New Civil Liberties Alliance

January 28, 2022

Dr. Gregory Washington
President of George Mason University
president@gmu.edu

Mr. David Farris
Executive Director, Safety and
Emergency Management
dfarris@gmu.edu

Ms. Julie Zobel
Assistant Vice President of Safety,
Emergency, and Enterprise Risk
Management
jzobel@gmu.edu

Mr. James Hazel
Rector of the Board of Visitors
bov@gmu.edu

VIA EMAIL

Re: GMU's Unconstitutional and Unethical Booster Mandate
On Behalf of NCLA Clients, Robert Fellner and Megan Darling

Dear Dr. Washington, Mr. Farris, and Ms. Zobel:

It has come to our attention that George Mason University (GMU) is requiring all eligible students[1] to receive a booster by February 15, and to upload proof of having done so into an online portal. Students who do not comply face disciplinary action, including holds placed on their accounts, late fees, suspension, and expulsion.

The New Civil Liberties Alliance (NCLA) represents Robert Fellner, a student at the Antonin

[1] Eligible students are defined as those who completed a course of Pfizer or Moderna at least six months ago or received the Johnson & Johnson shot at least two months ago, and who have not been granted a religious or medical exemption by the University.

Scalia Law School, and Megan Darling, a student at the School of Business, in this matter. Both students—who are fully vaccinated—have legitimate concerns about receiving a booster at this time. Their concerns are supported by medical and scientific research, in contrast to GMU's blanket booster mandate, which cannot be justified by logic, science, or medical ethics, particularly given the most up-to-date evidence establishing that the vaccines do little or nothing to reduce transmission of the Omicron variant. As a result, GMU's booster requirement infringes upon the students' Due Process and Equal Protection rights under the United States Constitution and Due Process rights under the Virginia State Constitution, and they should be exempted immediately. Moreover, as pointed out in an advisory opinion issued just days ago from Virginia's Attorney General to the Governor, GMU lacks the authority to implement such a mandate.[2] NCLA also urges GMU to reconsider and rescind its unconstitutional vaccination and booster policy for all students.

I. THE NEW CIVIL LIBERTIES ALLIANCE'S INTEREST IN THIS MATTER

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to protecting constitutional freedoms and restoring civil liberties. The "civil liberties" of the organization's name include rights at least as old as the Virginia and U.S. Constitutions themselves, such as trial by jury, due process of law, the right to be tried in front of an impartial and independent judge, the right to free expression without fear of censorship or reprisal, and the right to privacy and personal autonomy. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, state legislatures, and federal, state, and local administrative agencies, including state university administrations, have trampled them for so long.

Even where NCLA has not yet brought a lawsuit to challenge an unconstitutional exercise of state power or infringement of fundamental rights, it encourages governmental entities to cease encroaching upon civil liberties of their own volition. We believe that these governmental entities should continuously strive to establish meaningful limitations on administrative policymaking, rulemaking, adjudication, and enforcement, thereby avoiding unconstitutional overreach. For these reasons, NCLA advises GMU to reexamine its mandate and ideally to eliminate it, since whether or not to receive a booster should be a matter of individual choice.

[2] *See* 1/26/22 Advisory Opinion of Attorney General Jason Miyares to Governor Glenn Youngkin.

II. ROBERT FELLNER'S AND MEGAN DARLING'S BACKGROUNDS

Robert Fellner, 37 years old, is a first-year law student at GMU's Antonin Scalia Law School. Two years ago, although gainfully and happily employed in Las Vegas, Nevada, he realized that law was his true passion, and decided to pursue a career in that area. Although he was accepted by another university and waitlisted at several others, he decided to accept admission to Scalia Law School, as he shares the school's overarching values and was offered a sizeable scholarship of nearly $80,000. Mr. Fellner made substantial financial sacrifices and significant life changes in order to relocate to Northern Virginia and attend Scalia Law School; the move from the West Coast alone cost him around $10,000.

Because he believed that the COVID-19 vaccines work to prevent severe illness and disease, Mr. Fellner got two doses of the Moderna in April and May of 2021. Although he considered the benefits of vaccination to outweigh the risks, based on the significant research he has conducted, Mr. Fellner does not believe a booster is in his best interests and strongly objects to being coerced into receiving one by GMU.

Megan Darling, 33, is a disabled veteran and mother of a 3-year-old child. She began a post-baccalaureate program at GMU's School of Business this past fall. Having worked as a medic in the army, she suffers from post-traumatic stress disorder (PTSD) and military sexual trauma, among other conditions related to her service. Because of her psychiatric diagnosis, she is unable to pursue the career as a psychologist that she had initially intended, so she decided to enroll in this advanced degree program.

Ms. Darling received two doses of the Pfizer vaccine in March and April of 2021 and experienced menstrual changes as well as flu-like symptoms. In December of 2021, she came down with COVID-19 (diagnosed via an at-home rapid test) and accordingly has naturally acquired immunity. She plans to have more children and is concerned about the lack of data surrounding the effects of the booster on women's reproductive systems, and she wants to make her own decisions about her medical care.

III. GMU'S BOOSTER MANDATE

GMU community members received an email from President Gregory Washington on December 31, 2021, informing them that all students, faculty, and staff who had not been granted a religious or medical exemption from the original vaccine requirement would have to get a booster shot by February 15, if eligible according to the CDC. This requirement applies to anyone who completed a

Pfizer, Moderna, or WHO-approved vaccination course at least six months ago, or who received the one-shot Johnson & Johnson vaccine at least two months ago. Another email from President Washington, on January 14, 2022, reiterated the mandate and explicated GMU's rationale: "Given the highly infectious nature of omicron, we have seen unprecedented numbers of Mason students, staff, and faculty contracting the virus . . . we continue to see milder symptoms among those who are vaccinated, especially among those who received their booster shot."

As a result of Governor Youngkin's January 15 Executive Directive that prohibits state employers from mandating vaccines for their employees, GMU withdrew the booster requirement for faculty and staff via email on January 17. GMU did not eliminate the requirement for students, although they face higher risk of adverse side effects from the booster and lower risk of adverse consequences from the virus than employees by virtue of their age.

