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THE INTERSECTION OF EPIDEMIOLOGY
AND LEGAL AUTHORITY: COVID-19 STAY
AT HOME ORDERS.

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ABSTRACT

Federal and state government have the power and duty to protect the public from communicable disease. In the U.S., federal and state responses to the global pandemic of SARS-CoV-2/COVID-19 relied heavily on quarantine-like actions designed to slow the spread of SARS-CoV-2. This article summarizes initial epidemiological data on SARS-CoV-2/COVID-19, describes how the data correspond to federal and state authority for isolation and quarantine, and discusses the scope and limits of authority to control communicable disease through measures such as Stay at Home Orders. Stay at Home Orders raise four key Constitutional issues: (1) the right to pursue an economic livelihood and engage in legitimate business; (2) the right to lawful assembly; (3) the right to practice one's religion; (4) the right to interstate and intrastate travel. Delving into the history of Constitutional jurisprudence, this article explains the scope of each interest, parameters of permissible regulation, and provides corresponding analysis as applied to Stay at Home Orders. Finally, this article outlines elements of strategic health policy planning for communicable disease.

INTRODUCTION

As SARS-CoV-2/COVID-19 spread globally, critical questions emerged within each discipline of epidemiology, public health law, and health policy. In the United States, on March 1, 2020 President Trump issued Proclamation 9994 that the COVID-19 outbreak in the United States constituted a national emergency.¹ Throughout March 2020, states and localities within in the United States issued guidelines and orders for curbing transmission such as social distancing and quarantine-like mandates such as Stay-at-Home Orders.

When responding to a communicable disease outbreak, stakeholders rely on the accuracy of clinical reports to determine appropriate treatment protocol.² Clinicians reporting patient symptoms and outcomes form the basis for collecting epidemiological data.³ Epidemiologists use these data to develop models and contextualize potential rates of hospitalization, morbidity, and case fatality rates.⁴ Accurate and transparent reporting of clinical observations and methods

¹ Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

² See Sylvia Aloisi et al., *Special Report: As Virus Advances, Doctors Rethink Rush To Ventilate*, REUTERS (April 30, 2020), <https://www.reuters.com/article/us-health-coronavirus-ventilators-specia/special-report-as-virus-advances-doctors-rethink-rush-to-ventilate-idUSKCN2251PE>.

³ KATRINA HEDBERG & JULIE MAHER, THE CDC FIELD EPIDEMIOLOGY MANUAL § 4 (2018), <https://www.cdc.gov/eis/field-epi-manual/chapters/collecting-data.html>.

⁴ Hannah Richie et al., *Mortality Risk of COVID-19*, OUR WORLD IN DATA (2020), <https://ourworldindata.org/mortality-risk-covid#citation> (describing case fatality rate, infection fatality rate, and crude mortality); see also *Estimated Disease Burden of COVID-19*, CDC (Jan. 31, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/burden.html> (describing estimates of infection, illness, and hospitalization.).

for deriving epidemiological data informs the appropriateness of policy strategies designed to control the spread of communicable disease.⁵ Despite the government's power and duty to protect the public from communicable disease, this authority is not unlimited.⁶ The Supreme Court in *Jacobson v. Massachusetts* clarified at the state level, exercise of police power when enacting measure to protect public health must be necessary, reasonable, proportionate, and may not cause more harm than the benefit the measure provides.⁷

In Part I, this article summarizes initial epidemiological data on SARS-CoV-2/COVID-19, explains the role and limitations of

⁵ Federal and state law specify what types of communicable disease constitute a quarantinable condition or a notifiable disease. The specific type of disease impacts both clinical care, reporting requirements, and whether state or federal officials have authority to exercise isolation or quarantine measures. See *Legal Authorities for Isolation and Quarantine*, CDC (Feb. 24, 2020),

<https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>; *Reportable Disease*, US NATIONAL LIBRARY OF MEDICINE, <https://medlineplus.gov/ency/article/001929.htm>.

⁶ See Wendy Mariner et al., *Jacobson v. Massachusetts: It's Not Your Great-Grandfather's Public Health Law*, 95 AMERICAN J. OF PUB. HEALTH 581 (2005) (discussing limits on police power and the inappropriate expansion of police power.).

⁷ *Jacobson v. Massachusetts*, 197 U.S. 11, 38–39 (1905); see Lawrence Gostin, *Jacobson v Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AMERICAN J. OF PUB. HEALTH 576 (2005) (summarizing *Jacobson v. Massachusetts* and interpreting the court's holding to stand for the proposition that state exercise of police power must be necessary, reasonable, proportionate, and may not cause more harm than benefit.).

diagnostic testing, and defines key principles of epidemiology that are integral for contextualizing the risk that a specific disease poses to the public's health.

Part II describes the intersection of epidemiology and legal authority to control communicable disease, distinguishing the scope of federal authority to control communicable disease entering into the country and between states from state authority to control communicable disease pursuant to police power emanating from the 10th Amendment of the Constitution. This section provides a brief overview of measures states enacted aimed at controlling the spread of SARS-CoV-2/COVID-19 referred to as Stay-at-Home Orders.

In Part III, the article analyzes legal precedent and constitutional interests associated with Stay-at-Home Orders. First, this section describes litigation in two states that challenged the executive branch's authority relating to the Stay-at-Home Order and resulting outcomes. Second, this section explores four defined constitutional interests: (1) the right to pursue an economic livelihood and engage in legitimate business; (2) the right to lawful assembly; (3) the right to practice one's religion; and (4) the right to interstate and intrastate travel. This section explains the scope of each interest, the extent of permissible regulation, and provides corresponding analysis as applied to Stay-at-Home Orders. Finally, Part IV outlines elements of strategic health policy planning and responsible use of authority for controlling communicable disease.

I. BACKGROUND ON SARS-CoV-2/COVID-19

This section traces the emergence of SARS-CoV-2/COVID-19 into the U.S. from China in the beginning of 2020. It explains how public health professionals use diagnostic testing to monitor and control communicable disease, describes the Food and Drug Administration (FDA) regulation of diagnostic and antibody testing, and how collecting epidemiological data including testing data provides information on key

questions, such as disease symptoms, severity, rates of hospitalization, case fatality rate, and infection fatality rate. Lastly, this section clarifies potentially misleading terminology affecting perception of disease severity.

A. Origins of SARS-CoV-2/COVID-19

COVID-19 illustrates the importance of global international transparency and cooperation to respond to communicable disease at the outset. Communicable disease illustrates precisely how we are a global health community, and how quickly a lack of accurate information can impact the spread of a virus. In January 2020, reports emerged that China allegedly downplayed the number of cases and silenced physician whistleblower, Dr. Li Wenliang, who attempted to alert fellow physicians of a novel coronavirus infection.⁸ According to reports, the Wuhan Municipal Bureau for Public Security detained, questioned, and reprimanded Dr. Li for an “unlawful act.”⁹ Suppressing the discussion of clinical symptoms indicative of communicable disease significantly impedes the ability to control the disease both within the country of origin but also hinders global efforts to monitor the entry of people who may be carrying the virus into its borders.

⁸ Ruipeng Lei & Renzong Qiu, *Chinese Bioethicists: Silencing Doctor Impeded Early Control of Coronavirus*, THE HASTINGS CTR. BIOETHICS F. (Feb. 13, 2020), <https://www.thehastingscenter.org/coronavirus-doctor-whistleblower/>; see also Stephanie Hegarty, *The Chinese Doctor Who Tried To Warn Others About Coronavirus*, BBC NEWS (Feb. 6, 2020), <https://www.bbc.com/news/world-asia-china-51364382>; Nick Paton Walsh, *The Wuhan Files*, CNN (Dec. 1, 2020), <https://www.cnn.com/2020/11/30/asia/wuhan-china-covid-intl/index.html>.

⁹ Lei & Qiu, *supra* note 8.

An accurate understanding of SARS-CoV-2/COVID-19 relies on a chain of communication between patients, clinicians, and public health professionals. People who have SARS-CoV-2 may develop a range of symptoms.¹⁰ Preliminary reports from China and Iceland suggest that many people who carry SARS-CoV-2 are asymptomatic and never develop COVID-19, the disease caused by the virus.¹¹ According to the World Health Organization (WHO), about 80% of people who contract SARS-CoV-2 are either asymptomatic or experience only mild symptoms and recover without requiring special treatment.¹² Older people, and those with underlying medical problems like cardiovascular disease, diabetes, chronic respiratory disease, and cancer are more likely to develop serious illness.¹³

There is currently significant disagreement about potential case fatality rate and infection fatality rate based on conflicting and

¹⁰ *Coronavirus*, WORLD HEALTH ORG. (2020), https://www.who.int/health-topics/coronavirus#tab=tab_3.

¹¹ The Novel Coronavirus Pneumonia Emergency Response Epidemiology Team, *The Epidemiological Characteristics of an Outbreak of 2019 Novel Coronavirus Diseases (COVID-19) — China, 2020*, 8 CHINA CDC WEEKLY 113–22 (Feb. 2020); *COVID-19 in Iceland – Statistics*, DIRECTORATE OF HEALTH AND THE DEP’T OF CIV. PROT. AND EMERGENCY MGMT. (2020), <https://www.covid.is/data>; see also Tara John, *Iceland Lab's Testing Suggests 50% Of Coronavirus Cases Have No Symptoms*, CNN (April 3, 2020), <https://www.cnn.com/2020/04/01/europe/iceland-testing-coronavirus-intl/index.html>.

¹² *Coronavirus Disease (COVID-19): Similarities and Differences with Influenza*, WORLD HEALTH ORG. (Mar. 17, 2020), <https://www.who.int/news-room/q-a-detail/q-a-similarities-and-differences-covid-19-and-influenza>.

¹³ *Coronavirus*, WORLD HEALTH ORG. (2020), https://www.who.int/health-topics/coronavirus#tab=tab_2.

incomplete data.¹⁴ Understanding whether SARS-CoV-2 will produce significant morbidity, mortality, and pose a severe danger to public health requires accurate testing. As regions and nations report data on patients with COVID-19, there are a range of questions epidemiologists, public health professionals, and policy makers should have considered.

B. The Role of Diagnostic Testing

Reliable information about the virus requires accurate diagnostic testing. In the U.S., the FDA regulates diagnostic tests on the market. During an emergency or pandemic, manufacturers must obtain an Emergency Use Authorization (EUA) and produce evidence that the

¹⁴ *Report of the WHO–China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, WORLD HEALTH ORG., (Feb. 8, 2020), [https://www.who.int/publications-detail/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-\(covid-19\)](https://www.who.int/publications-detail/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-(covid-19)); Robert Verity et al., *Estimates of the Severity of Coronavirus Disease 2019: A Model-Based Analysis*, 20 THE LANCET INFECTIOUS DISEASES 30243-30247 (Jun. 1, 2020); Timothy Russell et al., *Estimating the Infection and Case Fatality Ratio For Coronavirus Disease (COVID-19) Using Age-Adjusted Data From The Outbreak On The Diamond Princess Cruise Ship, February 2020*, 12 EUROSURVEILLANCE 1–5 (Mar. 26, 2020); Anthony Fauci et al., *Covid-19 – Navigating the Uncharted*, 382 NEW ENG. J. MED. 1268–69 (Feb. 28 2020); Eran Bendavid et al., *COVID-19 Antibody Seroprevalence in Santa Clara County, California*, MEDRXIV (Apr. 14, 2020), <https://www.medrxiv.org/content/10.1101/2020.04.14.20062463v1>; John P.A. Ioannidis, *The Infection Fatality Rate of COVID-19 Inferred from Seroprevalence Data*, MEDRXIV (Jun. 8, 2020), <https://doi.org/10.1101/2020.05.13.20101253>.

diagnostic test “may be effective.”¹⁵ The process of an EUA expedites the review standard in recognition that there are no alternatives and assessing impact on public health requires rapid introduction of diagnostic tests.¹⁶ During this time, the manufacturer simultaneously submits data on the test’s clinical validity, analytic validity, and clinical utility. Notably, expediency means that the EUA is not equivalent to FDA approval or clearance.¹⁷ In all diagnostic test development, there is an inherent margin of error for false positives, false negatives, differences among what sequences of the virus each diagnostic test identifies, and how the diagnostic test controls for other sequences of coronavirus not linked to SARS-CoV-2. Importantly, the WHO warned against potentially significant rates for false positives from certain types of diagnostic tests based on cross-reactivity with other pathogens including other coronaviruses.¹⁸

In March 2020, FDA issued a Consumer Update cautioning the public against obtaining SARS-CoV-2 diagnostic tests for which the

¹⁵ Office of the Comm’r et al., FDA, FDA-2016-D-1025, *Emergency Use Authorization of Medical Products and Related Authorities*, 7 (2017), <https://www.fda.gov/media/97321/download>.

¹⁶ Press Release, Stephen M. Hahn, M.D., Comm’r of Food and Drugs, FDA, *Coronavirus (COVID-19) Update: FDA expedites review of diagnostic tests to combat COVID-19* (Mar. 30, 2020), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-expedites-review-diagnostic-tests-combat-covid-19>.

¹⁷ *Emergency Use Authorization of Medical Products and Related Authorities*, *supra* note 15.

¹⁸ *Advice on the Use of Point-of-Care Immunodiagnostic Tests for COVID-19*, WORLD HEALTH ORG. (Apr. 8, 2020), <https://www.who.int/news-room/commentaries/detail/advice-on-the-use-of-point-of-care-immunodiagnostic-tests-for-covid-19>.

FDA has not granted an EUA.¹⁹ Reports of diagnostic testing, whether conducted by public health professionals or in the clinical setting should include granular level information that not only reports the test finding, but also indicates the manufacturer and type test used to assist in understanding whether there are meaningful differences between manufacturers, testing methodology, test results, and patient outcomes.

