

The COVID Cases: A Preliminary Assessment of Judicial Review of Public Health Powers During a Partisan and Polarized Pandemic

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I. INTRODUCTION

What powers do states have to protect the public from a public health emergency? For most of the last 100 years, the protracted and robust

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debate about that question has been largely hypothetical.¹ Although courts had occasion to assess the scope of state public health powers in cases concerning HIV,² measles,³ vaping,⁴ and Ebola,⁵ to offer just a few examples, until COVID-19, no court in the past century had to determine the full reach of state public health emergency powers during a widespread and highly lethal pandemic.⁶ Nor had any court been asked to reconcile contemporary understandings of constitutional rights with the states' need to protect its residents from such a pandemic.

In the spring of 2020, numerous state and local courts, including the Supreme Court of the United States, were presented with just those challenges. As cases of COVID-19 spiked in many American communities, governors and local officials across the country used their emergency powers to impose a range of social distancing orders (SDOs), shuttering businesses, restricting religious services, requiring the wearing of masks, and banning

1. See, e.g., George J. Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 NEW ENG. J. MED. 1337 (2002); Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53 (2007); Lawrence O. Gostin, *When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105 (2003); Lawrence O. Gostin, Scott Burris & Zita Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59 (1999); Wendy K. Mariner, George J. Annas & Wendy E. Parmet, *Pandemic Preparedness: A Return to the Rule of Law*, 1 DREXEL L. REV. 341 (2009).

2. E.g., *People v. C.S.*, 583 N.E.2d 726, 729 (Ill. App. Ct. 1991) (“[T]he testing of individuals belonging to a high-risk group for contraction of AIDS viruses in the midst of the AIDS epidemic is a reasonable exercise of the State’s police powers.”). For a discussion of the scope of state powers with respect to HIV, see, for example, Scott Burris, *Fear Itself: AIDS, Herpes, and Public Health Decisions*, 3 YALE L. & POL’Y REV. 479, 479 (1985) (noting that it is well settled that states have authority to act to protect public health); Wendy E. Parmet, *Legal Rights and Communicable Disease: AIDS, the Police Power, and Individual Liberty*, 14 J. HEALTH POL., POL’Y & L. 741 (1989); Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985).

3. E.g., *F.F. ex rel. Y.F. v. State*, 108 N.Y.S.3d 761, 776 (N.Y. Sup. Ct. 2019) (denying a preliminary injunction that would enjoin the repeal of the religious exemption to vaccination mandates in New York’s Public Health Law).

4. E.g., *Vapor Tech. Ass’n v. Baker*, No. SUCV20193102D, 2019 WL 6050041, at *16 (Mass. Super. Ct. Oct. 21, 2019) *vacated*, No. SJC-12834, 2019 WL 9048858 (Mass. Dec. 26, 2019) (partially enjoining state order banning vaping).

5. E.g., *Mayhew v. Hickox*, No. CV-2014-36, 2014 Me. Trial Order LEXIS 1, at *6 (Dist. Ct. Me. Oct. 31, 2014) (ordering respondent to comply with “Direct Active Monitoring”); *Liberian Cmty. Ass’n of Conn. v. Malloy*, No. 3:16-cv-00201(AVC), 2017 WL 4897048, at *1 (D. Conn. Mar. 30, 2017), *aff’d sub nom. Liberian Cmty. Ass’n of Conn. v. Lamont*, 970 F.3d 174 (2d Cir. 2020) (dismissing challenge to mandatory quarantine of individuals entering Connecticut after travel to Ebola-affected countries).

6. The last comparable pandemic was the 1918 influenza pandemic. See *1918 Pandemic (H1N1 Virus)*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> [<https://perma.cc/57LT-EYMP>] (“The 1918 influenza pandemic was the most severe pandemic in recent history.”).

nonessential medical services, all in an effort to “flatten the curve.”⁷ Although the vast majority of the public supported these measures,⁸ at least initially, numerous litigants went to court seeking to enjoin SDOs.⁹ They did so against the backdrop of an increasingly polarized reaction to the pandemic, with President Trump, who had promoted social distancing in March, tweeting in April for the liberation of states as armed protesters shut down the Michigan legislature.¹⁰ Meanwhile, false and misleading information about COVID-19 and potential policy responses spread wildly across social media, some of it amplified by the President himself.¹¹

Protests, polarization, and misinformation: these formed the environment in which state and federal courts confronted the initial wave of constitutional challenges to COVID-19 SDOs. In deciding those claims, and in the absence of significant contemporary precedent, most courts looked to the Supreme Court’s 1905 decision in *Jacobson v. Massachusetts*.¹² A complex and multifaceted decision, *Jacobson* has been cited frequently in the 115 years since it was decided. But never before had it been used so prominently to

7. See Kara Gavin, *Flattening the Curve for COVID-19: What Does It Mean and How Can You Help?*, MICH. HEALTH (Mar. 11, 2020, 1:47 PM), <https://healthblog.uofinhealth.org/wellness-prevention/flattening-curve-for-covid-19-what-does-it-mean-and-how-can-you-help> [https://perma.cc/8PYF-CQC8]. Preliminary studies suggest that these efforts saved thousands of lives. See Umair Irfan, *2 New Studies Show Shutdowns Were Astonishingly Effective*, VOX (June 9, 2020, 4:00 PM), <https://www.vox.com/2020/6/9/21284087/coronavirus-covid-19-shutdown-lockdown-cases-deaths> [perma.cc/A28C-AZ52]. For an overview of state actions, see Lindsay K. Cloud et al., *A Chronological Overview of the Federal, State, and Local Response to COVID-19*, in ASSESSING LEGAL RESPONSES TO COVID-19, at 10, 10–18 (Scott Burris et al., eds. 2020), https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f4d6578225705285562d0f0/1598908033901/COVID19PolicyPlaybook_Aug2020+Full.pdf [https://perma.cc/3CDL-B25K].

8. See Katelyn Burns, *Polls: Americans Don’t Want to End Social Distancing Policies Despite Financial Devastation*, VOX (Apr. 29, 2020, 1:15 PM), <https://www.vox.com/policy-and-politics/2020/4/29/21241069/polls-social-distancing-policies-financial-devastation> [https://perma.cc/4B5H-3VKX]; Ashley Kirzinger et al., *KFF Health Tracking Poll – Late April 2020: Coronavirus, Social Distancing, and Contact Tracing*, KAISER FAM. FOUND. (Apr. 24, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/kff-health-tracking-poll-late-april-2020/> [https://perma.cc/MPS4-FLJR].

9. See *infra* Part IV.

10. See Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html> [https://perma.cc/8GY3-9W3N].

11. Wendy E. Parmet & Jeremy Paul, *COVID-19: The First Posttruth Pandemic*, 110 AM. J. PUB. HEALTH 945, 945–46 (2020).

12. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

decide the constitutionality of broad state SDOs in the midst of a pandemic.¹³ And never before had it been relied upon to such an extent in such a lethal, partisan, and heated moment.¹⁴

How did the courts respond to the initial wave of litigation? This Article offers some preliminary observations by examining court opinions published in Westlaw reviewing abortion, free speech, and free exercise claims that cited to *Jacobson* between March 21 and May 29, 2020, when the Supreme Court handed down its first COVID-19 opinions.¹⁵ This examination shows that although lower courts offered different interpretations of *Jacobson*, all accepted the importance of the state’s interest in protecting the public’s health.¹⁶ Moreover, no court questioned the seriousness of the pandemic; nor did any adopt the misleading information about the pandemic that was widely available on social media.

Nevertheless, at least until May 29, when Chief Justice Roberts and Justice Kavanaugh issued concurring and dissenting opinions respectively accompanying the Supreme Court’s refusal to block the application of California’s social distancing order to religious services,¹⁷ the lower courts diverged over how to reconcile the deference that *Jacobson* accords to public health authorities with the protection of fundamental constitutional rights.¹⁸ Further, while factual distinctions regarding state-specific SDOs likely help explain some of the different outcomes, the shifting nature of the claims and the evolving politics around SDOs may also have played a role, raising critical questions as to how courts may respond should states impose new SDOs either in response to a “second wave” of COVID-19 or a future pandemic.

The Article proceeds as follows. Part II reviews the events of the late winter and spring of 2020, including the arrival of COVID-19 in the United States, the imposition of SDOs, and the breakdown of the initial consensus

13. Many communities imposed social distancing measures or mask laws during the 1918 influenza pandemic. Jason Marisam, *Local Governance and Pandemics: Lessons from the 1918 Flu*, 85 DET. MERCY L. REV. 347 (2008). There was considerable litigation over these measures, but *Jacobson* does not appear to have played a major role in that litigation. For a discussion of the 1918 litigation, see *id.*

14. This is not to say that *Jacobson* has not been cited in highly contentious cases. It has. For example, it was cited in *Roe v. Wade*, 410 U.S. 113, 155 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992). But although abortion has always been polarizing, those cases were not decided during a pandemic, nor at a time when the courts were as polarized along party lines as they are today. Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 227 (2019).

15. See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (mem.).

16. See *infra* notes 103–07 and accompanying text.

17. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (mem.).

18. See *infra* Part IV.

around those orders. Part III provides a brief discussion of *Jacobson* and the law relating to public health emergency powers prior to COVID-19. Part IV provides an overview of opinions contained in the Westlaw database that cite to *Jacobson* and a fuller analysis of the cases that relate to free speech, free exercise, and abortion between March 21 and May 29.¹⁹ Part V discusses the last case decided in the period under study, the Supreme Court's decision in *South Bay United Pentecostal Church. v. Newsom*,²⁰ focusing in particular on the concurring and dissenting opinions of Chief Justice Roberts and Justice Kavanaugh. Part VI concludes with some tentative and surprisingly positive observations about the role that courts have played in the early days of the pandemic, as well as warnings about the storm clouds that hover on the horizon.

II. A POLARIZING PANDEMIC

The story of COVID-19's arrival in the United States is one of missteps, misinformation, and polarization. Between January 21, when the first person in the United States was diagnosed with the disease caused by the novel coronavirus named SARS-COV-2,²¹ and March 15, when seven San Francisco Bay area counties issued the first broad "shelter-in-place" orders,²² the nation's response was both halting and polarized. Despite issuing an emergency declaration and banning the entry of non-U.S. nationals from China on January 31,²³ President Trump minimized the threat, telling Sean Hannity on Fox News on February 2, "we pretty much shut it down coming in from China."²⁴ A few days later, after being acquitted in his impeachment

19. For a discussion of the research methodology, see *infra* note 92.

20. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (mem.).

21. Erin Schumaker, *Timeline: How Coronavirus Got Started*, ABC NEWS (Apr. 23, 2020, 12:12 PM), <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165> [<https://perma.cc/D8WG-KXYA>]; *Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It*, WORLD HEALTH ORG., [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) [<https://perma.cc/YU3K-ZBXX>].

22. Janie Har, *San Francisco Bay Area Counties Issue Shelter-in-Place Order*, AP NEWS (Mar. 15, 2020), <https://apnews.com/a342998638cdccb56172a1663e8d6edf> [<https://perma.cc/DW8Z-5D8S>].

23. *COVID-19 in Illinois, the U.S. and the World: Timeline of the Outbreak*, CHI. TRIB. (May 15, 2020), <https://www.chicagotribune.com/coronavirus/ct-viz-coronavirus-timeline-20200507-uvrzs32nljabrpn6vzkq7m2fpq-story.html> [<https://perma.cc/HJH3-J24F>].

24. Tamara Keith & Malaka Gharib, *A Timeline of Coronavirus Comments from President Trump and WHO*, NPR (Apr. 15, 2020, 5:33 PM), <https://www.npr.org/sections/goatsandsoda/>

trial, the President told a campaign rally, “Looks like by April, you know, in theory, when it gets a little warmer, it miraculously goes away. I hope that’s true.”²⁵ Throughout February, conservative media commentators followed the President in minimizing the danger and comparing COVID-19 to the seasonal flu or a cold.²⁶ For example, in late February, Rush Limbaugh told his listeners, “The coronavirus is the common cold, folks.”²⁷ Limbaugh also suggested that the virus was a hoax designed to undermine the President.²⁸

The downplaying of the threat was enabled, in part, by the numerous problems plaguing the CDC’s testing program.²⁹ Without adequate testing, neither health officials nor the public knew the degree to which the virus was spreading in the United States. Further, falsely reassured by the Trump Administration that the dangers were minimal, there was no sense of urgency within the federal government, the states, or private institutions to prepare by stockpiling personal protective equipment (PPE) and other critical supplies.³⁰

The missteps, misinformation, and political fighting continued even after the risks of COVID-19 were becoming too hard to deny. In late February, reports emerged about outbreaks on the Diamond Princess cruise ship docked off the coast of Japan;³¹ in Iran; South Korea; and Northern Italy.³² On February 25, Nancy Messonnier, director of CDC’s National Center

2020/04/15/835011346/a-timeline-of-coronavirus-comments-from-president-trump-and-who [https://perma.cc/QRL5-DXNC].

