021, 5:34 PM), <https://www.wsj.com/articles/france-italy-require-health-pass-restaurants-bars-11628587800> [<https://perma.cc/M87E-22JM>]. Eventually, the European Union launched the EU Digital COVID Certificate for use in crossing EU boundaries as well as for countries to use internally for access to venues. See *EU Digital COVID Certificate*, EUR. COMM’N, https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en [<https://perma.cc/Q69F-3G9G>]; see also Marc Rovira, *Catalan High Court Approves Use of Covid Passport in Bars, Restaurants, and Gyms*, EL PAÍS: SOC’Y (Nov. 25, 2021, 9:09 AM), <https://english.elpais.com/society/2021-11-25/catalan-high-court-approves-use-of-covid-passport-in-bars-restaurants-and-gyms.html> [<https://perma.cc/GG93-P2KU>] (discussing how several Spanish regions had sought judicial permission to use the EU digital certificate as a means of enforcing COVID passports in certain venues). The United Kingdom, no longer part of the EU, planned to implement a vaccine passport system in England but ultimately canceled those plans after major protests and pushback. Alyssa Lukpat, *Amid Cries of Tyranny, England Cancels Plans to Require Vaccine Passports*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/2021/09/12/world/europe/britain-vaccine-passport-cancelled.html?searchResultPosition=2> [<https://perma.cc/97KE-GNRR>].

5. See Kostov & Sylvers, *supra* note 4.

implemented alongside or in conjunction with a similar scheme for employment.⁶ Outside of Europe and Israel, Australia, New Zealand, certain provinces of Canada, and other nations adopted some version of a COVID vaccine passport regime.⁷

II. THE DOMESTIC ROOTS OF US VACCINE PASSPORT REGIMES

Vaccine passports in the United States evolved from some states' efforts to emerge from the pandemic in winter of 2021 by requiring proof of negative COVID tests to see sporting events.⁸ As the vaccines became more widespread, some sports teams in spring of 2021 began allowing more compressed seating in certain vaccinated sections, while requiring unvaccinated fans to sit socially distanced.⁹ Upon the CDC's May 2021 recommendation

6. Katie Nadworny, *Italy Implements Mandatory Green Pass for Workers*, SHRM (Oct. 12, 2021), <https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/coronavirus-italy-green-pass.aspx> [<https://perma.cc/NZJ4-GPP8>] (“Italy’s Green Pass—a domestic COVID-19 passport that indicates if someone is fully vaccinated or has tested negative for the virus in the last 72 hours—has been required at restaurants, entertainment venues and other public places, but will soon be required for any employees who are working onsite.”).

7. See Antoni Nerestant, *Quebec Expands Vaccine Passports to Liquor, Cannabis Stores, with 3rd Dose Requirement on the Way*, CBC: NEWS (Jan. 6, 2022, 11:45 AM), <https://www.cbc.ca/news/canada/montreal/vaccination-passport-saq-sqdc-covid-hospitalizations-1.6305992> [<https://perma.cc/84S8-UUEY>]; Retail Council of Canada, *Proof of Vaccination Requirements by Province*, <https://www.retailcouncil.org/coronavirus-info-for-retailers/vaccination-requirements-by-province/>; Sybilla Gross, *Australian State Unveils Vaccine Passport as Lockdown End Nears*, BLOOMBERG (Sept. 21, 2021) <https://www.bloomberg.com/news/articles/2021-09-22/australian-state-unveils-vaccine-passport-as-lockdown-end-nears> [<https://perma.cc/82AT-ND5P>] (discussing New South Wales’s plan to restrict entry to pubs, restaurants, gyms, and other retail outlets to those who are “fully vaccinated” and the role that a digital app would play in that system); New Zealand Gov’t, *COVID-19 Protection Framework (Traffic Lights)*, (Nov. 2021), https://www.beehive.govt.nz/sites/default/files/2021-11/291121_UAC_CPFSummary_A3.pdf [<https://perma.cc/J3NR-D3HM>] (requiring the use of a “Vaccine Pass” to access certain venues and activities like cafes, restaurants, bars, and sporting events, in certain situations).

8. See, e.g., *Cuomo: 6,700 Fans will be Allowed at Bills Playoff Game*, WGRZ (Dec. 30, 2020, 11:24 PM), <https://www.wgrz.com/article/sports/nfl/bills/governor-andrew-cuomo-fans-will-be-allowed-in-buffalo-bills-playoff-game/71-24ee693f-c63a-4a4e-9e60-0aa264f5ffd1> [<https://perma.cc/Y5AD-3FVT>] (requiring fans “in attendance . . . to provide evidence of a negative test in the previous 72 hours”).