Mr. Fellner made a number of attempts, via email and petition, to convince GMU to change its policy.[3] In response, on January 25, 2022, an individual writing via email on behalf of Rector James W. Hazel dismissed Mr. Fellner's concerns, maintaining that the CDC recommended boosters for everyone, and admonishing him that "you and I are not public health experts," and that Mr. Fellner had the option of attending law school elsewhere if he did not like the terms.

[3] Robert Fellner, "Repeal George Mason University's Vaccine Booster Mandate," *Change.org*, *available at* https://www.change.org/p/tell-gmu-president-gregory-washington-to-repeal-george-mason-university-s-vaccine-booster-mandate?pt=AVBldGl0aW9uABzQ5gEAAAAAYfGaVVGSk8o4ZmM2NmI2YQ%3D%3D&source_location=topic_page (last visited Jan. 26, 2022).

IV. Scientific Data to Date on the Boosters, the New Variants, and Naturally Acquired Immunity

GMU's booster mandate is predicated on the assumption that forcing students to get a booster will help to slow the spread of COVID-19. This premise is false, as boosters have a limited effect on transmission. A new trial in Israel demonstrated that "the level of antibodies needed to protect and not to g[e]t infected from Omicron is probably too high for the vaccine" to accomplish.[4] Even CDC Director Rochelle Walensky has said that the vaccines do not stop transmission of the Delta and Omicron variants. Likewise, the CDC's webpage does not claim that the vaccines reduce or stop transmission, particularly in light of the emergence of the Omicron variant.[5] That is a glaring omission and indicates that the CDC does not have evidence that the vaccines are sterilizing (*i.e.* that they stop transmission). Even Anthony Fauci stated recently that nearly every American will be infected with the coronavirus at some point.[6]

There is a paucity of evidence surrounding the benefits—compared to the detriments—of receiving a booster. Dr. Paul Offit, a member of the FDA COVID vaccine advisory panel and a zealous advocate for vaccines, maintains that the initial vaccination course is sufficient to protect against severe disease in most cases and advised his own son, who is in his 20's, not to get a booster. Offit stated, "[G]iven that two doses of an mRNA-containing vaccine are very likely to protect against severe illness, I'm even more convinced that we should hold off on pushing boosters when such an unusual variant is circulating . . . . [T]here may be benefits to waiting for a booster that's more tailored to a variant that is completely resistant to protection against serious illness afforded by the vaccine."[7] In the words of epidemiologist Tracy Beth Hoeg, MD, PhD, "data just released from Denmark (where 85% of infections are omicron) show no effect of the booster against being infected and no difference between 2 and 3 doses against severe disease" in those under 70 years old.[8]

While the vaccines appear to be relatively safe at a population level, like all medical

---

[4] "Israeli study shows 4th shot of COVID-19 vaccine less effective on Omicron," *Reuters* (Jan. 17, 2022), *available at* https://www.reuters.com/world/middle-east/israeli-study-shows-4th-shot-covid-19-vaccine-not-able-block-omicron-2022-01-17/ (last visited Jan. 25, 2022).
[5] "Omicron Variant: What You Need to Know," *Centers for Disease Control and Prevention* (Dec. 20, 2021), *available at* https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html (last visited Jan. 25, 2022).
[6] Andrew Jeong, et al., "Virus may infect most, Fauci says," *The Washington Post* (Jan. 12, 2022), *available at* https://www.washingtonpost.com/nation/2022/01/12/covid-omicron-variant-live-updates/ (last visited Jan. 26, 2022).
[7] Dr. Paul Offit, "No, We don't need boosters for all—just for some," *The Philadelphia Inquirer* (Dec. 29, 2021), *available at* https://www.inquirer.com/opinion/commentary/booster-covid-mandate-vaccine-pro-con-20211229.html (last visited Jan. 26, 2022).
[8] Tracy Hoeg, MD, PhD (@TracyBethHoeg), Twitter (Jan. 5, 2022, 5:17 PM), https://twitter.com/tracybethhoeg/status/1478853178699354112?s=21.

interventions, they carry the potential for individual adverse health consequences, including severe ones. Evidence has emerged regarding the real risk of vaccine-induced myocarditis (heart inflammation), particularly for men under 40 like Mr. Fellner. Multiple independent data sets suggest that vaccine-induced myocarditis occurs at rates 400 to 500% greater than the CDC's estimates and may in fact exceed the rates of COVID-related cardiac complications in healthy men under 40 years.[9] In other words, the risk of cardiac complications from the vaccine may be greater than the risk posed by COVID itself.

The booster appears to further increase myocarditis risk.[10] In fact, a third dose of Pfizer BioNTech is estimated to have a risk ratio of 7.6 for myocarditis, compared to an incidence risk ratio for SARS-CoV-2 of 2.02.[11] As cardiologist Anish Koka has explained, the notion that myocarditis can be dismissed as "minor"—as CDC, FDA, and various other public health authorities have tried to do—is absurd. Not only does one suffer chest pain and leak cardiac enzymes from damaged heart muscle, but a third of patients are found to suffer fibrosis and scarring in the heart, leaving them with an uncertain long-term prognosis. Furthermore, following diagnosis, young men are put on activity restrictions for 3 to 6 months.[12]

There is also evidence that boosters could, in fact, deplete individuals' immune systems and leave them *more* susceptible to reinfection.[13] Very recent research confirmed anecdotal reports that the vaccines cause menstrual changes, and not infrequently. While at this time there does not appear

---

[9] Martina Patone, et al., "Risks of myocarditis, pericarditis, and cardiac arrhythmias associated with COVID-19 vaccination or SARS-CoV-2 infection," *Nature Medicine* (Dec. 14, 2021), *available at* https://www.nature.com/articles/s41591-021-01630-0 (last visited Jan. 25, 2022); Sharff et al., "Risk of Myopericarditis following COVID-19 mRNA vaccination," MEDRXIV (Dec. 27, 2021), *available at* https://www.medrxiv.org/content/10.1101/2021.12.21.21268209v1 (last visited Jan. 25, 2022) ("[T]rue incidence of myopericarditis is markedly higher than the incidence reported to US advisory committees."); Chua et al., "Epidemiology of Acute Myocarditis/Pericarditis in Hong Kong Adolescents Following Comirnaty Vaccination," PUBMED (Nov. 28, 2021), *available at* https://pubmed.ncbi.nlm.nih.gov/34849657/ (last visited Jan. 25, 2022); David Zweig (@davidzweig), Twitter (Jan. 2, 2022, 4:14PM), https://twitter.com/davidzweig/status/1477750160033726464?s=20.