25. *Id.*

26. Jeremy W. Peters & Michael M. Grynbaum, *How Right-Wing Pundits Are Covering Coronavirus*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/us/politics/coronavirus-conservative-media.html> [https://perma.cc/G8HR-MZ4V].

27. Michael M. Grynbaum & Rachel Abrams, *Right-Wing Media Says Virus Fears Were Whipped Up to Hurt Trump*, N.Y. TIMES (Feb. 28, 2020), <https://www.nytimes.com/2020/02/28/business/media/coronavirus-right-wing-media.html> [https://perma.cc/5H9J-SKN2].

28. Allyson Chiu, *Rush Limbaugh on Coronavirus: ‘The Common Cold’ That’s Being ‘Weaponized’ Against Trump*, WASH. POST (Feb. 25, 2020, 2:43 AM), <https://www.washingtonpost.com/nation/2020/02/25/limbaugh-coronavirus-trump/> [https://perma.cc/MG3C-TMX70].

29. Eric C. Schneider, *Failing the Test – The Tragic Data Gap Undermining the U.S. Pandemic Response*, 383 NEW ENG. J. MED. 299, 300 (2020), <https://www.nejm.org/doi/pdf/10.1056/NEJMp2014836?articleTools=true> [https://perma.cc/JRQ3-CYFD].

30. Gavin Yamey & Gregg Gonsalves, *Donald Trump: A Political Determinant of COVID-19*, 369 BRIT. MED. J. 1643 (2020), <https://www.bmj.com/content/369/bmj.m1643> [https://perma.cc/MLZ5-UHFV].

31. Smriti Mallapaty, *What the Cruise-Ship Outbreaks Reveal About COVID-19*, NATURE (Mar. 26, 2020), <https://www.nature.com/articles/d41586-020-00885-w> [https://perma.cc/BH6T-7GTM].

32. Bill Chappell, *Where Coronavirus Is Now Causing Concern: Iran, Italy, South Korea*, NPR (Feb. 24, 2020, 1:21 PM), <https://www.npr.org/sections/goatsandsoda/2020/02/24/808893094/coronavirus-has-pandemic-potential-but-isn-t-there-yet-who-says> [https://perma.cc/M9AA-YP2V].

for Immunization and Respiratory Diseases, warned, “As more and more countries experience community spread, successful containment at our borders becomes harder and harder.”³³ She added that Americans had to be prepared because “[d]isruption to everyday life might be severe.”³⁴ Following that announcement, stock prices dropped dramatically as Americans began to recognize that they were at risk.³⁵ Still, on February 24, the President tweeted that the coronavirus is “very much under control in the USA.”³⁶

By early March, the mood began to change as outbreaks were reported first in Kirkland, Washington³⁷ and then New Rochelle, New York.³⁸ On March 11, after the NBA announced that it was postponing its season,³⁹ the President addressed the nation from the oval office and promised that “we are marshalling the full power of the federal government and the private sector to protect the American people.”⁴⁰ Stating that his “team is the best anywhere in the world,” he announced a ban on travel by non-U.S. nationals from Europe.⁴¹ Nevertheless, testing remained inadequate,

33. Megan Thielking & Helen Branswell, *CDC Expects ‘Community Spread’ of Coronavirus, as Top Official Warns Disruptions Could Be ‘Severe,’* STAT (Feb. 25, 2020), <https://www.statnews.com/2020/02/25/cdc-expects-community-spread-of-coronavirus-as-top-official-warns-disruptions-could-be-severe/> [https://perma.cc/V84W-4QJM].

34. *Id.*

35. Fred Imbert, Yun Li & Michael Sheetz, *Stocks Plunge for a Second Day as the Dow Lost More than 800 Points on Tuesday*, CNBC (Feb. 24, 2020, 6:04 PM), <https://www.cnbc.com/2020/02/24/stock-futures-are-flat-in-overnight-trading-following-the-dows-1000-point-rout.html> [https://perma.cc/T4ZC-X9GW].

36. Pippa Stevens, *Trump Is Reportedly Furious that the Stock Market Is Plunging on Coronavirus Fears*, CNBC (Feb. 25, 2020, 7:53 PM), <https://www.cnbc.com/2020/02/25/trump-is-reportedly-furious-with-the-plunging-stock-market-due-to-coronavirus-fears.html> [https://perma.cc/V7RF-Q66Q].

37. Will Stone, *Coronavirus Hit This Long-Term Care Facility Hard, but Moving Residents Isn’t Easy*, NPR (Mar. 14, 2020, 7:00 AM), <https://www.npr.org/2020/03/14/815606731/coronavirus-hit-this-long-term-care-facility-hard-but-moving-residents-isnt-easy> [https://perma.cc/F544-77NX].

38. Sarah Maslin Nir, *Coronavirus in N.Y.: Inside New Rochelle’s ‘Containment Area,’* N.Y. TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/nyregion/coronavirus-new-rochelle-containment.html> [https://perma.cc/XD69-BH6K].

39. Scott Cacciola & Sopan Deb, *N.B.A. Suspends Season After Player Tests Positive for Coronavirus*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/sports/basketball/nba-season-suspended-coronavirus.html> [https://perma.cc/HH7J-CQW7].

40. President Donald Trump, Remarks by President Trump in Address to the Nation (Mar. 11, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-address-nation> [https://perma.cc/N6SW-WSQU].

41. *Id.* There was great confusion about what this ban meant for Americans who were in Europe. Many rushed home, leading to long lines and chaos at U.S. Customs that may have helped to spread the virus. Greg Miller, Josh Dawsey & Aaron C. Davis,

PPE for health care workers was in short supply, and the nation lacked a coordinated response.⁴² Without one, states and local governments began to employ the limited tools available to them: SDOs that were designed to reduce the transmission of the virus by keeping people apart.⁴³

In contrast to isolation and quarantine, SDOs cast a broad net. The goal is to reduce interaction within the community, rather than prevent transmission by specific individuals who are known to have been infected or to have had close contact with infected individuals.⁴⁴ This approach, which was used by some U.S. communities during the 1918 influenza pandemic,⁴⁵ had been employed in different ways in China and Italy in response to COVID-19.⁴⁶ It was widely viewed by public health experts to be the only way of “flattening the curve,” namely, stopping the virus’s exponential growth in the absence of a vaccine, drug therapy, or the widespread testing and contact tracing that could permit more targeted isolation and quarantine orders.⁴⁷

On March 10, before the President’s address to the nation, New York Governor Andrew Cuomo imposed a one-mile containment zone around

One Final Viral Infusion: Trump’s Move to Block Travel from Europe Triggered Chaos and a Surge of Passengers from the Outbreak’s Center, WASH. POST (May 23, 2020, 8:14 AM), https://www.washingtonpost.com/world/national-security/one-final-viral-infusion-trumps-move-to-block-travel-from-europe-triggered-chaos-and-a-surge-of-passengers-from-the-outbreaks-center/2020/05/23/64836a00-962b-11ea-82b4-c8db161ff6e5_story.html [<https://perma.cc/P7PW-HP92>].

42. See Meghan L. Ranney, Valerie Griffeth & Ashish K. Jha, *Critical Supply Shortages — The Need for Ventilators and Personal Protective Equipment during the Covid-19 Pandemic*, NEW ENG. J. MED. (Apr. 30, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2006141> [<https://perma.cc/Z9DL-255C>].

43. See Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement - United States, March 1–May 31, 2020*, CENTERS FOR DISEASE CONTROL & PREVENTION (Sept. 4, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm> [<https://perma.cc/86G2-PYZX>] (noting that between March 1–May 31, 2020, “42 states and territories issued mandatory stay-at-home orders”).

44. See *id.*

45. Nancy Tomes, “*Destroyer and Teacher*”: *Managing the Masses During the 1918–1919 Influenza Pandemic*, 125 PUB. HEALTH REP. (SUPPLEMENT 3) 48, 49 (2010).

46. Chris Buckley & Javier C. Hernández, *China Expands Virus Lockdown, Encircling 35 Million*, N.Y. TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/world/asia/china-coronavirus-outbreak.html> [<https://perma.cc/WHT6-HUH8>]; *Coronavirus: Italy Extends Lockdown Amid Hopes of Turning Corner*, BBC NEWS (Mar. 31, 2020), <https://www.bbc.com/news/world-europe-52100153> [<https://perma.cc/LBG2-865L>].

47. Elisabeth Mahase, *Covid-19: Physical Distancing of at Least One Metre Is Linked to Large Reduction in Infection*, 369 BRIT. MED. J. 2211, 2211 (2020), <https://www.bmj.com/content/bmj/369/bmj.m2211.full.pdf> [<https://perma.cc/A5KK-8NRE>]; Edward R. Melnick & John P. A. Ioannidis, *Should Governments Continue Lockdown to Slow the Spread of Covid-19?*, 369 BRIT. MED. J. 1924, 1924–25 (2020), <https://www.bmj.com/content/bmj/369/bmj.m1924.full.pdf> [<https://perma.cc/JA3K-8GKL>].

a part of New Rochelle, New York, which was experiencing an outbreak.⁴⁸ Within the zone, schools and large facilities were closed, but some businesses such as grocery stores and delis were allowed to stay open and people were able to come and go.⁴⁹ Then, on March 13, Washington State closed all schools.⁵⁰ On March 16, health officials in seven San Francisco Bay area counties issued so-called shelter-in-place orders (often mistakenly referred to as “lockdowns”), requiring residents to stay at home except when engaging in essential work or essential activities.⁵¹ That same day, the Trump Administration urged the elderly and those at-risk to stay at home, and cautioned all Americans to avoid gatherings of more than ten people.⁵²

Over the course of the next few weeks, most of the country was subject to some type of SDO.⁵³ These varied widely in terms of what was and what was not covered. None were true “lockdowns” or broad sanitary cordons; they all provided exemptions for essential activities, usually including outdoor exercise.⁵⁴ Nevertheless, the orders shuttered many

48. Sarah Maslin Nir & Jesse McKinley, ‘*Containment Area*’ Is Ordered for New Rochelle Coronavirus Cluster, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/2020/03/10/nyregion/coronavirus-new-rochelle-containment-area.html> [<https://perma.cc/CNB4-SE9F>].

49. N.Y. Creates ‘*Containment Zone*’ Limiting Large Gatherings in New Rochelle, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/2020/03/10/nyregion/coronavirus-new-york-update.html> [<https://perma.cc/T4XU-T9XE>].

50. Hannah Furfaro et al., *Inslee Expands Coronavirus K–12 School Closure, 250-Person Gathering Ban, Across Washington*, SEATTLE TIMES (Mar. 13, 2020, 1:30 PM), <https://www.seattletimes.com/education/lab/inslee-announces-all-washington-k-12-schools-to-close-in-an-effort-to-slow-the-spread-of-coronavirus/> [<https://perma.cc/SP25-LEWQ>].

51. Olga R. Rodriguez & Janie Har, *San Francisco Bay Area Counties Issue Shelter-in-Place Order*, ABC NEWS (Mar. 16, 2020, 7:32 PM), <https://abcnews.go.com/Health/wireStory/bay-area-counties-california-order-shelter-place-69627648> [<https://perma.cc/RLX9-AGZU>].

52. Jonathan Lemire, Andrew Taylor & Jill Colvin, *Trump Urges Older Americans to Stay Home and Everyone to Avoid Groups of More than 10 as Part of New Coronavirus Guidelines*, CHI. TRIB. (Mar. 16, 2020, 2:59 PM), <https://www.chicagotribune.com/coronavirus/ct-nw-coronavirus-guidelines-trump-white-house-20200316-3bypmrckuvfzpi53gkwucera2u-story.html> [<https://perma.cc/U7ZE-PPHL>].

53. Seren Morris, *31 States Now Have Stay at Home Orders Amid the Coronavirus Outbreak*, NEWSWEEK (Mar. 31, 2020, 6:04 AM), <https://www.newsweek.com/us-states-stay-home-social-distancing-order-coronavirus-covid19-outbreak-1495205> [<https://perma.cc/D8YH-26X9>].

54. For a review of these orders, see *State Data and Policy Actions to Address Coronavirus*, KAISER FAM. FOUND. (Aug. 3, 2020), <https://www.kff.org/coronavirus->

businesses and, with fear of the virus itself, helped to cause significant economic and social pain.⁵⁵

At least initially, public support for SDOs was widespread.⁵⁶ Recent studies have also concluded that the initial SDOs saved many lives,⁵⁷ and that many more might have been saved if the orders had been imposed earlier.⁵⁸ Still, by the end of May, the number of confirmed fatalities in the United States exceeded 100,000.⁵⁹ Although data remains incomplete, communities of color suffered disproportionately with African Americans dying at a rate twice their share of the population.⁶⁰ In addition, so-called blue states were affected at least in the early months far more significantly than so-called red states.⁶¹

Whether or not these disparities played a role, the political consensus about SDOs did not last long. On March 24, President Trump stated that the country should be “opened up . . . by Easter.”⁶² That did not happen, but over the next few weeks, the President began to talk more about opening

covid-19/issue-brief/state-data-and-policy-actions-to-address-coronavirus/ [https://perma.cc/A55W-VT54].

