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COVID-19, Constitutional Law, and Catastrophe

Brendan Williams

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Brendan Williams

COVID-19, Constitutional Law, and Catastrophe

20 U.N.H. L. REV. 153 (2021)

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INTRODUCTION

On January 19, 2020, the first U.S. patient with symptoms of COVID-19 presented to an urgent care clinic in the state of Washington following a trip to see family in Wuhan, China, which had become a hotspot for the spread of this novel coronavirus.¹

In early February, the first U.S. COVID-19 outbreak began at a nursing home in Kirkland, Washington, with 46 associated deaths.²

A conference in Boston for the pharmaceutical company Biogen held in late February, and concluding March 1st, became the first U.S. COVID-19 “superspreader” event: “Biogen employees, most feeling healthy, boarded planes full of passengers. They drove home to their families. And they carried the virus to at least six states, the District of Columbia and three countries, outstripping the ability of local public health officials to trace the spread.”³ Ultimately, scientific research through genetic tracing found this single event was tied to well over 300,000 cases.⁴

Messaging from President Trump belied the unfolding crisis. On February 28, he declared: “It’s going to disappear. One day it’s like a miracle, it will disappear.”⁵

On March 15th the White House messaging changed, and “Coronavirus Guidelines” were issued:

The suggestions include encouraging people to “avoid social gatherings in groups of more than 10 people,” as well as avoiding “eating or drinking in bars, restaurants and food courts.”

¹ Michelle L. Holshue, et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 *NEW ENGLAND J. MED* 929, 929 (2020).

² See Paige Cornwell, *Coronavirus Vaccinations begin at Life Care Center of Kirkland, Original Epicenter of the U.S. COVID-19 Outbreak*, *SEATTLE TIMES* (Dec. 28, 2020, 5:27 PM), <https://www.seattletimes.com/seattle-news/health/coronavirus-vaccinations-begin-at-life-care-center-of-kirkland-original-epicenter-of-seattle-area-covid-19-outbreak/> [https://perma.cc/573C-44ZC]. See also Paige Cornell (@pgcornwell), *TWITTER* (Dec. 28, 2020, 12:42 PM), <https://twitter.com/pgcornwell/status/1343613409418387457> [https://perma.cc/PF5Q-TF3P].

³ Farah Stockman & Kim Barker, *How a Premier U.S. Drug Company Became a Virus ‘Super Spreader’*, *N.Y. TIMES* (Apr. 12, 2020), <https://www.nytimes.com/2020/04/12/us/coronavirus-biogen-boston-superspreader.html> [https://perma.cc/6Z3P-5Y82].

⁴ Jacob E. Lemieux, et al., *Phylogenetic Analysis of SARS-CoV-2 in Boston Highlights the Impact of Superspreading Events*, *SCIENCE* (2021) at 1, 5.

⁵ Stephen Collinson, *Trump Seeks a ‘miracle’ as Virus Fears Mount*, *CNN* (Feb. 28, 2020, 8:21 AM), <https://www.cnn.com/2020/02/28/politics/donald-trump-coronavirus-miracle-stock-markets/index.html> [https://perma.cc/JPZ3-PC9G].

In states where community transmission has already occurred, officials should close “bars, restaurants, food courts, gym, and other indoor and outdoor venues where groups of people congregate,” the guidelines say.⁶

Mixed messaging persisted, however, as Trump projected that the country could be fully opened up by Easter: “Wouldn’t it be great to have all of the churches full?” he said. “You’ll have packed churches all over our country. I think it’ll be a beautiful time.”⁷ Instead, the COVID-19 guidelines intended to last just fifteen days were later extended by Trump through April 30th,⁸ although during this period he took to Twitter to inspire rallies against the very state restrictions his White House recommended.⁹

Moreover, the federal guidelines were suggestions, not mandates, and not the national stay-at-home order preferred by Doctor Anthony Fauci, director of the

⁶ Dan Mangan, *Trump Issues ‘Coronavirus Guidelines’ for Next 15 Days to Slow Pandemic*, CNBC (Mar. 16, 2020, 6:28 PM), <https://www.cnn.com/2020/03/16/trumps-coronavirus-guidelines-for-next-15-days-to-slow-pandemic.html> [<https://perma.cc/QN7W-4YN4>].

⁷ Courtney Subramanian & Deirdre Shesgreen, *Trump Says He Hopes to Lift Coronavirus Restrictions by Easter Because it Would be a ‘Beautiful Time’*, USA TODAY (Mar. 24, 2020, 11:28 PM), <https://www.usatoday.com/story/news/politics/2020/03/24/coronavirus-trump-sets-easter-deadline-reopen-country/2912854001/> [<https://perma.cc/U6TD-6GNM>]. See also Annie Karni & Donald G. McNeil Jr., *Trump Wants U.S. ‘Opened Up’ by Easter, Despite Health Officials’ Warnings*, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/us/politics/trump-coronavirus-easter.html> [<https://perma.cc/S937-PZYU>] (“Public health officials were horrified by Mr. Trump’s statement, which threatened to send many Americans back into the public square just as the peak of the virus was expected.”).

⁸ Philip Ewing, *Coronavirus Task Force Details ‘Sobering’ Data Behind Its Extended Guidelines*, NPR (Mar. 31, 2020, 3:10 PM), <https://www.npr.org/2020/03/31/823916343/coronavirus-task-force-set-to-detail-the-data-that-led-to-extension-of-guideline> [<https://perma.cc/K9CY-9CWZ>]; Tamara Keith, Franco Ordoñez, Ayesha Rascoe, & Roberta Rampton, *How 15 Days Became 45: Trump Extends Guidelines to Slow Coronavirus*, NPR (Mar. 30, 2020, 5:00 AM), <https://www.npr.org/2020/03/30/822448199/how-15-days-became-45-trump-extends-guidelines-to-slow-coronavirus> [<https://perma.cc/3T79-NCCW>].

⁹ Craig Mauger & Beth LeBlanc, *Trump Tweets ‘Liberate’ Michigan, Two Other States with Dem Governors*, DETROIT NEWS (Apr. 17, 2020, 6:18 PM), <https://www.detroitnews.com/story/news/politics/2020/04/17/trump-tweets-liberate-michigan-other-states-democratic-governors/5152037002/> [<https://perma.cc/DQ8R-JYD2>] (even as Trump demanded his supporters “liberate” Michigan, “The number of COVID-19 cases in Michigan reached 29,263 Thursday with 2,093 deaths. The state has the fourth most confirmed cases among all states.”). Presciently, one attorney wrote that Trump appeared to be calling for insurrection. See Mary McCord, *Trump’s ‘LIBERATE MICHIGAN!’ Tweet Incite Insurrection. That’s Illegal*, WASH. POST (Apr. 17, 2020), <https://www.washingtonpost.com/outlook/2020/04/17/liberate-michigan-trump-constitution/> [<https://perma.cc/779D-Z67G>].

National Institute of Allergy and Infectious Diseases.¹⁰ States were left to make their own decisions, even though it was reported that “health experts said there also needed to be a nationwide approach and that it was not clear that patchwork, state-by-state policies alone could be effective.”¹¹

And, indeed, that “patchwork” approach was not effective, as the death toll increased exponentially — by late May the U.S. had lost over 100,000 lives to COVID-19;¹² that number surpassed 200,000 by September,¹³ and a half-million lives had been lost by March 2021.¹⁴

This article examines common actions states took to mitigate the spread of COVID-19 and court actions associated with those unprecedented measures. It begins by examining the seminal 1905 U.S. Supreme Court case recognizing the right of government to exercise its police power in matters of public health, which was invoked in many cases involving state action relative to COVID-19. It then addresses state restrictions — sometimes pejoratively referred to as “lockdowns” — on activities and movement, including gatherings, that were employed as a means of reducing the risk of respiratory virus spread. It moves on to focus on the convoluted U.S. Supreme Court treatment of restrictions upon religious services. It details one of the cultural clashes engendered by the pandemic — particularly over mandates that citizens wear masks — as well as general challenges to local control where states refused to act. Finally, it concludes by commenting upon a

¹⁰ Quint Forgey, *Fauci Endorses National Stay-at-Home Order: ‘I Just Don’t Understand Why We’re Not Doing That’*, POLITICO (Apr. 3, 2020, 7:09 AM), <https://www.politico.com/news/2020/04/03/fauci-endorses-national-stay-at-home-order-162794> [<https://perma.cc/UU79-QA43>].

¹¹ Annie Karni & Donald G. McNeil Jr., *Trump Wants U.S. ‘Opened Up’ by Easter, Despite Health Officials’ Warnings*, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/us/politics/trump-coronavirus-easter.html> [<https://perma.cc/N4Q6-46CZ>] (“Public health officials were horrified by Mr. Trump’s statement, which threatened to send many Americans back into the public square just as the peak of the virus was expected.”).

¹² See *An Incalculable Loss*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/interactive/2020/05/24/us/us-coronavirus-deaths-100000.html> [<https://perma.cc/8N69-YDTA>].

¹³ See Carla K. Johnson, *‘Unfathomable’: US Death Toll from Coronavirus Hits 200,000*, ASSOCIATED PRESS (Sept. 22, 2020), <https://apnews.com/article/virus-outbreak-huntsville-alabama-us-news-public-health-a05360a9df7e19f9bee83f52odeadaic> [<https://perma.cc/44LH-65H2>] (“The number of dead is equivalent to a 9/11 attack every day for 67 days. It is roughly equal to the population of Salt Lake City or Huntsville, Alabama.”).

¹⁴ See *Covid-19: U.S. Surpasses 500,000 Covid-19 Deaths, a Monumental Loss*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/live/2021/02/22/world/covid-19-coronavirus?action=click&pgtype=Article&module=&state=default®ion=header&context=breakout_link_back_to_briefing [<https://perma.cc/JM95-LG7A>].

public health failure of an unprecedented magnitude.

I. *JACOBSON V. MASSACHUSETTS* AND POLICE POWER IN PUBLIC HEALTH

In *Jacobson v. Massachusetts*, the U.S. Supreme Court upheld a mandatory smallpox vaccination law as an exercise of “the police power — a power which the State did not surrender when becoming a member of the Union under the Constitution.”¹⁵ While the Court noted it had “refrained from any attempt to define the limits of that power,” the Court stated that it had “distinctly recognized the authority of a State to enact quarantine laws and ‘health laws of every description’; indeed, all laws that relate to matters completely within its territory and which do not, by their necessary operation, affect the people of other States.”¹⁶ According to the decision:

The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best, and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.¹⁷

Yet, the Court stated that “the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”¹⁸ Instead, in words that are relevant today, the Court noted that “[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”¹⁹ As to how this should be done, the Court would defer to science: “[I]f we are to attach any value whatever to the knowledge which, it is safe to affirm, is common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the Board of Health was not necessary in order to protect the public health and secure the public safety.”²⁰

¹⁵ 197 U.S. 11, 25 (1905).

¹⁶ *Id.*

¹⁷ *Id.* at 26.

¹⁸ *Id.*

¹⁹ *Id.* at 27.

²⁰ *Id.* at 28.

II. STAY-AT-HOME ORDERS AND “LOCKDOWNS”

Court challenges began early in response to efforts by state and local governments to control the spread of COVID-19 by limiting gatherings, as two law professors noted:

In one of the first cases arising from a coronavirus order, the governor of New Hampshire defended a statewide ban on large gatherings by arguing that “[a] court should only interfere” with “[a]n executive’s decision to exercise emergency powers in the face of a rapidly evolving public health crisis . . . when the executive’s actions were not taken in good faith or if there is no factual basis for the executive to believe that a restriction he imposed was necessary.” Invoking *Smith v. Avino*, a widely cited Eleventh Circuit decision regarding curfews imposed after Hurricane Andrew, the New Hampshire trial court accepted the good faith/some factual basis standard proffered by the defendant on the grounds that certain “fundamental rights . . . may be . . . suspended” for the duration of the emergency.²¹

Yet courts in other states refused to defer to the public health imperative cited by government actors.

Before the Michigan Supreme Court, at issue in the case of *Midwest Institute of Health, PLLC v. Governor of Michigan (In re Certified Questions from the U.S. District Court)* was “a succession of executive orders over the past six months limiting public and private gatherings, closing and imposing restrictions upon certain businesses, and regulating a broad variety of other aspects of the day-to-day lives of our state’s citizens[.]”²² Finding the actions of Democratic Governor Gretchen Whitmer unconstitutional, the court went so far as to determine that a 75-year-old state law (“the Emergency Powers of the Governor Act of 1945” or “EPGA”) under which Whitman issued her orders was “an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution.”²³

In a Pollyannish footnote, the court stated that “[o]ur decision leaves open many avenues for the governor and legislature to work together to address this challenge and we hope that this will take place.”²⁴ And yet it was the Republican-controlled

²¹ Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARV. L. REV. 179, 181 (2020) (footnotes omitted). Somewhat alarmingly, the Eleventh Circuit decision had relied, in part, upon the infamous U.S. Supreme Court decision upholding Japanese internment during World War II: “In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended.” *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996) (citing *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Korematsu v. United States*, 323 U.S. 214 (1944).

²² 958 N.W.2d 1, 6 (Mich. 2020).

²³ *Id.* (citation omitted).

²⁴ *Id.* at 6, n. 3.