9. See, e.g., Charles Woodman, *Mariners Offer Exclusive Seating, \$10 Tickets for Vaccinated Fans*, PATCH: SPORTS (May 7, 2021, 11:53 AM), <https://patch.com/washington/seattle/mariners-announce-discounted-tickets-vaccinated-fans> [<https://perma.cc/7A2H-MJFM>] (discussing Seattle Mariners’ practice of

that fully vaccinated persons could go maskless, some venues required proof of vaccination in order to unmask,¹⁰ while requiring patrons who could or would not show proof of vaccination to mask.¹¹ Eventually, in the summer of 2021, a handful of businesses required customers to furnish proof of vaccination before entering the establishment.¹² Bruce Springsteen's Broadway show was one of the first high-profile live performances to require all attendees to show proof of vaccination.¹³ All the while, some states provided the digital infrastructure for such private vaccine passport schemes by creating state-run electronic vaccine verification systems.¹⁴

III. SUMMER 2021: US MUNICIPALITIES BEGIN ADOPTING VACCINE PASSPORTS

Municipal vaccine passport regimes emerged in the summer of 2021, seemingly in reaction to the onset of the wave of new COVID infections due to the Delta variant. Before their emergence, there was a brief respite from both COVID and the attendant government restrictions in the spring and early summer of 2021, at which point every state except Hawaii that still had a mask

giving fans who show proof of full vaccination discounts on food, gift shop items, a free t-shirt, and access to "fully vaccinated" seating areas).

10. Rachel Cohrs, *CDC Backtracks, Saying Fully Vaccinated People can go Maskless Indoors*, STAT: HEALTH (May 13, 2021), <https://www.statnews.com/2021/05/13/cdc-backtracks-saying-fully-vaccinated-people-can-go-maskless-indoors/> [<https://perma.cc/X2ZR-4XNQ>].

11. Zack Demars, *OHA: Businesses Must See Proof of Vaccination to Forgo Mask Rules*, TILLAMOOK HEADLIGHT HERALD (May 31, 2021), https://www.tillamookheadlightherald.com/news_free/oha-businesses-must-see-proof-of-vaccination-to-forgo-mask-rules/article_017a14ee-b8bd-11eb-968d-1797268ea6d2.html [<https://perma.cc/6RZ9-59RN>].

12. David A. Lieb, *Businesses, States Reluctant to Require Customers to Show Proof of Vaccine*, INS. J. (June 28, 2021), <https://www.insurancejournal.com/news/national/2021/06/28/620399.htm> [<https://perma.cc/ZF2Q-7D4T>] (discussing a wine bar in New York City that required proof of vaccination for customers to enter).

13. Nick Corasiniti, *Bruce Springsteen Reopens Broadway, Ushering in Theater's Return*, N.Y. TIMES (June 27, 2021), <https://www.nytimes.com/2021/06/27/theater/bruce-springsteen-broadway.html> [<https://perma.cc/DTQ6-J77M>] (noting that the performance required that all attendees demonstrate proof of vaccination, and that this practice followed the same requirement for a Foo Fighters concert at Madison Square Garden a week earlier).

14. Lieb, *supra* note 12 (discussing the digital COVID vaccination passes created by the state governments of California, Hawaii, Louisiana, and New York).

mandate finally rescinded it.¹⁵ Numerous elected officials, such as President Biden and many governors and mayors, declared with much fanfare in June and July 2021 that their jurisdictions were finally “reopening” and moving past COVID restrictions.¹⁶

As the Delta variant “surged” in the late summer of 2021, however, it became clear that the pandemic was not over. Certain jurisdictions then implemented mandatory vaccine passport regimes in response.¹⁷ New York City was the first to do so, with Mayor Bill de Blasio announcing the “Key to NYC” initiative in early August.¹⁸ De Blasio’s regime would apply to both customers and employees of indoor settings like dining, entertainment, and fitness.¹⁹ De Blasio justified his regime, implemented by mayoral emergency order, quite explicitly as less about safety within such settings and more as a means of encouraging people to get vaccinated, even asserting that if more New Yorkers would get vaccinated, New York City could “stop the Delta variant.”²⁰

Several cities emulated New York City in the following weeks and announced their own municipally-mandated vaccine passport regimes: San Francisco, New Orleans, and Honolulu in August, succeeded by Berkeley; Maui; King County, Wash. (home to

15. Robert Hart & Alison Durkee, *Return of Mask Mandates: Oregon Becomes Latest State to Reimpose Rules*, FORBES (Aug. 11, 2021), <https://www.forbes.com/sites/roberthart/2021/08/11/return-of-mask-mandates-oregon-becomes-latest-state-to-reimpose-rules/?sh=4a2c51746744> [https://perma.cc/RE9U-34XY] (noting that Hawaii was the only state never to rescind its indoor mask mandate).

16. See, e.g., Luis Ferré-Sadurní & Shawn Hubler, ‘A Momentous Day’: New York and California Lift Most Virus Restrictions, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/15/nyregion/coronavirus-restrictions.html> [https://perma.cc/89UP-S6UX]; Fedor Zarkhin, *Oregon Celebrates Official Pandemic Reopening, but More Work to be Done on Equity, Governor Says*, OREGONLIVE (June 30, 2021), <https://www.oregonlive.com/coronavirus/2021/07/oregon-celebrates-official-pandemic-reopening-but-more-work-to-be-done-on-equity-governor-says.html> [https://perma.cc/U5NV-2P3Z]; Jennifer Jacobs & Sophia Cai, *Biden Declares Success in Beating Pandemic in July 4 Speech*, BLOOMBERG (July 4, 2021), <https://www.bloomberg.com/news/articles/2021-07-04/biden-to-appeal-for-vaccinations-after-u-s-missed-july-4-target> [https://perma.cc/3MM5-L5Q8].

17. Many jurisdictions also re-imposed mask mandates after the brief respite therefrom. See Hart & Durkee, *supra* note 15.