55. Michael H. Keller, Steve Eder & Karl Russell, *A Striking Disconnect on the Virus: Economic Pain with Little Illness*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/interactive/2020/06/06/business/economy/high-unemployment-few-coronavirus-cases.html> [https://perma.cc/UBZ6-JL9Y].

56. Bill Chappell, *8 in 10 Americans Support COVID-19 Shutdown, Kaiser Health Poll Finds*, NPR (Apr. 23, 2020, 4:46 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/23/843175656/8-in-10-americans-support-covid-19-shutdown-kaiser-health-poll-finds> [https://perma.cc/5ZGC-DHGY].

57. Solomon Hsiang et al., *The Effect of Large-Scale Anti-Contagion Policies on the COVID-19 Pandemic*, 584 NATURE 262, 262, 265 (2020), <https://www.nature.com/articles/s41586-020-2404-8> [https://perma.cc/HC6Q-ULRQ].

58. James Glanz & Campbell Robertson, *Lockdown Delays Cost at Least 36,000 Lives, Data Show*, N.Y. TIMES (May 20, 2020), <https://www.nytimes.com/2020/05/20/us/coronavirus-distancing-deaths.html> [https://perma.cc/KG8F-J4PS].

59. *United States Coronavirus (COVID-19) Death Toll Surpasses 100,000*, CENTERS FOR DISEASE CONTROL & PREVENTION (May 28, 2020), <https://www.cdc.gov/media/releases/2020/s0528-coronavirus-death-toll.html> [https://perma.cc/7JU9-LHP2].

60. Maria Godoy & Daniel Wood, *What Do Coronavirus Racial Disparities Look Like State by State?*, NPR (May 30, 2020, 6:00 AM), <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state> [https://perma.cc/K4S9-DHHJ].

61. Jennifer Medina & Robert Gebeloff, *The Coronavirus Is Deadliest Where Democrats Live*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/us/politics/coronavirus-red-blue-states.html> [https://perma.cc/GF5G-D3BS].

62. Brett Samuels & Morgan Chalfant, *Trump Says He Hopes to Have Economy Reopen by Easter*, HILL (Mar. 24, 2020, 1:32 PM), <https://thehill.com/homenews/administration/489251-trump-says-he-hopes-to-have-economy-reopen-by-easter> [https://perma.cc/C399-7UJT].

the country than controlling the virus.⁶³ Moreover, protesters, some heavily armed, began to demand that their states reopen.⁶⁴ On April 17, President Trump lent his support, tweeting “Liberate Michigan!” and “Liberate Minnesota!”⁶⁵ A few days later, Attorney General William Barr issued a memorandum directing “United States Attorneys to also be on the lookout for state and local directives that could be violating the constitutional rights and civil liberties of individual citizens.”⁶⁶ The memorandum went on to warn that “even in times of emergency, when reasonable and temporary restrictions are placed on rights, the First Amendment and federal statutory law prohibit discrimination against religious institutions and religious believers.”⁶⁷

As the Trump Administration began to shift its tone, so too did some governors. On April 30, Georgia Governor Kemp announced that his state would reopen, albeit with some social distancing measures.⁶⁸ Florida Governor Ron DeSantis followed shortly thereafter.⁶⁹ And throughout the country, behavior was changing. According to Gallup, 68% of Americans reported that they were staying at home and isolating or mostly isolating themselves from people outside of their family between April 20 and 26,

63. Peter Baker & Michael D. Shear, *Trump Says States Can Start Reopening While Acknowledging the Decision Is Theirs*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/us/politics/coronavirus-trump-guidelines.html> [<https://perma.cc/2FJC-6U7M>].

64. *Coronavirus: Armed Protesters Enter Michigan Statehouse*, BBC (May 1, 2020), <https://www.bbc.com/news/world-us-canada-52496514> [<https://perma.cc/KWN5-7PVH>].

65. See Shear & Mervosh, *supra* note 10.

66. Memorandum from Attorney Gen. William P. Barr to Assistant Attorney Gen. for Civil Rights & All U.S. Attorneys 1 (Apr. 27, 2020), <https://www.washingtonpost.com/context/attorney-general-william-p-barr-s-memo-balancing-public-safety-with-the-preservation-of-civil-rights/749fc86a> [<https://perma.cc/TN85-CGLL>].

67. *Id.*

68. Press Release, Office of the Governor, Gov. Kemp Extends Protections for Vulnerable Georgians, Releases Guidance for Businesses (Apr. 30, 2020), <https://gov.georgia.gov/press-releases/2020-04-30/gov-kemp-extends-protections-vulnerable-georgians-releases-guidance> [<https://perma.cc/2XXP-L4SG>].

69. Elliott C. McLaughlin et al., *Florida Will Start to Reopen May 4, but for Now Miami-Dade and Two Other Counties Won't Be Included*, CNN (Apr. 29, 2020, 10:10 PM), <https://www.cnn.com/2020/04/29/us/florida-reopening-coronavirus/index.html> [<https://perma.cc/T5WU-Q7CP>]. By late June, many of the states that had reopened first were experiencing a new surge of cases, and some governors were rolling back some parts of their reopenings. See Talal Ansari, Stephanie Armour & Alex Leary, *Texas Governor Rolls Back Reopening as U.S. Coronavirus Cases Hit Record*, WALL ST. J. (June 26, 2020, 9:01 PM), <https://www.wsj.com/articles/coronavirus-latest-news-06-26-2020-11593159630> [<https://perma.cc/XR3K-PDUS>].

but only 58% of people reported doing so between May 4 and 10.⁷⁰ Further, attitudes towards the virus began to diverge significantly along partisan lines. Republicans were less likely than Democrats to isolate themselves or wear a mask⁷¹—which the President pointedly chose not to don in public.⁷² Explaining these divisions, Frank Newport wrote:

Americans therefore look for cues to help guide their formation of opinions about these issues (and to come up with answers when asked about the virus in surveys). Americans’ underlying political identity provides a guidepost for their thinking, pointing them to cues provided by public comments and stances of their party’s political influencers and thought leaders. While there has been some political cooperation across party lines relating to the virus, including the bipartisan passage of major spending legislation aimed at helping mitigate the economic impact of virus containment efforts (for which there was also bipartisan public support), there has also been predictable political division and rancor.⁷³

This was the climate in which the early COVID-19 litigation took place.

III. THE LEGACY OF *JACOBSON V. MASSACHUSETTS*

Jacobson v. Massachusetts is undoubtedly the Supreme Court’s leading public health case.⁷⁴ Justice John Marshall Harlan’s opinion for the Court rejecting a Fourteenth Amendment challenge to a Cambridge, Massachusetts law that fined individuals who refused to be vaccinated for smallpox famously proclaimed the scope and importance of state public health powers: “Upon 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.”⁷⁵ To safeguard that end, the Court explained,

70. *Coronavirus Pandemic*, GALLUP, <https://news.gallup.com/poll/308222/coronavirus-pandemic.aspx> [<https://perma.cc/7F83-GMPX>].

71. Frank Newport, *The Partisan Gap in Views of the Coronavirus*, GALLUP (May 15, 2020), <https://news.gallup.com/opinion/polling-matters/311087/partisan-gap-views-coronavirus.aspx> [<https://perma.cc/F6PA-9RZL>].

72. Kevin Liptak, *Trump Says He Won’t Wear a Mask in Front of Cameras*, CNN (May 21, 2020, 5:55 PM), <https://www.cnn.com/2020/05/21/politics/donald-trump-michigan-masks/index.html> [<https://perma.cc/CY5V-T4F2>].

73. Newport, *supra* note 71.

74. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The literature on *Jacobson* is voluminous. See, e.g., LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 121–27 (3d ed. 2016); Wendy K. Mariner, George J. Annas & Leonard H. Glantz, *Jacobson v. Massachusetts: It’s Not Your Great-Great Grandfather’s Public Health Law*, 95 AM. J. PUB. HEALTH 581 (2005); Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117 (2020) [hereinafter Parmet, *Rediscovering Jacobson*]; Wendy E. Parmet, Richard A. Goodman & Amy Farber, *Individual Rights Versus the Public’s Health—100 Years After Jacobson v. Massachusetts*, 352 NEW ENG. J. MED. 652 (2005).

75. *Jacobson*, 197 U.S. at 27.

states may delegate their public health powers to boards of health.⁷⁶ The Court further exclaimed that judicial review should be deferential to a board's efforts to protect the public from an epidemic disease.⁷⁷

Jacobson, however, also recognized some important limits to state public health powers. First, applying traditional police power jurisprudence,⁷⁸ Justice Harlan made clear that public health laws must be "reasonable" and bear a "real or substantial relation" to their goal.⁷⁹ Second, he explained that courts should intervene if a state law was "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."⁸⁰ Finally, he stated that courts should step in if a state exercised its police powers in a manner that was "so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression," or when, due to a personal—presumably health—reason, the law would "be cruel and inhuman in the last degree."⁸¹

Importantly, although Henning Jacobson, the appellant in *Jacobson*, was a preacher who appeared to have religious objections to vaccination, the case was decided before the Supreme Court had incorporated the First Amendment into the Fourteenth Amendment.⁸² The Court, therefore, had no occasion to consider a free exercise challenge to state public health laws. The case was also decided before the Court had developed the concept of strict scrutiny⁸³ or varied tiers of review applicable for different constitutional claims.⁸⁴ Rather, the Court analyzed Jacobson's defense under the prevailing Fourteenth Amendment police power jurisprudence, which focused largely on the *reasonableness* of the state's law.⁸⁵ In so doing, the Court stressed the need for deference to the state while also opening the door to constitutional challenges to laws that limit individual bodily integrity.⁸⁶

76. *Id.*

77. *Id.* at 31.

78. Parmet, *Rediscovering Jacobson*, *supra* note 74, at 122.

79. *Jacobson*, 197 U.S. at 29, 31.

80. *Id.* at 31.

81. *Id.* at 38–39.

82. Parmet, *Rediscovering Jacobson*, *supra* note 74, at 121.

83. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

84. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing intermediate scrutiny for gender classifications).

85. *Jacobson*, 197 U.S. at 29, 38.

86. *Id.* at 38. For a further discussion of *Jacobson*, see Parmet, *Rediscovering Jacobson*, *supra* note 74.

Despite its archaic doctrine, in the years leading up to COVID-19, courts continued to cite *Jacobson*.⁸⁷ Most often, courts treated it as controlling authority in cases affirming state vaccination laws.⁸⁸ A federal district court in New Jersey in 2016 also cited *Jacobson* in support of its decision to dismiss a due process challenge to an Ebola quarantine based on qualified immunity.⁸⁹ Yet, courts have also cited *Jacobson* in support of individual autonomy and as establishing limits on the state’s public health powers.⁹⁰ Nevertheless, until the spring of 2020, no court of record in the last century had occasion to consider *Jacobson*’s applicability to widespread SDOs. Indeed, prior to last spring, few courts had fully grappled with how to reconcile *Jacobson* with contemporary constitutional doctrine outside of the context of vaccination laws.⁹¹

Yet, that was precisely the question that dozens of courts faced in the spring of 2020. Presented with a plethora of constitutional challenges to state emergency orders, federal and state courts were forced to consider how the 115-year-old *Jacobson* relates to contemporary constitutional claims. In so doing, courts had to decide not only how to reconcile the many messages of *Jacobson* with current notions of heightened scrutiny, but also the appropriate role for courts during a public health emergency. The initial response suggests that although courts uniformly recognize public health as an important state function, they remain divided as to how much deference to afford state public health emergency laws, as well as over how to reconcile that deference with contemporary doctrinal approaches, most notably the use of strict scrutiny. Still, some of the early decisions offered the glimmers of a reconciliation.

87. For a discussion of some of the reasons why *Jacobson* remained “good law,” when other decisions from its era have not fared so well, see Parmet, *Rediscovering Jacobson*, *supra* note 74.

88. *E.g.*, Phillips *ex rel.* B.P. v. City of New York, 775 F.3d 538, 542 (2d Cir. 2015) (citing *Jacobson* as foreclosing plaintiffs’ substantive due process claim); Whitlow v. California, 203 F. Supp. 3d 1079, 1083 (S.D. Cal. 2016) (citing *Jacobson* in rejecting free exercise challenge to state vaccination law); Brown v. Smith, 235 Cal. Rptr. 3d 218, 220 (Cal. Ct. App. 2018) (citing *Jacobson* affirming abolition of religious exemption to state vaccine law).

89. *Hickox v. Christie*, 205 F. Supp. 3d 579, 591 (D.N.J. 2016).

90. See Parmet, *Rediscovering Jacobson*, *supra* note 74, at 127–28 (citing cases).

91. For example, the court in *Hickox v. Christie*, a case challenging an Ebola quarantine, cited to *Jacobson* and then concluded that its dicta about the reasonableness of quarantine laws was apt. *Hickox*, 205 F. Supp. 3d at 593. But when it turned to a discussion of the plaintiff’s substantive and procedural due process claims, the court did not discuss *Jacobson*. See *id.* at 597–603. The court did, however, conclude that the applicability of contemporary constitutional standards to quarantine was not sufficiently well-established to enable the plaintiff to escape qualified immunity. *Id.* at 599.