Diagnostic tests serve a dual function for both public health and clinical care. Accurate tests facilitate diagnosis and permit clinicians to provide patients directions for how to manage disease symptoms if the patient tests positive and instructions for care and monitoring. Rapid and accurate diagnostic testing can also enable health departments to provide guidelines on quarantine (while waiting on test result), isolation (where the test is positive), perform contact tracing, and track the number of cases in a specific region.

C. Questions for Epidemiology

Media reports on death or fatality rates across the globe spurred considerable anxiety and panic among the public. Public health professionals working with media have an obligation to communicate the significant differences between death rates – which presented alone are misleading – and instead examine how to assess the case fatality rate, infection fatality rate, and compare these figures to other diseases in context.

The accurate impact of how a virus behaves in a population must account for the full denominator: how many people in the population

¹⁹ *Beware of Fraudulent Coronavirus Tests, Vaccines and Treatments*, FDA (Mar. 24, 2020), <https://www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments>.

experience mild symptoms or are completely asymptomatic? Referring to the death rate can be an imprecise measure, particularly if some regions only test people with the most severe symptoms who enter the hospital. To be more accurate, the case fatality rate refers to the percent of people who test positive for the disease who will die, or alternatively, the infection fatality rate refers to the percent of people who contract the disease (some of whom are never tested) that will die.

This may require rapid broad population-based testing over time, or population sampling that includes people who have no symptoms. It may also require modifying testing strategies to include different types of tests, such as antibody testing to discern whether people have been exposed to and mounted an immune response to SARS-CoV-2 or recovered from COVID-19. In the U.S., since most people infected with SARS-CoV-2 were asymptomatic or experienced mild symptoms they did not receive a diagnostic test during the initial stages of the pandemic.²⁰ The Center for Disease Control's (CDC)

²⁰ Amy Goldstein et al., *Expanded Coronavirus Testing May Overwhelm Lab Capacity, Say Some Experts*, WASHINGTON POST (March 5, 2020), https://www.washingtonpost.com/health/expanded-coronavirus-testing-may-overwhelm-lab-capacity-say-some-experts/2020/03/04/3de454e6-5e49-11ea-9055-5fa12981bbbf_story.html; Will Feuer, *CDC Quietly Revises Coronavirus Guidance To Downplay Importance Of Testing Asymptomatic People*, CNBC (Aug. 26, 2020), <https://www.cnbc.com/2020/08/26/cdc-quietly-revises-coronavirus-guidance-to-downplay-importance-of-testing-for-asymptomatic-people.html>; Robinson Meyer, *America Isn't Testing for the Most Alarming Coronavirus Cases*, THE ATLANTIC (March 13, 2020), <https://www.theatlantic.com/science/archive/2020/03/who-gets-tested-coronavirus/607999/>; *but see Overview of Testing for SARS-CoV-2 (COVID-19)*, CNTR. FOR DISEASE CONTROL AND PREVENTION (2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-criteria.html> (last visited Feb. 28, 2021).

issued a series of guidance statements, with the first recommendations stating that patients with mild symptoms may not need to be tested and it may be difficult to locate testing based on lack of testing supplies.²¹ Accordingly, epidemiologists imputed figures into projections of the total case denominator in calculating both the case fatality rate and infection fatality rate until testing became more widespread.

Understanding the impact of a virus requires examining not only the sickest people with COVID-19 that present to a hospital with severe symptoms, but also people who experience mild symptoms and self-treat at home, or those who are fully asymptomatic. This also requires collecting and assessing data about whether people who are asymptomatic carry and infect others. Despite initial hypotheses that

²¹ See Press Release, CDC Newsroom, Transcript for CDC Media Telebriefing: Update on COVID-19 (Feb. 14, 2020), <https://www.cdc.gov/media/releases/2020/t0214-covid-19-update.html.html> (“I want to say right now CDC’s recommendations and the policies we are following across the board is to test people with the history of exposure who are showing symptoms.”); Press Release, U.S. Dept. of Health & Human Services, HHS Announces Upcoming Funding Action to Provide \$186 Million for COVID-19 Response (April 6, 2020), <https://www.hhs.gov/about/news/2020/04/06/hhs-announces-upcoming-funding-action-provide-186-million-covid19-response.html> (describing HHS and CDC efforts to increase funding for COVID-19 testing). The author notes that these CDC recommendations have changed as the science and funding behind COVID-19 eradication efforts has changed.

asymptomatic members of the population spread the virus, the WHO clarified asymptomatic transmission seems to be “rare.”²²

Regional and national differences were also reflected in rates of hospitalization, which vary considerably across different regions.²³ Some response plans hospitalized all patients as a method of isolation to mitigate spread of SARS-CoV-2,²⁴ while other regions only hospitalized people with severe symptoms.²⁵ In the U.S., CDC guidance to the public states that most people will experience mild

²² Jacqueline Howard, *WHO Clarifies Comments on Asymptomatic Spread of Coronavirus: 'There's Much Unknown'*, CNN (June 10, 2020), <https://www.cnn.com/2020/06/09/health/who-coronavirus-asymptomatic-spread-bn/index.html>.

²³ Pinar Karaca-Mandic et al., *Calling All States to Report Standardized Information on COVID-19 Hospitalizations*, HEALTH AFFAIRS BLOG (April 7, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200406.532030/full/>.

²⁴ Yixiang Ng et al., *Evaluation of the Effectiveness of Surveillance and Containment Measures for the First 100 Patients With COVID-19 in Singapore — January 2–February 29, 2020*, 69 MORBIDITY AND MORTALITY WEEKLY REPORT 307, 307–11 (Mar. 20, 2020).

²⁵ Charles Ornstein *Coronavirus Hospitalization Numbers Are Spotty. Journalists, Help Us Fill in the Gaps*, PROPUBLICA (March 26, 2020), <https://www.propublica.org/article/coronavirus-hospitalization-numbers-are-spotty-journalists-help-us-fill-in-the-gaps> (explaining that in the beginning of the pandemic, hospitals were not uniformly reporting hospitalizations); *FAQs*, CNTR. FOR DISEASE CONTROL & PREVENTION (updated on March 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#:~:text=Not%20all%20patients%20with%20COVID,under%20appropriate%20isolation%20precautions> (explaining not all patients with COVID-19 require hospitalization).

symptoms from COVID-19 and can recover at home.²⁶ For patients never seen by a clinician or admitted to the hospital, understanding the number of cases relies on both self-reporting of symptoms and availability of tests through health departments, which differed as the pandemic progressed.²⁷ Complications in patients with known or suspected COVID-19 who have been hospitalized reflect a higher age demographic and rate of co-existing co-morbidities.²⁸ Clinicians reporting patient cases and outcomes for epidemiological purposes should notate age, co-morbidities, time to recovery, and any additional information post-recovery.

²⁶ *Testing for COVID-19*, CNTR. FOR DISEASE CONTROL & PREVENTION (2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-criteria.html>.

²⁷ See Dylan Smith & Paul Ingram, *After 'Wasted Time,' Coronavirus Testing Poised To Increase In Arizona*, TUSCON SENTINEL (March 15, 2020), http://www.tucson-sentinel.com/local/report/031520_coronavirus_tests/after-wasted-time-coronavirus-testing-poised-increase-arizona/; Paul Sisson, *Testing Capacity Surges In San Diego, But Still Not Enough To Check Everyone*, SAN DIEGO TRIBUNE (April 5, 2020), <https://www.sandiegouniontribune.com/news/health/story/2020-04-05/only-testing-will-set-us-free>; Will Cushman, *Wisconsin's Race To Roll Out More COVID-19 Tests, Despite Shortages Of 'Everything'*, WISCONTEXT (March 30, 2020), <https://www.wiscontext.org/wisconsins-race-roll-out-more-covid-19-tests-despite-shortages-everything>.

²⁸ CDC COVID-19 Response Team, *Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019 — United States, February 12–March 28, 2020*, 69 MORBIDITY AND MORTALITY WEEKLY 382, 382–86 (Apr. 3, 2020).

Accurate recordkeeping of patient symptoms, test results, and diagnosis matters both for epidemiology, but also for legal compliance. The Coronavirus Aid, Relief, and Economic Security Act provides a 20% diagnosis group related add on payment for patients with COVID-19.²⁹ While Congress designed the provision to reimburse providers for additional care related to COVID-19, some stakeholders early in the pandemic pointed out potential monetary incentives to presume COVID-19 cases.³⁰ Hospital administrators and legal departments should caution physicians against “gaming the system” through broad presumption of COVID-19 diagnoses to mitigate risk of billing abuse under the False Claim Act.³¹

In cases involving patient death, physicians should report the cause of death with precision by taking care to distinguish patients who expired *with* COVID-19 and co-morbidities from patients who expired *from* COVID-19 as the primary cause. Lack of appropriate diagnostic testing early in the pandemic may have impede reporting of deaths, and guidance from CDC directing physicians to include probable and

²⁹ CARES Act, Public Law No: 116-136, 116th Cong. (2020).

³⁰ Brian Bakst, *COVID-19 Death Certificate Change Stirs Controversy*, MPR (April 7, 2020), <https://www.mprnews.org/story/2020/04/07/covid19-death-certificate-change-stirs-controversy>.

³¹ *Id.*; see Katherine Drabiak & Jay Wolfson, *What Should Health Care Organizations Do to Reduce Billing Fraud and Abuse?*, 22 AMA J. OF ETHICS E221, E221-E231 (Mar. 2020); *Medicare Fraud and Abuse: Prevent, Detect, Report*, CTR. FOR MEDICARE AND MEDICAID SERVS. (Feb. 2019), <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/Fraud-Abuse-MLN4649244.pdf>; see Brian Bakst, *COVID-19 Death Certificate Change Stirs Controversy*, MPR (April 7, 2020), <https://www.mprnews.org/story/2020/04/07/covid19-death-certificate-change-stirs-controversy>.

presumed cases may inappropriately inflate death statistics.³² Moreover, presumptive diagnoses in the absence of clear clinical criteria or effective diagnostic tests should not replace physician judgment and ordinary standard of care for determining cause of death. On the other side, accurate death reporting can also reduce the risk of underreporting deaths and identifying the population most vulnerable to dying from COVID-19. Approximately one year into the pandemic, New York Attorney General Leticia James announced an ongoing investigation into nursing home facilities in New York to assess allegations of patient neglect, improper infection control procedures, and undercounting deaths of nursing home residents.³³

Accurate recordkeeping promotes transparency, precision, and reduces both over counting and undercounting for a clearer picture of how the disease acts within the population.

³² *Guidance for Certifying Deaths Due to Coronavirus Disease 2019 (COVID-19)*, CNTR. FOR DISEASE CONTROL & PREVENTION (Apr. 2020), <https://www.cdc.gov/nchs/data/nvss/vsrg/vsrg03-508.pdf>; Jason Silverstein, *President Trump Accuses New York City Of Inflating Its Coronavirus Death Toll*, CBS NEWS (April 16, 2020) (discussing CDC's standard to presume COVID deaths); Bakst, *supra* note 32 (discussing controversy on CDC guidelines to presume COVID deaths and whether it promotes proper and accurate death counts).

³³ Press Release, New York Attorney General, Attorney General James Releases Report on Nursing Homes' Response to COVID-19 (Jan. 28, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-releases-report-nursing-homes-response-covid-19>; *see also* Joe Palazzolo et al., *Cuomo Advisers Altered Report on Covid-19 Nursing-Home Deaths*, WALL STREET JOURNAL (March 4, 2021), <https://www.wsj.com/articles/cuomo-advisers-altered-report-on-covid-19-nursing-home-deaths-11614910855>.

Gathering data from across the U.S. and examining preliminary data from countries that experienced earlier disease onset permits epidemiologists to compare the projected impact of COVID-19 against other communicable diseases, such as SARS 2003, MERS, Ebola, and seasonal influenza.³⁴ Following historical outbreaks, CDC and the WHO estimated the case fatality rate for the following: SARS 2003 (11%), Ebola (50%), and seasonal influenza (.1%).³⁵ These comparisons provide context to understanding whether COVID-19 would have significant morbidity, case fatality rate and pose a severe danger to public health.

Initial reports demonstrate several critical points; first, preliminary data often projects inflated predictions for case fatality rates. In February 2020, the WHO-China Joint Mission on Coronavirus Disease published an estimated 3.8% case fatality rate.³⁶ Second, subsequent analyses modified initial predictions, hypothesizing

³⁴ Russell et al., *supra* note 14; Hannah Richie et al., *Mortality Risk of COVID-19*, OUR WORLD IN DATA (2020), <https://ourworldindata.org/mortality-risk-covid#citation>.

³⁵ *Consensus Document on the Epidemiology of Severe Acute Respiratory Distress Syndrome*, WORLD HEALTH ORG. (2003), <https://www.who.int/csr/sars/en/WHOconsensus.pdf>; *Ebola virus disease*, WORLD HEALTH ORG. (Feb. 10, 2020), <https://www.who.int/news-room/fact-sheets/detail/ebola-virus-disease>; Hannah Richie et al., *Mortality Risk of COVID-19*, OUR WORLD IN DATA (2020), <https://ourworldindata.org/mortality-risk-covid#citation>; Anthony Fauci et al., *Covid-19 – Navigating the Uncharted*, 382 NEW ENG. J. MED. 1268–69 (Feb. 28 2020).