Michigan Legislature that had sued the governor over the rules.²⁵

Chief Justice Bridget McCormack would not have declared the EPGA unconstitutional, writing that “[i]f, as Aristotle said, ‘the law is reason free from passion,’ an emotionally charged case seems like a terrible candidate for making new law. When there is a settled rule that has been in place for decades, discarding it to respond to an outlier case (especially when there are other solutions available) is imprudent.”²⁶ McCormack added that “[i]f citizens are unhappy with the Governor’s actions, they can launch a petition to recall her (and again, at least one is already circulating) – or vote against her in the next election.”²⁷ While she agreed that the Governor had exceeded her authority under another law, the Emergency Management Act of 1976, McCormack would have maintained “the EPGA as a valid delegation of legislative authority under our settled jurisprudence.”²⁸

Justice Richard Bernstein agreed that the EPGA was constitutional, but noted that “[t]o conclude, as I do, that Governor Whitmer has the legal authority to issue orders under the EPGA would not prevent the people of Michigan from otherwise expressing their frustrations with the COVID-19 orders.”²⁹

Gov. Whitmer characterized the majority decision as political:

This virus has now killed more Michiganders than World War I. It is a novel virus for which there is no cure, and which has infected the President of the United States, members of the United States Congress, and Legislators across our state. This virus continues to take the lives of Americans every single day, and without a cure or approved vaccine, that will continue for the foreseeable future.

Today’s Supreme Court ruling, handed down by a narrow majority of Republican justices, is deeply disappointing, and I vehemently disagree with the court’s interpretation of the Michigan Constitution. Right now, every state and the federal government have some form of declared emergency. With this decision, Michigan will become the sole outlier at a time when the Upper Peninsula is experiencing rates of

²⁵ See David Eggert, *Republicans Have Spent \$542K to Challenge Whitmer’s Orders*, ASSOCIATED PRESS (Oct. 6, 2020) <https://apnews.com/article/virus-outbreak-public-health-legislature-michigan-lawsuits-1f83502cbcaec811bb68bf911708decc> [<https://perma.cc/ZY76-GLSU>] (“GOP lawmakers have long criticized Whitmer’s handling of the outbreak, though the public has backed her in polling.”).

²⁶ *In re Certification Questions*, 958 N.W.2d at 54 (McCormack, C.J., concurring in part, dissenting in part).

²⁷ *Id.* at 55.

²⁸ *Id.*

²⁹ *Id.* at 59 (Bernstein, J., concurring in part and dissenting in part).

COVID infection not seen in our state since April.³⁰

Yet Whitmer was not left without some options, as an action taken just days after the court’s decision demonstrated:

[T]he administration can control an epidemic under a 1978 public health law that was not at issue in the case, though its authority is narrower. Department of Health and Human Services Director Robert Gordon required the wearing of masks at non-residential indoor and outdoor gatherings and during organized sports; limited gathering sizes; and ordered bars to close indoor common areas where people can dance or mingle and to sell alcohol only at tables kept at least 6 feet apart.³¹

In Wisconsin, a conservative majority on the state’s high court left the state without any COVID-19 restrictions.³² In *Wisconsin Legislature v. Palm*,³³ the Wisconsin Supreme Court took up a case it described as “about the assertion of power by one unelected official, Andrea Palm, and her order to all people within Wisconsin to remain in their homes, not to travel and to close all businesses that she declares are not ‘essential’ in Emergency Order 28.”³⁴ Palm was “Secretary-designee of the Department of Health Services (DHS)” and the legislature argued her order was a rule, not an order. The court agreed, making Emergency Order 28 “subject to statutory emergency rulemaking procedures established by the Legislature.”³⁵ Thus, because those procedures were not followed, the court declared “Emergency Order 28 is unenforceable.”³⁶

Although the court asserted “the Governor’s emergency powers are not challenged by the Legislature, and Palm does not rely on the Governor’s emergency powers,” it went on to opine that:

³⁰ Press Release, Governor Gretchen Whitmer, Statement from Governor Whitmer on Michigan Supreme Court Ruling on Emergency Powers (Oct. 2, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-541283--,00.html [https://perma.cc/R2Z2-MUX3].

³¹ David Eggert, *Michigan Health Agency Issues Mask, Other Virus Restrictions*, ASSOCIATED PRESS (Oct. 5, 2020), <https://apnews.com/article/virus-outbreak-public-health-michigan-gretchen-whitmer-courts-67e2a457dfc2a3bf97ac7c9749eaf168> [https://perma.cc/QN85-BRYD].

³² Bill Ruthart, *Wisconsin Now Without COVID-19 Restrictions After State Supreme Court Strikes Down Gov. Tony Evers’ Stay-at-Home Order*, CHICAGO TRIBUNE (May 14, 2020, 7:06 AM), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-wisconsin-stay-at-home-order-state-supreme-court-20200513-vpjo34p6pfctpazbst7owsze2m-story.html> [https://perma.cc/A4D6-ENSF].

³³ 942 N.W.2d 900 (2020).

³⁴ *Id.* at 904.

³⁵ *Id.* at 905.

³⁶ *Id.* at 914.

[T]he Governor's emergency powers are premised on the inability to secure legislative approval given the nature of the emergency. For example, if a forest fire breaks out, there is no time for debate. Action is needed. The Governor could declare an emergency and respond accordingly. But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.³⁷

Dissenting, Justice Amy Bradley found the lack of a stay of the 4 – 3 majority's decision troubling: “The lack of a stay would be particularly breathtaking given the testimony yesterday before Congress by one of our nation's top infectious disease experts, Dr. Anthony Fauci. He warned against lifting too quickly stay-at-home orders such as embodied in Emergency Order 28.”³⁸

Justice Rebecca Dallet also dissented, accusing the majority of “completely disregarding the long-standing, broad statutory powers the Legislature itself granted to the Department of Health Services (DHS) to control COVID-19, a novel contagion. This decision will undoubtedly go down as one of the most blatant examples of judicial activism in this court's history. And it will be Wisconsinites who pay the price.”³⁹

Justice Brian Hagedorn dissented as well, finding the order to not be a rule, and therefore not in violation of rulemaking procedure, and further concluding that:

[T]he legislature has not alleged, nor can I identify, any harm to the legislature as a constitutional body for which this court can grant relief. Executive branch overreach may be challenged by those who are harmed by the executive branch action. Except in unusual cases, the lawmaking body is not injured in its lawmaking functions by executive branch enforcement gone awry. Therefore, the legislature lacks standing to bring this claim, and it should be dismissed.⁴⁰

Justice Bradley was right, as the majority's denial of a stay of its decision reportedly left “Wisconsin as the only state in the nation without a single protective measure in place to combat the coronavirus.”⁴¹ The impact was immediate: “Social media posts and media reports Wednesday night showed Wisconsinites packing into some bars with little regard to social distancing and the other state health guidelines.”⁴² The Republican legislative leaders who had challenged the Democratic administration's order had “not offered any legislation or plan of their own on how the state should balance reopening the state's economy and keeping

³⁷ *Id.* (footnote omitted).

³⁸ *Id.* at 942 (Bradley, J., dissenting).

³⁹ *Id.* at 943 (Dallet, J., dissenting) (footnote omitted).

⁴⁰ *Id.* at 974 (Hagedorn, J., dissenting).

⁴¹ *See* Ruthart, *supra* note 32.

⁴² *Id.*

Wisconsinites safe.”⁴³

In Pennsylvania, Democratic Governor Tom Wolf also found himself at odds with majority Republican legislative leaders in his enacting COVID-19 restrictions.⁴⁴

In *Friends of DeVito v. Wolf*,⁴⁵ plaintiffs sought “extraordinary relief from Governor Wolf’s March 19, 2020 order (the ‘Executive Order’) compelling the closure of the physical operations of all non-life-sustaining business to reduce the spread of the novel coronavirus disease (‘COVID-19’). The businesses of the Petitioners were classified as non-life-sustaining.”⁴⁶

One petitioner, a golf course, argued against the Executive Order based on the experience of similarly-situated businesses in other states:

Blueberry Hill Public Golf Court & Lounge (‘Blueberry Hill’) operates a public golf course and restaurant (now take-out only) in Russell (Warren County). . . . It avers that the Executive Order has resulted in financial harm to its business. Specifically, despite being closed for business, Blueberry Hill must expend significant sums to maintain the fairways and greens.⁴⁷

Blueberry Hill “argued that it should be permitted to resume its business based on the facts that three other states with ‘stay at home’ orders have allowed golf courses reopen, provided they do so with COVID-19 prevention and mitigation protocols[.]”⁴⁸

In an amicus brief on behalf of a petitioning realtor, the Pennsylvania Association of Realtors contended that Realtors provide “life-sustaining services to millions of Pennsylvanians, and that the Governor has improperly prohibited the offering of these services to the public.”⁴⁹

The petitioners acknowledged “there are far-reaching powers granted to the

⁴³ *Id.*

⁴⁴ Ron Southwick, *GOP Lawmakers Denounce Gov. Tom Wolf’s New Coronavirus Restrictions on Restaurants and Bars*, PATRIOT-NEWS (July 15, 2020, 6:25 PM), <https://www.pennlive.com/news/2020/07/gop-lawmakers-denounce-gov-tom-wolfs-new-coronavirus-restrictions-on-restaurants-and-bars.html> [<https://perma.cc/4UAZ-XCHH>] (“GOP lawmakers, who control both chambers of the General Assembly, denounced the Democratic Governor and said he’s acting without consulting the legislative branch. They also said his actions could wipe out small businesses.”).

⁴⁵ 227 A.3d 872 (Pa. 2020), *cert. denied*, 141 S. Ct. 239 (2020).

⁴⁶ *Id.* at 876.

⁴⁷ *Id.* at 881 (citations omitted).

⁴⁸ *Id.* at 882.

⁴⁹ *Id.* at 883.

Governor under the Emergency Code.”⁵⁰ Under the relevant language of that law, the governor was authorized to declare a disaster emergency in the event of a natural disaster such as “[a]ny hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life.”⁵¹ The petitioners argued that “because viral illness is not included in the list of applicable disasters, COVID-19 cannot be a natural disaster because it is not of the same type or kind as those on the list.”⁵²

The court disagreed: “The COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions. Its presence in and movement through Pennsylvania triggered the Governor’s authority under the Emergency Code.”⁵³ At that time, in April 2020, the court wrote that “[r]ecent models for the COVID-19 pandemic predict that about 60,000 Americans will die.”⁵⁴ To the majority of the court, the governor’s actions were warranted, because “[t]he protection of the lives and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power.”⁵⁵

Joined by two other justices on the seven-member court, Chief Justice Thomas Saylor filed a decision both concurring in the result and dissenting, stating that “in light of the ongoing public health crisis . . . I believe there is much to be said for treating the executive branch’s actions as presumptively valid for now,” yet leaving the door open for other challenges by also stating, with respect to the exercise of the governor’s police power, “that greater account must be given to the specific nature of the exercise, and that arbitrariness cannot be tolerated, particularly when the livelihoods of citizens are being impaired to the degree presently asserted.”⁵⁶

In September 2020, U.S. District Court Judge William Stickman IV attempted to unravel Wolf’s orders, finding, for example, that limiting the number of people who could gather was unconstitutional:

The imposition of a cap on the number of people that may gather for political, social, cultural, educational and other expressive gatherings, while permitting a larger number for commercial gatherings limited only by a percentage of the occupancy capacity of the

⁵⁰ *Id.* at 887.

⁵¹ *Id.* (quoting 35 PA. CONS. STAT. § 7301).

⁵² *Id.* at 888 (citation omitted).

⁵³ *Id.* at 889.

⁵⁴ *Id.* at 891 (citation omitted).

⁵⁵ *Id.* at 892.

⁵⁶ *Id.* at 904 (Saylor, C.J., concurring in part and dissenting in part).

facility is not narrowly tailored and does not pass constitutional muster.⁵⁷

Judge Stickman equated the closure of businesses under the governor’s stay-at-home order to tyranny: “It appears as though the imposition of lockdowns in Wuhan and other areas of China—a nation unconstrained by concern for civil liberties and constitutional norms—started a domino effect where one country, and state, after another imposed draconian and hitherto untried measures on their citizens.”⁵⁸ This he found unconstitutional: “Broad population-wide lockdowns are such a dramatic inversion of the concept of liberty in a free society as to be nearly presumptively unconstitutional unless the government can truly demonstrate that they burden no more liberty than is reasonably necessary to achieve an important government end.”⁵⁹ Stickman found that the way in which the state “designed, implemented, and administered the business closures is shockingly arbitrary.”⁶⁰ Accordingly, he held that Governor Wolf’s measures violated the Equal Protection Clause of the Fourteenth Amendment.⁶¹

Stickman, an appointee of President Trump,⁶² had his decision stayed by the chief judge for the U.S. Third Circuit Court of Appeals.⁶³ As Leah Litman, a University of Michigan law professor, wrote:

[W]hat was most striking — what reveals the radical nature of the opinion — is that Stickman leaned on a discredited 1905 Supreme Court decision, *Lochner v. New York*, in arguing Pennsylvanians had the due process right to choose how to earn a living, even during a pandemic. Until this week’s case, *Lochner* had been consigned to the dustbin of history.⁶⁴

⁵⁷ County of Butler v. Wolf, 486 F. Supp. 3d 883, 908 (W.D. Pa. 2020).

⁵⁸ *Id.* at 916.

⁵⁹ *Id.* at 918.

⁶⁰ *Id.* at 925.

⁶¹ *Id.* at 928.

⁶² See Leah Litman, *A Conservative Judge Just Made it Even Harder to Stop Covid*, WASH. POST (Sept. 17, 2020, 8:42 AM), <https://www.washingtonpost.com/outlook/2020/09/17/conservative-judge-just-made-it-even-harder-stop-covid/> [<https://perma.cc/F59P-GWRR>].

⁶³ See Barbara S. Miller, *Federal Court Judge Orders Stay of Stickman Order in Case against Wolf, Levine*, HERALD-STANDARD (Oct. 1, 2020), https://www.heraldstandard.com/news/covid-19/federal-court-judge-orders-stay-of-stickman-order-in-case-against-wolf-levine/article_29d95764-ceda-5c22-90c6-a4afaebbf228.html [<https://perma.cc/XU5K-3FG8>].