IV. THE COVID-19 DECISIONS

As of June 10, 2020, Westlaw's database included at least fifty-three judicial decisions issued between March 20, 2020 and May 29, 2020—when the Supreme Court issued its order in *South Bay United Pentecostal Church v. Newsom*—that cited to *Jacobson* either in a majority opinion or in a separate concurring or dissenting opinion.⁹² These opinions were from state and federal courts at the trial and appellate level. Many of the published decisions stemmed from the same litigation. For purposes of the analysis below, each such decision, even when more than one decision arose from the same litigation, is counted separately. Further, because this Article is more interested in looking at how courts responded during the early stages of the pandemic than determining what the law *is*, the discussion includes decisions that were or may ultimately be reversed on appeal. The few cases that considered challenges to SDOs but did not cite to *Jacobson* were not reviewed.⁹³ Also not included are the many COVID-related cases that did not discuss SDOs, for example, the cases challenging conditions in prisons.

The opinions citing *Jacobson* discussed a wide range of jurisdictional, statutory, and constitutional claims, most at a preliminary stage—typically relating to a motion for a temporary restraining order (TRO) or preliminary injunction—or a request for interlocutory review of a lower court's decision.⁹⁴

92. See *infra* Appendix A. Searches were conducted in the Westlaw Edge database between June 1–10, 2020. Beginning at *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), cases listed in the “Citing References” tab were reviewed, limiting the date range to all dates after March 19, 2020. This was followed by a keyword search using the terms “COVID” and “Jacobson,” again limiting the date range to all dates after March 19, 2020. Cases were then organized according to the primary claims underlying the various plaintiffs’ challenges to SDOs. Without question, other court decisions, not included in Westlaw, may have cited to or considered *Jacobson*. Moreover, some cases that were decided in the period in question appear to have been added to the database after the research was completed. Also, some courts ruled upon constitutional claims without citing to *Jacobson*. See, e.g., *Preterm-Cleveland v. Attorney Gen. of Ohio*, No. 1:19-cv-00360, 2020 WL 1932851 (S.D. Ohio Mar. 30, 2020).

93. Many other cases touch upon the legal issues related to COVID-19 in a variety of settings. By limiting the analysis to *Jacobson* cases, this discussion focuses on decisions that put the issue of the relationship between state public health powers and constitutional rights front and center.

94. For a discussion of some of the different issues raised by these cases, see James G. Hodge, Jr. et al., *Legal “Tug-of-Wars” During the COVID-19 Pandemic: Public Health v. Economic Prosperity* (June 9, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3623516> [<https://perma.cc/8RW3-7CM2>].

Not surprisingly, many opinions discussed multiple claims. Counting only the claim that the court focused primarily on, the most common constitutional challenges were: free exercise of religion, nineteen cases; abortion rights, sixteen cases; and freedom of speech, assembly, or both, seven cases.⁹⁵ Other cases raised Second Amendment, procedural due process, substantive due process, and privileges and immunities claims.⁹⁶ Perhaps the most contentious case, the Wisconsin Supreme Court's decision in *Wisconsin Legislature v. Palm*, was decided primarily on state statutory grounds, although the court's analysis was driven in part by constitutional concerns about separation of powers and individual liberty.⁹⁷ Several other cases only discussed jurisdictional or procedural issues, usually relating to the availability of mandamus or interlocutory relief.⁹⁸

The discussion below looks more closely at how courts that discussed *Jacobson* analyzed abortion, free exercise, and free speech claims. These claims were chosen because they constituted the largest categories of cases citing *Jacobson* during the time period studied. They also offer insight into how courts analyzed challenges to public health emergency powers based on specific, established, fundamental constitutional rights for which some form of heightened scrutiny might otherwise be applied. Coincidentally, all of these cases were decided by federal courts.

The discussion below is influenced by population-based legal analysis, an approach to legal analysis and theory that I have described elsewhere.⁹⁹ In brief, this approach posits (1) that the protection of public health is a legal norm, in other words, a goal that law seeks to advance, (2) that legal analysis should incorporate public health's population perspective, and (3) in doing so, courts should respect the empirical methodologies of public health.¹⁰⁰ Importantly, population-based legal analysis does not suggest that public health powers should always prevail. Rather, it requires courts to take population health, and evidence regarding it, seriously.¹⁰¹ In some cases, this may lead a court to strike an order undertaken in the name of public health. It also pushes courts to see how respect for human rights can often support, rather than undermine, population health.

95. See *infra* Appendix A.

96. See *infra* Appendix A.

97. See *Wis. Legislature v. Palm*, 942 N.W.2d 900, 912–18 (Wis. 2020).

98. E.g., *In re Abbott (Abbott II)*, 800 F. App'x 293, 296 (5th Cir. 2020) (per curiam) (granting emergency stay of district court order pending review of request for writ of mandamus).

99. See generally WENDY E. PARMET, *POPULATIONS, PUBLIC HEALTH, AND THE LAW* (2009) (explaining population-based legal analysis and how it incorporates public health methodology into legal reasoning).

100. *Id.* at 51–59.

101. *Id.* at 52.

Before looking more closely at the specific categories of cases, a few additional, general observations are in order. First, as noted above, all of these cases were decided by federal courts. Not surprisingly, the cases that focused on state statutory claims were more likely to be decided by state courts.¹⁰²

Second, as population-based legal analysis would suggest, all of the courts accepted that COVID-19 constituted an emergency and that controlling it was an important or compelling state interest.¹⁰³ This may seem unremarkable given that the virus killed over 100,000 Americans in three months.¹⁰⁴ Nevertheless, in light of the frequent downplaying of the virus by the President and many of his supporters,¹⁰⁵ it is worth emphasizing that even the courts that enjoined state SDOs accepted the seriousness of the situation and the weightiness of the state's interest in combatting the pandemic. For example, in the first reported case to discuss *Jacobson* and enjoin a state order, a federal court in Oklahoma stated in early April:

There is no dispute that the State of Oklahoma—like governments across the globe—is facing a health crisis in the COVID-19 pandemic that requires, and will continue for an indeterminate time to require, emergency measures. In this effort to secure the health and safety of the public, the State has broad power to act and even, temporarily, impose requirements that intrude upon the liberty of its citizens.¹⁰⁶

Several weeks later, while affirming a preliminary injunction of Kentucky's SDO as applied to plaintiffs who wished to worship in person, the Sixth Circuit stated that “no one contests that the Governor has a *compelling interest* in preventing the spread of a novel, highly contagious, sometimes fatal virus. The Governor has plenty of reasons to try and limit this contagion”¹⁰⁷

102. See, e.g., *Palm*, 942 N.W.2d 900; *Kelly v. Legislative Coordinating Council*, 460 P.3d 832 (Kan. 2020).

103. See, e.g., *Palm*, 942 N.W.2d at 910–11; *Kelly*, 460 P.3d at 838.

104. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (July 20, 2020, 8:56 PM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [<https://perma.cc/M3XQ-5HZB>].

105. See *supra* notes 23–28 and accompanying text.

106. *S. Wind Women's Ctr. v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at *1 (W.D. Okla. Apr. 6, 2020).

107. *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020) (emphasis added).

Third, despite the plethora of misinformation circulating about the virus—some spread by the President himself¹⁰⁸—none of the courts appeared to rely on dubious claims or conspiracy-fed misinformation. As will be discussed below, courts varied in the degree to which public health evidence informed their decisions. However, courts did not adopt clearly false information or rely on highly questionable sources.

Fourth, although courts consistently recognized the public health crisis, the nature of the claims and the approach used by courts appeared to evolve over the ten weeks studied. In late March and the first few days of April, most of the cases decided concerned state bans on abortion during the state of emergency.¹⁰⁹ Although the courts were divided in these cases, the abortion cases produced the strongest calls for broad deference to state emergency powers.¹¹⁰ In contrast, the first free speech claim discussing *Jacobson* was not decided until early May.¹¹¹ Here, however, there was no division: all of the courts rejected the free speech claims.¹¹²

The first free exercise cases were decided in the second week of April but the majority—fourteen out of nineteen—were decided in May.¹¹³ As with the abortion cases, the courts were divided. While most courts upheld the state orders, in two cases the U.S. Courts of Appeals for the Sixth Circuit ruled for the plaintiffs at least at the preliminary stage.¹¹⁴

Finally, few of the courts reviewing the constitutionality of state orders discussed the social justice implications of SDOs. Although some courts noted the disparate impact on religious observers,¹¹⁵ none cited the striking racial or socioeconomic disparities laid bare by the pandemic.¹¹⁶

108. Christian Paz, *All the President's Lies About the Coronavirus*, ATLANTIC (Aug. 31, 2020), <https://www.theatlantic.com/politics/archive/2020/08/trumps-lies-about-coronavirus/608647/> [<https://perma.cc/8MW3-JVDS>].

109. See *infra* Appendix A.

110. See *infra* notes 139–53 and accompanying text.

111. See *infra* Appendix A.

112. See *infra* notes 177–92 and accompanying text.

113. See *infra* Appendix A.

114. See *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) (per curiam) (preliminary injunction granted); *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020).

115. See *infra* notes 197–219 and accompanying text.

116. One court did discuss the potential disparate socioeconomic impact of the state SDO. See *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 927–28 (6th Cir. 2020) (finding irreparable harm for the plaintiffs by pointing to the harm to “low-income women who disproportionately seek out abortions and who have been disproportionately harmed by the economic downturn generated in COVID-19’s wake”). For a discussion of the disparities created by the pandemic the responses to it, see, for example, Christopher J. Brooks, *40% of Black-Owned Businesses Not Expected to Survive Coronavirus*, CBS NEWS (June 22, 2020, 12:37 PM), <https://www.cbsnews.com/news/black-owned-businesses-close-thousands-coronavirus-pandemic/> [<https://perma.cc/AG78-52AT>]; Samantha Artiga, Rachel Garfield & Kendal Orgera, *Communities of Color at Higher Risk for Health and*

Nor did any court consider whether the state's limitation on liberty created any obligation to provide any type of assistance to the plaintiffs.

To be sure, the absence of such discussions is not surprising.¹¹⁷ U.S. constitutional law primarily protects individuals from government-imposed limitations on their activities. As Chief Justice Rehnquist stated in *DeShaney v. Winnebago County Department of Social Services*, the “purpose [of the Fourteenth Amendment] was to protect the people from the State The Framers were content to leave the extent of governmental obligation . . . to the democratic political process.”¹¹⁸ This understanding of the Constitution helps to create an asymmetry clearly evident in the COVID-19 cases. Despite treating the states' interest as important—if not compelling—the cases studied did not recognize a right to be healthy or to have the economic wherewithal to maintain social distancing.

A. The Abortion Cases

The first constitutional challenges of state emergency orders related to abortion.¹¹⁹ In late March, in an effort to reduce stress on hospitals and preserve PPE, many states banned nonessential health care services, including nonemergency surgeries.¹²⁰ According to the Center for Reproductive Rights, officials in eight states construed these orders to apply to abortions

Economic Challenges Due to COVID-19, KAISER FAM. FOUND. (Apr. 7, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/communities-of-color-at-higher-risk-for-health-and-economic-challenges-due-to-covid-19/> [<https://perma.cc/L84T-QJ8J>]; Joshua Kaplan & Benjamin Hardy, *Early Data Shows Black People Are Being Disproportionately Arrested for Social Distancing Violations*, PROPUBLICA (May 8, 2020, 6:22 PM), <https://www.propublica.org/article/in-some-of-ohios-most-populous-areas-black-people-were-at-least-4-times-as-likely-to-be-charged-with-stay-at-home-violations-as-whites> [<https://perma.cc/4YG5-X3AL>].

117. See Matthew M. Kavanaugh & Renu Singh, *Democracy, Capacity, and Coercion in Pandemic Response—COVID 19 in Comparative Political Perspective*, HEALTH POL., POL'Y & L. (May 28, 2020) (unpublished manuscript at 2, 12, 14), <https://read.dukeupress.edu/jhpl/article-abstract/doi/10.1215/03616878-8641530/165294/Democracy-Capacity-and-Coercion-in-Pandemic?redirectedFrom=fulltext> [<https://perma.cc/2J2P-YNSU>]; Eric Posner, *You Can Sue to Stop Lockdowns, But You Can't Sue to Get Them. That's Dangerous.*, WASH. POST (May 4, 2020, 3:00 AM), https://www.washingtonpost.com/outlook/lockdown-legal-challenges-constitution/2020/05/03/389af052-8aff-11ea-9dfd-990f9d9c71fc_story.html [<https://perma.cc/3B83-V29Q>].

118. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

119. See *infra* Appendix A.

120. See Eric Oliver, *35 States Canceling Elective Procedures*, BECKER'S ASC REV. (Apr. 10, 2020), <https://www.beckersasc.com/asc-transactions-and-valuation-issues/35-states-canceling-elective-procedures.html> [<https://perma.cc/9PLC-KZ56>].

even though abortions are time-sensitive, and prenatal care and childbirth also require medical resources.¹²¹

Not surprisingly, supporters of abortion rights went to court.¹²² Some simply amended complaints and brought new motions for TROs in ongoing challenges to state abortion restrictions.¹²³

The COVID-19 abortion cases were among the first decisions to discuss *Jacobson*.¹²⁴ The rulings forced courts to reconcile *Jacobson*'s recognition that states have broad powers to limit the liberty of citizens during a public health emergency with *Planned Parenthood of Southeastern Pennsylvania v. Casey*'s undue burden standard¹²⁵ and the Supreme Court's more recent decision in *Whole Woman's Health v. Hellerstedt*.¹²⁶ In doing so, courts had to consider the impact of a pandemic on an already highly charged area of the law¹²⁷ in which preexisting doctrines are often applied in an "exceptional" manner.¹²⁸ Further, in contrast to the free speech and free exercise cases discussed below, public health claims were made on both sides of the ledger. The states cited the need to protect the public's health by reducing use of personal protective gear during the pandemic, and the plaintiffs argued that the postponement of abortions could endanger the health of women seeking an abortion.¹²⁹

While seeing *Jacobson* as relevant, nine out of the fifteen decisions that reached the merits granted or affirmed at least partial relief for the

121. *Center Lawsuits to Protect Abortion Access during the COVID-19 Pandemic Are Working*, CTR. FOR REPRODUCTIVE RTS. (May 5, 2020), <https://reproductiverights.org/story/center-files-emergency-lawsuit-texas-protect-essential-abortion-access-during-pandemic> [<https://perma.cc/C4AW-9GEM>].

122. *Id.*

123. *See id.*

124. *See infra* Appendix A.

125. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874, 876–79 (1992).

126. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300, 2309 (2016). The cases under review were decided before the Supreme Court issued its decision in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020), striking a Louisiana abortion regulation similar to that struck in *Hellerstedt*.

127. Indeed, the COVID-19 abortion cases were decided even as parties and courts waited for the Supreme Court to decide a major, pre-COVID-19 abortion case. *June Med. Servs.*, 140 S. Ct. 2103 (oral arguments heard Mar. 4, 2020).

128. *See, e.g.*, Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1049–56 (2014); Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1176–77, 1190–91 (2014); *see also* Nicholas P. Terry, *Abortion Exceptionalism During COVID-19*, WEEK IN HEALTH L., <https://blog.petrieflom.law.harvard.edu/2020/04/10/new-twihl-182-abortion-exceptionalism-during-covid-19/> [<https://perma.cc/R2S9-G4AQ>].

129. *See* Yana Rodgers, *Delaying 'Nonessential' Abortions During Coronavirus Crisis Endangers Women's Health and Financial Future*, CONVERSATION (Apr. 1, 2020, 6:14 PM), <https://theconversation.com/delaying-nonessential-abortions-during-coronavirus-crisis-endangers-womens-health-and-financial-future-135288> [<https://perma.cc/Y7RP-SCM2>].

plaintiffs.¹³⁰ These decisions cited *Jacobson*, but viewed the right to an abortion as a fundamental right falling within *Jacobson*'s admonition that courts should strike "plain, palpable invasion[s]" of fundamental rights protected by law.¹³¹ As Judge Kristine Baker from the Eastern District of Arkansas said in *Little Rock Family Planning Services v. Rutledge*, "it is the duty of the courts" to judge a "plain, palpable invasion of rights."¹³²

After quoting or citing *Jacobson*, the courts that granted relief to the plaintiffs tended to engage in a relatively granular analysis of the orders, looking at their application to medication abortions¹³³ or to women whose pregnancies would be past the state's limit for abortions at the duration of the SDO.¹³⁴ The courts that granted relief found that state bans in these circumstances placed an undue burden on the right to an abortion because they could either harm a woman's health,¹³⁵ could not be justified by the state's interest in preserving access to PPE, or both.¹³⁶

Although most of the decisions provided at least limited relief for the plaintiffs, two courts of appeals rejected or narrowed relief that had been granted by the district court.¹³⁷ These decisions provided some of the broadest readings of the deference demanded by *Jacobson* and, as discussed below, were widely cited and relied upon in free speech and free exercise cases,¹³⁸ suggesting that the "exceptional" jurisprudence relating to abortion may have helped to set the tone for the COVID-19 cases more generally.

The most notable decisions were from the Fifth Circuit in *In re Abbott*.¹³⁹ In this challenge to Texas's COVID-19 based abortion ban, the Fifth Circuit

130. See *infra* Appendix A.

131. E.g., *S. Wind Women's Ctr. v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at *1 (W.D. Okla. Apr. 6, 2020) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

132. *Little Rock Family Planning Services v. Rutledge*, No. 4:19-cv-00449-KGB, 2020 WL 1862830, at *9 (E.D. Ark. Apr. 14, 2020) (quoting *Jacobson*, 197 U.S. 11, 31 (1905)).

133. *S. Wind Women's Ctr.*, 2020 WL 1677094, at *3; *Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323-LY, 2020 WL 1815587, at *6 (W.D. Tex. Apr. 9, 2020), *vacated in part sub nom. In re Abbott (Abbott IV)*, 956 F.3d 696 (5th Cir. 2020).

134. *S. Wind Women's Ctr.*, 2020 WL 1932900, at *7.

135. See *Preterm-Cleveland v. Attorney Gen. of Ohio*, No. 1:19-cv-00360, 2020 WL 1957173, at *10 (S.D. Ohio Apr. 23, 2020).

136. See *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1182 (11th Cir. 2020).

137. See *infra* notes 138–53 and accompanying text.

138. See *infra* notes 178–92; 202–31 and accompanying text.

139. *In re Abbott (Abbott I)*, 954 F.3d 772 (5th Cir. 2020); *In re Abbott (Abbott II)*, 800 F. App'x 293 (5th Cir. 2020) (per curiam); *In re Abbott (Abbott III)*, 809 F. App'x 200 (5th Cir. 2020) (per curiam); *In re Abbott (Abbott IV)*, 956 F.3d 696 (5th Cir. 2020). For a discussion of the Fifth Circuit's initial *Abbott* decision, see Lindsay F. Wiley &

issued four decisions during the time period under study, three of which stayed district court orders. Without going through the full procedural drama, what is notable and has been influential about *In re Abbott* is its strong reading of what can be called *Jacobson* deference. In its first decision on April 7, the court, in an opinion by Judge Stuart Kyle Duncan, explained that *Jacobson* created a “framework” for reviewing public health emergency measures,¹⁴⁰ under which “review is ‘only’ available ‘if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has *no real or substantial relation to those objects*, or is *beyond all question, a plain, palpable invasion of rights secured by the fundamental law.*’”¹⁴¹ While recognizing that *Jacobson* did offer some additional circumstances in which courts could intervene, the Fifth Circuit was insistent: “The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some ‘real or substantial relation’ to the public health crisis and are not ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law.’”¹⁴²

In reaching this “bottom line,” the Fifth Circuit did not consider that *Jacobson* predated contemporary notions of strict scrutiny. Nor did the court grapple with the fact that *Jacobson* did not deal with a fundamental constitutional right. Instead, the Fifth Circuit stated that “*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency.”¹⁴³ Thus the court implied that the standard for determining if a constitutional right was violated was altered during a pandemic. No longer was heightened scrutiny applied even for fundamental rights, rather a challenge to a state public health emergency law was to be upheld only if the violation of constitutional rights was evident “*beyond all question.*”¹⁴⁴ So stated, the Fifth Circuit concluded that Texas’s abortion ban was permissible under *Casey* because it was at most a temporary postponement of nonessential procedures.¹⁴⁵

In a later encounter with the case, the Fifth Circuit backed away a bit. While holding to its original framework, on April 13, the circuit panel

Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARV. L. REV. F. 180–94 (2020).

140. As the Author has written elsewhere, *Jacobson* should not be read as limited to emergency orders. See Parmet, *Rediscovering Jacobson*, *supra* note 74, at 130–31.

141. *Abbott I*, 954 F.3d at 783–84 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

142. *Id.*

143. *Id.* at 786.

144. *Id.* at 784 (quoting *Jacobson*, 197 U.S. at 31).

145. See *id.* at 789–91.

rejected the government’s request for a writ of mandamus to stay the state’s order as it relates to medication abortions.¹⁴⁶ But on April 20, the appellate court again struck the lower court’s TRO, including with respect to medication abortions, criticizing the trial court for not following its framework, and stressing that the state’s order needed to be upheld unless the constitutional violation was “beyond question.”¹⁴⁷

The Fifth Circuit’s approach has been cited by many courts, including in First Amendment cases.¹⁴⁸ It was also adopted by the Eighth Circuit, which on April 22, in *In re Rutledge*, issued a writ of mandamus to strike a TRO barring Arkansas’s application of its COVID-19 emergency order to abortion.¹⁴⁹ Emphasizing the “unprecedented health crisis,”¹⁵⁰ the court stated that “while constitutional rights do not disappear during a public health crisis,” they may be restrained.¹⁵¹ Following *Abbott*, the court then explained that *Jacobson* had established a “two-part framework” under which challenges to orders issued “in the context of a public health crisis” are only “susceptible to constitutional challenge” if they have “no real or substantial relation” to public health or are “beyond all question, a plain, palpable invasion of rights secured by fundamental law.”¹⁵² Because the state’s order was limited in time, and the court could not say that the order did not have a real relation to public health, the Eighth Circuit struck the TRO. Notably, like the Fifth Circuit, the Eighth Circuit inserted the word “only” before quoting *Jacobson*, ignoring *Jacobson*’s reliance on the “reasonableness” of public health laws and its insistence that courts should intervene when laws are “arbitrary” or “oppressive” in their application.¹⁵³

The next appellate court to examine a COVID-related abortion order was the Eleventh Circuit. In *Robinson v. Attorney General*, that court denied the state’s motion to stay the trial court’s issuance of a preliminary injunction of Alabama’s restrictions on abortion.¹⁵⁴ Noting that *Jacobson* did not create “an absolute blank check for the exercise of governmental

146. *In re Abbott (Abbott III)*, 809 F. App’x 200, 202 (5th Cir. 2020) (per curiam).

147. *In re Abbott (Abbott IV)*, 956 F.3d 696, 705 (5th Cir. 2020).

148. See *infra* notes 178–92 and accompanying text. It is worth pondering whether the Fifth Circuit’s strong reading of public health emergency powers was influenced, at least in part, by the abortion context. See *supra* note 128.

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

150. *Id.* at 1023.

151. *Id.* at 1027.

152. *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

153. *Jacobson*, 197 U.S. at 26, 38.

154. *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1183–84 (11th Cir. 2020).

power,” the Eleventh Circuit determined that the lower court had looked carefully at *Jacobson*, as well as the circuit’s own decision in *Smith v. Avino*, which had upheld a curfew imposed in the wake of hurricane Andrew.¹⁵⁵ The court also pointed out that “for at least some women, a mandatory postponement until April 30 would operate as a *prohibition* of abortion, entirely nullifying their right to terminate their pregnancies.”¹⁵⁶ Moreover, the court found that, for other women, postponing an abortion could cause “serious harm, or a substantial risk of serious harm, to that woman’s health.”¹⁵⁷ Based on these findings and the state’s failure to present evidence that its order would preserve PPE, the circuit court concluded that the trial court did not err in finding that the state’s restriction created an undue burden under *Casey* and a “plain, palpable” violation of rights within the meaning of *Jacobson*.¹⁵⁸ Also critical to the court was the fact that the preliminary injunction was narrow and simply required the state to interpret its order as the state on April 3 had stated it should be read.¹⁵⁹

The final appellate court to address a COVID-related abortion ban was the Sixth Circuit. On April 24, in one of the very last abortion cases to cite *Jacobson* during the time under discussion, the Sixth Circuit in *Adams & Boyle v. Slatery* upheld but narrowed a lower court’s injunction of Tennessee’s abortion restriction.¹⁶⁰ In an opinion by Judge Karen Nelson Moore, the court explained that, in the absence of a public health crisis, “the analysis would be relatively straightforward.”¹⁶¹ With the crisis, *Jacobson* becomes critical. However, *Jacobson*, the court explained, arose from a different set of facts.¹⁶² Henning Jacobson was merely fined; he did not lose access to health care.¹⁶³ Nor did *Jacobson* concern a fundamental right.¹⁶⁴ “If *Jacobson* teaches us anything, it is that context matters.”¹⁶⁵ Thus during a pandemic, abortion rights might not be “identical” as to how they are in the absence of pandemic.¹⁶⁶ Still, the court explained, the pandemic did not “demote[] *Roe* and *Casey*.”¹⁶⁷ Given the breadth of the

155. *Id.* at 1179 (first citing *Jacobson*, 197 U.S. at 27, 25, then citing *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996), *abrogated on other grounds* by *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998)).

156. *Id.* at 1180.

157. *Id.*

158. *Id.* at 1182.

159. *Id.* at 1183.