³⁶ REPORT OF THE WHO–CHINA JOINT MISSION ON CORONAVIRUS DISEASE 2019 (COVID-19) 12 (World Health Org., 2020) [https://www.who.int/publications-detail/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-\(covid-19\)](https://www.who.int/publications-detail/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-(covid-19)).

potential case fatality rates around 1.2-1.4% and infection fatality rates at .6-.66%.³⁷ In an editorial in the *New England Journal of Medicine*, Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, and colleagues revised their assessment of the case fatality rate for COVID-19 hypothesizing: “the case fatality rate may be considerably less than 1%. This suggests that the overall clinical consequences of Covid-19 may ultimately be more akin to those of a severe seasonal influenza (which has a case fatality rate of approximately 0.1%) or a pandemic influenza.”³⁸ Preliminary data collection from antibody seroprevalence testing in Santa Clara County, California suggested the infection fatality rate may be dramatically lower than expected at approximately .12-.2%.³⁹ In May 2020, CDC published a planning scenario estimating an infection fatality rate at .26%, magnitudes lower than initially projected and subsequently updated the estimate to .65%.⁴⁰

³⁷ Verity et al., *supra* note 14 at 669 (citing case fatality rate of 1.4% and infection fatality rate of .66%).

³⁷ Russell et al., *supra* note 14 at 1 (citing case fatality rate of 1.2% and infection fatality rate of .6%).

³⁸ Fauci et al., *supra* note 14.

³⁹ Bendavid et al., *supra* note 14.

⁴⁰ *COVID-19 Pandemic Planning Scenarios*, CDC, 4-5 (May 20, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios-archive/planning-scenarios-2020-05-20.pdf> (This figure combines two statistical estimates: an infection fatality rate at .4% among symptomatic cases multiplied by the estimate that only 35% of cases are asymptomatic); *COVID-19 Pandemic Planning Scenarios*, CDC (Jul. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios-archive/planning-scenarios-2020-09-10.pdf>; *see also COVID-19 Pandemic*

These figures demonstrate there are not only differences in what data are being collected, but how scientists are projecting likely outcomes, interpreting significance of the data, and whether the data justifies a particular policy response. Importantly, when new data emerge that corrects projections for the case fatality rate and infection fatality rate, government officials, policymakers, and health professionals must integrate these modified assessments into determining whether the approach to controlling the disease is necessary, reasonable, and proportionate in light of new data.

II. CONNECTING EPIDEMIOLOGY TO LEGAL AUTHORITY FOR CONTROLLING COMMUNICABLE DISEASE

This section distinguishes the role of federal versus state law that provide authority for responding to communicable disease, explains provisions for isolation and quarantine, and describes quarantine-like Stay-at-Home Orders enacted across the U.S. in response to SARS-CoV-2/COVID-19.

A. Federal Authority to Control Communicable Disease

Understanding the complexities of epidemiological data, including potential case fatality rate, infection fatality rate, and context compared to other diseases directly corresponds to what actions federal and state government officials should enact toward controlling the spread of the virus. The government has both the power and duty to protect the public from communicable disease, which may include building and executing preparedness plans, mitigation, and exercising

Planning Scenarios, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last visited April 21, 2021) (describing the most recent changes in planning scenarios).

authority under laws pertaining to isolation and quarantine. Isolation and quarantine constitute but one of many elements in the public health armamentarium.

At the federal level, the federal government derives its authority for isolation and quarantine from the Commerce Clause.⁴¹ Section 361 of the Public Health Service Act gives the U.S. Secretary of Health and Human Services power to take measures to prevent the entry and spread of communicable diseases from foreign nations into the United States and between states as applied to a specific list of quarantinable conditions.⁴² Executive Orders in 2003 and 2014 added Severe Acute Respiratory Syndrome to the list of quarantinable conditions, which encompasses SARS-CoV-2.⁴³ This power is delegated to CDC, which is authorized to: detain, medically examine, and release persons arriving

⁴¹ *Legal Authorities for Isolation and Quarantine*, CNTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html> (last visited Feb. 5, 2021).

⁴² Public Health Service Act, 42 U.S.C. § 264 (2010).

⁴³ Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (April 4, 2003); *see also* *What Diseases are Subject to Federal Isolation and Quarantine Law?*, U.S. DEPT. OF HEALTH & HUMAN SERV., <https://www.hhs.gov/answers/public-health-and-safety/what-diseases-are-subject-to-federal-isolation-and-quarantine-law/index.html> (last visited April 14, 2021); *Frequently Asked Questions: Pandemic*, U.S. OFFICE OF PERSONNEL MANAGEMENT, <https://www.opm.gov/FAQs/QA.aspx?fid=10260ea7-b31e-4227-b0e4-94d4804b2c8a&pid=df56d47d-2725-46f1-b325-c9c58d0212fa> (last updated March 7, 2020).

into the United States and traveling between states who are suspected of carrying the communicable disease.⁴⁴

The executive branch has exercised this authority through a variety of actions. In January of 2020, President Trump released a proclamation suspending entry of certain persons into the United States, and specifically outlined the intention to initiate medical screening and quarantine when appropriate.⁴⁵ CDC issued quarantine orders for people arriving from airline travel that had been to China and implemented travel restrictions for persons known or suspected of being infected with SARS-CoV-2.⁴⁶

B. State Power and Duty to Control Communicable Disease

From the 10th Amendment of the U.S. Constitution, states derive authority to exercise police power and may enact laws designed to protect the health, safety, and welfare of the public.⁴⁷ However, this authority is not absolute: laws designed to control communicable disease must be reasonable, necessary, proportionate, and must not cause more harm than the benefit they are designed to produce.⁴⁸ Laws

⁴⁴ CDC COVID-19 Response Team, *supra* note 28; *Legal Authorities for Isolation and Quarantine*, CNTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html> (last visited Feb. 5, 2021).

⁴⁵ Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020).

⁴⁶ *Quarantine and Isolation Travel Restrictions*, CNTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/quarantine/travel-restrictions.html> (last visited Feb. 5, 2021).

⁴⁷ See U.S. CONST. amend X.

⁴⁸ See generally *Jacobson v. Massachusetts*, 197 U.S. 11, 11 (1905); Lawrence O. Gostin, *Could – or Should – the Government Impose a mass Quarantine on an American City?*, HEALTH AFFAIRS BLOG (Mar. 10, 2020),

and orders relating to quarantine historically have required specific factors.⁴⁹ First, quarantine presumes that everyone in a specific and identifiable geographic region has been exposed to a communicable disease.⁵⁰ Restrictions on liberties in the context of public health traditionally require state and local officials to produce evidence demonstrating how a particular individual or narrow geographic area has been exposed to a communicable disease, and how this specific individual or area poses a risk to the rest of the community.⁵¹ Next, orders apply to a narrow geographic location (e.g., a building, a city

<https://www.healthaffairs.org/doi/10.1377/hblog20200310.824973/full/>;
Katherine Drabiak, *Wisconsin Supreme Court Strikes Down Stay at Home Order*, HARV. L. BILL OF HEALTH (June 10, 2020),
<https://blog.petrieflom.law.harvard.edu/2020/06/10/wisconsin-supreme-court-strikes-down-safer-at-home-order/> [hereinafter Drabiak, *Wisconsin Supreme Court Strikes Down Stay at Home Order*].

⁴⁹ GEORGE J. ANNAS ET AL., PANDEMIC PREPAREDNESS: THE NEED FOR A PUBLIC HEALTH APPROACH (ACLU Jan 3. 2008),
https://www.aclu.org/sites/default/files/pdfs/privacy/pemic_report.pdf;
Wendy K. Mariner et al., *Pandemic Preparedness: A Return to the Rule of Law*, 1 DREXEL L. REV. 341, 368 (2009) [hereinafter Mariner et al., *Pandemic Preparedness: A Return to the Rule of Law*];
Gostin, *supra* note 48.

⁵⁰ See ANNAS ET AL., *supra* note 49 at 24–25; Mariner, *Pandemic Preparedness: A Return to the Rule of Law*, *supra* note 49 at 368; see also *Hannibal R.R. Co. v. Husen*, 95 U.S. 465 (1977). In *Hannibal*, the Court held state police power encompasses excluding persons or animals that are afflicted with contagious or infectious disease from entry into the area under the theory of self-defense. *Id.*

⁵¹ See ANNAS ET AL., *supra* note 49, at 24-25; Mariner, *Pandemic Preparedness: A Return to the Rule of Law*, *supra* note 49, at 368.

block, airplane or ship).⁵² Finally, they are limited in duration required for monitoring specific individuals suspected of exposure to monitor to

⁵² See *Compagnie Francaise v. Louisiana Bd. of Health*, 186 U.S. 380 (1902). This Court examined whether the board of health could declare cities under quarantine and preclude a vessel that had no evidence of communicable disease from landing and disembarking its passengers. *Id.* The court upheld the Board's exclusion of one vessel and accepted the Board's reasoning that the regulation sought to prevent more people from entering the city as a means of controlling the population that could be exposed to the communicable disease. *Id.* Plaintiffs asserted that the Board of Health could invoke quarantine law in a manner that would arbitrarily control interstate commerce and effectively prevent the entry of immigrants into the city. *Id.* The Court responded that courts should examine the "operation and effect" of the statute to determine the scope of impact on interstate commerce. *Id.* In the dissent, Justice Brown and Justice Harlan noted that the exclusion of vessels in the regulation was open ended and not tailored to a period of time connected to the communicable disease but instead appeared to be a mechanism to prevent immigration into the city, which unduly interfered with the federal power to regulate interstate commerce and treaties with foreign nations. *Compagnie Francaise v. Louisiana Bd. of Health*, 186 U.S. 380 (1902) (Brown, dissenting). The dissent stated: "While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws,—it may not interfere with the transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." *Id.* at 399-400.

assess whether the person develops symptoms of the disease.⁵³ Since quarantine orders curtail individual liberties, they must be based on a compelling government interest and narrowly tailored.

Each state contains different laws pertaining to the control of communicable disease set forth in areas related to emergency management, communicable disease, and public health responses through isolation and quarantine.⁵⁴ Such laws recognize that certain circumstances require powerful state and local responses aimed at controlling and mitigating the spread of communicable disease. Quarantine orders are enforceable by law, and in many states, violation of a quarantine order constitutes a criminal violation with attendant penalty of fine and or incarceration.⁵⁵ Viewing violation of a quarantine order as a criminal violation also means some states permit health officials working with law enforcement to enter property to administer

⁵³ LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 429 (2d Ed. 2008) (“[I]solation is the separation, for the period of communicability, of known infected persons in such places and under such conditions as to prevent or limit the transmission of the infectious agent... [Q]uarantine is the restriction of the movement of persons who have been exposed, or potentially exposed, to infectious disease, during its period of communicability, to prevent transmission of infection during the incubation period.”).

⁵⁴ *State Quarantine and Isolation Statutes*, NAT’L CONF. OF STATE LEGIS. (Aug. 7, 2020), <https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx>.

⁵⁵ *State Quarantine and Isolation Statutes*, *supra* note 54; Gostin, *supra* note 40.

and enforce quarantine orders.⁵⁶ Other states statutorily attempt to modify ordinary criminal procedure, such as suspending the need for warrant prior to arrest.⁵⁷

Multiple public health law scholars have noted that mass quarantines are likely ineffective, have the potential to undermine constitutional rights, and in practice may pose significant ethical dilemmas.⁵⁸ At the beginning of the COVID-19 epidemic, public health law professor Lawrence Gostin classified mass quarantine as “too blunt a tool” and predicted if challenged, courts would likely not uphold such broad restriction on liberty.⁵⁹ Similarly, during pandemic influenza preparedness planning in 2008, public health law professors George Annas, Wendy Mariner, and Wendy Parmet cautioned against framing response to communicable disease as a national security or law enforcement issue, but instead highlighted the importance of preparedness and mitigation.⁶⁰

C. Quarantine-Like Stay-at-Home Orders

⁵⁶ *State Quarantine and Isolation Statutes*, *supra* note 54; *see* Idaho Admin. Code § 16.02.10.065 (2008).

⁵⁷ *Id.*; *see* Ala. Code § 22.11A.7 (1987).

⁵⁸ ANNAS ET AL., *supra* note 49, at 14–15; Mariner et al., *Pandemic Preparedness: A Return to the Rule of Law*, *supra* note 49; Gostin, *supra* note 40.

⁵⁹ Gostin, *supra* note 40.

⁶⁰ ANNAS ET AL., *supra* note 49 at 7-8 (stating “Public health concerns cannot be addressed with law enforcement or national security tools” and discussing the federal government’s role in mitigation); Mariner et al., *Pandemic Preparedness: A Return to the Rule of Law*, *supra* note 49 at 358 (discussing mitigation strategies).

1. Overview of Orders

In March 2020, many localities and states issued “quarantine-like” orders such as Safer-at-Home or Stay-at-Home Orders.⁶¹ The language of each order varied, but these orders constituted unprecedented and sweeping use of state police power intended to control communicable disease.⁶² Many Stay-at-Home Orders directed people to remain at home as much as possible and prohibit social gatherings, with multiple exceptions. Orders effectively closed entire sectors of society, such as schools, businesses, shopping centers, and civic locations such as parks, libraries, and places of worship. Exceptions permitted people to travel to work at an essential business, to travel to stores classified as essential businesses for groceries or medicine, and to walk or exercise outside.

Some jurisdictions legally enforced orders against businesses, people, and civic locations.⁶³ In Washington, Governor Inslee stated that government officials working with law enforcement planned to

⁶¹ Alicia Lee, *These States Have Implemented Stay-at-Home Orders. Here's What That Means for You*, CNN (Apr. 7, 2020), <https://www.cnn.com/2020/03/23/us/coronavirus-which-states-stay-at-home-order-trnd/index.html>.

⁶² See also Lawrence Gostin, *Could – Or Should – The Government Impose A Mass Quarantine On An American City?*, HEALTH AFFAIRS BLOG (March 10, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200310.824973/full/>.