18. *New York City Launches Vaccine Passport Program*, FOX 5 NY, at 01:36 (Aug. 4, 2021), <https://www.fox5ny.com/news/new-york-city-launches-vaccine-passport> [https://perma.cc/68QG-D25Z]. De Blasio announced the program on Aug. 3, to take effect on Aug. 16, with enforcement to begin Sept. 13. *Id.*

19. *Id.*

20. *Id.*

Seattle); and Los Angeles and neighboring communities in September and October.²¹ These initial regimes varied in some respects. Honolulu and New Orleans, for instance, allowed proof of a negative PCR COVID test within a certain amount of time as an alternative basis for entry to the regulated venues.²²

After a two-month lull following the adoption of a vaccine passport in early October by the City of Los Angeles, West Hollywood, and Los Angeles County, the arrival of the Omicron variant of COVID-19 in the United States in large numbers in December 2021 preceded another flurry of widespread vaccine passport adoptions.²³ In short order, Philadelphia; Boston; Chicago; Washington, D.C.; Cook County, Ill. (which surrounds and includes Chicago); Newark, N.J.; and Highland Park, Ill., adopted vaccine passports shortly before or after (Latin) Christmas 2021.²⁴ Like the prior regimes, there were minor variations among the newer regimes, particularly with respect to how they regulated children and how they recognized religious and medical exemptions.²⁵ The FDA authorized COVID vaccines for children

21. See *infra* App. Puerto Rico's governor also promulgated a version of a vaccine passport in early August, requiring vaccination for government contractors, hotel guests and employees, and all health facility workers. See, e.g., Dánica Coto, *Puerto Rico Widens Vaccine Requirements Amid COVID-19 Spike*, AP NEWS (Aug. 5, 2021), <https://apnews.com/article/lifestyle-health-business-caribbean-coronavirus-pandemic-1d83c3535da6759734f1fd5dada6fea8> [https://perma.cc/MNH6-PP2E]. On August 12, Puerto Rico's governor announced that he would expand the regime to include restaurants, theaters, and other establishments. See, e.g., Juan Felipe Santos et al., *Puerto Rico Extends Mandatory Vaccination to Dining and Entertainment Sectors*, JACKSON LEWIS (Aug. 12, 2021), <https://www.jacksonlewis.com/publication/puerto-rico-extends-mandatory-vaccination-dining-and-entertainment-sectors> [https://perma.cc/AK7G-C7Y5].

22. In New Orleans the test had to be within 72 hours prior whereas in Honolulu (Oahu) it had to be within 48. Compare *Mayor Cantrell Announces New Vaccine Requirements in Response to Covid Surge*, CITY OF NEW ORLEANS (Aug. 12, 2021), <https://www.nola.gov/mayor/news/august-2021/mayor-cantrell-announces-new-vaccine-requirements-in-response-to-covid-surge/> [https://perma.cc/72RJ-GZYW], with *Safe Access Oahu*, CITY & COUNTY OF HONOLULU, <https://www.oneoahu.org/safe-access-oahu> [https://perma.cc/FW59-W96B].

23. Nate Rattner, *U.S. Covid Cases Rise to Pandemic High as Delta and Omicron Circulate at Same Time*, CNBC (Dec. 29, 2021) <https://www.cnbc.com/2021/12/29/us-covid-cases-rise-to-pandemic-high-as-delta-and-omicron-circulate.html> [https://perma.cc/C6UN-Z4QJ] (noting that “the emergence of omicron [] is contributing to a near-vertical rise in daily new cases”).

24. See *infra* App.

25. *Id.*

ages five to eleven for emergency use in late October 2021.²⁶ The pre-existing regimes, as well as the newer ones, had to wrestle with whether—and how soon—to require children of that age group to be “fully vaccinated” before permitting entry into regulated establishments.²⁷

Despite the variation in substantive scope and coverage among the municipal vaccine passport regimes within the United States, it is notable that *none* of them permitted proof of recent prior infection—so-called “natural immunity”—to serve as an alternative means to entry to regulated venues. In Europe, by contrast, the EU COVID Digital Passport allowed proof of recent infection back to 180 days as a potentially valid means of entry.²⁸ Just how much natural, infection-based—as opposed to vaccine-generated—immunity should be recognized as conferring protection has been a source of much dispute in the scientific and political spheres during the pandemic.²⁹

IV. HOW US JURISDICTIONS ADOPTED VACCINE PASSPORTS AND NORMATIVE IMPLICATIONS THEREFROM

In addition to their adoption as a policy across US municipal jurisdictions, this Part focuses on the *method* by which cities and counties imposed vaccine passport regimes. The vast majority of cities and counties used emergency or unilateral executive powers to promulgate their regimes. Indeed, of the twenty-four city or

26. FDA News Release, *FDA Authorizes Pfizer-BioNTech COVID-19 Vaccine for Emergency Use in Children 5 Through 11 Years of Age*, FDA (Oct. 29, 2021), <https://www.fda.gov/news-events/press-announcements/fda-authorizes-pfizer-biontech-covid-19-vaccine-emergency-use-children-5-through-11-years-age> [https://perma.cc/L4VJ-TN7Z].