[10] Vinay Prasad, "UK Now Reports Myocarditis stratified by Age & Sex After Vaccine or Sars-cov-2," *Substack* (Dec. 26, 2021), *available at* https://vinayprasadmdmph.substack.com/p/uk-now-reports-myocarditis-stratified (last visited Jan. 25, 2022).

[11] Patone, et al., "Risks of myocarditis following sequential COVID-19 vaccinations by age and sex," MEDRXIV (Dec. 25, 2021), *available at* https://www.medrxiv.org/content/10.1101/2021.12.23.21268276v1.full.pdf (last visited Jan. 25, 2022).

[12] *See* 1/26/22 Declaration of Anish Koka, Attachment A.

[13] *See* Jennifer Block, "Vaccinating people who have had covid-19: why doesn't natural immunity count in the US?" BRITISH MEDICAL JOURNAL (Sept. 13, 2021), *available at* https://www.bmj.com/content/374/bmj.n2101 (last viewed Dec. 13, 2021) (Vaccination of the naturally immune may increase their chances of reinfection. Some experts believe that subsequent vaccination for those who have been previously infected may cause "'exhaustion,' and in some cases even a deletion, of T-cells," leading to a depleted immune response.). *See also* Irina Anghel, "Frequent Boosters Spur Warning on Immune Response," *Bloomberg* (Jan. 12, 2022), *available at* https://www.bloomberg.com/news/articles/2022-01-11/repeat-booster-shots-risk-overloading-immune-system-ema-says (last visited Jan. 25, 2022) (frequent COVID-19 shots can adversely affect immune response.).

to be great cause for concern, given how dismissive the medical establishment has been of women's reports about this side effect of the COVID-19 vaccine for some time, this new admission underscores the many unknowns and substantiates the need for personal choice, particularly when it comes to boosters.[14] A recent editorial in the British Medical Journal (BMJ), for instance, noted that "there is still much to learn. Scientifically, it will be important to characterize the mechanism by which post-vaccination menstrual changes occur," and acknowledged that more studies are needed to determine if vaccination affects fertility.[15] Indeed, issues related to reproduction are among Ms. Darling's concerns about receiving a booster shot.

Ms. Darling also recently recovered from COVID-19. Mountains of evidence demonstrate that a COVID-19 infection creates immunity to the virus at least as robust and long-lasting as that achieved through vaccination. For example, a study conducted by researchers at Cleveland Clinic of 1,359 unvaccinated individuals previously infected with COVID-19 found *zero* reinfections.[16] The researchers' conclusion that "individuals who have had SARS-CoV-2 infection are unlikely to benefit from COVID-19 vaccination[,]" echoes other studies determining that naturally acquired immunity is at least as effective at combatting COVID-19 infection—whether from the original virus or any of the mutant variants—as immunity conferred through any of the three vaccines approved for use in the United States.

Along these lines, the largest study conducted so far, from Israel, found that vaccinated individuals had 13.1 times greater risk of testing positive, 27 times greater risk of symptomatic disease, and around 8.1 times greater risk of hospitalization than unvaccinated individuals with naturally acquired immunity. Nor is there any evidence or reason to believe that natural immunity is less durable than vaccination.[17] Quite the contrary. Just last week the CDC released a study providing further evidence that naturally acquired immunity alone, without vaccination, provided a 55.3-fold reduction in hospital admissions compared to 19.8-fold reduction among those with vaccination alone (no prior

---

[14] "New Drugs Found to Cause Side Effects Years After Approval," *NBC News* (May 10, 2017), *available at* https://www.nbcnews.com/health/health-news/new-drugs-found-cause-side-effects-years-after-approval-n757526 (last visited Jan. 26, 2022).

[15] Victoria Male, "Menstruation and covid-19 vaccination," BRITISH MEDICAL JOURNAL (26 Jan. 2022).

[16] Nabin K. Shrestha, et al., *Necessity of COVID-19 Vaccination In Previously Infected Individuals*, MEDRXIV (June 5th, 2021), https://www.medrxiv.org/content/10.1101/2021.06.01.21258176v2.

[17] *Id. See also* Yair Goldberg, et al., *Protection of Previous SARS-Cov-2 Infection is Similar to That of BNT162b2 Vaccine Protection: A Three-Month Nationwide Experience From Israel*, MEDRXIV (April 20, 2021), https://www.medrxiv.org/content/10.1101/2021.04.20.21255670v1.full.pdf; Smerconish, *Should Covid Survivors and the Vaccinated be Treated the Same?*: Interview with Jay Bhattacharya, Professor of Medicine at Stanford University (CNN June 12, 2021), https://www.cnn.com/videos/tv/2021/06/12/should-covid-survivors-and-the-vaccinated-be-treated-the-same.cnn; Marty Makary, *The Power of Natural Immunity*, WALL STREET JOURNAL (June 8, 2021, 12:55 PM), https://www.wsj.com/articles/the-power-of-natural-immunity-11623171303 (last visited June 29, 2021).

infection).[18] GMU should also recognize that there is no data about the safety and efficacy of booster shots in those who have hybrid immunity (both naturally acquired immunity and immunity derived from vaccination). That should give the University pause in mandating a booster for Ms. Darling, and others similarly situated.[19]