⁶⁴ See Litman, *supra* note 62. As every former law student may recall, at issue in *Lochner* was enforcement of a labor law applying to bakeries where an employer “wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week.” *Lochner v. New York*, 198 U.S. 45, 52 (1905). The Court held the law unconstitutional, stating:

[w]e think the limit of the police power has been reached and passed in this case. There is, in our

In *Cameron v. Beshear*,⁶⁵ a U.S. District Court was asked to uphold the challenge by Kentucky's Republican attorney general, Daniel Cameron, against its Democratic governor, Andy Beshear, over imposing interstate travel restrictions upon Kentuckians or those visiting Kentucky. The travel restrictions complained of had been modified to conform with prior court rulings:

Nevertheless, the Attorney General argues adjudication of the merits is appropriate for two reasons: first, voluntary cessation of a challenged practice does not deprive the Court of jurisdiction over the matter; and second, the injury asserted is capable of repetition, yet evading review, because the Governor 'can continue to reissue similarly problematic executive orders at any time[.]'⁶⁶

The court dismissed the case as moot,⁶⁷ noting that "[i]n the unlikely event the restraint on travel is reinstated, the Court will address any constitutional challenge promptly, as it has done with respect to every other constitutional challenge levied against one of Governor Beshear's executive orders."⁶⁸

Governor Beshear contended that he wanted "to put politics aside during the coronavirus crisis, but his veto of a bill that would have allowed Cameron to ban abortions during the pandemic sparked disagreement between Beshear and the attorney general."⁶⁹

Indeed, the Republican governor of Texas, Greg Abbott, was among those who sought to use the pandemic to halt abortions⁷⁰. An emergency order, GA-09, postponed "non-essential medical procedures during the COVID-19 pandemic" and included abortion.⁷¹ In *In re Abbott*, the U.S. Fifth Circuit Court of Appeals sought to overturn a U.S. District Court ruling protective of reproductive rights that it held:

[S]econd-guessed the basic mitigation strategy underlying GA-09 (that is, the concept of "flattening the curve"), and also acted without knowing critical facts such as whether, during this pandemic, abortion providers do (or should) wear masks or other protective

judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker.

Id. at 58.

⁶⁵ No. 3:20-cv-00023-GFVT, 2020 WL 2573463 (E.D. Ky. May 21, 2020).

⁶⁶ *Id.* at *2 (citations omitted).

⁶⁷ *Id.* at *3.

⁶⁸ *Id.* at *2.

⁶⁹ Justine Coleman, *Kentucky Attorney General Calls Governor's Travel Restrictions Unconstitutional*, THE HILL (Apr. 28, 2020, 4:32 PM), <https://thehill.com/regulation/court-battles/495098-kentucky-attorney-general-calls-governors-travel-restrictions> [<https://perma.cc/3GZW-HKNK>].

⁷⁰ See *In re Abbott*, 956 F.3d 696, 703 (5th Cir. 2020).

⁷¹ *Id.*

equipment when meeting with patients. Those errors led the district court to enter an overbroad TRO that exceeds its jurisdiction, reaches patently erroneous results, and usurps the state's authority to craft emergency public health measures “during the escalating COVID-19 pandemic.”⁷²

The appellate court accepted the state’s rationale for restricting abortions, ostensibly the preservation of personal protective equipment (PPE), by oddly relying upon the widespread use of PPE by non-medical personnel:

The pertinent question . . . is whether medication abortions require PPE *during the COVID-19 pandemic*. Respondents submitted no evidence on that question: they neither stated what PPE they were consuming “during the COVID-19 disaster,” nor submitted evidence establishing the standard of care for medication abortions during the pandemic. Scour the twenty declarations Respondents submitted to support their claim. Does any testify that *during the current pandemic*, abortion providers are not wearing masks? No. Nor would one expect such a statement when everyday life now presents police officers, priests, mail carriers, grocery store cashiers, gas station attendants, and retail clerks wearing them every day.⁷³

Dissenting in part, Judge James Dennis asserted that the state’s actions against abortion were “pretextual and motivated not by a desire to advance public health, but rather to reduce the number of abortions performed for its own sake.”⁷⁴

The Fifth Circuit decision was vacated by the U.S. Supreme Court.⁷⁵

The U.S. Eighth Circuit Court of Appeals also upheld a restriction on abortions in Arkansas.⁷⁶ The case arose when Arkansas Department of Health (ADH) inspectors:

[C]onducted an unannounced inspection of the Little Rock Family Planning Services (LRFP) facility, which is a provider of surgical abortions in Arkansas. It was found that the facility was still providing surgical abortions that were not deemed immediately necessary. The following day, April 10, 2020, the ADH sent LRFP a cease-and-desist letter stating that LRFP was violating the ADH directive and ordering it to stop performing non-emergency abortion surgeries.⁷⁷

The clinic then “challenged the ADH directive as it applies to surgical abortions. It alleges that, rather than being motivated by any concern for public health, the directive was but the latest attempt by the state to eliminate a woman’s

⁷² *Id.*

⁷³ *Id.* at 714 (footnote and citation omitted).

⁷⁴ *Id.* at 734 (Dennis, J., dissenting in part).

⁷⁵ *See* Planned Parenthood Center for Choice v. Abbott, 141 S. Ct. 1261 (2021).

⁷⁶ *In re Rutledge*, 956 F.3d 1018, 1033 (8th Cir. 2020).

⁷⁷ *Id.* at 1024.

constitutional right to choose an abortion.⁷⁸ After the clinic moved for a temporary restraining order, “[t]he following day, on April 14, 2020, the district court entered a TRO enjoining the State from enforcing the directive against surgical-abortion providers. Now, unlike all other surgical procedures, Arkansas cannot proscribe non-emergency surgical abortions in its effort to conserve PPE and to limit social contact.”⁷⁹

The appellate court disagreed with this ruling, finding, among other things, that “the State’s interest in conserving PPE resources and limiting social contact among patients, healthcare providers, and other staff is clearly and directly related to public health during this crisis.”⁸⁰ Remarkably, it went on to state that:

[W]e are not convinced by LRFP’s contention that it has a self-sustaining amount of PPE and that it will not draw upon state stockpiles—the purpose behind the ADH directive is that, by delaying all non-emergency surgeries, conservation of a finite amount of PPE resources across Arkansas may be possible today. Additionally, the fact that LRFP has its own reserve of PPE does not lessen the problem of additional social contact between patients and providers.⁸¹

These would seem to be matters of medical judgment beyond the discernment of a federal appellate court.

In Oklahoma, a U.S. District Court found an executive order by Republican Governor Kevin Stitt, an ardent opponent of abortion,⁸² unconstitutional in its burden upon the right to an abortion, concluding:

that while the current public health emergency allows the State of Oklahoma to impose some of the cited measures *delaying* abortion procedures, it has acted in an ‘unreasonable,’ ‘arbitrary,’ and ‘oppressive’ way—and imposed an ‘undue burden’ on abortion access—in imposing requirements that effectively *deny* a right of access to abortion.⁸³

The court granted a temporary restraining order, noting that “[t]his effective

⁷⁸ *Id.* at 1025.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1029.

⁸¹ *Id.*

⁸² See Ryan Sharp & Carmen Forman, *Gov. Kevin Stitt Says Abortions Included in Suspended Elective Surgeries*, OKLAHOMAN (Mar. 27, 2020, 8:05 PM), <https://www.oklahoman.com/article/5658751/governors-office-clarifies-executive-order-to-include-abortions/> [<https://perma.cc/5WMF-PUC3/>] (“Stitt, who opposes abortion, has said he believes life begins at conception. As a candidate for governor, Stitt vowed to sign every piece of anti-abortion legislation that advances to his desk.”).

⁸³ *S. Wind Women’s Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 U.S. Dist. LEXIS 60020, at *5 (W.D. Okla. Apr. 6, 2020).

denial of the Fourteenth Amendment right to abortion access represents the type of ‘plain, palpable invasion of rights’ identified in *Jacobson* as beyond the reach of even the considerable powers allotted to a state in a public health emergency.”⁸⁴ Two weeks later the court issued a preliminary injunction, stating that:

Plaintiffs have demonstrated that the injury that will be suffered as a result of delaying abortion access to a pregnant patient nearing 20 weeks postfertilization is a complete denial, to that patient, of the Fourteenth Amendment right to access abortion. That plain and palpable deprivation of a fundamental right outweighs the injury the public may suffer if those procedures are allowed to occur. As for other pregnant patients, the State’s own guidance indicates that the need for the disputed restrictions will be at least partly eliminated by April 24, 2020. A delay may result in fewer and more invasive abortion options being available, and supplying prenatal care for these patients in the meantime would indisputably require interpersonal contact and use of PPE and other hospital supplies.⁸⁵

The U.S. Tenth Circuit Court of Appeals left this decision undisturbed, given that the case was moot as the executive order had expired.⁸⁶

The fact that states could use a public health emergency to restrict reproductive rights might give pause to those who supported the measures states took that were more explicitly protective of public health (such as closures of businesses deemed non-essential). Unbridled authority could lead to dire consequences, as in New York, where an order from the administration of Democratic Governor Andrew Cuomo forced nursing homes to admit over nine thousand hospital patients with COVID-19.⁸⁷

III. RELIGIOUS EXPRESSION AND COVID-19 RESTRICTIONS

In *Calvary Chapel Dayton Valley v. Sisolak*, a church sought injunctive relief against an order by Nevada Governor Steve Sisolak to be allowed to “conduct services, in accordance with its plan, for up to 50% of maximum occupancy.”⁸⁸ The

⁸⁴ *Id.* at *12 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

⁸⁵ *S. Wind Women’s Ctr. LLC v. Stitt*, 455 F. Supp. 3d 1219, 1231 (W.D. Okla. 2020).

⁸⁶ *S. Wind Women’s Ctr. LLC v. Stitt*, 823 F. App’x. 677, 679 (10th Cir. 2020).

⁸⁷ See Bernard Condon & Jennifer Peltz, *AP: Over 9,000 Virus Patients Sent into NY Nursing Homes*, ASSOCIATED PRESS (Feb. 11, 2021) <https://apnews.com/article/new-york-andrew-cuomo-us-news-coronavirus-pandemic-nursing-homes-512cae0abb55a55f375b3192f2cdd6b5> [<https://perma.cc/T73J-FGB7>] (“The Cuomo administration’s March 25 directive barred nursing homes from refusing people just because they had COVID-19. It was intended to free up space in hospitals swamped in the early days of the pandemic.”).

⁸⁸ 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting).

U.S. Supreme Court declined to take up its application.⁸⁹ In a bitter dissent, Justice Alito wrote:

The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance. But the Governor of Nevada apparently has different priorities. Claiming virtually unbounded power to restrict constitutional rights during the COVID–19 pandemic, he has issued a directive that severely limits attendance at religious services.⁹⁰

A dissent from Justice Gorsuch sounded a similar theme:

In Nevada, it seems, it is better to be in entertainment than religion. Maybe that is nothing new. But the First Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.⁹¹

In *South Bay United Pentecostal Church v. Newsom*,⁹² the Supreme Court declined to take up a petition for injunctive relief against California Governor Gavin Newsom’s limitation upon religious gatherings. Concurring in the denial, Chief Justice Roberts wrote:

Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.⁹³

Roberts would have judges defer to science, writing that “[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement,” and in his opinion “the politically accountable officials of the States” should make those decisions without “second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people.”⁹⁴

Dissenting, Justice Kavanaugh, joined by Justices Gorsuch and Thomas, would have granted the injunction: “The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its

⁸⁹ *Id.* at 2603.

⁹⁰ *Id.* at 2603–04 (Alito, J., dissenting).

⁹¹ *Id.* at 2609 (Gorsuch, J., dissenting).

⁹² 140 S. Ct. 1613, 1613 (2020).

⁹³ *Id.* (Roberts, C.J., concurring).

⁹⁴ *Id.* at 1613–14 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)).

residents and any number of businesses to adhere to proper social distancing and hygiene practices.”⁹⁵

Everything changed in *Roman Catholic Diocese of Brooklyn v. Cuomo*,⁹⁶ where the Court was confronted with restrictions upon religious services in New York pursuant to executive order from Governor Cuomo.

As the Court wrote:

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as “essential” may admit as many people as they wish. And the list of “essential” businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.⁹⁷

The Court acknowledged that “[m]embers of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area.”⁹⁸ It then went ahead and second-guessed those judgments and held “that enforcement of the Governor’s severe restrictions on the applicants’ religious services must be enjoined.”⁹⁹

Concurring, Justice Gorsuch wrote that “according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?”¹⁰⁰ He stated of Governor Cuomo: “In his judgment laundry and liquor, travel and tools, are all ‘essential’ while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids.”¹⁰¹

In dissent, Justice Sotomayor, joined by Justice Kagan, took issue with Justice

⁹⁵ *Id.* at 1615 (Kavanaugh, J., dissenting). For some reason, while it was noted that Justice Alito would have granted the application he did not join the written dissent. *Id.* at 1613. One can support the free exercise of religion and quarrel with Justice Kavanaugh’s facile equation of a church to a *business*. For example, in a Maine outbreak attributable to a church’s indoor service, the pastor was quite unrepentant, while a business might see its commerce disappear. See Lynne Fort, *Brooks Pastor Apologizes Only ‘To Those We Have Stood By’ as Outbreak Spreads*, BANGOR DAILY NEWS (Oct. 27, 2020), <https://bangordailynews.com/2020/10/27/news/midcoast/brooks-pastor-apologizes-as-outbreak-spreads-in-waldo-county/> [<https://perma.cc/D5TS-VNMC>].