27. *See, e.g.*, Press Release, NYC, Mayor de Blasio Announces Vaccine Mandate for Private Sector Workers, and Major Expansions to Nation-Leading “Key to NYC” Program (Dec. 6, 2021) <https://www1.nyc.gov/office-of-the-mayor/news/807-21/mayor-de-blasio-vaccine-mandate-private-sector-workers-major-expansions-to> [https://perma.cc/5V76-7UMJ] (requiring children ages five to eleven to show proof of one dose of the vaccine as of December 14, and requiring children twelve and over to show proof of two vaccine doses as of December 27 in order to access the covered venues and activities).

28. *EU Digital COVID Certificate*, *supra* note 4.

29. *See, e.g.*, Marty Makary, *The High Cost of Disparaging Natural Immunity to COVID*, WALL ST. J. (Jan. 26, 2022), <https://www.wsj.com/articles/the-high-cost-of-disparaging-natural-immunity-to-covid-vaccine-mandates-protests-fire-rehire-employment-11643214336> [https://perma.cc/K7PR-7RG8].

county policies identified,³⁰ eleven were initially promulgated by mayoral or executive order, in most instances relying on emergency powers.³¹ Eleven others were promulgated by an order or emergency order of a health officer within the jurisdiction—often a health commissioner—again with some relying on emergency powers.³² Only four vaccine passport regimes—Los Angeles; Oakland; Highland Park, Ill.; and West Hollywood—were adopted by a vote of the city council, and in the latter two only after the mayor and city manager, respectively, initially promulgated the rules themselves.³³ None appear to have been adopted through local rulemaking, including notice and comment, by the health department as opposed to executive proclamation. In at least one other instance—Los Angeles County—the health department mandated a vaccine passport after the elected board of supervisors had unanimously requested that the department look into means of doing so.³⁴

The value of cities as laboratories of democracy has always been due in part to their numerosity—thousands of jurisdictions as compared to a mere fifty states and one federal government. Amid this sea of policymaking authority, some interesting new approaches to major societal problems are bound to emerge. The “advantage” offered by cities’ numerosity is compounded by the availability of emergency powers during a pandemic. I have written previously about how cities’ more streamlined method of government, with smaller, unicameral legislatures and fewer “veto gates,” can facilitate the adoption of policy proposals that are more

30. I exclude from this calculus Puerto Rico, which is an unincorporated U.S. territory, but is included in the Appendix.

31. *See infra* App.

32. *See id.*

33. *See id.*

34. *See* Nouran Salahieh et al., *L.A. County Supervisors Vote to Examine Options for Requiring COVID Vaccine Proof at Certain Indoor Spaces*, KTLA (Aug. 10, 2021), <https://ktla.com/news/local-news/l-a-county-supervisors-to-consider-requiring-vaccine-proof-at-certain-indoor-spaces/> [<https://perma.cc/5JTM-44Q3>]; News Release, County of L.A. Public Health, *Public Health to Modify Health Officer Order Adding Vaccination Verification Requirements at Select High-Risk Settings – 37 New Deaths and 1,930 New Confirmed Cases of COVID-19 in Los Angeles County* (Sept. 15, 2021), <http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&prog=media&cur=cur&prid=3383&row=25&start=1> [<https://perma.cc/EAV6-2KVS>](announcing county vaccine passport regime).

difficult to push through in state legislatures or Congress.³⁵ In the context of other public health measures, like rules designed to reduce tobacco use and obesity, the availability of local rulemaking by local health agencies also played a role in facilitating innovation.³⁶

Vaccine passports, however, break entirely new ground by using unilateral executive authority—whether by a mayor or health commissioner—to promulgate new policy. With no procedural hoops to jump through whatsoever, emergency policy adoption is the ultimate in snap decision-making. Among thousands of jurisdictions, if a handful of mayors in different cities agree with a policy of one of their counterparts, they can simply adopt it by a stroke of a pen, as the flurry of vaccine passport adoptions before Christmas 2021 illustrated. Municipal policy innovation has never been so easy.

While ease of innovation was always a benefit of municipal government, it was also usually considered in conjunction with some of the deliberative benefits of local government. Whereas the fifty state legislatures and Congress are geographically further from the people, the vast majority of Americans live within a shorter distance from city hall or the county seat. Local lawmaking thus allows for a level of *participation* unmatched at the state and federal levels.³⁷ Moreover, with a ratio of elected officials to residents much lower than that of Congress and most state legislatures, city government can also allow residents greater access to their elected officials to lobby them. This comparatively heightened access to their leaders for regular folks may somewhat counteract the influence of campaign contributions and expensive lobbying. Although concentrated and well-funded interest groups wield these tools at all levels of government, their relative ability to do so successfully may be heightened in state legislatures and Congress as compared to city halls due to the former being more

35. See Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Structure and Scale*, 91 WASH. U. L. REV. 1219, 1266-69 (2014) (discussing cities' streamlined legislative structures).

36. See *id.* at 1278-79 (discussing the "important role" that "administrative rulemaking plays" in local public health policy innovation).

37. *Id.* at 1256-57; see also GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 21-24 (1999) (arguing that participation in local politics is necessary for meaningful democracy).

distant from the people and usually requiring more expensive campaigns to win elected office.³⁸

With emergency or unilateral executive orders, however, the participatory benefits of local lawmaking are short-circuited, if not eliminated entirely. It is true that residents can attempt to lobby their mayors before they implement a vaccine passport regime, and that in doing so they may have greater access to the mayor than the governor. But the emergency order regime at any level of government has fewer entry points for citizen and resident input. Unlike city council ordinance adoption, there is no formal opportunity for citizens to testify, nor do the additional voices of city councilmembers and council institutional processes—such as committee markups and floor hearings—play a role in the process. In Chicago, for instance, rather than allow and even require fifty aldermen from fifty wards around the city to go on the record in favor or against vaccine passports, only one official—the unelected city health commissioner—weighed in, albeit with the mayor's clear imprimatur.³⁹ Aldermen could comment, send letters, and write opinion pieces, but they were never required to do so.