The Commonwealth of Virginia's public policy traditionally recognizes the scientific fact of naturally acquired immunity. State law governing vaccination of school children for measles, mumps, rubella, and varicella (chickenpox) explicitly exempts from the requirements those who can demonstrate existing immunity through serological testing that measures protective antibodies.[20] To put it bluntly, the medical community and public policy have long recognized that there is no reason for persons with naturally acquired immunity to receive a vaccine—and certainly none for the government to mandate one. Given that Ms. Darling has received *two* doses of the Pfizer vaccine, and recovered from COVID-19 just last month, mandating a booster which has no safety data and no proven effectiveness among those younger than 39 in her case is inconsistent with medical ethics.[21]

V. GMU'S POLICY WOULD NOT WITHSTAND A LEGAL CHALLENGE, IN ALL LIKELIHOOD

As an administrative unit of the Commonwealth of Virginia, and in contrast to private employers, those who make policy at public universities such as GMU are legally obligated to ensure that those policies do not violate the United States Constitution or the Virginia State Constitution.[22] GMU's policy amounts to a vaccine mandate. As courts have recognized, "the line between 'incentive' and 'coercion' is thin."[23] Coercion "by definition, is designed to induce a person to do that which the person offering the incentive wishes done."[24]

The Fourteenth Amendment to the United States Constitution prohibits states from depriving

---

[18] COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis," *Centers for Disease Control and Prevention* (Jan. 19, 2022), *available at* https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e1.htm?s_cid=mm7104e1_w (Jan. 25, 2022).

[19] Mahesh Shenai and Hooman Noorchashm, "Neglect of Natural Immunity Has Been Disastrous," *Real Clear Markets* (Jan. 19, 2022), *available at* https://www.realclearmarkets.com/articles/2022/01/19/neglect_of_natural_immunity_has_been_disastrous_812624.html (last visited Jan. 28, 2022).

[20] 12 Va. Admin. Code § 5-110-80 (2021).

[21] Tracy Hoeg, MD, PhD (@TracyBethHoeg), Twitter (Jan. 5, 2022, 5:17 PM), https://twitter.com/tracybethhoeg/status/1478853178699354112?s=21.

[22] *See, e.g.*, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (explaining that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years").

[23] *Enterprises v. Volvo Cars of N.A., LLC*, 2:14-CV-360, 2016 WL 4480343, at *10 (S.D. Ohio Aug. 25, 2016). *See also Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000) (explaining, in reference to Congress's spending powers, "[t]he boundary between incentive and coercion has never been made clear").

[24] *Enterprises*, 2016 WL 4480343 at *10.

individuals of "life, liberty or property, without due process of law."[25] Similarly, the Constitution of Virginia provides that: "all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[26] Accordingly, "there are certain inherent rights which men do not surrender by entering into organized society, and of which they cannot be arbitrarily deprived by the state."[27]

Mr. Fellner and Ms. Darling have liberty interests in declining a (medically unnecessary) booster shot, which entails an invasion of their bodily autonomy and deprivation of their rights to decline medical treatment.[28] They have property and liberty interests in completing their educations at the university where they began them.[29] The Supreme Court has explained that: "[p]rotected interests in property are normally not created by the Constitution. Rather, they are created and their dimensions are defined by an independent source[.]"[30]

Mr. Fellner gave up an income and career he loved and moved across the country, at substantial financial cost, to pursue a law degree at GMU, choosing this over other options. One of the reasons he did so was the nearly $80,000 scholarship GMU offered him, in which he has a vested property interest. Ms. Darling invested time, emotional energy, and other resources into her pursuit of a post-baccalaureate degree from the business school. Both students have already completed one semester; this new requirement was foisted upon them out of nowhere, and they did not anticipate or agree to it when they began the school year. Nor could they have foreseen such a requirement. This new term of enrollment thus not only constitutes a due process violation, but also creates a breach of the contract into which Ms. Darling and Mr. Fellner entered with GMU.[31]

---

[25] U.S. Const., Amend. XIV.
[26] Va. Const., Article I, § 1.
[27] *Taylor v. Smith*, 140 Va. 217 (1924).
[28] *Washington v. Harper*, 494 U.S. 210, 229 (1990); *Washington v. Glucksberg,* 521 U.S. 702, 722 n.17 (1997).
[29] *See Goss v. Lopez*, 419 U.S. 656 (1975) (holding that entitlement to a public education as a property interest is protected by the Due Process Clause, and that may not be withheld for misconduct without observing minimum procedures required by that Clause); *Doe v. Rector and Visitors of George Mason University*, 132 F.Supp.3d 712, 721-22 (E.D. Va. 2015) (expulsion of student from GMU without a hearing implicated his liberty interests under the Due Process Clause); *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 223 (1985) (assuming a "constitutionally protected right . . . in continued enrollment"); *Bd. Of Curators of University of Mo. v. Horowitz*, 435 U.S. 78, 84-85 (1978) (assuming a liberty or property interest in continuing a medical education); *Tigrett v. Rector & Visitors of University of Virginia*, 290 F.3d 620, 627 (4th Cir. 2002) (assuming "some constitutionally protected interest in continued enrollment"); *Henson v. Honor Comm. Of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983) (assuming "a protectable liberty or property interest in [disciplinary] proceeding.").
[30] *Goss,* 419 U.S. 656.
[31] *See Doe v. Alger*, 175 F.Supp.3d 646, 656 (W.D. Va. 2016) (a property interest protected by the Due Process Clause may arise from state statutes, contracts, regulations, or policies.).

GMU's booster mandate infringes students' liberty and property interests by coercing them into receiving unwanted medical care, the effects of which have not been thoroughly studied (*especially* as to Ms. Darling, who just recovered from COVID-19), and the risks of which may outweigh the benefits (*especially* as to Mr. Fellner, who is at heightened risk of suffering an incident of myocarditis by virtue of his age and sex), at threat of being expelled from the university in which they have invested time, money, and other resources. Moreover, it does so without a hearing, in violation of Mr. Fellner's and Ms. Darling's procedural due process rights.[32]

GMU should not assume that it will be able to rely upon *Jacobson v. Massachusetts*.[33] In contrast to that case, *inter alia*, the COVID-19 vaccines are not sterilizing, the virus does not present a deadly threat to the vast majority of people, especially twice-vaccinated university students (not to mention COVID-recovered ones), and the challenged policy involves not a one-time intrusion but an ongoing invasion into the individual's autonomy. In light of these facts, as well as the illogic of what amounts to a partial mandate—since faculty and staff are now exempt from the booster requirement—it could not survive even rational-basis review.