⁹⁶ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020).

⁹⁷ *Id.* at 66.

⁹⁸ *Id.* at 68.

⁹⁹ *Id.* at 69.

¹⁰⁰ *Id.* at 69 (Gorsuch, J., concurring).

¹⁰¹ *Id.* (Gorsuch, J., concurring).

Gorsuch's analogies: "Justice Gorsuch does not even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID-19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time."¹⁰²

Justice Breyer's dissent, joined by Justices Sotomayor and Kagan, took similar issue with Justice Gorsuch's reasoning: "[M]embers of the scientific and medical communities tell us that the virus is transmitted from person to person through respiratory droplets produced when a person or group of people talk, sing, cough, or breathe near each other."¹⁰³ He noted that "[t]he nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants' First Amendment challenges."¹⁰⁴

Chief Justice Roberts dissented because he thought the case was moot, given that "the Governor revised the designations of the affected areas. None of the houses of worship identified in the applications is now subject to any fixed numerical restrictions. At these locations, the applicants can hold services with up to 50% of capacity, which is at least as favorable as the relief they currently seek."¹⁰⁵ As he wrote, "[a]n order telling the Governor not to do what he's not doing fails to meet that stringent standard."¹⁰⁶

Under this change of heart by the Court, Calvary Chapel would go on to prevail in the U.S. Ninth Circuit Court of Appeals.¹⁰⁷ At issue for Calvary Chapel was a directive that capped occupancy at 50% of fire-code capacity for "[r]etail businesses, bowling alleys, arcades, non-retail outdoor venues, gyms, fitness facilities, restaurants, breweries, distilleries, wineries, and body-art and piercing facilities[.]"¹⁰⁸ However, the directive limited attendance to "the lesser of 50% of fire-code capacity or 50 people in movie theaters (per screen), museums, art galleries, zoos, aquariums, trade schools, and technical schools."¹⁰⁹ And it prohibited altogether "public attendance at musical performances, live

¹⁰² *Id.* at 79 (Sotomayor, J., dissenting) (citations omitted).

¹⁰³ *Id.* at 78 (Breyer, J., dissenting) (citations omitted).

¹⁰⁴ *Id.* (Breyer, J., dissenting).

¹⁰⁵ *Id.* at 75 (Roberts, C.J., dissenting).

¹⁰⁶ *Id.* (Roberts, C.J., dissenting).

¹⁰⁷ *See* Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228 (9th Cir. 2020).

¹⁰⁸ *Id.* at 1230.

¹⁰⁹ *Id.*

entertainment, concerts, competitions, sporting events, and any events with live performances.”¹¹⁰

Calvary Chapel challenged the section of the directive that placed “a fifty-person cap on ‘indoor in-person services’ at ‘houses of worship.’”¹¹¹ The court, citing the “seismic shift in Free Exercise law” in the Supreme Court’s *Roman Catholic Diocese of Brooklyn* decision,¹¹² found this limitation unconstitutional: “Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities.”¹¹³ Thus, it reversed a district court decision denying the church relief, and went on to “instruct the district court to employ strict scrutiny review to its analysis of the Directive, and [to] preliminarily enjoin the State from imposing attendance limitations on in-person services in houses of worship that are less favorable than 25% of the fire-code capacity.”¹¹⁴

In April 2021, the Court struck again with reports noting the “decisive role” that the Court’s newest justice, Amy Coney Barrett, played.¹¹⁵ In *Tandon vs. Newsom*, the issue was at-home religious gatherings, and a 5–4 Court majority again made inapt comparisons: “California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time.”¹¹⁶

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1231.

¹¹² *Id.* at 1232.

¹¹³ *Id.* at 1233.

¹¹⁴ *Id.* at 1234.

¹¹⁵ Robert Barnes, *Supreme Court Strikes Another Pandemic-Related Restriction on Religious Services*, WASH. POST (Apr. 10, 2021, 8:55 AM), https://www.washingtonpost.com/politics/courts_law/supreme-court-california-coronavirus-church/2021/04/10/182faec2-99e8-11eb-962b-78c1d8228819_story.html [<https://perma.cc/K84M-AD8N>]. Barrett had been a “handmaid” in a far-right Christian religious sect prior to becoming a judge. Emma Brown et al., *Amy Coney Barrett Served as a ‘Handmaid’ in Christian Group People of Praise*, WASH. POST (Oct. 6, 2020, 8:09 PM), https://www.washingtonpost.com/investigations/amy-coney-barrett-people-of-praise/2020/10/06/5f497d8c-0781-11eb-859b-f9c27abe638d_story.html [<https://perma.cc/47CT-SHNS>] (noting “the group’s male-dominated hierarchy and view of gender roles”).

¹¹⁶ *Tanden v. Newsom*, 141 S. Ct. 1294, 1297 (2021). Yet a movie theater, for example, is not a private home’s living room. In striking down COVID-19 restrictions, the Court consistently favored frivolous analogies, without noting the public health safeguards that applied to, say, restaurants but not private homes.

In dissent, with two justices joining her, Justice Kagan pointed out that “California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment. And the State does exactly that: It has adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike.”¹¹⁷

Chief Justice Roberts would have denied the application without offering any explanation.¹¹⁸

There is some irony in the U.S. Supreme Court’s weighing in to second-guess public health directives, as, due to COVID-19, the Supreme Court building was entirely closed to visitors in March 2020,¹¹⁹ and the Court began conducting oral arguments by telephone in May 2020.¹²⁰ And for Justice Gorsuch to falsely equate cavernous casinos with the enclosed spaces of churches ignored science, including an early COVID-19 outbreak spread by a church choir practice,¹²¹ or an explosion of cases early in the U.S. pandemic that were linked to a New Rochelle, New York synagogue.¹²² In New York there were also challenges in getting tight-knit communities of Orthodox Jews to obey public health guidelines as part of their

¹¹⁷ *Id.* at 1298 (Kagan, J., dissenting).

¹¹⁸ *See id.* at 1298.

¹¹⁹ *See* Press Release, U.S. Supreme Court (Mar. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20 [<https://perma.cc/L7D4-EVZ3>] (“The Building will remain closed to the public until further notice.”).

¹²⁰ *See* Mark Walsh, *What Will Change When SCOTUS Hears Oral Arguments by Phone?*, ABA J. (Apr. 21, 2020, 2:02 PM), <https://www.abajournal.com/web/article/supreme-court-agrees-to-hear-oral-arguments-by-telephone-next-month-attorneys-ponder-what-to-wear> [<https://perma.cc/N6WB-AQ6C>].

¹²¹ *See* David Waldstein, *Coronavirus Ravaged a Choir. But Isolation Helped Contain It.*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/12/health/coronavirus-choir.html> [<https://perma.cc/LRD5-XZ25>] (following a church choir practice, 53 of 61 participants became sick with COVID-19, and two died). Caesars Palace is 6,975,570 square feet. *See Caesars Entertainment Introduces Major Energy Efficiency Upgrades*, PR NEWSWIRE, (Sept. 10, 2015), <https://www.prnewswire.com/news-releases/caesars-entertainment-introduces-major-energy-efficiency-upgrades-300141029.html> [<https://perma.cc/MD2X-LK8S>].

¹²² *See* Joseph Spector, *‘They Have Been Remarkable’: How a New York Synagogue is Coping as an Epicenter of the US Coronavirus Spread*, USA TODAY (Mar. 12, 2020, 10:29 AM), <https://www.usatoday.com/story/news/nation/2020/03/12/coronavirus-new-york-synagogue-coping-hotspot/5026107002/> [<https://perma.cc/C336-7U5F>] (“As of Tuesday afternoon, the number of cases in New Rochelle accounted for 62% of the state’s 173 cases and about 13% of the total across the U.S.”).

religious practices, compelling Cuomo's order.¹²³

IV. THE CULTURE WAR OVER MASK MANDATES AND LOCAL CONTROL

President Trump long made it a point to denigrate the wearing of masks to control the spread of COVID-19, a respiratory virus,¹²⁴ and even dramatically removed his face mask upon being released from the hospital for COVID-19 treatment while still believed to be contagious.¹²⁵ Trump had contracted the virus at a largely mask-less, packed Rose Garden "superspreader" event for the nomination of Justice Amy Coney Barrett.¹²⁶

There were consequences to Trump's example. In a September visit to Wisconsin, for example, Trump refused to comply with the state's mask mandate and encouraged others at a roundtable meeting not to wear masks.¹²⁷ However, in

¹²³ Liam Stack & Joseph Goldstein, *How a Virus Surge Among Orthodox Jews Became a Crisis for New York*, BALTIMORE SUN (Oct. 8, 2020), <https://www.baltimoresun.com/coronavirus/sns-nyt-orthodox-jews-queens-brooklyn-closures-20201008-b42soeg4ofgkvmvskxe6uvz3wm-story.html> [https://perma.cc/3LMW-6TLC] ("The Orthodox communities in New York City, Rockland and Orange counties have all experienced sharp increases in cases: The positivity rate over the past week in the Town of Palm Tree in Orange, a Satmar Hasidic enclave, is 18%.").

¹²⁴ See Daniel Victor, et al., *In His Own Words, Trump on the Coronavirus and Masks*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/us/politics/donald-trump-masks.html> [https://perma.cc/XS8W-YUBF].

¹²⁵ Allan Smith & Dareh Gregorian, *Trump Returns to White House after Leaving Hospital, Sheds Mask for Photo Opportunity*, NBC NEWS (Oct. 5, 2020, 10:17 PM), <https://www.nbcnews.com/politics/donald-trump/trump-says-he-s-leaving-hospital-monday-evening-n1242172> [https://perma.cc/37NV-PRBB].

¹²⁶ See *Here's Everyone at the White House Rose Garden SCOTUS Event Now Called a Likely 'Superspreader.' Help Us ID them all.*, USA TODAY (Jan. 28, 2021, 10:16 AM), <https://www.usatoday.com/in-depth/news/investigations/2020/10/07/likely-rose-garden-covid-superspreader-white-house-drew-hundreds/3636925001/> [https://perma.cc/55XQ-UK3C] (identifying attendees). When Barrett was later sworn into office by Justice Clarence Thomas, Thomas joined attendees, including Barrett and Trump, in not wearing a mask. See Peter Baker, *In Swearing In Barrett, Trump Defiantly Mimics 'Superspreader' Rose Garden Ceremony*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/trump-barrett.html> [https://perma.cc/CW2C-RZJ5].

¹²⁷ David Jackson, *Donald Trump Goes Maskless in Kenosha, and Urges Others to Do So Despite COVID-19 Order*, USA TODAY (Sept. 2, 2020, 12:11 PM), <https://www.usatoday.com/story/news/politics/2020/09/01/donald-trump-no-mask-kenosha-despite-covid-19-spread-wisconsin/5682906002/> [https://perma.cc/Q6S7-KPSC] ("None of the roundtable participants wound up wearing masks, a group that included Attorney General William Barr and Acting Homeland Security Secretary Chad Wolf.").

October a state judge refused to side with the Republican legislative leaders to overturn Democratic Governor Tony Evers's mask mandate.¹²⁸

Still, by October 27, 2020, it was reported that “[i]t took Wisconsin more than seven months to reach 100,000 coronavirus cases. On Monday, just five weeks later, it reached 200,000.”¹²⁹ The next month, even as Wisconsin hospital capacity was strained, it was reported that “[p]eople not wearing masks or wearing them under their chins or below their noses can be seen at supermarkets and other businesses around the state.”¹³⁰

In March 2021, the Wisconsin Supreme Court acted to overturn Evers's mask mandate in a 4-3 decision,¹³¹ with the majority finding “that the governor may, for 60 days, act with expanded powers to address a particular emergency. Beyond 60 days, however, the legislature reserves for itself the power to determine the policies that govern the state's response to an ongoing problem.”¹³² In other words, after sixty days a legislature that chose to do nothing could stymie any public health response amidst a pandemic. Dissenting, with two other justices joining her, Justice Amy Bradley noted: “This is no run-of-the-mill case. We are in the midst of a worldwide pandemic that so far has claimed the lives of over a half million people in this country.”¹³³ It was reported that “Republican lawmakers applauded the ruling. . . . Assembly Speaker Robin Vos said people and businesses should be free to make their own decisions about what's best for them ‘and don't need state

¹²⁸ See Scott Bauer & Todd Richmond, *Wisconsin Judge Upholds Gov. Tony Evers' Order Requiring Masks to be Worn in Enclosed Spaces*, CHICAGO TRIB. (Oct. 12, 2020, 12:09 PM), <https://www.chicagotribune.com/coronavirus/ct-nw-wisconsin-mask-mandate-20201012-zncv3gi4zzbn3juz3i4nqmq3sq-story.html> [https://perma.cc/B3AE-2ERL] (noting “Republican legislative leaders did not immediately return messages seeking comment. The Legislature filed a brief in support of the lawsuit.”).

¹²⁹ James Doubek & David Greene, *As COVID-19 Cases Surge in Wisconsin, Health Workers Brace for More*, NPR (Oct. 27, 2020, 6:00 PM), <https://www.npr.org/2020/10/27/928212558/as-covid-19-cases-surge-in-wisconsin-health-workers-brace-for-more> [https://perma.cc/U3X8-TFM2].

¹³⁰ Guy Boulton, *'People in the Community Don't Seem to Care': Wisconsin Hospitals' Struggles with COVID Surge Isn't Getting People to Change Behavior*, MILWAUKEE J. SENTINEL (Nov. 13, 2020, 1:41 PM), <https://www.jsonline.com/story/money/business/health-care/2020/11/13/wisconsin-covid-19-cases-surge-but-public-isnt-changing-behavior-coronavirus/3761703001/> [https://perma.cc/6NS6-ZMRR].