As compared to using regular administrative processes, emergency rulemaking also falls short with respect to deliberation. There is no opportunity for formal commentary by the citizenry and affected businesses and residents, nor is there any obligation by the promulgating agency to respond to such comments. Again, city councilmembers may weigh in informally, but the formal processes that form the foundation of modern administrative rulemaking are circumvented.⁴⁰ With respect to expertise, another cornerstone justification for the modern administrative state, when a mayor adopts an emergency vaccine passport order, he or she may consult the city's health commissioner, but the mayor on his or her own has no special claim to expertise on the matter.

Thus, in relying on emergency and unilateral executive rulemaking, cities short-circuit not just involving the public more

38. *Id.* at 1257-62.

39. See *infra* App. On Chicago's city council, see *City Council, Your Ward & Alderman*, CHICAGO, <https://www.chicago.gov/city/en/about/council.html> [<https://perma.cc/59KL-WESC>].

40. See, e.g., Julia Marsh, *Staten Island GOP Pols Demand Reversal of 'Unfair' Indoor Vaccine Mandate*, N.Y. POST (Aug. 4, 2021), <https://nypost.com/2021/08/04/gop-pols-call-for-reversal-of-nycs-indoor-vaccine-mandate/> [<https://perma.cc/VVB3-HTXT>].

in whether such policies should be adopted, but also in determining the policies' scope. As illustrated above, there are numerous details to be determined in adopting vaccine passport policies. Which facilities should be required to screen for vaccine proof? What kinds of alternative forms of entry should be permitted? Should one shot or two of the mRNA vaccines be required? What about for children who only recently can be vaccinated, and those who cannot yet be? Should religious and medical exemptions be allowed, and at what "price" of accommodation (e.g., requiring a negative PCR test instead)? Without involving the public more broadly in determining these critical questions of scope, the policy is likely to be less reflective of public sentiment and lacking in democratic legitimacy.

The countervailing concern for speed of policy implementation during a fast-moving pandemic certainly merits consideration. That most of these policies emerged more than a year into the pandemic and months after widespread availability of vaccines, however, weakens that argument. In addition, several took a month or two to implement after being announced, demonstrating that the urgency was not perhaps as stark as advertised. Moreover, Los Angeles, Oakland, West Hollywood, and Highland Park demonstrate that cities can use the ordinance-making process to adopt or at least ratify vaccine passports.⁴¹ Those cities with an established administrative process also can use that system to adopt a policy relatively quickly. In New York City, for instance, the city's administrative procedure act allows for agencies to adopt emergency rules for up to sixty days without going through notice and comment with the possibility of extending for sixty more days so long as they get the notice and comment process started at that point.⁴²

41. Note that in Los Angeles, one councilman's objections slowed down the passage of the ordinance by a week. Emily Alpert Reyes & Luke Money, *L.A. Puts Off Vote on Vaccination Requirement for Indoor Venues*, L.A. TIMES (Sept. 29, 2021), <https://www.latimes.com/california/story/2021-09-29/la-council-puts-off-vote-proof-of-vaccination-indoor-venues> [https://perma.cc/E7F9-JSMR].

42. NEW YORK CITY CHARTER, City Administrative Procedure Act § 1043(i) (2022).

V. CONCLUSION

The ebbing of the Omicron wave of COVID in February 2022 led most jurisdictions to drop their vaccine passport requirements. As of this writing, all but four of the twenty municipal jurisdictions have since ended their vaccine passport requirements. Two of the holdouts — Los Angeles and New Orleans — each have plans to do so within the near future.⁴³ As quickly and unilaterally as they were implemented, so too have vaccine passports thus been repealed, sometimes over objections. In Washington, D.C., for instance, members of the city council objected to Mayor Muriel Bowser's unilateral repeal of vaccine passports, with one even proposing legislation to reinstate the system before ultimately deciding not to pursue it.⁴⁴ Emergency policymaking is a double-edged sword with respect to its swiftness.

Although they are now disappearing fast, mayors and executives could choose to reinstate vaccine passports should COVID cases rise again. Moreover, not all the repeals completely eliminate the prior regime; Berkeley, for instance, rescinded the requirement that restaurants and gyms check for vaccine proof but retained and even added requirements that employees in settings deemed “high risk” be fully vaccinated and boosted.⁴⁵ It would be a mistake, therefore, to dismiss municipal vaccine passport regimes a mere flash in the pan. Rather, the use of emergency and

43. New Orleans says that it will end its vaccine passport on March 21 “if the city’s virus levels remain stable.” Clair Lorell, *With Mardi Gras Over, New Orleans Stops Requiring Masks in Restaurants and Bars*, *EATER: NEW ORLEANS* (Mar. 2, 2022), <https://nola.eater.com/2022/3/2/22958720/new-orleans-stops-requiring-masks-restaurants-one-day-after-mardi-gras> []. And Los Angeles’s City Council voted on March 9 to direct the city attorney to draw up a new ordinance, repealing the prior one which created the vaccine passport system. *LA City Council Takes Step Toward Ending Vaccine Mandate for Many Indoor Areas, Large Outdoor Events*, *ABC7* (Mar. 9, 2022), <https://abc7.com/los-angeles-vaccine-mandate-proof-of-vaccination-covid-vote/11635332/> [<https://perma.cc/QZ7L-VZ5P>].