160. *Adams & Boyle P.C. v. Slatery*, 956 F.3d 913, 930 (6th Cir. 2020).

161. *Id.* at 924.

162. *Id.* at 926.

163. *Id.*

164. *Id.*

165. *Id.* at 927.

166. *Id.*

167. *Id.*

state's order, which in contrast to the Texas order at issue in *Abbott*,¹⁶⁸ gave no deference to clinical judgment, the court concluded that a narrow preliminary injunction was appropriate.¹⁶⁹

Within a few days of the court's decision in *Slatery*, many of the states that had barred abortions had "reopened," ending, at least for the moment, the COVID-related abortion cases.¹⁷⁰

B. Freedom of Speech, Petition, and Assembly

Between April 27 and May 27, seven trial courts issued decisions citing *Jacobson* while reviewing First Amendment freedom of speech and assembly claims.¹⁷¹ In one case, the court concluded that the plaintiffs lacked standing.¹⁷² None of the cases granted relief to the plaintiffs.¹⁷³ Importantly, all of these cases concerned claims that predated the widespread protests that arose in the wake of George Floyd's killing in Minneapolis.¹⁷⁴ Moreover, none commented upon the increasing contentiousness of the debates over SDOs.

In contrast to the abortion cases, the courts adopted a relatively consistent approach in the free speech cases. Some of these decisions also appear to offer a relatively nuanced, if not always explicit, integration of *Jacobson* with contemporary doctrine. The first decided free speech opinion, *Givens v. Newsom*, provides an illuminating example.¹⁷⁵ In *Givens*, the plaintiffs argued that California Governor Newsom's ban on mass gatherings violated their constitutional rights to free speech, assembly, and to petition the legislature.¹⁷⁶ After going through a preliminary discussion of the pandemic,

168. See *In re Abbott (Abbott I)*, 954 F.3d 772 (5th Cir. 2020).

169. *Adams & Boyle*, 956 F.3d at 929.

170. Laurie Sobel et al., *State Action to Limit Abortion Access During the COVID-19 Pandemic*, KAISER FAM. FOUND. (June 25, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/> [<https://perma.cc/R9TU-P228>].

171. See *infra* Appendix A.

172. *Henry v. DeSantis*, No. 20-cv-80729-SINGHAL, 2020 WL 2479447, at *5 (S.D. Fla. May 14, 2020).

173. See *infra* Appendix A.

174. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (July 10, 2020, 1:16 PM), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/483N-KTWL>].

175. *Givens v. Newsom*, No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224 (E.D. Cal. May 8, 2020).

176. *Id.* at *1.

the availability of judicial notice, and the standards applicable for a TRO, Judge John A. Mendez quoted the passages in *Jacobson* describing the state’s ability to institute “emergency police powers.”¹⁷⁷ Then channeling *Abbott*—which he did not cite until the next paragraph—Judge Mendez claimed that, under *Jacobson*, measures must be upheld “unless (1) there is no real or substantial relation to public health, or (2) the measures are ‘beyond all question’ a ‘plain, palpable invasion of rights secured by fundamental law.’”¹⁷⁸

As in *Abbott*, Judge Mendez ignored *Jacobson*’s discussion of “reasonable” police measures; nor did he stop to consider that *Jacobson* predated the development of contemporary First Amendment law. Nevertheless, unlike the Fifth Circuit in *Abbott*, he did not emphasize the curtailment of constitutional rights. Rather, he moved to a discussion of First Amendment doctrine in which *Jacobson* and the public health facts provided critical context, without significantly altering the applicable doctrine.¹⁷⁹ For example, while discussing the free speech claim, Judge Mendez emphasized that content-neutral restrictions on the time, place, or manner of speech are not ordinarily subject to strict scrutiny.¹⁸⁰ Rather—although he did not use the term—they are subject to intermediate scrutiny, under which they are to be sustained as long as they are “narrowly tailored to serve a significant governmental interest” and leave open alternative modes for communication.¹⁸¹ Then, in an important move, he concluded that although the orders might not ordinarily be considered narrowly tailored, “‘narrow’ in the context of a public health crisis is necessarily wider than usual.”¹⁸² He added that the “[t]he evidence before this Court clearly demonstrates that in-person gatherings increase the spread of COVID-19.”¹⁸³ Further, the state had not prevented the plaintiffs from engaging in other forms of protest or communication.¹⁸⁴ As a result, he concluded that the plaintiffs were not likely to succeed on the merits of their free speech claim.¹⁸⁵ Likewise, because the state’s order was “wholly unrelated to the suppression of expressive association,” he denied the plaintiffs’ request for relief based on their claim for freedom of assembly.¹⁸⁶

177. *Id.* at *3 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905)).

178. *Id.* (quoting *Jacobson*, 197 U.S. at 31).

179. *See id.* at *5.

180. *Id.*

181. *Id.* at *5–6.

182. *Id.* at *6.

183. *Id.*

184. *Id.*

185. *Id.* at *7.

186. *Id.*

All of the free speech decisions that followed *Givens* agreed that the SDOs were content-neutral and therefore not subject to strict scrutiny. In one notable discussion, Judge Denise Cote of the Southern District of New York pointed to *Jacobson* for the assertion that the state's right to protect the public from the pandemic provided a "lens" through which the First Amendment analysis should be viewed.¹⁸⁷ Other judges, however, read *Jacobson*'s limitation on constitutional challenges more robustly. For example, Judge Stephen Clark in the Eastern District of Missouri—which is in the Eighth Circuit—relied heavily on *Abbott* and the Eighth Circuit's decision in *Rutledge* to emphasize courts' limited role in reviewing state actions during a public health emergency.¹⁸⁸ Reiterating that courts should not usurp the functions of the other branches of government, Judge Clark held that the orders were not "beyond all question, a plain and palpable invasion" of plaintiffs' First Amendment rights.¹⁸⁹ Interestingly, in reaching that conclusion, Judge Clark provided almost no analysis other than saying that the orders did not prevent the plaintiffs from assembling remotely and did not constitute a total ban on expressive association.¹⁹⁰ His discussion of the freedom of assembly claim was also quite thin, limited to citing the Supreme Court's decision in *Roberts v. U.S. Jaycees*.¹⁹¹ In short, for Judge Clark, *Jacobson* did not simply offer a lens through which to view the First Amendment analysis; it largely replaced the need for a robust First Amendment analysis.¹⁹²

Importantly, none of the courts found that the speech or association claims had merit on their own terms. Indeed, although the courts' discussion of the deference owed under *Jacobson* varied, all of the courts ultimately concluded that the orders were content-neutral and did not violate the First Amendment. Hence, none of the courts explained how they would have

187. *Geller v. De Blasio*, No. 20cv3566 (DLC), 2020 WL 2520711, at *3 (S.D.N.Y. May 18, 2020).

188. *SH3 Health Consulting, LLC v. Page*, No. 4:20-cv-00605 SRC, 2020 WL 2308444, at *6–*8 (E.D. Mo. May 8, 2020).

189. *Id.* at *8.

190. *Id.*

191. *Id.* (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18, 623 (1984)).

192. In *Henry v. DeSantis*, the court likewise emphasized the court's limited role during a public health emergency. No. 20-cv-80729-SINGHAL, 2020 WL 2479447, at *8 (S.D. Fla. May 14, 2020). Further, while stating that "[c]onstitutional rights do not give way to a government's perceived authority in times of crisis," the court offered little analysis of the merits of the plaintiff's First Amendment claim, simply saying: "She is not prohibited from any of her First Amendment rights." *Id.*

ruled if the states' orders would have been found to have been unconstitutional in the absence of a public health emergency. Indeed, because they did not do so, it is possible to read most of these cases as treating *Jacobson* as imposing a simple tautology: public health laws are constitutional as long as they do not violate a constitutional right.

C. Free Exercise Claims

Free exercise claims form the largest category of *Jacobson*-citing cases. They also span the entire time period studied here. The first decided case, *On Fire Christian Center v. Fischer*, was decided on April 11, 2020, only a few days after the first abortion case.¹⁹³ But, in contrast to the abortion cases, free exercise claims continued to be decided throughout May as SDOs became more politically contentious.¹⁹⁴

As with the free speech claims, most courts hearing free exercise claims refused to enjoin the state's SDO—thirteen out of nineteen.¹⁹⁵ Six decisions, however, granted or affirmed some form of preliminary relief for the plaintiffs.¹⁹⁶ As with the abortion cases—but not the free exercise cases—many were very fact-driven, with courts looking closely at the particularities of state orders, particularly the exemptions that were and were not given. Several cases, however, offered a very different take on *Jacobson*'s application to constitutional claims than was evident in the free speech or abortion cases. Some also deployed a more inflammatory rhetoric than was evident in the other categories of cases.

That different tone was apparent in the first decided case, *On Fire Christian Center v. Fischer*.¹⁹⁷ The case was brought by a church in Louisville that objected to the mayor's ban of drive-in church services.¹⁹⁸ In contrast to most of the other decisions discussed, Judge Justin Walker's opinion did not begin with an overview of the public health crisis.¹⁹⁹ Rather, he commenced his discussion by stating, "On Holy Thursday, an American mayor criminalized the communal celebration of Easter."²⁰⁰ Emphasizing that the mayor's order applied on Easter, Judge Walker then derided the mayor's decision as "stunning" and "'beyond all reason,' unconstitutional."²⁰¹

193. *On Fire Christian Ctr. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020).

194. *See infra* Appendix A.

195. *See infra* Appendix A.

196. *See infra* Appendix A.

197. *On Fire Christian Ctr.*, 2020 WL 1820249.

198. *Id.* at *1.

199. *See id.*

200. *Id.*

201. *Id.* at *2 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

From there, Judge Walker proceeded to quote from the Gospel of St. Paul and recite the long history of religious persecution around the world and in the United States.²⁰² “[I]n recent years,” he explained, “an expanding government has made the Free Exercise Clause more important than ever.”²⁰³ Then wading more deeply in culture war issues, he lamented the bigotry experienced by cakemakers and religious preschoolers.²⁰⁴

Turning to the case before him, Judge Walker quoted *Abbott*’s summation of what *Jacobson* commands.²⁰⁵ He then stated that in the case before him, the violation of the free exercise clause was “beyond all question.”²⁰⁶ In doing so, he offered little reason to believe that the pandemic provided any lens through which to assess the free exercise claim. Rather, he focused on the fact that the mayor’s order was underinclusive because it did not prohibit activities that were deemed essential and overinclusive because “it appears likely that Louisville’s interest in preventing churchgoers from spreading COVID-19 would be achieved by allowing churchgoers to congregate in their cars.”²⁰⁷ Judge Walker concluded by stating that “the rules of the road in constitutional law remain rigidly fixed in the time of a national emergency,” and proclaiming that his opinion “does not even scratch the surface of religious liberty’s importance to our nation’s story, identity, and Constitution.”²⁰⁸

Easter services—which loomed so large in the President’s messaging around COVID-19—also formed the basis for several other cases applying strict scrutiny. In both *Maryville Baptist Church v. Beshear* and *Roberts v. Neace*, the Sixth Circuit, which had previously narrowed a TRO of an abortion ban in *Adams & Boyle v. Slatery*,²⁰⁹ enjoined pending appeal Kentucky Governor Beshear’s ban on mass gatherings, including “faith-based” events.²¹⁰ In *Maryville Baptist Church*, the appellate court considered the application of a SDO to drive-in Easter services.²¹¹ The court began its discussion of the merits by emphasizing that because the SDO explicitly prohibited “faith-

202. *Id.*

203. *Id.* at *3.

204. *Id.*

205. *Id.* at *6.

206. *Id.* (quoting *In re Abbott (Abbott I)*, 953 F.3d 772, 784 (5th Cir. 2020)).

207. *Id.* at *7.

208. *Id.* at *8.

209. *Adams & Boyle P.C. v. Slatery*, 956 F.3d 913, 917 (6th Cir. 2020).

210. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615–16 (6th Cir. 2020) (per curiam); *Roberts v. Neace*, 958 F.3d 409, 414, 416 (6th Cir. 2020) (per curiam).

211. *Maryville Baptist Church*, 957 F.3d at 611.

based” mass gatherings, while permitting “life-sustaining” operations, the order treated religious activity disparately and therefore was subject to strict scrutiny.²¹² The court then cited to *Jacobson* while stating that it did not “doubt the Governor’s sincerity in trying to do his level best to lessen the spread of the virus or his authority to protect the Commonwealth’s citizens.”²¹³ Nevertheless, the court found that the state’s failure to exempt religious services while exempting other activities was inexplicable: “why,” the court asked “can someone safely interact with a brave deliverywoman but not with a stoic minister?”²¹⁴ The court added: “While the law may take periodic naps during a pandemic, we will not let it sleep through one.”²¹⁵

One week later, in *Roberts v. Neace*, the same court considered the same church’s claim to conduct in-person services.²¹⁶ Once again, the court began by emphasizing the free exercise claim rather than the pandemic. And, once again, the court found that the state’s emergency orders discriminated against faith-based services, not due to animus, but because faith-based services were not included in the exceptions to orders. The court explained, “[a]s a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law.”²¹⁷

After determining that the failure to exempt religious services from the SDOs “defies explanation,” the court held that strict scrutiny was required and that the orders were not the least restrictive means of “serving these laudable goals.”²¹⁸ Largely replicating the reasoning it used in finding the orders discriminatory, the court said,

Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, why do the orders permit people who practice social distancing and good hygiene in one place but not another for similar lengths of time? . . . All in all, the Governor did not customize his orders to the least restrictive way of dealing with the problem at hand.²¹⁹

From the perspective of population-based legal analysis, what is troubling about the Sixth Circuit’s decision is not that it enjoined the Governor’s orders, but that it did not consider *any* public health evidence in deciding that the distinctions drawn by the state were nonsensical. Rather than look to science, the court relied solely on its own common sense conclusion. As a result, the court failed to consider that many of the

212. *Id.* at 614.