For similar reasons, GMU's policy will not withstand an Equal Protection Clause challenge. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state may "deny to any person within its jurisdiction the equal protection of the laws." This prohibits state and local governments and government officials from arbitrarily discriminating among citizens, denying to some rights or benefits that are made available to other similarly situated citizens, without justification.[34] Since the vaccines do not stop transmission and students are *less* likely than faculty and staff to suffer a serious outcome from COVID-19 due to their ages, GMU's mandate cannot survive such a challenge. Moreover, in this context particularly, the mandate makes no sense and is simply arbitrary. GMU cannot create a "booster bubble," so to speak, since employees are exempt from the mandate.

Finally, as Virginia's Attorney General just observed in an advisory opinion to Governor Youngkin, GMU does not have the authority to force students to get a COVID-19 vaccine or a booster in order to remain enrolled. A vaccine requirement necessitates explicit authorization from

---

[32] *Goss,* 419 U.S. 656 (suspending students without a hearing violated procedural Due Process protections under the United States Constitution); *Goldberg v. Kelly*, 397 U.S. 254 (1972) (welfare recipients could not be deprived of those benefits without a hearing.).

[33] *Cf. Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding that city could fine plaintiff $5 (about $150 today) for declining smallpox vaccine.).

[34] *See, e.g., City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 432 (1985).

the General Assembly, which has not been given. Accordingly, the Attorney General concluded that, to the extent a prior opinion determined that institutions of higher education could mandate vaccines, "that Opinion is superseded." Thus, there is no doubt that GMU would be unable to prevail should this matter proceed to litigation.

Defending its booster mandate, GMU (via Rector Hazel) relies upon CDC guidance recommending boosters for everyone over 16 who completed a full vaccination course a certain number of months ago. But guidance is not law, and recommendations are not mandates.[35] The University has a duty to do more than parrot nonbinding CDC guidance if it is to force medical treatments upon people without regard to their personal circumstances. The CDC also recommends that men have no more than two drinks per day, and that women have no more than one. Yet it would be readily apparent to most people that GMU's implementing a corresponding mandate is unethical, unlawful and ludicrous.[36] In a civilized, democratic society, we recognize that individuals possess a right to make cost-benefit analyses for themselves, and not have their lives governed by the "recommendations" of an agency operated by unelected officials, especially when those "recommendations" cannot be challenged in court because they do not carry the force of law.

VI. GMU Risks Legal Action If It Does Not Change Its Policy Immediately

GMU has an opportunity to be a leader in developing a rational, scientific, and humane policy that respects the personal and intellectual autonomy of Mr. Fellner and Ms. Darling to make their own decisions about their health. Although the booster mandate may be well-intentioned, GMU has breached its constitutional and ethical obligations by interfering with health decisions that should reside with individuals and their medical providers. Given the lack of GMU's knowledge as to Mr. Fellner's and Ms. Darling's specific health circumstances, the University is in no position to evaluate the risks and benefits associated with boosting them. As they are both vaccinated, Ms. Darling has recently recovered from COVID-19, and the vaccines are ineffective at stopping transmission, GMU has no interest—let alone a compelling one—in coercing them into receiving a booster or expelling them from the university they have invested time and resources into attending.

---

[35] *See Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."); *Appalachian Power v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).
[36] "Dietary Guidelines for Alcohol," *Centers for Disease Control and Prevention* (Dec. 29, 2020), *available at* https://www.cdc.gov/alcohol/fact-sheets/moderate-drinking.htm (last visited Jan. 26, 2022).

It is important to remember that circumstances have changed since last fall, when COVID-19 vaccine mandates began proliferating throughout the country. There is more evidence about risks of the vaccines and boosters, for instance myocarditis. The evidence to date indicates that the boosters confer no benefit on individuals in their 30's like Mr. Fellner and Ms. Darling. The vaccines did little or nothing when it came to stopping transmission of the Delta variant, and are even less effective at preventing the spread of the Omicron variant. The essence of a scholarly institution is epistemic humility: changing practices in the face of new evidence. Instead, GMU is clinging to a model that does not make any sense, and violating its students' constitutional rights in the process.

NCLA therefore urges GMU to re-examine its booster mandate, and to immediately leave up to students themselves the decision of whether or not to receive a booster. Please inform the undersigned of any decision to change GMU's policy as soon as possible, but certainly before February 4. Rest assured that NCLA is always prepared to file appropriate legal action to protect the rights of our clients and all Americans.

Sincerely,
/s/ *Jenin Younes*

Jenin Younes
Litigation Counsel
Mark Chenoweth
General Counsel
NEW CIVIL LIBERTIES ALLIANCE

Declaration of Anish Koka, MDA
I, Dr. Anish Koka, declare as follows:

1. I am an adult of sound mind and make this statement voluntarily, based upon my own personal knowledge, education, and experience.

EXPERIENCE & CREDENTIALS

2. I am a practicing Cardiologist. I am board certified in Internal Medicine and the subspecialty of Cardiology. I am also board certified in the cardiac subspecialties of Echocardiography, and Nuclear Medicine.

3. My assessment of vaccine related myocarditis is based on numerous peer reviewed studies of mRNA vaccines that have been published.

4. I have not and will not receive any financial or other compensation to prepare this Declaration.

5. I have no prior relationship with any of the plaintiffs.

6. I have been asked to provide my opinion the potential long term cardiac consequences of vaccines.

OPINIONS

7. There is little doubt that the mRNA vaccines are associated with myocarditis. This has been confirmed by multiple datasets, and the CDC agrees there is a "likely association."

8. The putative mechanisms are currently being explored by researchers.

9. Some of the datasets are summarized below:

Myocarditis after Covid-19 Vaccination in a Large Health Care Organization. N Engl J Med 2021;385:2132-9.