44. Martin Austermuhle, *Ahead of Friday Vote, Nadeau Withdraws Bill That Would Reinstate Vaccine Mandate*, *DCIST* (Feb. 18, 2022), <https://dcist.com/story/22/02/18/nadeau-withdraws-dc-bill-that-would-reinstate-vaccine-mandate-for-businesses/> [<https://perma.cc/PAV6-BFRY>].

45. *CITY OF BERKELEY, Requiring Proof of Vaccination for Patrons and Employees of Certain Businesses*, (revised March 8, 2022), https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Public_Health/covid19/COB-health-order-n24-vaccine-mandate.pdf [<https://perma.cc/26ZQ-U3X3>].

unilateral executive authority to adopt vaccine passports represents a potential watershed moment in municipal policymaking. Having used them now in such a substantial way, mayors and health commissioners may seek to use executive and emergency powers in the future to pursue other health-related goals that they previously might have pursued only through ordinance or regulation. Indeed, given the wide range of policies that have some impact on health, mayors and other executive officials may find it increasingly tempting to pursue their policy objectives in a manner similar to the implementation of vaccine passports in order to avoid the messy and unpredictable ordinance- and rule-making processes.⁴⁶

Whether the use of emergency authority at the local level will incur the kind of “backlash” to executive and public health authority that has occurred at the state level since the COVID-19 pandemic began remains to be seen.⁴⁷ The lack of significant partisan competition within most American cities may limit the likelihood of such a rollback.⁴⁸ Given that it may be here to stay, therefore, the quick and impactful use of emergency, executive authority to create and enforce vaccine passports should give some pause to those who have long lauded local government for its communitarian and deliberative nature. Just as cities and counties have been leaders in innovating with respect to the policies they adopt, vaccine passports demonstrate that they are also willing to break new ground in *how* they adopt such policies.

46. See, e.g., Shane Dixon Kavanaugh, *Portland Mayor Ted Wheeler Invokes Emergency Over Homeless Street Camping, Creates Central Command*, OREGONIAN (Mar. 3, 2022), <https://www.oregonlive.com/politics/2022/03/portland-mayor-to-launch-centralized-emergency-response-to-homeless-street-camping.html> [<https://perma.cc/C36T-BKFS>].

47. For more on the supposed “backlash” that has occurred at the state level, see Anna Maria Barry-Jester et al., *Pandemic Backlash Jeopardizes Public Health Powers, Leaders*, KAISER HEALTH NEWS & AP (Dec. 15, 2020), <https://khn.org/news/article/pandemic-backlash-jeopardizes-public-health-powers-leaders/> [<https://perma.cc/W3DM-GEJQ>].

48. See David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J.L. & POL’Y. 419 (2007).

VI. APPENDIX⁴⁹

Jurisdiction ⁵⁰	Announced	Effective	Ended	Manner of adoption	Negative test as substitute?	Age minimum
N.Y.C. ⁵¹	8/3/21	8/17/21	3/7/22	Mayoral	No	12+
S.F. ⁵²	8/12/21	8/20/21	3/11/22	Health Officer	No	12+
New Orleans, La. ⁵³	8/12/21	8/16/21		Health Dep't	Yes <72 hrs	5+ phased
Honolulu/Oahu, Haw. ⁵⁴	8/30/21	9/13/21	3/6/22	Mayoral	Yes <48 hrs	12+
Berkeley, Cal. ⁵⁵	9/1/21	9/10/21	3/8/22	Health Officer	No	5+

49. I do not include in the chart vaccine passport regimes like San Jose's, which applied to "mega-events" like indoor sporting events, but not to restaurants, cafes, and gyms. See Lloyd Alaban, *UPDATE: San Jose Mandates Proof of Vaccination for Large Events at City Buildings*, SAN JOSE SPOTLIGHT (Aug. 24, 2021), <https://sanjosespotlight.com/san-jose-to-require-proof-of-covid-vaccination-for-large-gatherings/> [https://perma.cc/42XP-JNSZ].

50. The author recognizes that there may have been more municipal vaccine passport regimes implemented in the United States in the last six months. With thousands of potential jurisdictions, it is possible that my research did not catch every single one.

51. NYC EMERGENCY EXEC. ORDER NO. 225, *Key to NYC: Requiring COVID-19 Vaccination for Indoor Entertainment, Recreation, Dining and Fitness Settings* (Aug. 16, 2021), <https://www1.nyc.gov/office-of-the-mayor/news/225-001/emergency-executive-order-225> [https://perma.cc/565J-TUV8].

52. ORDER OF THE HEALTH OFFICER OF THE CITY AND COUNTY OF SAN FRANCISCO, *Encouraging COVID-19 Vaccine Coverage and Reducing Disease Risks*, (effective June 11, 2021) (updated March 2, 2022), <https://www.sfdph.org/dph/alerts/files/C19-07-Safer-Return-Together-Health-Order.pdf> [https://perma.cc/FC7M-TGU4].