213. *Id.* at 614–15 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905)).

214. *Id.* at 615.

215. *Id.*

216. *Roberts v. Neace*, 958 F.3d 409, 411 (6th Cir. 2020).

217. *Id.* at 413.

218. *Id.* at 414–15.

219. *Id.* at 416.

distinctions that the state drew made sense based on what was known at the time about the virus. Gatherings of many people in a building for an extended period of time are likely far more dangerous than the more transient encounters in retail and like establishments.²²⁰ Further, communal prayer and singing may add to the risk.²²¹ Whether that proves to be true is, for present purposes, less important than the fact that the Sixth Circuit felt no need to defer to the state or be informed by the science. Indeed, despite citing *Jacobson*, the court's approach to strict scrutiny appears to have been no different than it would have been in the absence of a pandemic.

Most courts, however, espoused a somewhat different approach. In *Antietam Battlefield KOA v. Hogan*, for example, Judge Catherine Blake of the District of Maryland began her analysis by using *Jacobson* and the facts of the pandemic to set the table.²²² She then followed *Abbott* in stating that *Jacobson* provided a two-part test.²²³ First, the court must ask if the state order has a real or substantial relation to public health, and second, whether it is “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”²²⁴ Yet, like other courts reviewing free speech²²⁵ and free exercise claims,²²⁶ once she turned to the underlying constitutional claim, she proceeded almost as if *Jacobson* did not exist.²²⁷ Rather, looking to the Supreme Court's decisions in *Employment Division, Department of Human Resources of Oregon v. Smith*,²²⁸ and *Church of*

220. See, e.g., Paul Specht, *NC Governor Mostly Right About Indoor Worship and Coronavirus*, POLITIFACT (June 1, 2020), <https://www.politifact.com/factchecks/2020/jun/01/roy-cooper/nc-governor-mostly-right-about-indoor-worship-and/> [<https://perma.cc/8X2J-7DL2>].

221. Bill Chappell, *CDC Quickly Changed Its Guidance on Limiting Choirs at Religious Services*, NPR (May 29, 2020, 2:40 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/29/865324310/cdc-quickly-changed-its-guidance-on-limiting-choirs-at-religious-services> [<https://perma.cc/7FDM-T92D>].

222. *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 WL 2556496, at *1 (D. Md. May 20, 2020) (mem.).

223. *Id.* at *5; *In re Abbott (Abbott I)*, 954 F.3d 772, 784–85 (5th Cir. 2020) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

224. *Antietam Battlefield KOA*, 2020 WL 2556496, at *5 (quoting *Jacobson*, 197 U.S. at 31).

225. See *supra* notes 171–92 and accompanying text.

226. E.g., *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *7–11 (N.D. Ill. May 3, 2020).

227. See *Antietam Battlefield KOA*, 2020 WL 2556496, at *7–17.

228. *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990). The Supreme Court has granted certiorari in a case that poses the question whether *Smith* should be overruled. See Petition for Writ of Certiorari at i, *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (No. 19-123).

the Lukumi Babalu Aye, Inc. v. City of Hialeah,²²⁹ she explained that strict scrutiny was not required because the orders were generally applicable and did not discriminate against religious worship.²³⁰ In so doing, she emphasized the distinctions between religious services and exempted activities where the risk of transmission was lower, and cited to the lower courts that had ruled similarly.²³¹ Like the Sixth Circuit, however, she did not cite to public health evidence though her discussion of the risk of transmission was far more detailed than that of the Sixth Circuit.

The only court of appeals to cite *Jacobson* in a majority opinion rejecting a free exercise challenge was the Seventh Circuit in *Elim Romanian Pentecostal Church v. Pritzker*.²³² In a short opinion rejecting an emergency appeal of the district court’s refusal to enjoin Illinois’s emergency order, the Seventh Circuit cited *Jacobson* for the proposition that the SDO “responds to an extraordinary public health emergency.”²³³ The court added that the order did not discriminate against worship services because they were treated the same as “comparable types of secular gatherings, such as concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods.”²³⁴ Although the Seventh Circuit also did not cite any public health evidence, the court also did not ignore the pandemic when it turned to the analysis of the free exercise claim.²³⁵ Rather, the short opinion seemed to use both *Jacobson* and the pandemic as a lens through which to determine the level of scrutiny that was available. To the Seventh Circuit, *Jacobson* did not preclude strict scrutiny or limit the application of constitutional review, but it did provide background context that reminded the court that the public health emergency was relevant to its analysis.²³⁶ This was the approach that the Chief Justice took in his concurring opinion in *South Bay United Pentecostal Church v. Newsom*.²³⁷

229. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534–35 (1993).

230. *Antietam Battlefield KOA*, 2020 WL 2556496, at *7–8.

231. *Id.* at *7–9.

232. *Elim Romanian Pentecostal Church v. Pritzker (Elim Romanian I)*, No. 20-1811, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020).

233. *Id.* On June 16, 2020, the Seventh Circuit issued another decision upholding the governor’s orders. *See Elim Romanian Pentecostal Church v. Pritzker (Elim Romanian II)*, 962 F.3d 341 (7th Cir. 2020).

234. *Elim Romanian I*, 2020 WL 2517093, at *1.

235. *See id.*

236. *See id.* The only other federal circuit court opinion to cite *Jacobson* in a free exercise case was a dissent by Judge Collins to the Ninth Circuit’s decision in *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 942–43 (9th Cir. 2020) (Collins, J., dissenting), *appeal denied*, 140 S. Ct. 1613 (2020) (mem.).

237. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring).

V. THE JUSTICES WEIGH IN

On May 29, a few days after a Memorial Day weekend that saw large crowds enjoying reopened beaches and attractions²³⁸ and the same day that the Department of Justice filed a memorandum of interest in a lawsuit challenging Michigan’s SDO as violating the Equal Protection and Interstate Commerce Clauses,²³⁹ the Supreme Court denied an emergency application for an injunction in *South Bay United Pentecostal Church v. Newsom*.²⁴⁰ The case was brought by a church and its bishop who challenged the application of California’s SDO to in-person religious services.²⁴¹ The Ninth Circuit had denied an appeal of the District Court’s refusal to grant a TRO with a very brief opinion stating that the ban did not violate the First Amendment because it did not “‘infringe upon or restrict practices because of their religious motivation’ and does not ‘in a selective manner impose burdens only on conduct motivated by religious belief.’”²⁴² Without citing *Jacobson*, the Ninth Circuit quoted Justice Jackson’s warning in *Terminiello v. Chicago* that courts should not “convert the constitutional Bill of Rights into a suicide pact.”²⁴³

In dissent, Judge Daniel P. Collins contended that *Jacobson* did not hold that “an emergency *displaces* normal constitutional standards. Rather,

238. Derek Hawkins et al., *Memorial Day Weekend Draws Big Crowds, as U.S. Coronavirus Deaths Near 100,000*, WASH. POST (May 23, 2020, 8:43 PM), <https://www.washingtonpost.com/nation/2020/05/23/coronavirus-update-us/> [perma.cc/9MXB-US2V].

239. Statement of Interest on Behalf of the United States at 2, Signature Sotheby’s Int’l Realty, Inc. v. Whitmer, No. 1:20-cv-00360-PLM-PJG (W.D. Mich. May 29, 2020), <https://www.justice.gov/opa/press-release/file/1281736/download> [https://perma.cc/92BA-59ZS].

240. 140 S. Ct. 1613. After the period under study, the Supreme Court once again by five to four vote denied another emergency application for injunctive relief brought by a church. See *Calvary Chapel Dayton Valley v. Sisolak*, 2020 WL 4251360 (July 24, 2020) (mem.). Once again, the Chief Justice joined the majority. See *id.* This time, however, he did not write an opinion. In a dissent joined by Justices Thomas and Kavanaugh, Justice Alito stated that it “is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic.” *Id.* at *5 (Alito J., dissenting). *Jacobson*, he said, must be “read in context” and “it is important to keep in mind that *Jacobson* primarily involved a substantive due process challenge,” rather than a First Amendment challenge. *Id.* The Justice further found that by treating churches less generously than casinos and other public establishments, Nevada’s SDO appeared have violated the rights to free exercise and freedom of speech. *Id.*

241. *S. Bay Pentecostal Church*, 959 F. 3d at 938–39.

242. *Id.* at 939 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 543 (1993)).

243. *Id.* (quoting *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting)).

Jacobson provides that an emergency may justify temporary constraints *within* those standards.”²⁴⁴ Judge Collins added that *Jacobson* dealt with a substantive due process, not a free exercise claim, and hence was not controlling.²⁴⁵ With *Jacobson* cast aside, he went on to conclude that “[b]y *explicitly* and categorically assigning all in-person ‘religious services’ to a future Phase 3—without any express regard to the number of attendees, the size of the space, or the safety protocols followed,” the state had discriminated against religious conduct and therefore failed strict scrutiny.²⁴⁶

After losing before the Ninth Circuit, the plaintiffs sought emergency relief from the Supreme Court.²⁴⁷ By a 5–4 vote, the Court rejected the petition without issuing an opinion.²⁴⁸ Justice Brett Kavanaugh, joined by Justices Neil Gorsuch and Clarence Thomas, wrote a dissent in which *Jacobson* was neither discussed nor cited.²⁴⁹ While recognizing that the state “has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens,” Justice Kavanaugh relied on the Sixth Circuit’s opinion in *Roberts v. Neace* to assert that the state’s application of its SDOs to religious activities when certain secular activities were exempted “do[es] little to further these goals.”²⁵⁰ Justice Kavanaugh added that the state had other options to prevent the spread of COVID-19, including requiring congregants to adhere to social distancing orders, or imposing occupancy caps.²⁵¹ “[A]bsent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.”²⁵² Thus, without using the term, the dissent assumed that strict scrutiny applied and the burden was on the state to present compelling evidence for the distinctions it drew.²⁵³ That is a standard that few states could meet when faced with a pandemic caused by a *novel* virus—for which the evidence is necessarily limited.

In contrast, in his concurring opinion, Chief Justice John Roberts signaled a very different approach. Rather than ignoring *Jacobson*, like the dissent, or treating it as limiting constitutional review to two discrete questions, as the Fifth and Eighth Circuits have done,²⁵⁴ he treated *Jacobson* as a lens

244. *Id.* at 942 (Collins, J., dissenting).

245. *Id.*

246. *Id.* at 945 (quoting *Lukumi*, 508 U.S. at 533).

247. *See* *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.).

248. *See id.*

249. *Id.* at 1614–15 (Kavanaugh, J., dissenting).

250. *Id.* (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam)).

251. *Id.* at 1615.

252. *Id.*

253. *See id.*

254. *See supra* notes 139–53 and accompanying text.

through which to analyze constitutional claims during a pandemic. Quoting *Jacobson*, he explained that “Our Constitution principally entrusts ‘the safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’”²⁵⁵ Broad latitude is especially warranted, he added, when “officials undertake to act in areas fraught with medical and scientific uncertainties.”²⁵⁶

The Chief Justice did not, however, suggest that deference was absolute or that courts should limit their review to cases in which the violation of a constitutional right was beyond question.²⁵⁷ To the contrary, he noted that California’s restrictions “on places of worship . . . appear consistent with the Free Exercise Clause of the First Amendment.”²⁵⁸ This was because “[s]imilar 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.”²⁵⁹ Thus, although he did not cite to any public health evidence, as the Seventh Circuit did in *Elim Romanian Pentecostal Church*, the Chief Justice seemed to channel the evolving epidemiological view of the dangers.²⁶⁰ Further, with his *Jacobson* lens on, he was willing, unlike the dissent, to accept the logic behind the state’s distinctions.

Still, the Chief Justice was careful to clarify the limited nature of his opinion. He emphasized that the deference he gave was especially appropriate given that the petitioners were seeking emergency, interlocutory relief, “while local officials are actively shaping their response to changing facts on the ground.”²⁶¹ In that posture it was not “indisputably clear” that the state had violated the free exercise clause.²⁶² With that, the Chief Justice left open the possibility that he might reach a different conclusion given different facts or a different procedural posture. *Jacobson*’s lens, after all, may offer clarity but it does not provide precise answers.

255. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)).