¹³¹ *Fabick v. Evers*, 956 N.W.2d 856, 864-65 (Wis. 2021).

¹³² *Id.*

¹³³ *Id.* at 878 (Bradley, J., dissenting).

government telling them how to live their lives.”¹³⁴

Notably, “[t]he case challenging the mask mandate was brought by Jere Fabick, who gave more than \$350,000 to Republican or otherwise conservative candidates in Wisconsin between 1994 and the middle of 2020, according to the Wisconsin Democracy Campaign” and “gave \$20,000 to conservative Wisconsin Supreme Court Justice Rebecca Bradley.”¹³⁵ Justice Bradley had separately concurred in the opinion, triumphantly quoting Thomas Paine from *Common Sense*: “In America THE LAW IS KING! For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other.”¹³⁶

United States Senator Rand Paul (R., Ky.), who had COVID-19 and knowingly exposed others to its risk while awaiting his test results,¹³⁷ made it a point not to wear masks, claiming he was immune to the virus even almost a year after contracting it,¹³⁸ and referring to mask-wearing as “theater.”¹³⁹ Paul was joined in his denialism by U.S. Senator Ron Johnson (R., Wis.), who, after having had COVID-19, opposed mask mandates,¹⁴⁰ and even questioned whether masks prevented infection.¹⁴¹ Going a step further, perhaps, a former Ohio state treasurer,

¹³⁴ Todd Richmond, *Wisconsin Supreme Court Strikes Down Governor's Mask Mandate*, WASH. POST (Mar. 31, 2021, 10:06 AM) <https://apnews.com/article/legislature-madison-wisconsin-coronavirus-pandemic-strikes-9f05a7331f7957721799b23ea381fead> [https://perma.cc/J8NG-8E5R].

¹³⁵ *Id.*

¹³⁶ Fabick, 956 N.W.2d at 878 (Bradley, J., concurring).

¹³⁷ See Chris Cillizza, *Rand Paul's Reckless, Feckless Actions on Coronavirus*, CNN (Mar. 23, 2020, 3:48 PM), <https://www.cnn.com/2020/03/23/politics/rand-paul-coronavirus/index.html> [https://perma.cc/U6BN-TJTP].

¹³⁸ See Chris Cillizza, *Why Won't Rand Paul Just Wear a Mask?*, CNN (Feb. 10, 2021, 6:30 PM), <https://www.cnn.com/2021/02/10/politics/rand-paul-mask-senate-impeachment-trial/index.html> [https://perma.cc/ZVZ4-QNJT].

¹³⁹ Maggie Fox, *Masks Are Not Theater, Fauci Tells Sen. Rand Paul in Hearing Exchange*, CNN (Mar. 18, 2021, 10:09 PM), <https://www.cnn.com/2021/03/18/politics/fauci-paul-masks-theater/index.html> [https://perma.cc/3ASL-8XBY].

¹⁴⁰ See Michael Levenson, *Ron Johnson Continues to Oppose Mask Mandates After Testing Positive for the Coronavirus.*, N.Y. TIMES (Oct. 4, 2020), <https://www.nytimes.com/2020/10/04/us/elections/ron-johnson-continues-to-oppose-mask-mandates-after-testing-positive-for-the-coronavirus.html> [https://perma.cc/C3FY-LSQ9].

¹⁴¹ See Patrick Marley & Molly Beck, *Ron Johnson Disputes Scientific Consensus on the Effectiveness of Masks in Preventing Spread of COVID-19*, MILWAUKEE J. SENTINEL (Apr. 26, 2021, 5:10 PM), <https://www.jsonline.com/story/news/politics/2021/04/26/ron-johnson-disputes-scientific-consensus-effectiveness-masks/7389867002/> [https://perma.cc/H9QQ-5QDC]. Johnson also promoted anti-vaccine misinformation and a debunked treatment for the virus. See Holmes

and Republican candidate for Ohio's U.S. Senate race in 2022, posted a social media video of himself burning a face mask.¹⁴²

Given the hostility demonstrated by political leaders up to and including the President toward wearing masks, it was unsurprising that public health officials seeking to implement mask mandates and other health restrictions found themselves terrorized by protesters.¹⁴³

Even where *Republican* governors implemented mask mandates, they faced ire from protesters – with New Hampshire Governor Chris Sununu citing such protests outside of his private home as the reason for canceling an outside inauguration ceremony in 2021.¹⁴⁴ Some anti-mask Republican state representatives had even called for Sununu's impeachment.¹⁴⁵ And yet these

Lybrand, *Fact-Checking Sen. Ron Johnson's Continued Efforts to Mislead on Covid-19 and January 6 Insurrection*, CNN (June 14, 2021, 6:44 PM), <https://www.cnn.com/2021/06/14/politics/ron-johnson-coronavirus-capitol-insurrection-fact-check/index.html> [https://perma.cc/9EPX-6QKM].

¹⁴² See Theodore Decker, *Josh Mandel is Neither a Freedom Fighter or Firebug. You Pick.*, COLUMBUS DISPATCH (June 8, 2021, 9:11 AM), <https://www.dispatch.com/story/news/columns/2021/06/06/firebug-josh-mandel-shows-us-how-serious-he-freedom/7504605002/> [https://perma.cc/SHA9-H27D].

¹⁴³ See Sasha Pezenik & Laura Romero, *Major Exodus Among Public Health Officials During Pandemic*, ABC NEWS (Feb. 5, 2021, 4:00 AM), <https://abcnews.go.com/US/major-exodus-public-health-officials-pandemic/story?id=75679880> [https://perma.cc/QHS5-WM33] (among examples, “[i]n Colorado, at least 20 health officials resigned after facing threats in public, the state health department told ABC News.”); Randy Ludlow, *Ohio Health Director Amy Acton Unexpectedly Resigns Amid Coronavirus Pandemic*, USA TODAY (June 17, 2020, 1:46 PM), <https://www.usatoday.com/story/news/nation/2020/06/11/amy-acton-ohio-health-director-resigns-amid-coronavirus-pandemic/5345010002/> [https://perma.cc/9KN2-5N3S] (the home of Dr. Amy Acton, director of the Ohio Department of Health, was targeted by protesters, and she had been assigned a “highway patrol protective detail” after threats); *California Health Official Resigns After Receiving Threats*, ASSOCIATED PRESS (June 9, 2020), <https://apnews.com/article/virus-outbreak-health-santa-ana-california-ca-state-wire-d274d355c701ee1abae6f2c9dd66e7aa> [https://perma.cc/VTL9-WBK2] (reporting that Dr. Nichole Quick, the health officer for Orange County, California, was “the seventh senior health official to resign in California since the pandemic began, and health officials have been facing unprecedented pressure, criticism and threats, [according to] Kat DeBurgh, executive director of the Health Officers Association of California”).

¹⁴⁴ See Kathy McCormack, *Governor Cancels Inaugural, Citing Mask Protests at His Home*, ASSOCIATED PRESS, (Dec. 30, 2020), <https://apnews.com/article/arrests-concord-coronavirus-pandemic-new-hampshire-74c5be34db1e5a287b4b1da4bf89958> [https://perma.cc/4CM4-SAHL].

¹⁴⁵ See Ethan DeWitt, *Anti-Mask Republican Representatives Seek Impeachment of Sununu*, CONCORD MONITOR (Nov. 24, 2020, 2:50 PM), <https://www.concordmonitor.com/Anti-mask-Republican-representatives-seek-impeachment-investigation-of-New-Hampshire-Gov-Chris-Sununu->

protests came *after* the Republican speaker of the New Hampshire House of Representatives died of COVID-19 following meetings of his caucus where mask-wearing was non-existent or irregular. This prompted Sununu to criticize his fellow Republican leaders.¹⁴⁶ Even with Republicans controlling all of state government, state budget passage in 2021 hinged upon Sununu's concessions to emergency power limits insisted upon by a conservative "Freedom Caucus" in the New Hampshire House.¹⁴⁷

In a sign of the evolution of COVID-19 politics, by the fall of 2021, Gov. Sununu's response to conservative anti-vaccine protesters stopping a meeting of the governor and the state's Executive Council was criticized as too muted.¹⁴⁸ A medical doctor who was a Republican member of the New Hampshire House of Representatives switched parties from Republican to Democrat after his fellow House Republicans

37469400 [https://perma.cc/5JCC-4V93]. A Republican state representative-elect who protested outside of Sununu's home claimed COVID-19 was less deadly than the flu. See Karen Dandurant, *Protesters Bash NH Mask Mandate Outside Gov. Sununu's Home*, SEACOAST ONLINE (Nov. 23, 2020, 9:19 AM), <https://www.seacoastonline.com/story/news/local/2020/11/22/protesters-nh-mask-mandate-sununu-home/6375125002/> [https://perma.cc/58KT-YRB8].

¹⁴⁶ Jaclyn Peiser, *New Hampshire's GOP Governor Blasts Anti-Maskers after House Speaker Dies of Covid-19: 'Don't Act Like a Bunch of Children'*, WASH. POST (Dec. 12, 2020, 1:23 AM), <https://www.washingtonpost.com/nation/2020/12/11/dick-hinch-dead-speaker-covid/> [https://perma.cc/MV42-8A8D] ("Those in our caucus who refused to take precautions are responsible for Dick Hinch's death,' state Rep. William Marsh (R), a retired doctor, wrote on Twitter.").

¹⁴⁷ See Kevin Landrigan, *State House Dome: Budget Battle Became a CPR-Like Rescue*, UNION LEADER (June 27, 2021), https://www.unionleader.com/news/politics/statehouse_dome/state-house-dome-budget-battle-became-a-cpr-like-rescue/article_e2120034-031b-5cfc-8a53-coce180a4754.html [https://perma.cc/JM2D-M2S6] ("Three dozen members of the House Freedom Caucus were in near-open revolt over an emergency powers provision that fell way short of what they wanted.").

¹⁴⁸ See Kevin Landrigan, *State House Dome: Why Weren't Anti-Vaccine Mandate Protesters Arrested?*, UNION LEADER (Oct. 2, 2021), <https://www.unionleader.com/news/politics/state/state-house-dome-why-werent-anti-vaccine-mandate-protesters-arrested/article7d2b15f3-1eff-5dcd-b7ae-d5fc056a231e.html> [https://perma.cc/K3UV-KHBF] (noting that the most "boisterous" protester disrupting the state meeting had previously been arrested outside Sununu's home, as were five people protesting the state budget outside Sununu's office); Editorial, *Sununu Stumbles: Not his Finest Hour*, UNION LEADER (Oct. 3, 2021), https://www.unionleader.com/opinion/editorials/sununu-stumbles-not-his-finest-hour/article_e9718e1b-fe31-5360-a863-974fi4d8f64d.html [https://perma.cc/94RL-GRL2] ("Sununu adopted a 'nothing to see here' attitude. He said he wasn't troubled by what he called 'a little bit of a mob mentality' at a council meeting where state employees needed police escorts to escape the place.").

held an antivaccination rally.¹⁴⁹

The Idaho Legislature had to suspend operations after several legislators contracted COVID-19, with the Associated Press reporting that, “[o]f the sickened lawmakers, seven of the eight were Republicans, who typically don’t wear masks.”¹⁵⁰ Ironically, the Republican-controlled legislature was about to take up a bill banning local mask mandates before its own outbreak.¹⁵¹ The outbreak occurred after a “burn the mask” rally in front of the state Capitol building at which the Republican lieutenant governor was a featured speaker.¹⁵² That lieutenant governor later seized the opportunity, while the governor was out of the state, to issue an executive order banning mask mandates – an order rescinded immediately upon the governor’s return.¹⁵³

One of the more peculiar battles, procedurally, involved the efforts of Republican Georgia Governor Brian Kemp to prevent Atlanta from implementing a mask ordinance – first one judge, then a second, recused themselves on the day the first hearing was to take place in July 2020.¹⁵⁴ The next month Kemp dropped the lawsuit.¹⁵⁵

¹⁴⁹ See Carline Anders, *New Hampshire lawmaker switches parties, joining Democrats because of GOP views on vaccines and masks*, WASH. POST (Sept. 16, 2021, 2:02 PM), <https://www.washingtonpost.com/politics/2021/09/15/new-hampshire-republican-democrat-covid/> [https://perma.cc/W68B-6784].

¹⁵⁰ Keith Ridler, *Idaho Legislature Has Big To-Do List after COVID-19 Break*, ASSOCIATED PRESS (Apr. 5, 2020), <https://apnews.com/article/legislature-constitutions-legislation-coronavirus-pandemic-idaho-de6e1ea3ae1530b4dcc1adfd701c84e3> [https://perma.cc/9ULA-7KC5].

¹⁵¹ *Id.*

¹⁵² See Kim Bellware, *Anti-Maskers Encouraged Kids to Burn Their Face Coverings on the Capitol Steps in Idaho*, WASH. POST (Mar. 7, 2021, 9:45 PM), <https://www.washingtonpost.com/nation/2021/03/07/idaho-mask-burning/> [https://perma.cc/4NZK-ZX6J].

¹⁵³ See Derek Hawkins, *Idaho Lieutenant Governor Banned Mask Mandates While the Governor Was Out of Town. It Didn’t Last.*, WASH. POST (May 28, 2021, 5:35 PM), <https://www.washingtonpost.com/politics/2021/05/28/idaho-mask-mandate-ban/> [https://perma.cc/WV29-XQKQ] (“The text of the short-lived order falsely asserted that face-coverings are ‘ineffective mitigation measures,’ despite widely available evidence that masks are a critical tool for containing infections.”).