⁶³ Lea Hunter et al., *Tracking Enforcement Measures for Violation of Stay-at-Home Orders*, CTR. FOR AM. PROGRESS (Apr. 2, 2020), <https://www.americanprogress.org/issues/criminal-justice/news/2020/04/02/482568/tracking-enforcement-measures-violation-stay-home-orders/>.

enforce compliance for businesses in violation of the emergency order through tiered enforcement: warning, fines, and potentially revoking the business' operating license.⁶⁴ Several states started deploying law enforcement officers to issue citations and arrests for alleged noncompliance, for actions such as eating in a restaurant, visiting a store designated as "non-essential,"⁶⁵ or congregating outside at a park.⁶⁶

Law enforcement officers also arrested religious leaders for violating an order, and in some instances levied criminal charges such as unlawful assembly, asserting that holding a religious service constitutes "reckless disregard for human life."⁶⁷ In Florida, local sheriffs arrested and charged a pastor with violation of public health emergency statute pertaining to quarantine and unlawful assembly.⁶⁸ Florida law defines unlawful assembly as a criminal violation with the

⁶⁴ Gov. Inslee Announces Crackdown on Violators of Stay-Home Order, KOMO NEWS (Mar. 30, 2020),

<https://komonews.com/news/coronavirus/inslee-announces-crackdown-on-violators-of-stay-home-order>.

⁶⁵ Miranda Suarez & Alana Watson, *People in Wisconsin are Being Arrested, Charged for Violating Stay-at-Home Order*, WIS. PUB. RADIO NEWS (Apr. 9, 2020), <https://www.wpr.org/people-wisconsin-are-being-arrested-charged-violating-stay-home-order>.

⁶⁶ David Hernandez, *52 Citations Issued in San Diego, County Over Violations of Stay-Home Order*, SAN DIEGO TRIBUNE (Apr. 6, 2020), <https://www.sandiegouniontribune.com/news/public-safety/story/2020-04-06/san-diego-police-issue-16-citations-over-violations-of-stay-home-order>.

⁶⁷ Tom Gjelten, *Florida Megachurch Pastor Arrested After Defying Order Not To Hold Gatherings*, NAT'L PUB. RADIO NEWS (Mar. 30, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/30/824151276/florida-megachurch-pastor-arrested-after-defying-order-not-to-hold-gatherings>.

⁶⁸ *Id.*

intention to commit a breach of the peace, such as through loud or violent behavior, which is situated in the Florida criminal code next to inciting fights and violent riots.⁶⁹ Some jurisdictions applied orders against religious gatherings even despite alternative venues that could permit social distancing, such as “drive in” religious services, which prompted legal backlash.⁷⁰

Other state orders, such as in Alaska, classified violation of the order as reckless endangerment, defined as conduct that places another person at substantial risk of injury or death.⁷¹ Situating the order in context, at the time Governor Dunleavy issued the order, there were eighty-nine cases of COVID-19 in the entire state of Alaska.⁷² To compare, criminal charges of reckless endangerment traditionally arise from excessively risky behavior and actions, such as discharging in

⁶⁹ FLA. STAT. § 870.02 (2020).

⁷⁰ Kaelan Deese, *Judge Rules in Favor of Louisville Church, Says Mayor's Ban on Drive-In Services 'Criminalized' Easter*, THE HILL (Apr. 11, 2020), <https://thehill.com/homenews/news/492363-judge-rules-in-favor-of-louisville-church-says-mayors-ban-on-drive-in-services>.

⁷¹ MICHAEL J. DUNLEAVY, COVID-19 HEALTH MANDATE (2020), <https://gov.alaska.gov/wp-content/uploads/sites/2/03272020-SOA-COVID-19-Health-Mandate-011.pdf>.

⁷² Zaz Hollander & Morgan Krakow, *Statewide Shelter in Place, Travel Ban Ordered as Alaska Sees First In-State COVID-19 Death*, ANCHORAGE DAILY NEWS (Mar. 27, 2020), <https://www.adn.com/alaska-news/2020/03/27/anchorage-sees-first-covid-19-death-in-alaska-hospital-officials-say/>.

firearm in a residential neighborhood, or driving at unreasonably high speeds.⁷³

2. How Quarantine-like Orders Deviate from Precedent

Classifying ordinary activities of daily life, such as patronizing restaurants and stores, visiting parks and beaches, and peacefully congregating to pray as a violent or dangerous activity should give us pause. Instituting punishment for people existing and gathering constitutes a shift toward classifying *people as inherently dangerous*. This radically erases both civil and criminal standards defining socially dangerous conduct without regard to two separate questions: (1) does evidence exist that this specific person has SARS-CoV-2; and (2) were this person's actions even likely to place other people at risk? And importantly, are the risks of the disease significant? Without answering those questions, the existence and enforcement of these orders dramatically modifies long-standing legal precedent.

Quarantine-like orders raise a number of additional questions based on their deviation from historically required elements. State and local officials' authority to act by issuing quarantine-like orders constitutes a question requiring multi-factor analysis to determine whether such actions fell within the scope of their executive authority.

Unlike tailored quarantine orders throughout history in the U.S., such as in response to the plague in San Francisco in the 1900s or smallpox in the early 1900s, current orders apply to extensive geographic areas, such as entire cities, counties, and states.⁷⁴ Unlike traditional emergency management measures or quarantine, many

⁷³ See generally Reckless Endangerment, 68 A.L.R. 4th 507 § 57(a) (1989) (discussing types of actions that may constitute reckless endangerment).

⁷⁴ See e.g. Jew Ho v. Williamson, 103 Fed. Rep. 10 (1900); Wong Wai v. Williamson, 103 Fed. Rep. 1 (1900).

orders are not limited to short time spans designed for assessment to determine whether an individual develops the disease, but span weeks or even months. Traditionally, short durations for emergency management orders permit state and local officials to reassess current data projecting case fatality rate and protects against overbroad proclamations.⁷⁵ Perhaps most importantly, quarantine orders require evidence that the specific person or location subject to quarantine has been exposed to the virus or communicable disease.⁷⁶

Finally, if new data emerge that suggests a lower-than-expected case fatality rate and infection fatality rate, then states and localities should exercise their flexibility to reassess whether current orders could be classified as reasonable, necessary, proportionate, and result in a favorable benefit.

III. EVALUATING POTENTIAL LEGAL CHALLENGES TO STAY-AT-HOME ORDERS

This section explores potential legal challenges to Stay-at-Home Orders arising from two distinct arenas of law. First, this section will address to recent challenges in Michigan and Wisconsin relating to whether state law provided authority to the executive branch to enact the respective state's Stay-at-Home Order. Initial judicial review by courts in Michigan and Wisconsin highlight how the purpose and parameters of the Separation of Powers doctrine defines specific roles for the executive and legislative branches of government when engaging

⁷⁵ See generally *infra* § III for a discussion of multiple Executive Orders in Michigan and Wisconsin and time limit duration.

⁷⁶ Stephen Miles, *Kaci Hickox: Public Health and the Politics of Fear*, 15 AM. J. OF BIOETHICS 17, 17–19 (2005).

in emergency health policy decision-making. Second, this section will describe four constitutional interests implicated by restrictions in Stay-at-Home Orders, including (1) the right to pursue an economic livelihood and engage in legitimate business; (2) the right to lawful assembly; (3) the right to practice one's religion; and (4) the right to interstate and intrastate travel. For each issue, this section will describe how the Supreme Court has articulated the scope and importance of each interest, describe permissible regulations when laws may restrict these rights, and analyze the application for Stay-at-Home Orders.

A. Judicial Review of Stay-at-Home Orders

In several states, parties challenged whether the state's Stay-at-Home Order constituted an appropriate and lawful exercise of authority.⁷⁷ At the time of this writing, the legislature in two states, Michigan and Wisconsin, filed suit against the state official issuing the order.⁷⁸ Both cases examined the separation of power between the executive and legislative branch, the scope of authority granted by the legislature to the executive branch for responding to emergencies, and limits on executive authority.

⁷⁷ See Laurie Sobel & MaryBeth Musumeci, *Litigation Challenging Mandatory Stay at Home and Other Social Distancing Measures*, KAISER FAMILY FOUNDATION (June 5, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/litigation-challenging-mandatory-stay-at-home-and-other-social-distancing-measures/>; see also *South Bay United Pentecostal v. Newsom*, 140 S. Ct. 1613 (2020); *County of Butler v. Wolf*, 486 F.Supp.3d 883 (W.D. Penn. 2020); *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020).

⁷⁸ Plaintiffs' Complaint, *Michigan House of Representatives v. Whitmer* (2020) (No. 20-000079), 2020 WL 3979949; *Wis. Legislature v. Palm*, 942 N.W.2d 900, 905 (Wis. 2020).

1. Michigan's Stay-at-Home Order

On March 10, 2020 Michigan Governor Whitmer declared a state of emergency and soon thereafter issued a corresponding set of executive orders referred to as Stay-at-Home Orders.⁷⁹ When the state of emergency expired after twenty-eight days, Governor Whitmer requested that the legislature agree to extend the declaration of emergency and issued additional orders clarifying and extending mandates in the Stay-at-Home order pertaining to business closures, school closures, travel restrictions, social restrictions, business operations, and regulation of other activities.⁸⁰ The legislature agreed to extend the emergency declaration until April 30, 2020. However, the legislature denied Whitmer's subsequent request for additional extensions. In response, Whitmer rescinded the emergency declaration, then issued a series of orders extending the state of emergency and select provisions of the Stay-at-Home Orders through June 19, 2020.⁸¹

⁷⁹ Mich. Exec. Order No. 2020-4, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html (last visited Mar. 1, 2021); Mich. Exec. Order No. 2020-21 (March 24, 2020, 12:01 AM), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html.

⁸⁰ See THE OFFICE OF GOVERNOR WHITMER, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html (last visited Mar. 1, 2021).

⁸¹ Mich. Exec. Order No. 2020-67, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-527717--,00.html (last visited April 5, 2021); Mich. Exec. Order No. 2020-68, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-527716--,00.html (last visited April 5, 2021); Mich. Exec. Order No. 2020-99, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-530039--

The Michigan state legislature sought a declaratory judgment clarifying the status of two interrelated laws: the 1945 Emergency Powers of the Governor Act (EPGA) and the 1976 Emergency Management Act (EMA).⁸² The EPGA grants the governor power to swiftly respond and implement measures to control a crisis, disaster, or catastrophe.⁸³ The EMA specifies a twenty-eight day time limit on emergency declarations unless a continuing declaration is approved by the legislature.⁸⁴ After twenty-eight days, the EMA specifies the governor's emergency powers expire unless the legislature approves a continuing state of emergency.⁸⁵

The legislature asserted that Governor Whitmer's exercise of executive power when issuing the Stay-at-Home Orders exceeded her scope of authority and violated the separation of powers doctrine. First, the legislature contended that the authority granted to the governor by the EPGA was limited to bringing a localized crisis or civil disturbances under control but did not provide unlimited authority to implement policies on statewide issues.⁸⁶ Second, the legislature alleged that by rescinding and issuing executive orders to extend a declaration of emergency and corresponding Stay-at-Home Orders after the legislature denied the extension violated the EMA. By circumventing the legislature, the Michigan Legislature maintained that this undermined

,00.html (last visited April 5, 2021); Mich. Exec. Order No. 2020-100, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-530037--,00.html (last visited April 5, 2021).

⁸² See Plaintiffs' Complaint, *supra* note 78; Mich. Comp. Laws § 10.31-10.33 (2020); Mich. Comp. Laws § 30.401-30.421 (2020).

⁸³ Mich. Comp. Laws § 10.31-10.33 (2020).

⁸⁴ Mich. Comp. Laws § 30.401-30.421 (2020).

⁸⁵ *Id.*

⁸⁶ Plaintiffs' Complaint, *supra* note 78, at 7.

the EMA's intention and purpose for the cooperation of the executive and legislative branches when responding to ongoing or extended states of emergency.⁸⁷ Unilateral extension of emergency powers and associated Stay-at-Home Orders violated the separation of powers doctrine, according to the Michigan Legislature.⁸⁸

Governor Whitmer maintained that the EPGA provided a broad scope of authority to respond to emergencies in the state.⁸⁹ Next, Governor Whitmer stated she had a duty to extend the state of emergency when the legislature declined to do so.⁹⁰ Further, Governor Whitmer asserted that her executive powers to declare ongoing emergencies and extend orders was not contingent upon legislative approval.⁹¹

The Michigan Court of Claims held that the EPGA granted the governor broad power to declare and act during a state of emergency, which is not limited to local concerns.⁹² The court rejected the legislature's concerns about the sweeping unprecedented scope of the order, and stated that EPGA inherently places parameters on what the governor can, and cannot, do after the emergency declaration: orders, rules, and regulations must be "reasonable" and "necessary" to protect

⁸⁷ *Id.* at 13.

⁸⁸ *Id.* at 18.

⁸⁹ Craig Mauger, *Whitmer Not Giving Up Says Michigan Remains in State of Emergency*, DETROIT NEWS (Apr. 29, 2020), <https://www.detroitnews.com/story/news/politics/2020/04/29/whitmer-covid-19-legislature/3050021001/>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Michigan House of Representatives v. Whitmer, No. 20-000079, 2020 WL 3979949, at *11 (Mich. Ct. Cl. May 21, 2020).

life, property, and bring the area under control. The court deferred to Governor Whitmer's assertion that the orders were both reasonable and necessary.⁹³ Next, the Court addressed the issue of Governor Whitmer rescinding, then immediately declaring another state emergency. Circumventing the twenty-eight day time limits, according to the Court, constituted ultra vires action.⁹⁴ Multiple points in the statute set forth the time limit of twenty-eight days for exercise of emergency power if the legislative does not approve an extension.⁹⁵ The Court clarified this provision was a mandatory directive: the governor must obtain legislative approval, or terminate the emergency declaration after twenty-eight days.⁹⁶ Following the court's ruling, the Michigan Legislature stated its intent to appeal the holding.⁹⁷

2. Wisconsin's Safer-at-Home Order

In Wisconsin, on March 12, 2020 Governor Evers issued an Executive Order declaring a state of emergency and on March 24, 2020 Secretary-Designee of Wisconsin's Department of Health Services, Andrea Palm, issued a Safer-at-Home Order pertaining to business closures, school closures, travel restrictions, social restrictions, business

⁹³ *Id.* at *9.