This was an evaluation of the incidence of myocarditis after the receipt of the BNT162b2 mRNA vaccine in a single health care organization in Israel that demonstrates a significant increase in incidence of myocarditis after the second dose of the vaccine.

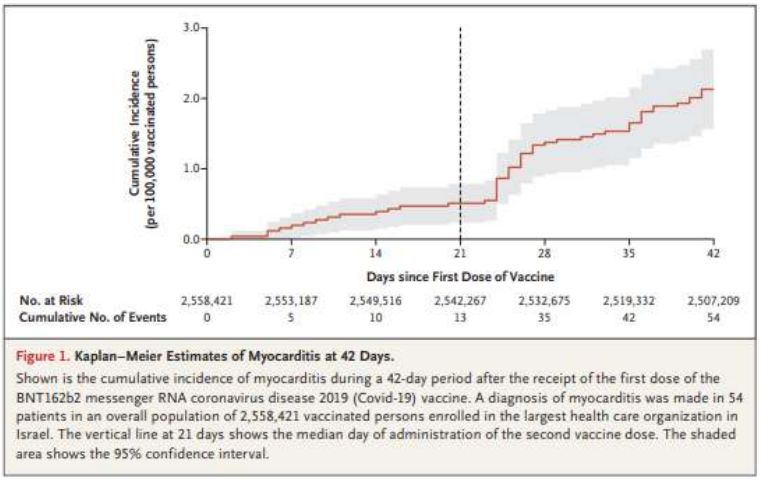


Figure 1. Kaplan–Meier Estimates of Myocarditis at 42 Days.
Shown is the cumulative incidence of myocarditis during a 42-day period after the receipt of the first dose of the BNT162b2 messenger RNA coronavirus disease 2019 (Covid-19) vaccine. A diagnosis of myocarditis was made in 54 patients in an overall population of 2,558,421 vaccinated persons enrolled in the largest health care organization in Israel. The vertical line at 21 days shows the median day of administration of the second vaccine dose. The shaded area shows the 95% confidence interval.

The diagnosis of myocarditis occurred throughout the post-vaccination period, but there appeared to be an increase approximately 3 to 5 days after the second vaccine dose. Most cases were mild or moderate in severity, but one patient had cardiogenic shock, and one patient with preexisting cardiac disease died of an unknown cause soon after hospital discharge.

Montgomery J, Ryan M, Engler R, et al. Myocarditis following immunization with mRNA COVID-19 vaccines in members of the US military. JAMA Cardiol 2021 June 29 (Epub ahead of print).

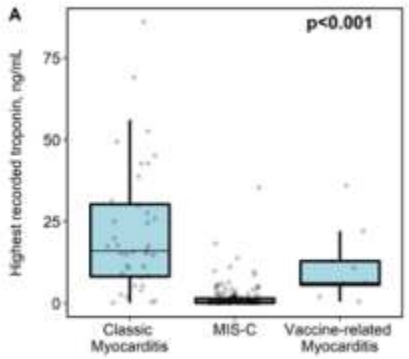
This was a report from the US military noted an incidence of 8.2 cases of myocarditis per 100,000 male service members.

Barda N, Dagan N, Ben-Shlomo Y, et al. Safety of the BNT162b2 mRNA Covid-19 vaccine in a nationwide setting. N Engl J Med 2021;385:1078-1090.

10. An Israeli study demonstrated 2.7 excess cases of myocarditis per 100,000 vaccinated persons.

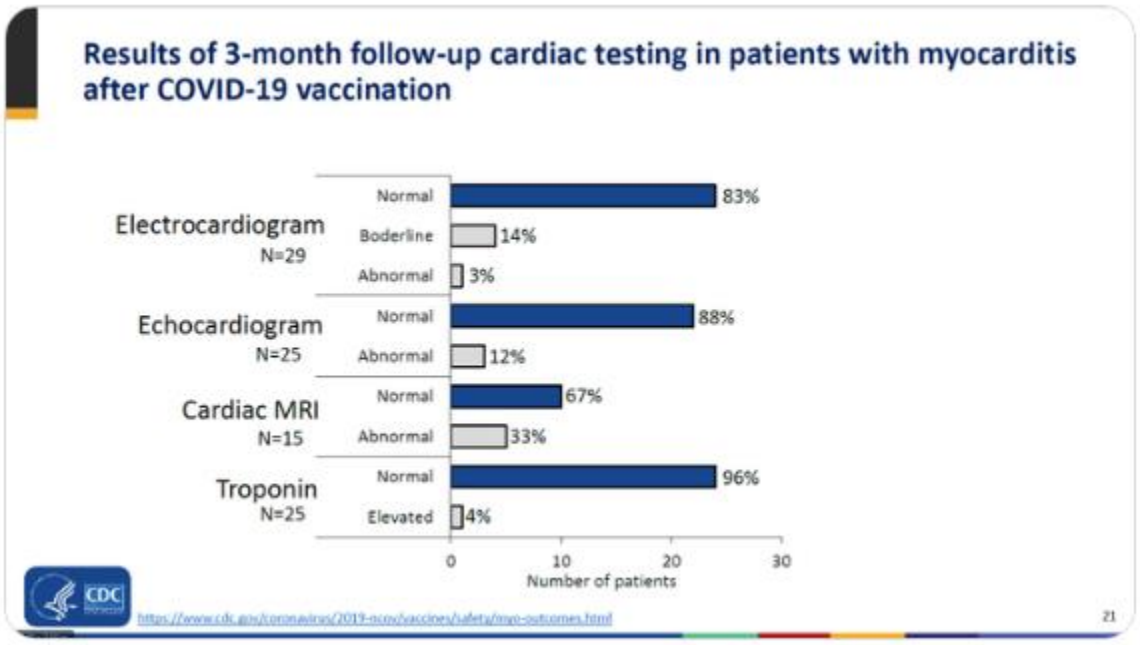
11. Vaccine related myocarditis is associated with a significant leak of cardiac enzymes from the heart and thus can result in permanent damage to the heart (as presented to the Vaccines and Related Biological Products Advisory Committee (VRBPAC))

(Comparison of MIS-C Related Myocarditis, Classic Viral Myocarditis, and COVID-19 Vaccine related Myocarditis in Children, Patel et. al.)