53. CITY OF NEW ORLEANS HEALTH DEPARTMENT, *Guidelines for COVID-19 Reopening* (Oct. 29, 2021), <https://ready.nola.gov/NOLAReady/media/Documents/Coronavirus/NOHD-Guidelines-for-reopening-October-29-2021-FINAL.pdf> [https://perma.cc/9NYX-H5E4].

54. HONOLULU EXEC. ORDER NO. 2022-01 (Jan. 5, 2022) https://www.honolulu.gov/rep/site/may/may_docs/FINAL_EO_2022-01_1.5.22.pdf [https://perma.cc/99M9-5KC2] (applying to employees, contractors & volunteers and facilitated by state vax app, Safe Access Oahu).

55. ORDER OF THE HEALTH OFFICER OF THE CITY OF BERKELEY, *Requiring Proof of Vaccination for Patrons and Employees of Certain Businesses* (effective Sept. 1, 2021) (revised Feb. 22, 2022) https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Public_Health/covid19/COB-health-order-n24-vaccine-mandate.pdf [https://perma.cc/8WJE-G9QQ].

Jurisdiction	Announced	Effective	Ended	Manner of adoption	Negative test as substitute?	Age minimum
Maui, Haw. ⁵⁶	9/3/21	9/15/21	2/21/22	Mayoral	Yes <48 hrs	12+
Contra Costa Cnty., Cal. ⁵⁷	9/14/21	9/22/21	2/4/22	Health Officer	Yes <72 hrs	12+
Los Angeles County, Cal. ⁵⁸	9/15/21	10/4/21	3/10/22	Health Officer	No	5+
King Cnty., Wash. ⁵⁹	9/16/21	10/25/21	3/1/22	Health Officer	Yes <72 hrs	12+
West Hollywood, Cal. ⁶⁰	9/17/21	11/4/21		Exec., then Ordinance	Only if exempt	18+
L.A. ⁶¹	10/6/21	11/8/21		Ordinance	Only if exempt	5+
Culver City, Cal. ⁶²	10/26/21	11/12/21		City Mgr.	Yes <72 hrs	18+

56. OFFICE OF THE MAUI MAYOR, *Public Health Emergency Rules* (effective Oct. 16, 2021), https://governor.hawaii.gov/wp-content/uploads/2021/10/2110079-COM_Public-Health-Emergency-Rules-Effective-October-16-2021-distribution-signed.pdf [https://perma.cc/9SD9-NWYG].

57. ORDER OF THE HEALTH OFFICER OF THE COUNTY OF CONTRA COSTA, *Mandating Operations of Specified Dining Establishments, Entertainment Venues and Fitness Facilities to Restrict Entry or Service Based on COVID-19 Vaccinations Status or Testing* (effective Sept. 14, 2021) https://813dcad3-2b07-4f3f-a25e-23c48c566922.filesusr.com/ugd/84606e_5b347d41f96e4be48d32f8b0c991dff3.pdf [https://perma.cc/78V6-5P9S].

58. News Release, County of L.A., *supra* note 34.

59. SEATTLE & KING COUNTY HEALTH OFFICER, *Verification of Vaccination* (revised Nov. 22, 2021) <https://kingcounty.gov/elected/executive/constantine/news/release/2021/September/~media/depts/health/communicable-diseases/documents/C19/LHO-proof-of-vaccination.ashx> [https://perma.cc/M5JU-D7RV].

60. CITY COUNCIL OF WEST HOLLYWOOD, *Ratifying Measures to Prevent the Spread of COVID-19*, Res. No. 21-5444, <https://www.weho.org/home/showpublisheddocument/50996> [https://perma.cc/4ZTB-Y494].

61. Los Angeles Ord. No. 21-0878 (Oct. 6, 2021), https://clkrep.lacity.org/online/docs/2021/21-0878_ord_draft_10-06-21.pdf [https://perma.cc/Z24Q-PG2B].

62. CITY OF CULVER CITY, *Proof of COVID-19 Vaccination Required to Enter Certain Indoor Businesses and Indoor City Facilities*, (effective Nov. 29, 2021),

Jurisdiction	Announced	Effective	Ended	Manner of adoption	Negative test as substitute?	Age minimum
Phila. ⁶³	12/13/21	1/3/22	2/16/22	Health Officer	No	5.25+
Boston ⁶⁴	12/20/21	1/15/22	2/18/22	Mayoral	No	5+ phased
Puerto Rico ⁶⁵	12/20/21	12/27/21		Gubernatorial	Yes <48 hours	12+
Oakland ⁶⁶	12/21/21	2/1/22		Ordinance	Only if exempt	12+
Chicago ⁶⁷	12/22/21	1/3/22	2/28/22	Health Comm'r	Only if exempt	5+
Wash., D.C. ⁶⁸	12/22/21	1/15/22	2/15/22	Mayoral	Only if exempt	12+
Cook Cnty., Ill. ⁶⁹	12/23/21	1/3/22	2/28/22	Health Dep't	No	5+

<https://www.culvercity.org/files/sharedassets/fire/38th-revised.pdf>
[<https://perma.cc/9QWQ-WL84>].