⁹⁴ *Id.*

⁹⁵ *Id.* Ultra vires action refers to actions "beyond the scope or in excess of legal power or authority" as defined by Merriam-Webster Legal Dictionary. See "Ultra vires," Merriam-Webster Legal Dictionary (2021), <https://www.merriam-webster.com/dictionary/ultra%20vires>.

⁹⁶ *Whitmer*, 2020 WL 3979949 at *12.

⁹⁷ Beth LeBlanc, *Judge Affirms Whitmer's Authority to Extend COVID-19 Emergency; Legislature to Appeal*, DETROIT NEWS (May 21, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/05/21/whitmer-had-authority-extend-michigans-state-emergency-judge-says/5238989002/>.

operations, and regulation of other activities.⁹⁸ On April 16, 2020 Secretary-Designee Palm issued a modified Safer-at-Home Order, criminalizing noncompliance.⁹⁹

The Wisconsin State Legislature filed suit against Secretary Designee Palm, asserting that she overstepped her authority by unilaterally issuing the Safer-at-Home Order without following required statutory procedures.¹⁰⁰ The crux of case in Wisconsin focused on whether the Safer-at-Home-Order was in fact a narrow, specific, and limited order or whether it was a broad policy solution designed to apply to multiple people and sectors of society. Wisconsin law delegates power to the Department of Health Services to authorize and implement emergency measures to control communicable disease.¹⁰¹ However, the law also specifies that if the Secretary intends to implement a “general order of general applicability” that has the force of law and applies

⁹⁸ See generally WI Exec. Order 72 (Mar. 12, 2020), <https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf>; WI Emer. Order 12 (Mar. 24, 2020), <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>; WI Emer. Order 1 (Mar. 13, 2020), <https://evers.wi.gov/Documents/EO/SignedSchoolClosure.pdf>; WI Emer. Order 28 (Apr. 16, 2020), <https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf>.

⁹⁹ WI Emer. Order 28 (Apr. 16, 2020), <https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf>; see also Drabiak, *Wisconsin Supreme Court Strikes Down Stay at Home Order*, supra note 48.

¹⁰⁰ Wis. Legislature v. Palm, 942 N.W.2d 900, 905 (Wis. 2020).

¹⁰¹ Wis. Stat. § 252.02(6) (2016); Wis. Stat. § 252.04 (2015).

broadly to many people or businesses, then this requires promulgating a rule through the rulemaking process.¹⁰²

Secretary-Designee Palm asserted that Wisconsin law provided broad authority to the Department of Health Services and that she had the authority to “implement all emergency measures necessary to control communicable disease.”¹⁰³ While Secretary-Designee Palm conceded the Order constituted a general order, Palm maintained the content of the Order did not require rulemaking because it did not meet the standard for general application but instead applied to a limited circumstance addressing a pandemic.¹⁰⁴

The Wisconsin Supreme Court struck down the state’s Safer-at-Home Order, calling it “unlawful, invalid, unenforceable.”¹⁰⁵ Wisconsin Supreme Court Justice Roggensack held Wisconsin’s order went “far beyond” an ordinary quarantine order because it was not confined by target, scope, or limited duration.¹⁰⁶ The Wisconsin Supreme Court decision noted that the breadth and reach of the order constituted a significant departure from the latitude of power historically exercised by a state official during an emergency.¹⁰⁷ Rather than merely closing schools, public buildings, or a specific location with confirmed cases of infection, the Order applied broadly to all people and to locations that were neither infected nor suspected of being infected. The Order placed substantial restrictions on movement and travel, prohibited all public and private gatherings, ordered business closures,

¹⁰² Wis. Stat. § 227.01(13) (2016); Wis. Stat. § 227.24 (2018); *Palm*, 942 N.W.2d at 905.

¹⁰³ *Palm*, 942 N.W.2d at 909.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 918.

¹⁰⁶ *Id.* at 916.

¹⁰⁷ *Id.* at 910–11.

and set forth prescriptive mandates on private conduct. While state public health officials do have the authority to declare an emergency and even issue quarantine orders, the Court held they do not have authority to summarily issue sweeping measures that apply to all people, all business, and all locations without adhering to the rulemaking process.¹⁰⁸ As the Court pointed out, in a pandemic that lasts month after month, there is sufficient time to engage in deliberative – but expedited – rulemaking that permits the state health department to hear a range of expert opinions on what constitutes an optimal strategy to protect public health and safety.¹⁰⁹

The Court also issued an oft-forgotten reminder that state police power to control communicable disease is not absolute: responses must be reasonable, necessary, proportionate, and must not cause more harm than the benefits they are designed to produce. These limitations “compel restraint when restraint is not desired.”¹¹⁰ Citing to precedent and a memorandum issued by the U.S. Attorney General, the Court stated: “individual rights secured by the Constitution do not disappear during a public health crisis...[they] are always in force and restrain government action.”¹¹¹

3. Lessons from Preliminary Litigation of Stay-at-Home Orders

¹⁰⁸ *Id.*

¹⁰⁹ *Palm*, 942 N.W.3d at 908.

¹¹⁰ *Id.* at 934, (Kelly, J., Concurring).

¹¹¹ *Id.* at 917 (citing OFFICE OF THE ATTORNEY GENERAL, MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS AND ALL UNITED STATES ATTORNEYS (Apr. 27, 2020), <https://www.justice.gov/opa/page/file/1271456/download>).

Several lessons emerge from both the holdings and public response to the two rulings. These court decisions emphasize that health officials may believe a particular course of action would effectively solve a public health problem, but health officials cannot act unless they have legal authority to do so.¹¹² When state health officials circumvent the mechanisms that define the scope and limits on their power by engaging in unilateral lawmaking this contravenes the separation of powers doctrine. The Wisconsin Supreme Court ruling and actions by Department of Justice further indicate Stay-at-Home Orders pose a variety of potential constitutional challenges based on whether the scope, breadth, and duration of each order meets the requirements for valid exercise of police power.¹¹³

Wisconsin Gov. Evers, politicians, and the media responded to the decision in Wisconsin with outrage, alleging the decision would “throw the state into chaos” and demonstrated “reckless disregard for human

¹¹² Statement of Interest on Behalf of the United States, Signature Sotheby’s Int’l Realty, Inc. v. Whitmer, No. 1:20-cv-00360-PLM-PJG (W.D. Mich. 2020) at 2.

¹¹³ See Vanessa Romo, *Justice Department Backs Challenge To Illinois Stay-At-Home Order*, NAT’L PUB. RADIO (May 22, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/22/861413069/justice-department-backs-challenge-to-illinois-stay-at-home-order>; Jon Passantino, *DOJ Warns LA Officials Stay-Home Extension May Be 'Arbitrary And Unlawful'*, CNN (May 22, 2020), <https://www.cnn.com/2020/05/22/politics/doj-la-warn-stay-at-home/index.html>; Press Release, Dep’t of Just., Department of Justice Files Statement of Interest Challenging the Constitutionality of Maine Governor’s COVID-19 Orders that Economically Harm Maine Campgrounds (May 29, 2020) (on file with Dep’t of Just.).

life.”¹¹⁴ These characterizations both misrepresent the legal questions of the case and omit meaningful discussion of what state laws do – and do not – permit when responding to communicable disease. Indignation over the courts’ outcomes is misplaced: Even if the public supports a specific action, the judiciary must protect the structural separation of powers, even when “consolidation of power may be tempting in times of exigency for expeditiously producing efficient and effective response.”¹¹⁵ Emergency circumstances do not grant additional power to any branch of government. Media responses in Michigan praised the court’s broad interpretation of the EPGA but glossed over the significance of the ruling that held Whitmer unlawfully circumvented the legislature by rescinding and immediately issuing another emergency order.¹¹⁶

The political divisiveness surrounding each ruling is prescient. Rather than fueling the incendiary nature of partisan disputes, stakeholders should recognize the underlying implications of disagreement: the divergence of reactions signify variation in how

¹¹⁴ *Wisconsin’s Stay at Home Order Has Been Overturned by the State Supreme Court; Here’s How People Are Responding*, MILWAUKEE J. SENTINEL (May 13, 2020),

<https://www.jsonline.com/story/news/2020/05/13/wisconsin-supreme-court-overturns-stay-at-home-order-tony-evers-coronavirus-covid-19-public-reacts/5187856002/>.

¹¹⁵ *Wis. Legislature v. Palm*, 942 N.W.2d 900, 921-22 (Wis. 2020) (Bradley, J., Concurring).

¹¹⁶ See Jack Turman & Adman Brewster, *Michigan Court Upholds Whitmer’s Power to Extend Stay at Home Order*, CBS NEWS (May 22, 2020), <https://www.cbsnews.com/news/michigan-court-stay-at-home-order-upheld-governor-whitmer/>.

policymakers interpreted the significance of epidemiological data, which impacts what different stakeholders consider effective translation of data into optimal and reasonable policy solutions. Importantly, a public health approach must not constitute a myopic conclusion aimed only at attempting to slow the spread of communicable disease but instead requires balancing varying risk assessments (including risk of the virus and disease itself) and co-existing considerations while operating within the parameters of the law.

B. Potential Constitutional Conflicts with Stay-at-Home Orders

Despite courts' broad deference for exercise of police power, the judiciary has a duty and responsibility to clarify limits when laws impermissibly infringe constitutional rights. Potential benefits of restrictions set forth in Stay-at-Home Orders even if state officials appropriately promulgate them must be weighed in conjunction with the risks of quarantine-like orders relating to economic burden, restrictions on liberty and freedom of association, practice of religion, and travel and enjoyment of public spaces.

1. Limits on Police Power

Jacobson v. Massachusetts set forth a two part standard clarifying state authority pursuant to the police power to enact measures designed to control the spread of communicable disease.¹¹⁷ First, the Supreme Court noted that liberty is not absolute, and the state may enact measures that infringe on people's liberty in order to protect public

¹¹⁷ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (upholding a state law mandating that adults receive one smallpox vaccine in the midst of an epidemic or pay a fine (about \$130 today)).

safety.¹¹⁸ Second; however, the Court warned that the state's exercise of police power may not be arbitrary, unreasonable, or go so far beyond what is required for the safety of the public and may not violate rights secured by the Constitution. Despite the two part clarification in *Jacobson* that elucidated the scope of police power, multiple subsequent courts abandoned the second portion of the analysis that described limits on this power.¹¹⁹ The Court in *Jacobson* explicitly warned if the state purposed to enact the law to protect the public health but it "has no real or substantial relation to those object *or* is, beyond question, a plain, palpable invasion of rights secured by fundamental law, it is the duty to courts to so adjudge, and thereby give effect to the Constitution." Using a disjunctive clause, the Court signaled that exercise of police power that plainly invades constitutional rights exceeds the scope of its authority.

In April 2020, the U.S. Attorney General William Barr issued a memorandum directing all Offices of the Attorney General to monitor state and local policies and their impact on constitutional rights.¹²⁰

¹¹⁸ *Id.* at 25.

¹¹⁹ See Statement of Interest on Behalf of the United States, *supra* note 95 at 7 (holding that deference to the state's exercise of police power must not equate to "abdication" of judicial review); see also Katherine Drabiak, *Disentangling Dicta: Prince v. Massachusetts, Police Power and Childhood Vaccine Policy*, 29 ANNALS OF HEALTH L. 173, 177–82 (2020) (discussing the expansion of police power to control communicable disease, increase in deference, and absence of judicial review).

¹²⁰ OFFICE OF THE ATTORNEY GENERAL, MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS AND ALL UNITED STATES ATTORNEYS (Apr. 27, 2020), <https://www.justice.gov/opa/page/file/1271456/download>.

Following this memorandum, several State Attorney Generals intervened in pending lawsuits relating to state Stay-at-Home Orders on the basis of potential constitutional violations.¹²¹

2. Constitutional Interests

a. Business Interests and Economic Livelihood

Stay-at-Home Orders that placed limitations on businesses or closed them entirely posed conflicts with the right to pursue a lawful calling, engage in legitimate business, and sustain economic livelihood.¹²² In *Meyer v. Nebraska*, the Supreme Court recognized the “right of the individual to contract, to engage in any of the common occupations of life” as encompassed within the definition of liberty protected by the 14th Amendment.¹²³ Similarly, the Supreme Court in *Toomer v. Witsell* held that the right to engage in “common callings” of business falls within the purview of the Privileges and Immunities

¹²¹ See Statement of Interest on Behalf of the United States, *supra* note 95; Statement of Interest on Behalf of the United States, *Bayley’s Campground v. Mills*, No. 2:20-cv-00176-LEW (D. Me. 2020); Statement of Interest on Behalf of the United States, *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-00204-AWA-RJK (E.D. Va. 2020).

¹²² See *Baker v. Daley*, 15 F.2d 881, 881 (D. Or. 1926) (holding that the right to earn livelihood by any lawful calling is subject to police power of states and protected by due process clause); *Premier-Pabst Sales Co. v. State Bd. of Equalization*, 13 F. Supp. 90, 92 (S.D. Cal. 1935) (holding that there is an inherent right in every person to carry on a legitimate business, subject, of course, to such reasonable rules and regulations as state governmental bodies, under the police power and general welfare clauses, may enact); see generally *Priddy v. City of Tulsa*, 882 P.2d 881 (Okla. Crim. App. 1994).