12. While vaccine myocarditis is associated with a reduction in function of the heart that appears to rapidly normalize, cardiac Magnetic Resonance imaging finds the formation of scar after vaccine myocarditis is similar to findings in non-vaccine myocarditis. (Hanneman et. al) (https://pubs.rsna.org/doi/10.1148/ryct.210252)

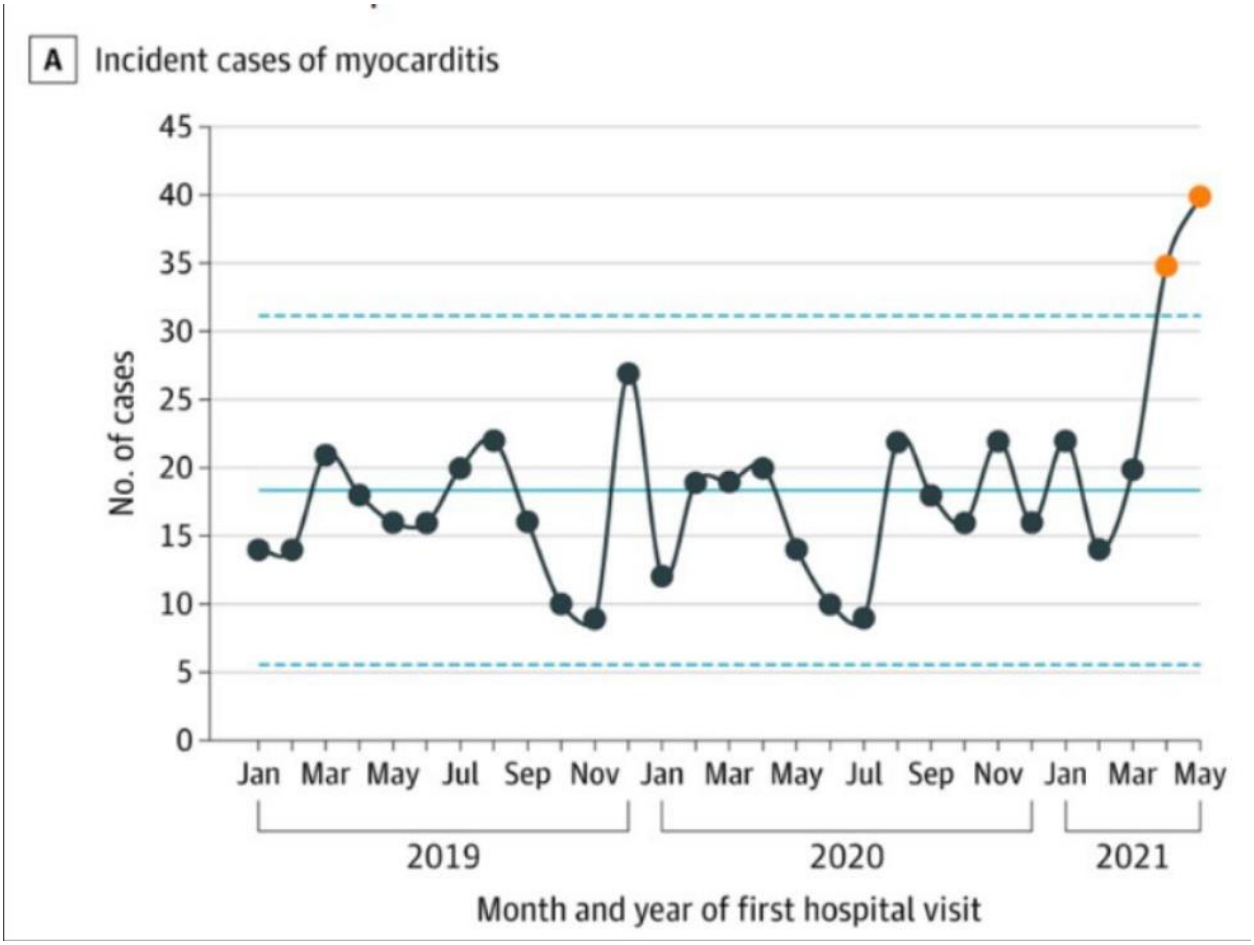
13. There is limited long-term follow up at present, but early evidence suggests about one-third of patients with vaccine myocarditis have evidence of scar/fibrosis seen in 3 month follow up.



14. The presence of scar, or fibrosis in the heart has potential long term consequences. A systemic review of the literature found that the presence of scar by cardiac MRI is associated with an increased risk of death, heart failure, the need for cardiac transplantation, and serious cardiac arrhythmias. (https://www.ahajournals.org/doi/10.1161/CIRCIMAGING.120.011492)