¹⁵⁴ See Kate Brumback, *2 Judges in Lawsuit over Atlanta Mask Rule Recuse Themselves*, ASSOCIATED PRESS (July 21, 2020), <https://apnews.com/article/e063eb1f6948c48fe20c64327272e3ad> [https://perma.cc/SA6J-QR35].

¹⁵⁵ See Vanessa Romo, *Governor Drops Lawsuit Against Atlanta Mayor Over Masks, But Fight May Not Be Over*, NPR (Aug. 13, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/08/13/902347003/governor-drops-lawsuit-against-atlanta-mayor-over-masks-but-fight-may-not-be-ove> [https://perma.cc/8WU8-EQVK]. As the reporter noted:

In Florida, Republican Governor Ron DeSantis issued a September 2020 executive order forbidding any “fines and penalties associated with COVID-19 enforced upon individuals.”¹⁵⁶ DeSantis’s order effectively made local mask ordinances meaningless, and DeSantis moved in March 2021 to waive any prior penalties.¹⁵⁷ DeSantis himself had not obeyed such local ordinances,¹⁵⁸ and would escalate his opposition to COVID-19 safeguards by opposing vaccination requirements for passengers on cruise ships sailing from Florida.¹⁵⁹ In July 2021, DeSantis reportedly began peddling “Don’t Fauci My Florida” merchandise even as his state saw some of the nation’s highest COVID-19 case counts.¹⁶⁰ With hospitalizations at a pandemic high, DeSantis issued an executive order blocking schools from requiring children to wear masks, while vowing “to fight any cities or

Bottoms, who, along with her husband, tested positive for COVID-19 last month, has been outspoken about the pandemic outbreak in Georgia. She has blamed Kemp and President Trump for not urging people to wear masks and says they were too eager to reopen the economy at the expense of public safety. She has also questioned why she was singled out by Kemp in the lawsuit when other city leaders issued similar directives.

Id.

¹⁵⁶ Fla. Exec. Order No. 20-244 (Sept. 25, 2020).

¹⁵⁷ See Lawrence Mower, *DeSantis, Cabinet Take 41 Seconds to Decide to Waive Fines from COVID Citations*, MIAMI HERALD (Mar. 10, 2021, 9:35 PM), <https://www.miamiherald.com/news/politics-government/state-politics/article249846688.html> [https://perma.cc/C4DL-EYDY] (“Gov. Ron DeSantis and the Florida clemency board announced Wednesday that it would wipe out fines imposed on people or businesses for violating COVID-19-related ordinances.”).

¹⁵⁸ See Wells Dusenbury, *Hotel Slapped with Warning for Hosting Maskless DeSantis Crowd*, S. FLA. SUN SENTINEL (Feb. 19, 2021, 7:09 PM), <https://www.sun-sentinel.com/local/palm-beach/fl-ne-desantis-pbc-masks-20210219-hazvwr6z65fbbjwvojzt3k5ldq-story.html> [https://perma.cc/HF26-VDTK] (“An estimated 80% of the crowd wore no masks. DeSantis himself showed up without a mask and remained that way.”).

¹⁵⁹ See Hannah Simpson, *Federal Judge Strikes Down CDC Cruise Rules in “Major Victory” for DeSantis*, WASH. POST, (June 18, 2021, 9:24 PM), <https://www.washingtonpost.com/travel/2021/06/18/florida-cruise-lawsuit-desantis/> [https://perma.cc/9TQU-MB88]; Taylor Dolven, *Royal Caribbean Reverses, Won’t Require Passengers on U.S. Cruises to Be Vaccinated*, MIAMI HERALD (June 7, 2021, 10:35 AM), <https://www.miamiherald.com/news/business/tourism-cruises/article251909713.html> [https://perma.cc/8G7B-RVKY] (“The about-face is an apparent submission to Gov. Ron DeSantis, who has insisted that there will be no exception made for cruise companies to a newly passed Florida law that fines companies \$5,000 each time they ask a patron to provide proof of vaccination.”).

¹⁶⁰ Hannah Knowles, *DeSantis Sells ‘Don’t Fauci My Florida’ Merch as New Coronavirus Cases Near Highest in Nation*, WASH. POST (July 16, 2021, 5:01 PM), <https://www.washingtonpost.com/politics/2021/07/13/desantis-fauci-florida/> [https://perma.cc/L2VM-E73Z] (“The Fauci items are listed alongside ‘Keep Florida Free’ hats and red koozies that take aim at face coverings with a DeSantis quote: ‘How the hell am I going to be able to drink a beer with a mask on?’”).

municipalities that try to institute Covid restrictions, including mask mandates or lockdowns.”¹⁶¹

In Texas, Allen West, the chair of the state’s Republican Party, joined a rally outside the governor’s mansion that assailed Republican Texas Governor Greg Abbott for COVID-19 restrictions, including a mask mandate.¹⁶² After Abbott abruptly declared his state free of restrictions in March 2021,¹⁶³ Texas Attorney General Ken Paxton, a Republican, also threatened to sue the City of Austin over its mask mandate, after mocking local officials for “oxygen deprivation from quintuple-masking,”¹⁶⁴ but suffered a setback in March 2021 when a judge rebuffed his efforts.¹⁶⁵ Yet, Paxton had earlier success persuading the Texas Supreme Court to halt the municipal and county dining curfew in Austin and surrounding Travis County.¹⁶⁶

Not waiting for court approval, it was reported that “[b]efore the ruling, Paxton and Abbott had encouraged bar and restaurant operators to ignore the

¹⁶¹ Matt Dixon & Bruce Ritchie, *Florida Covid Hospitalizations Shatter Record as DeSantis Downplays Threat*, POLITICO (Aug. 2, 2021, 4:14 PM), <https://www.politico.com/states/florida/story/2021/08/02/florida-covid-hospitalizations-shatter-record-as-desantis-downplays-threat-1389356> [https://perma.cc/SX67-HCES].

¹⁶² Patrick Svitek, *State GOP Chair Allen West, Agriculture Commissioner Sid Miller Join Anti-Greg Abbott Protest Outside Governor’s Mansion*, TEX. TRIB. (Oct. 10, 2020, 2:00 PM), <https://www.texastribune.org/2020/10/10/protest-greg-abbott-governors-mansion/> [https://perma.cc/V8R5-XEBL] (“West, who took over the party in July and has been an open critic of some of Abbott’s coronavirus decisions, read a resolution that the State Republican Executive Committee passed last month. The resolution tells Abbott: ‘No Exceptions, No Delays....Open Texas NOW.’”).

¹⁶³ Abbott’s decision to end the state’s mask requirement drew the accusation from President Biden that Abbott and like-minded governors were engaged in “Neanderthal thinking.” Zachary B. Wolf, *What’s Behind Texas Governor’s “Neanderthal thinking”?*, CNN (Mar. 3, 2021, 8:01 PM), <https://www.cnn.com/2021/03/03/politics/what-matters-march-3/index.html> [https://perma.cc/D9BX-428M] (“That Abbott . . . reportedly didn’t consult his state’s chief medical officer before ending the mask mandate makes it hard to see the decision as anything but political.”).

¹⁶⁴ Katie Shepherd, *Texas AG Ken Paxton Attacks Austin Mayor Over Mask Mandate: ‘Maybe It’s Oxygen Deprivation from Quintuple-Masking’*, WASH. POST (Mar. 11, 2021, 5:22 AM), <https://www.washingtonpost.com/nation/2021/03/11/texas-ken-paxton-austin-masks/> [https://perma.cc/A873-PTNA].

¹⁶⁵ See Reis Thebault, *Who Makes the Mask Rules? Despite a Texas Lawsuit, the Mandate Survives in Austin*, WASH. POST (Mar. 28, 2021, 8:55 PM), <https://www.washingtonpost.com/health/2021/03/28/austin-mask-mandate-lawsuit/> [https://perma.cc/5S3P-HV7K].

¹⁶⁶ See *In re State*, No. 21-0001, 2021 Tex. LEXIS 1 (Tex. Jan. 1, 2021).

curfew — which banned food and beverage service but did not require bars and restaurants to close and allowed curbside, delivery and takeout options to continue — and establishments followed the advice[.]”¹⁶⁷ Upon the state high court siding with him, Paxton celebrated the end of “oppressive, illegal city and county declarations[.]”¹⁶⁸

However, as discussed earlier, Paxton and Abbott had wasted no time during the early days of the COVID-19 pandemic to order a cessation of abortions, ostensibly to preserve “personal protective equipment needed to protect health care professionals and stop transmission of the virus.”¹⁶⁹

When the highly-contagious “Delta variant” of COVID-19 spread in the summer of 2021,¹⁷⁰ the city of Austin was helpless to enact safeguards against it, as Abbott had issued an executive order “restating his ban on mask mandates by local governments and health officials,” disallowing capacity limits on businesses even as hospital beds filled up with sick patients, and forbidding capacity limits or mask requirements at public facilities including public pools and sports fields.¹⁷¹

In a Pennsylvania case before a U.S. District Court, plaintiffs argued “that

¹⁶⁷ Chuck Lindell, *Texas Supreme Court Blocks Austin, Travis County Dine-in Curfew*, AUSTIN AM.-STATESMAN (Jan. 2, 2021, 8:43 AM), <https://www.statesman.com/story/news/2020/12/31/judge-hear-texas-ag-bid-overturn-austin-business-curfew/4099425001/> [https://perma.cc/5PR3-DG65] (Attorneys for Austin and Travis County “argued that Paxton’s agency was engaging in selective litigation, ignoring similar dine-in curfews in San Antonio, Bexar County and El Paso County.”).

¹⁶⁸ Press Release, Ken Paxton, Att’y Gen. of Tex, *Texas Supreme Court Ends Unlawful City of Austin and Travis County Shutdown Orders* (Jan. 1, 2021), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-texas-supreme-court-ends-unlawful-city-austin-and-travis-county-shutdown-orders> [https://perma.cc/LE7K-ME8Z].

¹⁶⁹ Press Release, Ken Paxton, Att’y Gen. of Tex., *Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic* (Mar. 23, 2020), <https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all> [https://perma.cc/VKK9-GVUB].

¹⁷⁰ Apoorva Mandavilli, *C.D.C. Internal Report Calls Delta Variant as Contagious as Chickenpox*, N.Y. TIMES (Aug. 1, 2021), <https://www.nytimes.com/2021/07/30/health/covid-cdc-delta-masks.html> [https://perma.cc/KZ8Y-2EV4] (“The Delta variant is more transmissible than the viruses that cause MERS, SARS, Ebola, the common cold, the seasonal flu and smallpox, and it is as contagious as chickenpox.”).

¹⁷¹ Heather Osbourne & Ella Malena Feldman, *Travis County Reaches Stage 5 Threshold, Abbott Ban on Mask Mandates Limits Local Response*, AUSTIN AM.-STATESMAN (Aug. 5, 2021, 10:15 AM), <https://www.statesman.com/story/news/2021/07/30/travis-county-stage-5-threshold-abbott-orders-limit-local-covid-19-response/5427899001/> [https://perma.cc/JZG5-RZRW].

because masks have become a ‘political symbol,’ the Mask Mandate is the equivalent of compelled speech.”¹⁷² They also asserted “that the Mask Mandate violates their privacy interests, including their right to bodily integrity and personal autonomy free from government interference. . . . Their objections originate, at least in part, from their assertion that ‘the efficacy of a mask is far from proven[.]’”¹⁷³

Judge John E. Jones III denied a motion for a preliminary injunction, while acknowledging the toll that public health safeguards had taken during the pandemic:

Nearly nine months, and quickly approaching a full year, into this global pandemic, we are *all* fatigued. We have not been able to hug our loved ones, attend school or work in-person, or frequent our favorite restaurants and local businesses. All of our lives have changed drastically, and, indeed, many of us are weary of continued mitigation efforts. But our Constitution does not permit us to consider such frustrations without concrete, particularized, and non-hypothetical allegations that are capable of full resolution by this court.¹⁷⁴

There could be national consequences to each state’s decision regarding masks. Although even President Trump’s White House Coronavirus Task Force advised South Dakota to implement a mask mandate,¹⁷⁵ the state’s Republican Governor Kristi Noem reportedly “refused to encourage people to wear masks or socially distance, instead saying the best thing people can do to stop the spread of the virus is wash their hands.”¹⁷⁶ Sioux Falls was among the South Dakota cities that enacted their own mandates,¹⁷⁷ and the state ranked among the worst for COVID-19 cases.¹⁷⁸

¹⁷² Parker v. Wolf, 506 F. Supp. 3d 271, 286 (M.D. Pa. 2020) (citation omitted).

¹⁷³ *Id.* at 277.

¹⁷⁴ *Id.* at 292.

¹⁷⁵ See Morgan Matzen, *South Dakota Gov. Noem Unlikely to Issue Mask Mandate after Task Force Recommends It*, STAR HERALD (Dec. 4, 2020), https://starherald.com/news/state-and-regional/south-dakota-gov-noem-unlikely-to-issue-mask-mandate-after-task-force-recommends-it/article_6ba56085-2819-5174-b80b-a01e9c7d731f.html [<https://perma.cc/XHR2-UYE3>].

¹⁷⁶ Stephen Groves, *South Dakota’s Noem Defends Forgoing Masks as Virus Surges*, ASSOCIATED PRESS (Nov. 18, 2020), <https://apnews.com/article/south-dakota-kristi-noem-coronavirus-pandemic-od58c61ba20c8bf9ba4ee02ef46b1dao> [<https://perma.cc/P73G-7UW6>].

¹⁷⁷ See Stephen Groves, *Sioux Falls OKs Mask Mandate after Push from Medical Groups*, ASSOCIATED PRESS (Nov. 17, 2020), <https://apnews.com/article/south-dakota-coronavirus-pandemic-rapid-city-63e59ae329d25ce479ed68a4fbfcbeb9> [<https://perma.cc/9Q4C-P9X3>].