¹²³ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Clause.¹²⁴ One court described the right “to acquire means of supporting life by honest labor and skill [as] an inherent right” of citizens.¹²⁵ Both the Constitution, and the Supreme Court affirm the primacy of property, engaging in work and business, and clarify that one purpose of government is to protect individual property.¹²⁶ Indeed, courts have upheld an appropriate use of police power encompasses protecting the public from financial loss.¹²⁷ As one court stated, limitations on the right to work may be sustained only after the most careful scrutiny.¹²⁸

¹²⁴ *Toomer v. Witsell*, 334 U.S. 385, 403 (1948) (holding that “commercial shrimping, like other common callings, is within the purview of the privileges and immunities clause” and affirming an injunction against the enforcement of a South Carolina statute that imposed substantial license taxes for non-residents engaged in shrimping that was 100 times greater than the license tax for residents. The court held the statute violated the privileges and immunities clause for a lack of reasonable relationship between the purpose of the statute and discrimination against non-citizens. The court also held Plaintiffs satisfied irreparable injury sufficient for the lower court’s injunction: compliance with the statute would require large sums of money, but defiance could lead to heavy fines and imprisonment.). *Id.* at 395.

¹²⁵ See generally *Priddy* 882 P.2d at 81; see also *Metropolitan Trust Co. v. Jones*, 51 N.E.2d 256 (Ill. 1943) (holding that law depriving people of the right to acquire and enjoy property is contrary to due process of law).

¹²⁶ See *Founders’ Quotes*, BILL OF RIGHTS INST., <https://billofrightsinstitute.org/resources/founders-quotes> (last visited Mar. 1, 2021) (“[G]overnment is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government which impartially secures to every man whatever is his own.”).

¹²⁷ See *Ziegler v. People*, 124 P.2d 593 (Colo. 1942).

¹²⁸ *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 539 (Cal. 1971).

Economic and property rights may be subject to reasonable regulation through the police power to protect the health, safety, and welfare of the public.¹²⁹ For example, courts uphold regulations that require certain professions to obtain a license to practice in a profession, such as dentists or contractors, to ensure the person engaged in the practice has the requisite skills and knowledge of the particular subject area.¹³⁰ Courts also uphold regulations that are reasonably related to promoting public safety, such as enforcing compliance with building codes or inspections for restaurants. Finally, courts even uphold business closures where practices inherent to the business purpose pose a risk to public safety, such as closing bathhouses and sex clubs with private rooms designed to facilitate sexual encounters during the rise of HIV.¹³¹

However, exercise of the police power must be reasonable, necessary, based on evidence of a threat,¹³² and may not be arbitrary or

¹²⁹ *Paterson v. Univ. of State of N.Y.*, 201 N.E.2d 27, 30 (N.Y. 1964); *Lincoln Fed. Lab. Union No. 19129 v. Nw. Iron and Metal Co.*, 335 U.S. 525, 536–37 (1949).

¹³⁰ *See Weill v. State ex rel. Gaillard*, 34 So. 2d 132 (Ala. 1948) (The court looked to legislative intent when determining the scope of licensing requirements for the practice of dentistry and discussed licensure requirements as reasonable regulation of the profession to ensure skill and competence); *Hope v. Contractors State License Bd.*, 39 Cal. Rptr. 514, 517 (Cal. Ct. App. 1964) (The court examined the reason for requiring licenses for contractors, finding that licensing protects the health, safety, and welfare of the public and constitutes a reasonable regulation of the profession).

¹³¹ *See City of N.Y. v. New St. Mark's Baths*, 562 N.Y.S.2d 642 (N.Y. App. Div. 1990).

¹³² *Priddy v. City of Tulsa*, 882 P.2d 881, 83-84 (Okla. Crim. App. 1994) (The court examined an ordinance that required sign painters to obtain licenses and to obtain a permit for each sign erected. The court stated the

discriminatory.¹³³ States may not pass laws or enact regulations beyond what is necessary in a manner that burdens or destroys private property.¹³⁴ For example, courts have examined the limits of zoning ordinances, holding they may not immediately force business closure or suppress a business.¹³⁵ Restrictions that apply to some businesses, but

ordinance had no logical connection to the purpose of protecting the safety of citizens, was unconstitutional, and exceeded the extent of the police power.); *see also* *Hannibal R.R. Co. v. Husen*, 95 U.S. 465, 472 (1977) [Hereinafter *Husen*] (clarifying states have police power to inspect or exclude persons or animals that are afflicted with contagious disease and pose threat of illness, but may not use police power to exclude unafflicted animals.).

¹³³ *See* *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *see also* *Minor v. Stephens*, 898 S.W.2d 71, 82 (Ky. 1995) (holding “While state has power to regulate insurance business, its power to regulate cannot be permitted to obscure the Bill of Rights,” as “[t]he legislative authority may not, under guise of promoting public interest, arbitrarily interfere, and police power is not without limitations.”); *Toomer v. Witsell*, 334 U.S. 385, 295-99 (1948) (examining whether there was a reasonable rationale for the law that charged 100 times the cost to obtain an out of state fishing/shrimping license versus in state licenses. The Court stated, “We would be closing our eyes to reality, we believe, if we concluded there was a reasonable relationship between the danger represented . . . and the severe discrimination practiced upon them.”).

¹³⁴ *Scutton v. Sacramento County*, 275 Cal. App. 2d 412, 421 (Cal. Ct. App. 1969) (examining a zoning ordinance and found that not all conditions for rezoning are reasonable when rezoning would modify owner’s use of property. The court stated that “[t]he police power ‘cannot extend beyond necessities of the case and be made a cloak to destroy constitutional rights as to inviolateness of private property.’”).

¹³⁵ *See e.g., id.* at 420.

not other similarly situated businesses may face challenges that they are arbitrary and in violation of the Equal Protection Clause.¹³⁶

Restrictions or business closures under the label of quarantine order similarly raises several issues. While states may enact measures to inspect or quarantine goods and products, the power to exclude products from commerce and preclude business transactions requires a specific examination of whether the particular product or business poses a danger. The Supreme Court has held that inspection and quarantine laws may not “wholly exclude” lawful products from entering into the state or preclude their entry into the stream of commerce.¹³⁷ Rather, courts specify that quarantine must be based on evidence that the product is contaminated, has a disease, or has been exposed to disease.¹³⁸

In *Husen*, the Supreme Court held that a state law restricting certain classes of cattle from particular regions was not in fact a

¹³⁶ See Statement of Interest on Behalf of the United States, *supra* note 112, at 1. The U.S. Attorney General’s Office filed a Statement of Interest on behalf of the case brought by Plaintiffs, a group of seven businesses that alleged Michigan’s Stay-at-Home Order placed arbitrary and irrational limits on some businesses but not others similarly situated, violating the Equal Protection Clause. *Id.* For example, the Statement of Interest highlighted that the Order commanded floral shops to close, while permitting recreational marijuana dispensaries to remain open. *Id.* The Order also directed Carhartt stores that sold Carhartt jackets to close, but consumers could purchase the same Carhartt jacket at a hardware store because the Order designated hardware stores an essential business. *Id.* at 7, 9, 12.

¹³⁷ See *Smith v. St. Louis & Sw. Ry. Co.*, 181 U.S. 248, 253 (1901); see also *Husen*, 95 U.S. at 472-473 (1877).

¹³⁸ *Gibbons v. Ogden*, 22 U.S. 1, 116-17 (1824) (describing state authority to quarantine and monitor specific people with an infectious disease or monitor a vessel originating from an “infected place.”); *Smith*, 181 U.S. at 255-57.

quarantine or inspection law supported by evidence of disease in the cattle but instead a broad restriction spanning several months that excluded classes of cattle, which violated the Commerce Clause.¹³⁹ Determining whether a law impermissibly interferes with interstate commerce requires examining the law's objective and effect on interstate commerce.¹⁴⁰ The Court held that while a state may enact restrictions relating to quarantine where the effect limits business transactions, it may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce or interfere with business beyond what is absolutely necessary, and it is the duty to the court to "guard vigilantly against any needless intrusion."¹⁴¹

Stay-at-Home Orders that placed restrictions or ordered closures of multiple sectors of business posed significant conflict with the right to engage in business and sustain an economic livelihood. While states may regulate businesses, Stay-at-Home Orders in some instances not merely regulated businesses but ordered their closure in the entirety, substantially burdening interstate commerce. Unlike precedent that permits tailored quarantine for goods and businesses based on identified threat of disease specific to each product or practice, Orders abandoned this requirement and instead imposed blanket restrictions without evidence of the virus or disease in goods or places of business.

b. Restrictions on Social Gatherings: Liberty and Lawful Assembly

¹³⁹ *Hannibal R.R. Co. v. Husen*, 95 U.S. 465, 473 (1977).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 473–74.

Stay-at-Home Orders that placed restrictions on both public and private social gatherings or assemblies implicated individual liberty and First Amendment rights. The U.S. Constitution protects a right of substantive due process – to be free from state actions that infringe on individual liberty and impose undue restraints.¹⁴² The Supreme Court recognized a right to peaceable assembly for a lawful purpose, specifically in public locations such as parks and streets.¹⁴³ Courts also recognized the First and Fourteenth Amendments protect a right to speak privately and to hold private assemblies for lawful purposes and in a lawful manner without government interference or hindrance.¹⁴⁴

Despite a right to peaceably assemble, states may place restrictions on gatherings when there is clear public danger, generally defined as physical disturbances, acts of violence, threats, and intimidation.¹⁴⁵ States have both the power and the duty to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents, such as permitting certain restrictions

¹⁴² Wendy K. Mariner et al., *Jacobson v. Massachusetts: It's Not Your Great-Grandfather's Public Health Law*, 95 AM. J. PUB. HEALTH 581, 582 (2005).

¹⁴³ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

¹⁴⁴ *Id.*; *Local 309, United Furniture Workers of Am., C.I.O. v. Gates*, 75 F.Supp. 620, 624, 626 (N.D. Ind. 1948).

¹⁴⁵ *Thornhill v. State of Alabama*, 310 U.S. 88, 103-05 (1945); *but see Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 193, 198, 204 (1921) (the court distinguished peaceable assembly from picketing and protests outside a steel plant wherein intimidating, dogging, obstructing entry, and instigating assault did not constitute peaceable assembly); *see also Police Dept. of City of Chicago v. Mosley*, 402 U.S. 92, 98 (1972) (discussing reasonable time, place, and manner restrictions for picketing).

relating to time, place, and manner for large public gatherings.¹⁴⁶ However, the Supreme Court has clarified that “clear and present danger,” “breach of the peace,” and “imminent and aggravated danger” constitutes a much higher standard than mere threat of remote or potential danger.¹⁴⁷ Moreover, this standard to restrict gatherings relies on examining a person’s specific *actions* or *conduct* – such as verbal assault, “dogging,” obstructing movement of passerby’s, and physical assault – not a person’s *suspected status* who may or may not be carrying a specific virus or communicable disease.¹⁴⁸

Public health authorities and the law may place restrictions on a person’s individual liberty in situations where a person’s actions pose a direct, immediate, and compelling harm to others. In public health law relating to communicable disease, state power to constrain individual rights requires a very specific standard: a person must actually have a disease and this person’s actions must pose a direct threat to others.¹⁴⁹ For example, health officials may seek a quarantine order to treat a person with active tuberculosis who continues to frequent highly populated public spaces until the person is no longer contagious.¹⁵⁰ In such cases, health authorities must produce evidence that a specific person or identifiable location has been exposed to the communicable disease.¹⁵¹ Courts uphold quarantine orders that target a specific person or identifiable location, and that are time limited to the disease

¹⁴⁶ *Thornhill*, 310 U.S. at 103–05.

¹⁴⁷ *Id.* at 103–06.

¹⁴⁸ *Id.* at 105–06.

¹⁴⁹ *City of Newark v. JS*, 652 A.2d 265, 271 (N.J. Super Ct. 1993).

¹⁵⁰ *Id.* at 268.

¹⁵¹ Miles, *supra* note 76, at 18.

incubation period or period of treating the confirmed case of active communicable disease.¹⁵²

Stay-at-Home Orders prohibited both public and private gatherings on the basis of attenuated risk, presuming that people posed a risk to the public based on their status as a potential vector for the virus. However, this classification discards jurisprudence requiring specific aggressive or violent actions to justify placing partial restrictions on gatherings. This classification also disregarded established precedent for police power to restrict movement on the basis of communicable disease in order to protect the public through quarantine orders because Stay-at-Home Orders omitted the most critical element: the power to restrict movement to control communicable disease derives authority from evidence that a specific person or identifiable location has been exposed to the disease.

c. Practice of Religion

Stay-at-Home Orders that ordered places of worship to close or limit operations raised First Amendment considerations for practicing one's religion, such as gathering in the location of worship, gathering with other congregants, meeting with their religious leader, or participating in religious rituals. The Free Exercise Clause of the First Amendment guarantees to all Americans the "right to believe and profess whatever religious doctrine [they] desire."¹⁵³ This encompasses the right to act on these beliefs by gathering in places of worship and

¹⁵² *Id.* at 18; *City of Newark*, 652 A.2d at 271; *Mayhew v. Hickox*, CV-2014-36 2014 U.S. Dist. LEXIS 1, at *3 (D. Me. Oct. 31, 2014) (referencing a twenty-one day period of observation for an asymptomatic person suspected of being infected with Ebola but showing no symptoms).

¹⁵³ *Emp't Div. v. Smith*, 494 U.S. 872, 877-78 (1990).

gathering with other congregants for a worship service.¹⁵⁴ Courts review laws that target religion under strict scrutiny: they must be based on a compelling government interest and narrowly tailored.¹⁵⁵ Alternatively, courts review neutral laws of general applicability that in effect burden religious practice under the rational basis standard: state officials simply must have a reasonable basis for the law that is neither arbitrary nor discriminatory.¹⁵⁶

Certainly, the right of free exercise of religion does not relieve people of the obligation to comply with valid or neutral laws of general applicability.¹⁵⁷ In *Employment Division v. Smith*, a drug treatment rehabilitation facility terminated two employees for using peyote, an illegal Schedule I Controlled Substance, which they used in a religious ceremony of the Native American Church.¹⁵⁸ The Supreme Court upheld Oregon's ability to deny the plaintiffs' unemployment claims, finding that religious convictions do not excuse a person from complying with otherwise valid laws prohibiting certain types of conduct, such as criminal possession and use of controlled substances that violated company policy.¹⁵⁹

¹⁵⁴ *Id.*; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

¹⁵⁵ *Emp't Div.*, 494 U.S. at 876.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 878–79.