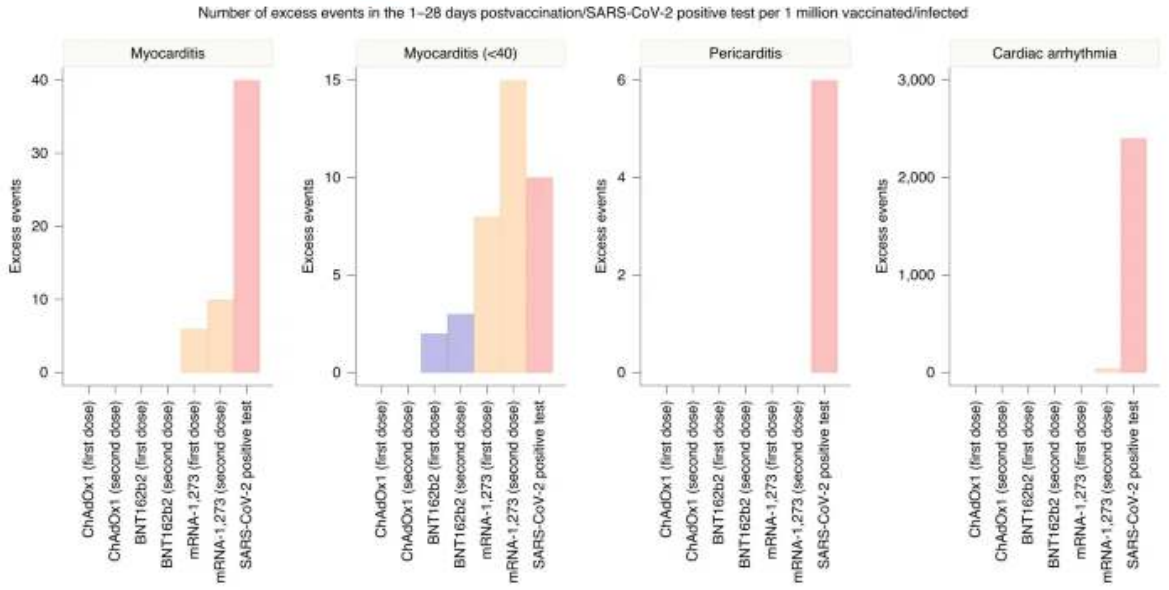
15. It has been suggested that the risk of myocarditis from contracting Sars-COV2 is higher than the risk of myocarditis from the mRNA vaccines. But, importantly, a study in the Journal of the American Medical Association (https://jamanetwork.com/journals/jama/fullarticle/2782900) that required a diagnosis of myocarditis to have supportive laboratory and imaging data showed

the diagnosis of myocarditis peaked only after widespread vaccine administration.



16. A recent nature study (https://www.nature.com/articles/s41591-021-01630-0) also suggests that the risk of myocarditis varies by type of vaccine, with the highest risk noted after the second dose of the Moderna vaccine. Importantly, rates of myocarditis related to a second dose of a Moderna vaccine are higher than rates of myocarditis related to SARS-COV2 infection.

Fig. 2: Number of excess events due to exposure per 1 million exposed, as reported in Supplementary Table 10.



When IRR did not show a significant increase of incidence over the 1–28 days postvaccination or a SARS-CoV-2 positive test, absolute measures are not given.

17. A recent study published in the Journal of the American Medical Association (JAMA) based on a CDC review of the VAERS database also confirms rates of myocarditis exceed the expected rates across multiple age and sex strata with the highest risk after the second vaccination dose in adolescent males aged 12 to 15 years (70.7 per million doses of the BNT162b2 vaccine), in adolescent males aged 16 to 17 years (105.9 per million doses of the BNT162b2 vaccine), and in young men aged 18 to 24 years (52.4 and 56.3 per million doses of the BNT162b2 vaccine and the mRNA-1273 vaccine, respectively). Importantly, the study authors noted that "Given the high verification rate of reports of myocarditis to VAERS after mRNA-based vaccination, underreporting is … likely. Therefore, the actual rates of myocarditis per million doses of vaccine are likely higher than estimated."

18. Data from Israel suggests booster doses of the Pfizer-BioNtech mRNA vaccines is associated with an increased risk of myocarditis in Males. (CDC presentation Slide 30). This risk is higher than what is seen after the first dose of the vaccine, but lower than what is seen after the second dose of the vaccine. Importantly, the data for efficacy presented by Pfizer for the booster shot demonstrates a decline in symptomatic Sars-COV-2 infection across age groups, but no evidence of a reduction in hospitalization or death. The CDC summarized the data to note that "VE [Vaccine Efficacy] after primary series [2 shots] waning for infection, but protection remains high for severe disease and hospitalization." It is also important to note this efficacy data is drawn from a time the delta variant was the predominant virus circulating. Data released by Pfizer on the efficacy of the current 2 shot vaccine series against the current dominant variant, Omicron, suggests vaccine efficacy is significantly reduced for this variant, but still notes that "two doses may still induce protection against severe disease". Boosters may, as a result, expose certain demographics (young males) to risk without a clear signal of significant benefit when it comes to hard outcomes like hospitalization and death.

Myocarditis in Israel

Reported after Pfizer-BioNTech COVID-19 vaccine, December 2020-October 10, 2021

	Age (years)	Post-dose 1 Rate per 100,000	Post-dose 2 Rate per 100,000	Post-dose 3 Rate per 100,000	Number of 3rd dose delivered
Females	12-15	0	0.6	0	279
	16-19	0	0.9	0	97,807
	20-24	0.4	2.5	0	141,910
	25-29	0	0.4	0	130,283
	≥30	0.1	0.3	0	1,542,142
Males	12-15	0.5	6.6	0	292
	16-19	1.2	16.1	5.2	96,238
	20-24	2.2	10.3	3.6	139,015
	25-29	1.2	8.4	0.7	133,650
	≥30	0.5	1.7	0.4	1,448,745

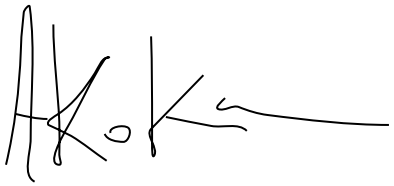
Rates of myocarditis after a third dose appear to fall **between** rates seen after **dose 1** and **dose 2**

As reported by Israel at FDA's VRBPAC meeting. Slides here: https://www.fda.gov/media/153086/download .

19. In summary, vaccine related myocarditis is a potentially serious medical condition that can lead to fibrosis in heart muscle. Fibrosis and scarring found within the heart muscle has been associated with long term complications related to cardiac arrhythmias and even sudden cardiac death. It is not yet known what the long-term sequelae will be for those patients who have developed scarring and fibrosis related to vaccine myocarditis. Rates of vaccine myocarditis in certain sub-populations may exceed the risks from SARS-Cov2 associated myocarditis. Risks should be considered in the context of the benefit of COVID-19 vaccination.

20. I declare under penalty of perjury under the laws of the United States of America that, to the best of my knowledge, the foregoing is true and correct this 26th day of January, at Philadelphia, Pennsylvania.

Respectfully submitted,



_____

Dr. Anish Koka, M.D.
Doctor of Internal Medicine and Cardiology