63. CITY OF PHILADELPHIA, *You Will Need to be Fully Vaccinated Against COVID to Enter Any Establishment that Serves Food in Philly* (Dec. 13, 2021), <https://www.phila.gov/2021-12-13-you-will-need-to-be-fully-vaccinated-against-covid-to-enter-any-establishment-that-serves-food-in-philly/> [<https://perma.cc/T7RB-ZUW3>].

64. CITY OF BOSTON, *Introducing B Together* (updated Feb. 1, 2022), <https://www.boston.gov/departments/mayors-office/introducing-b-together#download> [<https://perma.cc/2FD6-LUCP>].

65. Puerto Rico, Exec. Order No. EO-2021-063, Aug. 11, 2021, <file:///C:/Users/pdiller/AppData/Local/Temp/OE-2021-063-%20English.pdf>.

66. CITY OF OAKLAND, *Proof of Vaccination Ordinance Requirements*, <https://www.oaklandca.gov/resources/city-vaccination-mandate-ordinance> [<https://perma.cc/68BS-Q7HJ>] [last updated Feb. 15, 2022, 3:53 PM].

67. Order of the Comm'r of Health of the City of Chicago, No. 2021-2, Dec. 21, 2021 (effective Jan. 3, 2022), <https://www.chicago.gov/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2021/December/HealthOrder.pdf> [<https://perma.cc/P732-YX3R>].

68. GOVERNMENT OF THE DISTRICT OF COLUMBIA, *Vaccination Requirement for Entrance into Certain Indoor Establishments and Facilities* (Dec. 22, 2021), https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/2021-148%20Vaccination%20Requirement%20for%20Entrance%20into%20Certain%20Indoor%20Establishments%20and%20Facilities.pdf [<https://perma.cc/BZ7F-LKKW>].

69. Press Release, Cook County Public Health, Cook County Department of Health Issues New Mitigation Orders Amid Latest COVID-19 Surge (Dec. 23, 2021), <https://cookcountypublichealth.org/2021/12/23/cook-county-department-of-public->

Jurisdiction	Announced	Effective	Ended	Manner of adoption	Negative test as substitute?	Age minimum
Newark, N.J. ⁷⁰	12/23/21	1/10/22	2/17/22	Mayoral	No	5+
Highland Park, Ill. ⁷¹	12/29/21	1/7/22	2/14/22	Mayoral, then Ordinance	No	5+
Oak Park, Ill. ⁷²	12/30/21	1/10/22	2/2/22	Health Dep't	No	5+ phased
Evanston, Ill. ⁷³	12/30/21	1/10/22	2/28/22	Health Dep't	No ⁷⁴	5+
Minneapolis ⁷⁵	1/12/22	1/19/22	2/10/22	Mayoral	Yes <72 hrs	5+

health-issues-new-mitigation-orders-amid-latest-covid-19-surge/
[<https://perma.cc/YU8L-RBBM>].

70. CITY OF NEWARK EXEC. ORDER SUMMARY, *Requiring Proof of Vaccination for Entrance into Certain Indoor Establishments and Facilities* (Dec. 27, 2021), <https://www.newarknj.gov/news/executive-order-summary> [<https://perma.cc/8RVT-9R6U>].

71. CITY OF HIGHLAND PARK, *Supplemental Order Concerning On-Premises Food and Drink Establishments* (Dec. 29, 2021), <https://cms6.revize.com/revize/highlandparkil/2021-12-29%20Supplemental%20Order%20Concerning%20On-Premises%20Food%20and%20Drink%20Establishments.pdf> [<https://perma.cc/DW79-AEHE>]; City of Highland Park, *Proof of COVID-19 Vaccination for Patrons of On-Premises Dining Establishment Required*, https://www.cityhpil.com/news_detail_T21_R847.php [<https://perma.cc/GUZ9-6FDA>] (noting that the city council approved the mayor's emergency vaccination mandate order at a special meeting on the same day of its issuance).

72. VILLAGE OF OAK PARK, *Proof of Vaccination in Public Places* (amended Jan. 10, 2022) https://www.oak-park.us/sites/default/files/health/covid-19-packets/guidelines/vaccine_order_01-06-22.pdf [<https://perma.cc/6SDD-EG2P>]. Notably, Oak Park's vaccine passport contained no religious exemption. *Id.*

73. CITY OF EVANSTON, ILL., *Order of the Director, Department of Health and Human Services* (Jan. 14, 2022), <https://www.cityofevanston.org/home/showdocument?id=69423&t=637764536846389126> [<https://perma.cc/X933-TGWN>].

74. Evanston permitted a negative test to suffice in cases of religious exemptions proven by an attestation signed by a religious leader. *Id.*

75. ST. PAUL, MINN. EXEC. ORDER 2022-10 (Feb. 10, 2022), <https://www.stpaul.gov/departments/emergency-management/coronavirus-covid-19/emergency-executive-orders#jan-22> [<https://perma.cc/TMB3-PPJL>].

Jurisdiction	Announced	Effective	Ended	Manner of adoption	Negative test as substitute?	Age minimum
St. Paul, Minn. ⁷⁶	1/12/22	1/19/22	2/10/22	Mayoral	Yes <72 hrs	5+

76. MINNEAPOLIS EMERGENCY REGULATION NO. 2022-4 (JAN. 12, 2022), <https://www.minneapolismn.gov/government/mayor/official-notices/emergency-regulation-2022-4/> [<https://perma.cc/99TR-9DEY>].