¹⁵⁸ *Employment Division v. Smith*, 494 U.S. 872, 890 (1990).

¹⁵⁹ *Id.* (holding “We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the

Courts have similarly upheld laws against Free Exercise Clause challenges where parties dispute the application of criminal laws such as polygamy,¹⁶⁰ a husband invoking an affirmative defense to battery by asserting the tenets of his religion prescribe domestic violence against his wife,¹⁶¹ using venomous snakes in religious worship,¹⁶² asserting a nonexistent “right” to use an illegal substance such as marijuana when operating a motor vehicle,¹⁶³ or as a means to exculpate a defendant’s criminal liability for possession and intent to distribute controlled substances.¹⁶⁴ In each of these cases, courts rejected using religion as justification or an affirmative defense for engaging in a criminal conduct independently or in conjunction with religious worship.

The Free Exercise Clause prohibits laws from discriminating against religious beliefs, or prohibiting conduct because a person engaged in the action for religious reasons.¹⁶⁵ However, the Supreme Court has held “facial neutrality is not determinative.”¹⁶⁶ In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the city passed an

professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”).

¹⁶⁰ See *Reynolds v. U.S.*, 98 U.S. 145 (1878) (holding religious belief in polygamy did not constitute a defense to the criminal charge of bigamy).

Although the Court may not assess the *belief* of the practice, religion does not constitute a defense to the criminal *act*).

¹⁶¹ See *S.D. v. M.J.R.*, 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010).

¹⁶² See *Harden v. State*, 216 S.W.2d 708 (Tenn. 1949).

¹⁶³ See *State v. Hardesty*, 214 P.3d 1004, 1005 (Ariz. 2009).

¹⁶⁴ See *People v. Feliz*, 2018 WL 4469867 (V.I. 2018) (holding a plaintiff’s Rastafarian religious beliefs relating to marijuana use did not constitute a defense to criminal possession and intent to distribute marijuana.).

¹⁶⁵ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

¹⁶⁶ *Id.* at 534.

ordinance prohibiting the sacrifice or slaughter of animals in certain contexts stating the ordinance was in furtherance of the city's interest in public health relating to the disposal of animal carcasses and consumption of uninspected meat.¹⁶⁷ Despite the city's assertion that the law was facially neutral, the Court held the purpose of the law targeted the Santeria religion and aimed to prevent congregants' exercise of religion involving ritual animal sacrifice.¹⁶⁸ Notably, the Supreme Court clarified a facially neutral law constitutes impermissible "religious gerrymandering" when state officials interpret an ordinance according to what actions *they* unilaterally deem necessary versus unnecessary.¹⁶⁹ In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, for example, the Court pointed out the ordinance proscribed "unnecessary" killing of an animal targeting religious sacrifices, but contained lengthy and specific exceptions and permissions for categories of actions that city officials deemed "necessary" including slaughter for food consumption, hunting, and euthanasia.¹⁷⁰ The Court held that states may not unilaterally determine which religious practices it deems "necessary."¹⁷¹

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 533 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

¹⁶⁹ *Id.* at 535.

¹⁷⁰ *Id.* at 537 ("Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons.").

¹⁷¹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 527, 537 (1993).

Religious freedom and gathering with other congregants to practice one's religion constitutes a fundamental right. Although free exercise of religion is not absolute, cases that restrict free exercise generally address preexisting areas of criminal law where a person engaged in an action that threaten public order and safety, asserting that his religion prescribes the conduct. Stay-at-Home Orders, however, erased precedent's examination of the criminal conduct and instead defined *attending* religious services as criminal conduct. Lastly, the Supreme Court held that permitting certain practices in non-religious settings while prohibiting them in religious settings may constitute religious gerrymandering.¹⁷² States that promulgated and enforced Stay-at Home-Orders prohibiting large groups or barred individuals from attending religious services but permitted large groups to convene for political protests pertaining to race relations during the summer of 2020 may face allegations of religious gerrymandering.¹⁷³

d. Travel

Stay-at-Home Orders that closed public spaces such as beaches, parks, and nature trails; placed broad restrictions on travel; or discouraged travel may conflict with the right to both interstate and intrastate travel. The Supreme Court in multiple cases held the right to

¹⁷² *Id.* at 534.

¹⁷³ Julie Bosman & Amy Harmon, *Protests Draw Shoulder-to-Shoulder Crowds After Months of Virus Isolation*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/06/02/us/coronavirus-protests-george-floyd.html>; Rachel Weiner, *Political and Health Leaders' Embrace Of Floyd Protests Fuels Debate Over Coronavirus Restrictions*, WASH. POST (June 11, 2020), https://www.washingtonpost.com/health/political-and-health-leaders-embrace-of-floyd-protests-fuels-debate-over-coronavirus-restrictions/2020/06/11/9c60bca6-a761-11ea-bb20-ebf0921f3bbd_story.html.

interstate travel is “firmly embedded” in U.S. jurisprudence and “repeatedly recognized” as a “virtually unconditional” right, guaranteed in the Constitution.¹⁷⁴ The right to enter and abide any state in the U.S. encompasses three rights, including:

“the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”¹⁷⁵

State laws implicate the right to travel when they either impede travel as a primary objective or penalize citizens for exercising the right upon leaving or entering.¹⁷⁶ Both courts and several state constitutions address the right of intrastate travel, holding the freedom to move is a basic right of citizens that is “engrained in our history,” “part of our heritage,” and inherent in the concept of ordered liberty.¹⁷⁷

¹⁷⁴ Saenz v. Roe, 526 U.S. 489, 500 (1999); Jones v. Helms, 452 U.S. 412, 416 (1981); Att’y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903-04 (1986).

¹⁷⁵ Saenz v. Roe, 526 U.S. 489, 499 (1999); *see also* Crandall v. Nevada, 73 U.S. 35, 44 (1868).

¹⁷⁶ Jones, 452 U.S. at 418; Soto-Lopez, 476 U.S. at 903.

¹⁷⁷ Brandmiller v. Arreola, 544 N.W.2d 894, 898 (Wis. 1996) (citing Kent v. Dulles, 357 U.S. 116, 125 (1958); Aptheker v. Sec. of State, 378 U.S. 500, 504 (1964) (describing liberty and the freedom of movement emanating from the Fifth Amendment and that it implicates both interstate and intrastate travel)).

The right to travel is interwoven closely to other co-existing constitutional liberties, such as freedom to pursue economic opportunities both intrastate and interstate,¹⁷⁸ freedom of assembly, practice of religion, and the right to enjoy public spaces such as streets and parks.¹⁷⁹ Writing for the concurrence in *Aptheker v. Sec. of State*, Justice Douglas noted freedom of movement is integral to pursue economic and business opportunities and engage in cultural, social and political activities, each of which constitute the “very essence of our free society.”¹⁸⁰ Justice Douglas warned, “once the right to travel is curtailed, all other rights suffer” because restricting movement while purporting such enactments enhance security can lead to abhorrent concentration of state power present in totalitarian regimes that secure power by ticketing citizens and demanding identification papers.¹⁸¹

States do, however, have authority to enact reasonable laws and regulations to facilitate travel, promote public safety, or address a specific emergency. Courts have clarified that minor restrictions do not amount to denying the right to travel.¹⁸² Courts have upheld cruising

¹⁷⁸ See *Edwards v. California*, 314 U.S. 160 (1941). During the Dust Bowl, many poverty-stricken U.S. citizens attempted to migrate west to pursue economic opportunities. *Id.* In response, the state of California passed a law criminalizing bringing an indigent non-resident into the state. *Id.* The Court struck down the law, holding that economic difficulties did not justify the state’s attempt to insulate itself from the cost or burden from interstate migration. See *Aptheker*, 378 U.S. at 519 (Douglas, J., concurring).

¹⁷⁹ *Brandmiller*, 544 N.W.2d at 898; see also *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 496 (1939).

¹⁸⁰ *Aptheker*, 378 U.S. at 519 (Douglas, J., concurring).

¹⁸¹ *Id.*

¹⁸² *Brandmiller v. Arreola*, 544 N.W.2d 894, 901 (Wis. 1996). The court classified a “cruising” ordinance that designated certain restrictions for specific roadways during a time window as similar to traffic regulations like

ordinances that designate restrictions for specific roadways during a narrow time window, finding these ordinances are similar to traffic regulations, such as utilizing speed limits, traffic lights, and stop signs because they are designed to facilitate, not impede, travel.¹⁸³ States may also enact reasonable restrictions on travel for people who have been convicted of a crime as a means to promote public safety. The Supreme Court also addressed the need for states to have the authority to prevent citizens from leaving a state, or order their return to a state if the person has been convicted of a crime.¹⁸⁴ Similarly, lower courts uphold restrictions on individual movement of specific people, such as attaching probation conditions to a convicted burglar to prevent him from visiting the same store,¹⁸⁵ or restricting convicted sex offenders from visiting specific places such as schools and parks where children may be present.¹⁸⁶ Finally, courts uphold restrictions on travel

speed limits, traffic lights, and stop signs that are designed to facilitate, not impede travel. *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Jones v. Helms*, 452 U.S. 412, 419 (1981) (discussing authority for a criminal to leave the state and state's authority to order a convicted criminal to return); *Zemel v. Rusk*, 381 U.S. 1 (1965) (discussing a state may restrict travel through passport issuance where a person has engaged in illegal conduct).

¹⁸⁵ *People v. Moran*, 376 P.3d 617, 621 (Cal. 2016) (upholding a probation condition requiring defendant to refrain from visiting a specific hardware store of the chain from which he burglarized).

¹⁸⁶ *State v. Willard*, 756 N.W.2d 207, 211 (Iowa 2008); *Standley v. Town of Woodfin*, 661 S.E.2d 728, 729 (N.C. 2008).

connected to emergency circumstances, such as time and place restrictions during acute periods of violent riots.¹⁸⁷

In *Zemel v. Rusk*, the Supreme Court stated in dicta that although the freedom to travel within the U.S. is a constitutionally protected right, “that freedom does not mean that areas ravaged by flood, fire, or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole.”¹⁸⁸ If states enact laws or measures that substantially burden the right to travel, such as during an emergency, courts will examine the restrictions with strict scrutiny.¹⁸⁹ Restrictions must be narrowly tailored and serve a

¹⁸⁷ *United States v. Chalk*, 441 F.2d 1277, 1283 (4th Cir. 1971) (upholding travel restrictions inherent in imposing a temporary night curfew and declaration of emergency over violent riots); *Glover v. District of Columbia*, 250 A.2d 556, 560 (D.C. 1969) (upholding restriction on travel inherent in one-night curfew during city wide violent riots); *In re Juan C.*, 33 Cal. Rptr. 2d 919, 924 (Cal. Ct. App. 1994) (upholding restriction on travel inherent in night curfew during city wide violent riots).

¹⁸⁸ *Zemel v. Rusk*, 381 U.S. 1, 15-16 (1965) (upholding restrictions on international travel to Cuba and the Secretary of State denying a citizen’s request to travel to Cuba citing risk of danger to traveler while visiting Cuba and risk that travel of U.S. citizen to Cuba could increase international conflict).

¹⁸⁹ *Jones v. Helms*, 452 U.S. 412, 419 (1981) (holding states may prevent citizens from leaving or order citizens’ return to a state if the person has been convicted of a crime); *see Brandmiller v. Arreola*, 544 N.W.2d 894, 901 (Wis. 1996) (describing the cruising ordinance); *see Zemel*, 381 U.S. at 13-14 (holding that states may impose restrictions on international travel such as denying a passport when the applicant has engaged in illegal conduct and is attempting to evade the law. In dicta, the court also addressed the state’s right to restrict travel during emergency circumstances); *see also Chalk*, 441

compelling government interest.¹⁹⁰ Courts upholding restrictions on travel associated with emergency conditions such as riots examine how extensive the restriction reaches and whether the restriction is unreasonable based on the time during which it is enforced. For example, during acute riots over racial tensions that have occurred in U.S. history, cities note that it is their responsibility to maintain an orderly community.¹⁹¹ When a sudden disaster, threat, or catastrophe threatens the community, the city must act swiftly to prevent further serious disorder. During these riots, specific areas erupted in violent conflict, including rioters breaking windows, throwing rocks and missiles at police officers, throwing burning tires at law enforcement vehicles,¹⁹² committing assault, arson, homicide, and looting

F.2d at 1283 (upholding travel restrictions inherent in imposing a temporary night curfew and declaration of emergency over violent riots); *see Glover*, 250 A.2d at 560 (upholding restriction on travel inherent in one-night curfew during city wide violent riots); *see in re Juan C.*, 33 Cal. Rptr. 2d at 924 (upholding restriction on travel inherent in night curfew during city wide violent riots); *see Ballet v. City of Gretna*, No. 06-10859 2009 WL 1789413, at *11 (E.D. La. June 8, 2009) (holding that enforcing a restriction on pedestrian traffic across a bridge following Hurricane Katrina that resulted in waiting a day to cross the bridge by vehicle did not amount to denying plaintiffs' the right of interstate travel).

¹⁹⁰*Aptheker v. Sec. of State*, 378 U.S. 500, 514 (1964); *but see Brandmiller*, 544 N.W.2d at 901 (classifying a "cruising" ordinance that designated certain restrictions for specific roadways during a time window as traffic regulations, whereby the court reviewed the ordinance under intermediate scrutiny).

¹⁹¹ *Chalk*, 441 F.2d at 1281.