¹⁷⁸ Glenn Kessler, *South Dakota’s Covid-19 Numbers Have Been Terrible, but the Governor Says That’s the Wrong Metric*, WASH. POST (Feb. 5, 2021, 3:00 AM), <https://www.washingtonpost.com/politics/2021/02/05/south-dakotas-covid-19-numbers-have-been-terrible-governor-says-thats-wrong-metric/> [<https://perma.cc/BS3W-KD6L>].

But states do not exist in isolation: after 460,000 people from around the United States attended the annual motorcycle rally in Sturgis, South Dakota, in August 2020, one academic study “estimated 266,796 cases could be linked to the rally.”¹⁷⁹

Doctor Peter Hotez, a prominent vaccine scientist, wrote in *Scientific American* that “antiscience disinformation created mass havoc in the red states.”¹⁸⁰ He noted that a “hallmark” of the waves of cases “were thousands of individuals who tied their identity and political allegiance on the right to defying masks and social distancing. A nadir was a highly publicized ICU nurse who wept as she recounted the dying words of one of her patients who insisted COVID-19 was a hoax.”¹⁸¹

CONCLUSION: WE FAILED THIS CHALLENGE

As Seth Masket, a political science professor and director of the Center on American Politics at the University of Denver, wrote:

[T]he U.S. government’s approach to the COVID-19 pandemic was to give up on the central purpose of government in the first place — overcoming collective action dilemmas.

Without getting too technical, let me explain what that means. A collective action dilemma exists when everyone would benefit by working together, but individual self-interest prevents that cooperation from happening, and everyone ends up worse off as a result.¹⁸²

Our collective failure was clear from the very beginning of the pandemic’s impact. In what was characterized as a “lost month,” as the COVID-19 virus began to spread in the United States the federal government failed to roll out the testing that could have mitigated the resulting disaster.¹⁸³ As the *New York Times* reported,

¹⁷⁹ Brittany Shammas, “Worst Case scenarios” at Sturgis Rally Could Link Event to 266,000 Coronavirus Cases, *Study Says*, WASH. POST (Sept. 10, 2020, 7:25 PM), <https://www.washingtonpost.com/health/2020/09/08/worst-case-scenarios-sturgis-rally-may-be-linked-266000-coronavirus-cases-study-says/> [<https://perma.cc/Q3W5-XCLF>].

¹⁸⁰ Peter Hotez, *The Antiscience Movement Is Escalating, Going Global and Killing Thousands*, SCI. AM. (Mar. 29, 2021), <https://www.scientificamerican.com/article/the-antiscience-movement-is-escalating-going-global-and-killing-thousands/> [<https://perma.cc/6DCP-6Q9J>].

¹⁸¹ *Id.*

¹⁸² Seth Masket, *Masket: COVID-19 and the Extraordinary Failure of the U.S. Government*, DENVER POST (Dec. 11, 2020, 8:05 AM), <https://www.denverpost.com/2020/12/11/covid-19-government-failed-collective-action-dilemma/> [<https://perma.cc/PL6S-MF7R>].

¹⁸³ See Michael D. Shear et al., *The Lost Month: How a Failure to Test Blinded the U.S. to Covid-19*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/03/28/us/testing-coronavirus-pandemic.html> [<https://perma.cc/57VF-PVDM>].

based on over 50 interviews with administration and public health officials, along with scientists and executives, “the world’s richest country — armed with some of the most highly trained scientists and infectious disease specialists — squandered its best chance of containing the virus’s spread. Instead, Americans were left largely blind to the scale of a looming public health catastrophe.”¹⁸⁴

Trump was also reticent about using the Defense Production Act,¹⁸⁵ with critics noting that “use of the provision allowing the government to take over the allocation of scarce medical supplies would have helped ameliorate the chaotic free-for-all . . . that pitted governors, hospitals and municipal health departments against one another in competition for N95 respirator masks, hand sanitizer and disposable gloves.”¹⁸⁶

President Trump’s messaging, so often attacking the very public health safeguards his administration was promoting, was also self-defeating — even according to his top medical advisors like Dr. Anthony Fauci:

“The thing that hit me like a punch to the chest was then all of a sudden he got up and says, ‘Liberate Virginia, liberate Michigan,’ and I said to myself, ‘Oh my goodness, what is going on here?’” Fauci told CNN, referring to a series of Trump tweets. “It shocked me because it was such a jolt to what we were trying to do.”¹⁸⁷

Doctor Deborah Birx, Trump’s COVID-19 response coordinator, was also candid:

“I look at it this way. The first time we have an excuse,” Birx told CNN Chief Medical

¹⁸⁴ *Id.*

¹⁸⁵ *See* 50 U.S.C. § 4501 *et seq.*

¹⁸⁶ Andrew Jacobs, *Despite Claims, Trump Rarely Uses Wartime Law in Battle Against Covid*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2020/09/22/health/Covid-Trump-Defense-Production-Act.html> [<https://perma.cc/8CSF-SM78>]. During that “free-for-all” period, the author was quoted:

Small states, like New Hampshire, are at a disadvantage.

“I’m sorry, New Hampshire does not have the scale to compete with the state of New York, with the state of Illinois,” said Brendan Williams, president of the New Hampshire Health Care Association, which represents the state’s nursing homes.

“If it’s just going to be this sort of Darwinian free-for-all, like ‘Lord of the Flies’ . . . I don’t know what to say. It’s absolutely unconscionable. It’s unimaginable that this is where we are at right now.”

Brian Witte, *Hunt for Medical Supplies Creates Marketplace of Desperation*, ASSOCIATED PRESS (Apr. 4, 2020), <https://apnews.com/article/829280426e49dfdf7f2cb1be4b0cfe05> [<https://perma.cc/3HEG-C7KG>].

¹⁸⁷ Benjamin Din, *Trump Lashes Out at Fauci and Birx after CNN Documentary*, POLITICO (Mar. 29, 2021, 8:07 PM), <https://www.politico.com/news/2021/03/29/trump-fauci-birx-cnn-documentary-478422> [<https://perma.cc/H6GX-WQUQ>].

Correspondent Dr. Sanjay Gupta. “There were about a hundred thousand deaths that came from that original surge. All of the rest of them, in my mind, could have been mitigated or decreased substantially.”¹⁸⁸

Trump contributed to an environment in which science was politicized and ignored by many, often falsely comparing COVID-19 to the seasonal flu – even as he personally was afflicted with COVID-19:

“Flu season is coming up! Many people every year, sometimes over 100,000, and despite the Vaccine, die from the Flu,” tweeted Trump, who has Covid-19 and returned to the White House on Monday after three days at Walter Reed National Military Medical Center. “Are we going to close down our Country? No, we have learned to live with it, just like we are learning to live with Covid, in most populations far less lethal!!!”¹⁸⁹

Given the degree to which the virus was politicized, the lack of a coordinated federal response, and leaving matters to the states, was disastrous.

As the columnist Michael Gerson wrote in March 2021: “It is the sign of a sickness deeper than [C]ovid-19 that the defiance of public health guidance has become a political selling point in the Republican Party.”¹⁹⁰ Of South Dakota Governor Noem, Gerson noted that South Dakota had among the nation’s worst rates of viral transmission and death, asking:

What level of hubris, extremism or insanity does it take to crow about one of the worst covid records in the nation? Noem might as well be campaigning for higher office in a

¹⁸⁸ Stephen Collinson, *America's Pandemic Dead Deserve Accountability after Birx Disclosure*, CNN (Mar. 29, 2021, 9:48 AM), <https://www.cnn.com/2021/03/29/politics/coronavirus-deborah-birx-donald-trump-joe-biden/index.html> [https://perma.cc/AE2W-WYXV].

¹⁸⁹ Rebecca Shabad, *Fresh out of Walter Reed, Trump Compares Covid to the Flu. Experts Say He's Flat Wrong.*, NBC NEWS (Oct. 6, 2020, 3:52 PM), <https://www.nbcnews.com/politics/donald-trump/trump-compares-covid-flu-experts-say-he-s-flat-wrong-n1242258> [https://perma.cc/F7MT-792B]; Tommy Beer, *All The Times Trump Compared Covid-19 To The Flu, Even After He Knew Covid-19 Was Far More Deadly*, FORBES (Sept. 10, 2020, 10:05 AM), <https://www.forbes.com/sites/tommybeer/2020/09/10/all-the-times-trump-compared-covid-19-to-the-flu-even-after-he-knew-covid-19-was-far-more-deadly/?sh=4cfe2e33f9d2> [https://perma.cc/5DYZ-NAXT]. The influential conservative commentator Rush Limbaugh had gone a step further in claiming COVID-19 was being “weaponized” to bring down Trump politically: “Yeah, I’m dead right on this. *The coronavirus is the common cold, folks.*” Jordan Liles, *Did Rush Limbaugh Downplay COVID as ‘the Common Cold’?*, SNOPE (Feb. 17, 2021), <https://www.snopes.com/fact-check/rush-limbaugh-covid-common-cold/> [https://perma.cc/6BA4-FNUT] (emphasis added).

¹⁹⁰ Michael Gerson, *Opinion: The GOP is Facing a Sickness Deeper Than the Coronavirus*, WASH. POST (Mar. 29, 2021, 6:20 PM), https://www.washingtonpost.com/opinions/the-gop-is-facing-a-sickness-deeper-than-the-coronavirus/2021/03/29/6add488-90cd-11eb-9668-89be11273c09_story.html [https://perma.cc/F7LR-YUHB].

hearse.¹⁹¹

In lifting all of his state's COVID-19 restrictions in March 2021 despite U.S. Centers for Disease Control and Prevention warnings that lifting virus prevention measures was premature, Oklahoma's Republican Governor Kevin Stitts declared: "The standard for normal is freedom — the freedom to worship, the freedom to earn a paycheck, the freedom to visit your loved ones in nursing homes, the freedom to send your kids to school in person and the freedom to protect your family."¹⁹² In Stitt's view, those freedoms also included the right not to wear a mask in state buildings, and the freedom to attend indoor sporting events without attendance limits.¹⁹³

Nor were the courts always more science-oriented than politicians in what often seemed like an elevation of politics over science, as Northeastern University health law professor Wendy Parmet noted: "[e]ven as courts claim that they cannot consider the health implications of their decisions, they are making health policy."¹⁹⁴ With respect to a Supreme Court decision, Parmet went on to observe that it "gave no deference to the state's public health arguments. To the majority, the impact of their rulings on public health seems to be irrelevant. In Washington, D.C., as in Wisconsin, conservative justices feign powerlessness even while they exercise power."¹⁹⁵

An unexplored aspect to this politicization is the degree to which it operated from a position of health or racial privilege, as from the very beginning of its spread in the United States COVID-19 has had a disproportionate impact upon people of

¹⁹¹ *Id.* Months later, in apparently positioning herself for a 2024 presidential bid, Noem even attacked other Republican governors for their past mask mandates and COVID-19 business restrictions. See Maeve Reston, *Kristi Noem Criticizes GOP Governors Who Enacted Covid-19 Mandates While Accusing Some of Rewriting Their History*, CNN (July 11, 2021, 5:47 PM), <https://www.cnn.com/2021/07/11/politics/kristi-noem-cpac-south-dakota-governor-covid-mandate/index.html> [<https://perma.cc/7T7L-VEF6>].

¹⁹² Carmen Forman, *Oklahoma Gov. Kevin Stitt to Lift Coronavirus Restrictions, Despite CDC Warnings*, OKLAHOMAN (Mar. 11, 2021, 3:01 PM), <https://www.oklahoman.com/story/news/2021/03/11/oklahoma-gov-kevin-stitt-undo-remaining-covid-19-restrictions/6947773002/> [<https://perma.cc/5UX6-J4GE>].

¹⁹³ See *id.*

¹⁹⁴ Wendy Parmet, *Conservative Courts Say They Can't Set Health Policy — and Then They Do It Anyway*, WASH. POST (Apr. 12, 2021, 12:39 PM), <https://www.washingtonpost.com/outlook/2021/04/12/fabick-mask-mandate-conservative-judges/> [<https://perma.cc/H7HT-QJKE>].

¹⁹⁵ *Id.*

color,¹⁹⁶ as well as the elderly and infirm.¹⁹⁷

It was not until President Joe Biden took office that an executive order was issued, on January 21, 2021, requiring public health safeguards such as mask-wearing in a sphere clearly regulated by the federal government: public transportation.¹⁹⁸ That same day another executive order was issued invoking the Defense Production Act to:

[U]rgently and effectively . . . combat the coronavirus disease 2019 (COVID-19) pandemic. To that end, this order directs immediate actions to secure supplies necessary for responding to the pandemic, so that those supplies are available, and remain available, to the Federal Government and State, local, Tribal, and territorial authorities, as well as to America's health care workers, health systems, and patients.¹⁹⁹

A little over a month later, the nation crossed an unimaginable threshold where 500,000 Americans had died from COVID-19,²⁰⁰ and 600,000 would be dead by June

¹⁹⁶ See Scott Bauer, *Milwaukee's Black Community Hit Hard by Coronavirus*, ASSOCIATED PRESS (Mar. 27, 2020), <https://apnews.com/article/wi-state-wire-public-health-health-wisconsin-virus-outbreak-b52e4e9a63d64e3a25109f09010508b6> [<https://perma.cc/67TV-VGTZ>] (“Deaths and confirmed cases of the coronavirus are spiking in Milwaukee’s black community, leading public health and civic leaders to sound the alarm that decades of social, political and economic disadvantages are creating a toxic stew that puts people’s lives at risk like no time before.”); Gina Kolata, *Social Inequities Explain Racial Gaps in Pandemic, Studies Find*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/health/coronavirus-black-hispanic.html> [<https://perma.cc/9FYB-B4C2>] (“The coronavirus is more prevalent in minority communities, and infections, illnesses and deaths have occurred in these groups in disproportionate numbers.”).