¹⁹² *Id.* at 1282–83.

businesses.¹⁹³ In response, cities passed nighttime curfews during the periods of rioting.¹⁹⁴ One court held the government interest in community safety can, in appropriate circumstances, outweigh individual liberty interest in freedom to travel, noting that restrictions must be closely tailored by each factual circumstances and restrictions only last as long as “. . . imminent peril of violence exists.”¹⁹⁵

When balancing the individual liberty interest to travel against government interests, courts examine the extent of the restriction imposed and the necessity of the restriction, which the Supreme Court also addressed through the lens of national security and international travel.¹⁹⁶ In *Zemel v. Rusk*, the Supreme Court held that the Secretary of State could deny the applicant’s request to visit Cuba based on political turmoil in Cuba, a record of Cuba arresting and imprisoning U.S. citizens, and the high potential that travel to Cuba could spark dangerous international conflict and threaten national security.¹⁹⁷ However, the Supreme Court held in *Aptheker v. Sec. of State* that blanket restrictions on travel based on attenuated risk to national security sweep too broadly and indiscriminately.¹⁹⁸ In *Aptheker v. Sec. of State*, the Court examined provisions in the Subversive Activities Control Act, which required members of the Communist Party to register their membership with the Attorney General and permitted the

¹⁹³ *In re Juan C.*, 33 Cal. Rptr. 2d 919, 922 (Cal. Ct. App. 1994); *Glover v. District of Columbia*, 250 A.2d 556, 561 (D.C. 1969).

¹⁹⁴ *See generally In re Juan C.*, 33 Cal. Rptr. 2d at 919; *Glover*, 250 A.2d 556.

¹⁹⁵ *In re Juan C.*, 33 Cal. Rptr. 2d at 923.

¹⁹⁶ *Zemel v. Rusk*, 381 U.S. 1, 14 (1965); *Berrigan v. Sigler*, 358 F. Supp. 130, 140 (1973).

¹⁹⁷ *Zemel*, 381 U.S. at 14.

¹⁹⁸ *Aptheker v. Sec. of State*, 378 U.S. 500, 504 (1964).

Secretary of State to revoke their passports based on alleged danger that their political beliefs posed to national security.¹⁹⁹ The Court struck down the provision, finding that the blanket restriction on travel was overbroad and did not examine the purpose, activity, or places of travel to assess risk, but rather presumed significant risk.²⁰⁰

Notably, the Supreme Court also addressed travel restrictions as a means to prevent the introduction of “unsound and infectious articles,” to guard against pestilence, or prevent interstate migration of citizens that would burden the state’s health, economy, and resources.²⁰¹ In *Edwards v. California* the Court clarified states may restrict the flow of goods or items that have a documented infectious disease, but they may not prevent citizens from entering the state based on fear that the incoming people will burden the state’s own health or finances.²⁰² The Court held a state “may not isolate itself from the difficulties common to all states” by restricting the transportation of people and goods across its borders.²⁰³ Rather, states must work cooperatively to solve pressing national problems and barring citizens’ interstate travel based on theoretical risk to population health or drain to state financial resources is not permissible.²⁰⁴

One court addressed the conflicts that Stay-at-Home Orders and other measures, such as requiring all out of state visitors to quarantine upon entering the state.²⁰⁵ Although the court did not rule on the merits

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 514.

²⁰¹ *Edwards v. California*, 314 U.S. 160, 175–76 (1941).

²⁰² *Id.*

²⁰³ *Id.* at 166, 176-177.

²⁰⁴ *Id.*

²⁰⁵ *Bayley’s Campground v. Mills*, No. 2:20-cv-00176-LEW (D. Me. 2020).

of such restrictions, this case highlighted several pertinent considerations. In *Bayley's Campground v. Mills*, a campground business in Maine and non-Maine residents brought suit against Gov. Mills on the basis of an Executive Order that prevented out of state visitors from renting property in the state unless they quarantined for fourteen days in the state prior to renting the property.²⁰⁶ The state asserted that neighboring states had high rates of SARS-CoV-2/COVID-19 infections, the state was concerned that the influx of seasonal residents and vacationers would bring more cases of COVID-19 into the state, and asserted the increase in cases would overburden Maine's healthcare system.²⁰⁷ The effect, the court summarized, criminalized everyone who entered the state who did not quarantine for fourteen days and effectively discriminated against in-state residents and out-of-state residents when deciding access to goods and services within the state.²⁰⁸ The court stated that this restriction burdened the right to enter and leave the state and conflicted with "the right [of citizens] to be treated as a welcome visitor rather than unfriendly alien."²⁰⁹ Restrictions that are inherently prejudicial to interstate travel may only be "condoned in the face of dire hazard, even then tolerated only so long as the hazard is paramount."²¹⁰

Stay-at-Home Orders that issued broad restrictions on intrastate travel, closed public spaces such as beaches, parks, nature trails, and discouraged interstate travel by imposing blanket quarantine for out-of-state travelers raise the question of whether evidence relating to the risk or danger from COVID-19 supports the broad scope and extensive

²⁰⁶ *Id.* at 10.

²⁰⁷ *Id.* at 4.

²⁰⁸ *Id.* at 9-10.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 10.

nature of such restrictions. Existing precedent permits restrictions on travel when they are narrow time, place and circumstance regulations: such as a short duration nightly curfew to curb aggressive violent riots in a targeted geographic area,²¹¹ limitations on a specific person's movement after the person has been convicted of a crime as a means to further public safety²¹² or preventing the travel of diseased goods.²¹³ Courts have warned that imposing travel restrictions based on belief that a person or class of people poses a risk to the state's health, economy, or even national security sweeps too broadly and may be unconstitutional.²¹⁴

IV. PROTECTING PUBLIC HEALTH WHILE UPHOLDING THE RULE OF LAW

While the federal government and state authorities have the power and duty to protect the public health, actions must be grounded in authority, uphold the rule of law, and may not unduly burden Constitutional rights. This section describes principles to guide the responsible use of authority to control communicable disease and explains why public health policy must assess interconnected values and interests rather than focusing narrowly on only reducing the spread of communicable disease.

A. Responsible Use of Authority

²¹¹ See generally *In re Juan C.*, 33 Cal. Rptr. 2d 919 (Cal. Ct. App. 1994); *Glover v. District of Columbia*, 250 A.2d 556, 561 (D.C. 1969).

²¹² See generally *Jones v. Helms*, 452 U.S. 412, 415 (1981).

²¹³ See generally *Hannibal R.R. Co. v. Husen*, 95 U.S. 465, 473 (1977).

²¹⁴ See *Husen*, 95 U.S. at 473; *Edwards v. California*, 314 U.S. 160, 175–76 (1941); *Aptheke v. Sec. of State*, 378 U.S. 500, 514 (1964).

Policymakers must assess sweeping lengthy orders within the context of duty of stewardship to responsibly use authority without abuse of discretion. Surveillance and police power may be a positive good when used for early prevention and mitigation narrowly to identify, isolate, and provide assistance for self-quarantine.²¹⁵ This relies on bi-directional trust between government health officials and the public. Public health can excel at preparedness planning, assisting people by providing diagnostic tests, facilitating delivery of medical care, and providing directions for how limit the spread of disease in the population. But we must also guard against misuse and abuse of power, and increasing surveillance of all people, such as through GPS cell phone tracking or drone monitoring, especially during a time of crisis. It is a mistake to believe public health safety requires sacrificing privacy or other civil liberties.²¹⁶

Perhaps most troubling, by classifying all people as dangerous – based on their status as a person – a threat to public health, and risky to society, this dehumanizes people in unimaginable ways. People are not dangerous disease vectors, but human beings to whom we must afford dignity. To forget this is damaging both to the enforcer (law enforcement, who may experience moral distress of enforcing such orders) and the person being subjected to enforcement.

Dark periods in the history of the U.S. Supreme Court remind us how we have been wrong about this before: the Court upheld involuntary sterilization, and justified this practice as necessary to protect the public's health;²¹⁷ the Court also upheld placing people of

²¹⁵ ANNAS ET AL., *supra* note 49; Mariner et al., *Pandemic Preparedness: A Return to the Rule of Law*, *supra* note 49.

²¹⁶ See generally ANNAS ET AL., *supra* note 49; Mariner et al., *Pandemic Preparedness: A Return to the Rule of Law*, *supra* note 49.

²¹⁷ See *Buck v. Bell*, 274 U.S. 200 (1927).

Japanese descent into internment camps, again justifying this practice as necessary for national security.²¹⁸ Viewing people as a danger without evidence of a person's specific harmful conduct or action can lead to egregious human rights violations that cause injury and suffering. Media reports suggest this occurred across the globe, where some nations employed draconian measures against people in the name of controlling disease such as spraying toxic chemicals, sanctioning ruthless beatings, or deploying public shaming.²¹⁹ How the U.S. responds to epidemics of communicable disease constitutes a defining moment in history: government officials and policymakers in each instance must act with compassion and evidence-based reason.

B. Translating Data into Policy Solutions

Even with the same data, there are a range of expert opinions on how to best translate the data into policy actions. Many states and localities adopted a reactive model designed to slow the spread of the virus, asserted quarantine-like orders were required and framed opposition to the sweeping shut down of society as a course that threatened lives.²²⁰ Effective health policy decision-making should

²¹⁸ See *Korematsu v. U.S.*, 323 U.S. 214 (1944).

²¹⁹ Rebecca Radcliffe, *Teargas, Beatings and Bleach: the Most Extreme Covid-19 Lockdown Controls Around the World*, THE GUARDIAN (March 31, 2020), <https://www.theguardian.com/global-development/2020/apr/01/extreme-coronavirus-lockdown-controls-raise-fears-for-worlds-poorest>.

²²⁰ Emily Bazelon, *Restarting America Means People Will Die. So When Do We Do It?*, N.Y. TIMES MAG. (June 15, 2020), <https://www.nytimes.com/2020/04/10/magazine/coronavirus-economy-debate.html>.

encourage inquiry and analytical questions rather than issue conclusory statements. Promoting one solution as the only solution incites divisiveness and distracts stakeholders from gauging what values and trade-offs various responses would entail.

Reactive approaches also avoided the thorny assessment of what actions could have been done differently to focus on preparedness and prevention prior to the pandemic. In February 2020, *The Economist* published a briefing asserting interventions such as dramatic social distancing measures were a proven way to limit the damage by “flattening the curve” to delay the spread of the virus.²²¹ As health law professor Mark Rothstein aptly noted, expanding the time window for potential influx of patients into the hospital does not constitute an innovative strategy, but rather reflects a fundamental shortcoming in healthcare surge capacity.²²² Effective preparedness would instead address critical infrastructure insufficiencies, such as securing the availability and dissemination of effective diagnostic tests, organizing a reserve of public health personnel, and stockpiling centralized supplies such as personal protective equipment, medications, and ventilators that could be allocated to healthcare facilities based on necessity. Addressing population wide mitigation also entails communicating simple, yet effective public health strategies to reduce transmission set

²²¹ *Covid-19 is Now in 50 Countries, and Things Will Get Worse*, THE ECONOMIST (Feb. 29, 2020), <https://www.economist.com/briefing/2020/02/29/covid-19-is-now-in-50-countries-and-things-will-get-worse>.

²²² Mark Rothstein, *Flattening the Curve, Then What?*, HASTINGS CTR. BIOETHICS F. BLOG (Mar. 23, 2020), <https://www.thehastingscenter.org/flattening-the-curve-then-what/>.

forth by U.S. Surgeon General Adams, such as handwashing and self-isolating when sick.²²³

Experts across a number of disciplines raised insightful questions that demonstrate a range of possibilities existed when considering what constituted a cohesive response to communicable disease. Notably, physician and public health scholar David Katz asked the question that many had incorrectly presumed constituted a proven conclusion: What evidence demonstrates whether mass quarantine would even be effective at slowing the spread of the virus?²²⁴ Katz, along with public health scholar Michael Osterholm opined that based on current data, most cases of COVID-19 were mild and will not require medical intervention.²²⁵ Quarantine-like orders may not only be ineffective and unsustainable, but harmful according to Katz and Osterholm based on the damage they induced to educational, social, healthcare, and economic sectors. There is not one model for a public health response to communicable disease, but multiple options that assess risk and prioritize competing values differently.

²²³ Transcript: Jerome Adams on "Face the Nation", CBS NEWS (Mar. 8, 2020), <https://www.cbsnews.com/news/transcript-jerome-adams-on-face-the-nation-march-8-2020/>.

²²⁴ David Katz, *Is Our Fight Against Coronavirus Worse Than the Disease?*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/opinion/coronavirus-pandemic-social-distancing.html>.

²²⁵ Michael Osterholm & Mark Olshaker, *Facing Covid-19 Reality: A National Lockdown is No Cure*, WASH. POST (Mar. 21, 2020), <https://www.washingtonpost.com/opinions/2020/03/21/facing-covid-19-reality-national-lockdown-is-no-cure/>.

CONCLUSION

Effective responses to communicable disease begin long before the event occurs. This means transitioning to a preparedness model that recognizes viruses and disease have been – and will continue to be – part of our society. During a rapidly changing pandemic, it is imperative that federal, state, and local responses by government and health officials remain grounded by accurate reporting, encourage analytical questions, and permit flexibility for modifying strategies as new evidence emerges. Federal and state governments have separate and distinct roles to enact measures designed to control communicable disease. But this authority is not absolute; rather, strategies must follow appropriate procedural requirements upholding the Separation of Powers doctrine; they must be necessary, reasonable, and proportionate based on current data; and they may not plainly violate constitutional rights. As the Supreme Court long ago observed, abiding constitutional limitations compels restraint by guiding judicious use of power and resources and protects the foundational principles in our system of government. We must shift our mindset away from a paradigm that declares a war against people with the virus, or even the virus itself when developing strategies to control communicable disease. Instead, we must respond swiftly by listening to clinicians' reports on the front lines, gather accurate data, develop prudent plans designed to mitigate the virus' impact without dismantling fundamental values and structures upholding our society.