¹⁹⁷ See Brendan Williams, *Left for Dead: Nursing Home Care Amidst the COVID-19 Pandemic*, 24 QUINNIPIAC HEALTH L. J. 29 (2020).

¹⁹⁸ See Exec. Order No. 13998, 86 Fed. Reg. 7205 (Jan. 21, 2021). As the order stated:

The Centers for Disease Control and Prevention (CDC), the Surgeon General, and the National Institutes of Health have concluded that mask-wearing, physical distancing, appropriate ventilation, and timely testing can mitigate the risk of travelers spreading COVID-19. Accordingly, to save lives and allow all Americans, including the millions of people employed in the transportation industry, to travel and work safely, it is the policy of my Administration to implement these public health measures consistent with CDC guidelines on public modes of transportation and at ports of entry to the United States.

Id. at §1. Under President Trump, the only public health safeguards in a sphere regulated by the federal government had been in nursing homes. See Williams, *supra* note 197, at 31 (by April 2, 2020, all nursing home staff were required to wear masks while working, and nursing home visitation, communal dining, and group activities had been banned by the U.S. Centers for Medicare and Medicaid Services).

¹⁹⁹ Exec. Order No. 14001, 86 Fed. Reg. 7219 (Jan. 21, 2021).

²⁰⁰ See Philip Bump, *Putting 500,000 Covid-19 Deaths into Perspective*, WASH. POST (Feb. 23, 2021, 10:59 AM), <https://www.washingtonpost.com/politics/2021/02/23/putting-500000-covid-19-deaths-into-perspective/> [<https://perma.cc/U3KA-FURC>] (noting that “even if we knew with

2021 — a figure ten times greater than what President Trump had publicly predicted.²⁰¹ And yet, even after that grim milestone, the politicization of COVID-19 had extended to life-saving vaccination against the virus.²⁰²

One Georgia Republican congresswoman compared the vaccination push to Nazi Germany after having made repeated comparisons of mask mandates to the Nazi regime;²⁰³ the nation's failure to reach a higher vaccination threshold was avidly cheered at a Conservative Political Action Conference;²⁰⁴ and conservative

certainty that the country's 500,000th coronavirus death occurred this week, it's a scale that's simply beyond our ability to apprehend. We are able to distinguish visually the difference between 5,000, 50,000 and 500,000, but conceptually everything in the multi-thousands tends to blur together.”).

²⁰¹ See Dan Levin, *Covid Has Claimed More than 600,000 Lives in the U.S.*, N.Y. TIMES (June 16, 2021), <https://www.nytimes.com/2021/06/16/us/600000-us-covid-deaths.html> [<https://perma.cc/FQN8-M7BZ>]. By October 1, 2021, the U.S. death toll exceeded 700,000. See Julie Bosman & Lauren Leatherby, *U.S. Coronavirus Death Toll Surpasses 700,000 Despite Wide Availability of Vaccines*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/us/us-covid-deaths-700k.html> [<https://perma.cc/5RL9-43ZK>].

²⁰² See Amy B Wang & Nick Miroff, *“We Are in a Race”: GOP Governors Implore Residents to Overcome Vaccine Hesitancy as Delta Variant Rises*, WASH. POST (July 4, 2021, 3:18 PM), <https://www.washingtonpost.com/politics/2021/07/04/republicans-vaccines/> [<https://perma.cc/4SF5-ZGX4>] (Polling found “86 percent of Democrats have received at least one vaccine shot compared with 45 percent of Republicans. Only 6 percent of Democrats said they are not likely to get vaccinated, compared with 47 percent of Republicans.”).

²⁰³ See Felicia Sonmez, *Weeks after Holocaust Museum Visit, Rep. Greene Makes New Nazi-Era Comparison in Opposing Vaccination Push*, WASH. POST (July 7, 2021, 11:00 AM), https://www.washingtonpost.com/politics/weeks-after-holocaust-museum-visit-rep-greene-makes-new-nazi-era-comparison-in-opposing-vaccination-push/2021/07/06/96ba967e-deao-11eb-9f54-7ee10b5fcd2_story.html [<https://perma.cc/EN8H-DNTQ>]. A Colorado Republican congresswoman disparaged as “Needle Nazis” those vaccinating people in her district. Daniella Diaz & Veronica Stracqualursi, *Kinzinger Slams GOP Colleagues for Invoking Nazi-Era Imagery to Criticize Covid Vaccination Efforts*, CNN (July 11, 2021, 12:54 PM), <https://www.cnn.com/2021/07/11/politics/kinzinger-marjorie-taylor-greene-covid-sotu-cnntv/index.html> [<https://perma.cc/4W7X-8APR>].

²⁰⁴ See Mitchell Willets, *“It’s Horrifying,” Fauci Says after CPAC Crowd Cheers Lack of Vaccination*, NEWS & OBSERVER (July 11, 2021, 12:39 PM), <https://www.newsobserver.com/news/coronavirus/article252712658.html> [<https://perma.cc/EZT3-7Y3P>]. This was not an isolated incident: “As coronavirus cases and hospitalizations surged in Alabama, Rep. Marjorie Taylor Greene (R-Ga.) mentioned the state’s lowest-in-the-nation vaccination rate at a political fundraiser, eliciting cheers from the audience in a video posted this week.” Meryl Kornfield & Amy B Wang, *Marjorie Taylor Greene Fans Cheered Low Vaccination Rate in Alabama, Which Tossed 65,000 Doses*, WASH. POST (Aug. 9, 2021, 9:59 PM), <https://www.washingtonpost.com/nation/2021/08/07/alabama-vaccine->

media widely spread vaccine misinformation.²⁰⁵ After Tennessee’s Republican-led state government stopped all vaccine outreach to minors in the face of conservative pressure, the state’s top vaccine official was fired – allegedly due to her support for vaccinating kids.²⁰⁶

Making matters worse, an incentive to getting vaccinated had disappeared when, in May 2021, the federal government preemptorily lifted its guidance that all of those in indoor public places should wear masks,²⁰⁷ only to reverse course confusingly in July.²⁰⁸ When President Biden announced that the federal

rate-mtg/ [https://perma.cc/L5WT-VGM8]. The congresswoman also appeared to suggest people shoot anyone coming to their homes promoting vaccination. *Id.*

²⁰⁵ See Tiffany Hsu, *Despite Outbreaks Among Unvaccinated, Fox News Hosts Smear Shots*, N.Y. TIMES (July 12, 2021, 6:30 AM), <https://www.nytimes.com/2021/07/11/business/media/vaccines-fox-news-hosts.html> [https://perma.cc/J2DN-WWMG] (“Opposition to vaccines was once relegated to the fringes of American politics, and the rhetoric on Fox News has coincided with efforts by right-wing extremists to bash vaccination efforts.”). In an interview on an outlet called “Right Side Broadcasting” a North Carolina Republican congressman suggested the Biden Administration would “use door-to-door vaccination efforts as a means to ‘take your guns’ and ‘your Bibles.’” Natasha Korecki & Eugene Daniels, *“Potentially a Death Sentence”: White House Goes Off on Vaccine Vearmongers*, POLITICO (July 12, 2021, 1:22 PM), <https://www.politico.com/news/2021/07/12/biden-covid-vaccination-campaign-499278> [https://perma.cc/MG2G-UNZK].

²⁰⁶ See Brett Kelman, *Tennessee Abandons Vaccine Outreach to Minors — Not Just for COVID-19*, TENNESSEAN (July 13, 2021, 3:48 PM), <https://www.tennessean.com/story/news/health/2021/07/13/tennessee-halts-all-vaccine-outreach-minors-not-just-covid-19/7928701002/> [https://perma.cc/7KFK-QTS4] (Angry Republican state legislators had also “discussed dissolving the entire health department to stop its vaccine advertisements.”); Editorial, *Firing Tennessee’s Top Vaccine Official as COVID-19 Flares Up is Absurd and Dangerous*, TENNESSEAN (July 13, 2021, 1:00 PM), <https://www.tennessean.com/story/opinion/columnists/david-plazas/2021/07/13/covid-19-tennessee-fires-top-vaccine-official-michelle-fiscus/7947062002/> [https://perma.cc/N6WR-8UUD] (“This shouldn’t be a partisan issue, but Republican elected officials have decided that the pandemic is over even though the science says otherwise.”).

²⁰⁷ See Anne Flaherty & Cheyenne Haslett, *Surprise! CDC Reversal on Masks Leaves States, Businesses Scrambling*, ABC NEWS (May 15, 2021, 7:34 PM), <https://abcnews.go.com/Politics/surprise-cdc-reversal-masks-leaves-states-businesses-scrambling/story?id=77691769> [https://perma.cc/NW83-J5GL]; Leana Wen, *Opinion: The CDC Shouldn’t Have Removed Restrictions Without Requiring Proof of Vaccination*, WASH. POST (May 17, 2021, 12:24 PM), <https://abcnews.go.com/Politics/surprise-cdc-reversal-masks-leaves-states-businesses-scrambling/story?id=77691769> [https://perma.cc/NW83-J5GL] (“By resorting to the honor code, the CDC is removing a critical incentive to vaccination. Many who were on the fence might have been motivated to get the shot because they could go back to activities they were missing, without a mask.”).

²⁰⁸ See Sheryl Gay Stolberg & Michael D. Shear, *Americans Suffer Pandemic Whiplash as Leaders Struggle With Changing Virus*, N.Y. TIMES (Aug. 2, 2021), <https://www.nytimes.com/2021/08/>

government would use its regulatory powers to require certain businesses to mandate COVID-19 vaccination, or provide a regular testing opt-out, Republican rhetoric made it seem as if the party was opposed to vaccine mandates against any contagious disease, despite longstanding vaccine mandates in schools and the military.²⁰⁹

For those lost to COVID-19,²¹⁰ and their surviving families, friends, and loved ones, there was no luxury in the ideology that caused politicians to bicker over masks and public health safeguards and judges to second-guess restrictions on bars and religious services.²¹¹ The United States was confronted with an unprecedented

02/us/politics/covid-pandemic-guidelines.html [https://perma.cc/XB2L-JXAP] (noting “public health reversals from the White House and the Centers for Disease Control and Prevention has left Americans with pandemic whiplash”); Dan Goldberg & Erin Banco, *Biden’s New Mask Guidance Too Little, Too Late for Parts of the Country, Officials Say*, POLITICO (July 31, 2021, 7:00 AM), <https://www.politico.com/news/2021/07/31/states-covid-cdc-mask-guidance-501908> [https://perma.cc/7QCX-ETN9] (“The Biden administration might be in a stronger position had the CDC this spring not told vaccinated Americans that it was safe to remove their masks. Instead, the turnabout is providing fodder for critics and conspiracy theorists who say they’re proof that vaccines are overrated and that the government is winging it.”).

²⁰⁹ See Felicia Sonmez, Marianna Sotomayor & Mariana Alfaro, *GOP Condemnation of Biden Coronavirus Mandate Fuels Concern Other Vaccine Requirements Could be Targeted*, WASH. POST (Sept. 13, 2021, 8:15 PM), https://www.washingtonpost.com/politics/republicans-vaccines-mandate-covid/2021/09/13/751c7bde-14a3-11ec-9589-31ac3173c2e5_story.html [https://perma.cc/726H-SFK6] (for example, the U.S. House Republican leader flatly declared, without allowing for exceptions, “that there should be ‘NO VACCINE MANDATES.’”); Annie Linskey, Yasmeen Abutaleb, et al., *Biden announces sweeping new Vaccine Mandates for Businesses, Federal Workers*, WASH. POST (Sept. 9, 2021, 5:52 PM), https://www.washingtonpost.com/politics/vaccine-mandate-federal-employees/2021/09/09/1c1ce9dc-116b-11ec-882f-2dd15a067dc4_story.html [https://perma.cc/WKS3-Z7EM].

²¹⁰ Short of death, one could also be lastingly impaired by the virus through what are characterized as “long haul” symptoms. See David Cox, *What Covid-19’s Long Tail is Revealing About Disease*, BBC (June 9, 2021), <https://www.bbc.com/future/article/20210609-how-long-will-long-covid-last> [https://perma.cc/A6QY-86SX]; Jen Christensen, *As the Pandemic in the US Slows, the Fight Against “Long Haul” Covid is On*, CNN (June 18, 2021, 6:04 PM), <https://www.cnn.com/2021/06/18/health/long-haul-covid-19-treatments-and-developments/index.html> [https://perma.cc/K3UP-HR6H] (“One white paper study . . . looked at private insurance records for nearly 2 million Covid-19 patients and concluded nearly a quarter, 23.2%, had at least one post-Covid condition 30 or more days after initial diagnosis.”).

²¹¹ As one newspaper would editorialize: “The problem is that viruses evolve much faster than do human societies. Especially, it seems, this human society.” Editorial, *Utah Lawmakers Won’t Lead So They Should Get Out of the Way, Editorial Board Writes*, SALT LAKE TRIB. (Aug. 2, 2021, 1:16 PM), <https://www.sltrib.com/opinion/editorial/2021/08/01/utah-lawmakers-wont-lead/> [https://perma.cc/6M4Y-NK8X].

challenge, and our system of government utterly failed to meet it.²¹²

²¹² Consider the implications for the future, given that public health experts predict COVID-19 is not even the worst novel coronavirus we may see. See Anna Schaverien, *The Coronavirus Pandemic is “Not Necessarily the Big One,” Senior W.H.O. Official Says.*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/2020/12/29/world/who-covid-pandemic-big.html> [<https://perma.cc/JM8E-9HTF>].