256. *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)).

257. *See id.* at 1613–14.

258. *Id.* at 1613.

259. *Id.*

260. *See id.*

261. *Id.* at 1614.

262. *Id.*

VI. CONCLUSION

The Supreme Court issued its decision in *South Bay* on May 29, 2020.²⁶³ In the weeks that followed, COVID-19 cases began to rise in many parts of the country,²⁶⁴ even as police killings of unarmed Black citizens and mass protests over racism pushed COVID-19 for a time from the headlines.²⁶⁵ The country “opened up,” and many governors resisted imposing new shutdown orders, even as the number of cases rose.²⁶⁶ Instead, as the summer progressed, more and more governors used their emergency powers to require people to wear masks while in public.²⁶⁷ Mask mandates, it seemed, were destined to become yet another legal battleground.

What did we learn about the scope of judicial review of public health orders or the conflict between individual rights and the public’s health during the first ten weeks of COVID-19 cases?²⁶⁸ Both more and less than we might have thought.

263. *Id.* at 1613.

264. *COVIDView Summary Ending on June 20, 2020*, CENTERS FOR DISEASE CONTROL & PREVENTION (June 26, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/06262020.html> [<https://perma.cc/EZ4W-5WJX>].

265. *See, e.g.*, Richard Luscombe & Vivian Ho, *George Floyd Protests Enter Third Week as Push for Change Sweeps America*, GUARDIAN (June 7, 2020, 2:49 PM), <https://www.theguardian.com/us-news/2020/jun/07/george-floyd-protests-enter-third-week> [<https://perma.cc/JZS5-LQS2>].

266. Alice Miranda Ollstein & Dan Goldberg, *Quarantine Fatigue: Governors Reject New Lockdowns as Virus Cases Spike*, POLITICO (June 10, 2020, 7:55 PM), <https://www.politico.com/news/2020/06/10/quarantine-governors-lockdowns-coronavirus-312146> [<https://perma.cc/RT4H-92PH>]. Some governors, however, imposed more limited orders in response to a spike in cases. *See, e.g.*, Patrick Svitek, *Gov. Greg Abbott Orders Texas Bars to Close Again and Restaurants to Reduce to 50% Occupancy as Coronavirus Spreads*, TEX. TRIB. (June 26, 2020, 6:00 PM), https://www.texastribune.org/2020/06/26/texas-bars-restaurants-coronavirus-greg-abbott/?utm_source=articleshare&utm_medium=social [<https://perma.cc/RJ4H-JK2P>].

267. Marisa Fernandez, *The States Where Face Coverings Are Mandatory*, AXIOS (Aug. 4, 2020), <https://www.axios.com/states-face-coverings-mandatory-a0e2fe35-5b7b-458e-9d28-3f6cdb1032fb.html> [<https://perma.cc/C59M-6UG3>]; *see also* Lawrence O. Gostin, I. Glenn Cohen & Jeffrey P. Koplan, *Universal Masking in the United States: The Role of Mandates, Health Education, and the CDC*, 324 JAMA 837, 837–38 (2020).

268. As this Article was in publication, Justice Ruth Bader Ginsburg died and was replaced by Justice Amy Coney Barrett. After Justice Barrett joined the Court, the Supreme Court appeared to take a different approach to reviewing SDOs that apply to religious services. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354 (U.S. Nov. 25, 2020) (per curiam). Without citing *Jacobson*, the 5-4 majority, which included Justice Barrett, concluded that New York’s limits on religious services discriminated against religion and was subject to and would likely fail strict scrutiny. In reaching that conclusion, the majority did not consider any epidemiological evidence or cite to *Jacobson*. In a concurring opinion, Justice Gorsuch stated that *Jacobson* did not control, and criticized the Chief Justice’s opinion in *South Bay* for relying on it. *Id.* at *4, *6 (Gorsuch, J., concurring). The Court’s analysis in *Roman Catholic Diocese*

First, and not unimportantly, the courts in the early cases mostly eschewed polarizing rhetoric and the seduction of misinformation. With a few exceptions discussed above,²⁶⁹ the opinions were temperate and conventionally judicious in tone. That might seem unremarkable—don't we expect that of judges?—but in this highly polarized environment, it is worth commending. While a President suggested injecting people with bleach,²⁷⁰ and armed protesters shut down a legislature,²⁷¹ courts continued to write like courts.

Further, as noted above, all of the courts accepted that the protection of the public from the pandemic was an important or even compelling state interest. No court questioned the gravity of the situation or suggested that states should be powerless in facing it. Thus, all of the courts accepted that the protection of public health, not simply the rights of the individual plaintiffs, mattered to constitutional law. Without using the term, all of the courts treated population health as a legal norm, a goal that the law recognizes and grants constitutional weight.

Yet, all of the courts also recognized that judicial review should not disappear during a public health crisis. Even the Fifth and Eighth Circuits, which among the appellate courts appeared to grant the greatest deference to state orders—notably, in the context of reviewing abortion restrictions—relied on *Jacobson* to hold that courts must intervene when the state's order bore no “real or substantial” relation to public health, or when there was a “plain, or palpable violation” of fundamental law.²⁷² Many other courts that cited that formulation focused their attention on the underlying constitutional claim, suggesting that *Jacobson* made little difference to the

illustrates the problems discussed below that arise when states attempt to make fine-toothed distinctions between activities subjected to regulation. See *infra* text accompanying note 273. For a further discussion of what the changes to the Supreme Court may portend, see Lawrence O. Gostin, Wendy E. Parmet & Sara Rosenbaum, *Health Policy in the Supreme Court and a New Conservative Majority*, JAMA NETWORK (Oct. 27, 2020), <https://jamanetwork.com/journals/jama/article-abstract/2772515> [<https://perma.cc/NXP2-8K3S>].

269. See *supra* notes 193–208 and accompanying text (discussing *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020)).

270. Dartunorro Clark, *Trump Suggests ‘Injection’ of Disinfectant to Beat Coronavirus and ‘Clean’ the Lungs*, NBC NEWS (Apr. 23, 2020, 4:18 PM), <https://www.nbcnews.com/politics/donald-trump/trump-suggests-injection-disinfectant-beat-coronavirus-clean-lungs-n1191216> [<https://perma.cc/R6DC-BJ4Y>].

271. David Welch, *Michigan Cancels Legislative Session to Avoid Armed Protestors*, BLOOMBERG (May 14, 2020, 8:52 AM), <https://www.bloomberg.com/news/articles/2020-05-14/michigan-cancels-legislative-session-to-avoid-armed-protesters> [<https://perma.cc/6D3L-7VR3>].

272. See *supra* notes 139–53 and accompanying text.

outcome.²⁷³ Some of these courts found for the challengers, others for the state. One common thread, however, was that the more exceptions states drew, the greater scrutiny they faced. Ironically, this may make it more challenging for states if they try to respond to further outbreaks with more tailored SDOs. Because evidence will inevitably still be incomplete, more particularized responses that apply to fewer activities may prove to be more susceptible to disparate treatment claims.

Few courts suggested whether or how the magnitude and epidemiology of the pandemic should influence courts' analysis of the underlying constitutional claims. Courts that touched upon those critical questions did so obliquely and with broad generalities. Judge Cote suggested that the pandemic provided a lens for reviewing the constitutionality of the mayor's order.²⁷⁴ In a similar vein, Chief Justice Roberts viewed *Jacobson* and the pandemic as establishing the context through which he approached the petitioners' claims.²⁷⁵ Thus, rather than presenting a rigid rule of deference, or ignoring the pandemic when turning to the First Amendment claim, the Chief Justice only suggested that the pandemic be kept in mind when reviewing the free exercise claim.²⁷⁶

Perhaps this is as much as we could have hoped for from courts in the spring of 2020: the recognition that the public's health matters, as do constitutional rights; the acceptance that courts must be open to safeguarding liberty, while also not applying doctrines rigidly without a recognition of the crisis that was occurring. In a time of deep partisan divide and misinformation, this may be as much as we could have expected.

Still, *Jacobson* has other lessons to teach. In a season in which the protection of public health was so frequently viewed as antithetical to liberty, Justice Harlan's reminder that real liberty exists only in conjunction with the limitations imposed for the common good bears repetition.²⁷⁷ We cannot be liberated from a virus unless its prevalence is reduced at a population level. Risks are not solely individual.²⁷⁸ If we want to be "free," we need to lower population-level risks. This no individual can do on their own.

273. See *supra* notes 130–32; 178–86; 205–19 and accompanying text.

274. See *Geller v. De Blasio*, No. 20cv3566 (DLC), 2020 WL 2520711, at *3 (S.D.N.Y. May 18, 2020); see also *supra* note 187 and accompanying text.

275. See *supra* notes 255–56 and accompanying text.

276. See *supra* notes 257–62 and accompanying text.

277. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

278. This point was noted by the Seventh Circuit on June 12, 2020 in another decision in *Elim Romanian Pentecostal Church v. Pritzker*. 962 F.3d 341, 342 (7th Cir. 2020) (“Reducing the number of people at gatherings protects those persons, and perhaps more important it protects others not at the gathering from disease transmitted by persons who contract COVID-19 by attending a gathering that includes infected persons.”).

Further, the context of COVID-19 is deeper and more troubling than any of the opinions studied acknowledged. The heavy toll the virus inflicted on the United States was due not only to its biology, but also our governments' proximal negligence and our distal but powerful structural inequities. As Lindsay F. Wiley and Samuel R. Bagenstos have explained, many of the latter were created by law.²⁷⁹ Moreover, as noted above, deep constitutional asymmetries make it difficult for litigants to claim that governments have legally-binding obligations to address those inequities or protect them from a pandemic. The context is thus one in which the government can—but need not—limit individual liberties in the name of health, but also has no obligation to foster liberty by protecting health. Nor does our constitutional jurisprudence require the government to help people who are not in custody comply with public health orders, for example, by providing income support or access to health care when SDOs are in place.

Perhaps due to this asymmetry, the most striking feature of the COVID-19 cases is what was missing. While courts should be applauded for rising above the misinformation and partisan hyperbole that have infected much current debate, the COVID-19 cases were remarkably quiet about the jurisprudence and the understanding of the nature of liberty, that helped the United States become so vulnerable to the pandemic. During the three months covered, more than 100,000 Americans died.²⁸⁰ Millions more lost their jobs.²⁸¹ Their government—our government—failed them miserably for many reasons.²⁸² What was their constitutional claim? How do we protect the liberty they lost? Or prevent others from meeting a similar fate? To those questions, the COVID-19 cases offer only silence.

279. Lindsay F. Wiley & Samuel R. Bagenstos, *How the Law Harms Public Health*, DEMOCRACY (June 16, 2020, 4:59 PM), <https://democracyjournal.org/magazine/how-the-law-harms-public-health/> [<https://perma.cc/8UHD-XH78>].

280. *Cases in the U.S.*, CTR. FOR DISEASE CONTROL & PREVENTION (Aug. 4, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/3NNN-XTTB>].

281. Eric Morath, *How Many U.S. Workers Have Lost Jobs During Coronavirus Pandemic? There Are Several Ways to Count*, WALL ST. J. (June 3, 2020, 5:30 AM), <https://www.wsj.com/articles/how-many-u-s-workers-have-lost-jobs-during-coronavirus-pandemic-there-are-several-ways-to-count-11591176601> [<https://perma.cc/N78P-4RS6>].

282. For an overview of the many ways in which our government, and our courts, have failed, see generally PUBLIC HEALTH LAW WATCH, GEORGE CONSORTIUM, *ASSESSING LEGAL RESPONSES TO COVID-19* (Scott Burris et al., eds. 2020), https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f4d6578225705285562d0f0/1598908033901/COVID19PolicyPlaybook_Aug2020+Full.pdf [<https://perma.cc/3CDL-B25K>].

VII. APPENDIX A

Below is a list of abortion, free speech, assembly and right to petition, and free exercise cases citing to *Jacobson* between March 19 and May 29, 2020. The cases are listed chronologically by category.

Abortion

Case	Date	Court	Outcome
S. Wind Women's Ctr. LLC v. Stitt, No. CIV-20-277-G, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020).	April 6, 2020	United States District Court for the Western District of Oklahoma	Temporary restraining order granted
Preterm-Cleveland v. Attorney Gen. of Ohio, No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020).	April 6, 2020	United States Court of Appeals for the Sixth Circuit	Dismissed for lack of jurisdiction; temporary restraining order upheld
<i>In re</i> Abbott (<i>Abbott I</i>), 954 F.3d 772 (5th Cir. 2020).	April 7, 2020	United States Court of Appeals for the Fifth Circuit	Temporary restraining order vacated
Planned Parenthood Ctr. for Choice v. Abbott, No. A-20-CV-323-L.Y, 2020 WL 1815587 (W.D. Tex. Apr. 9, 2020), <i>vacated in part sub nom. In re</i> Abbott (<i>Abbott IV</i>), 956 F.3d 696 (5th Cir. 2020).	April 9, 2020	United States District Court for the Western District of Texas	Temporary restraining order granted
<i>In re</i> Abbott (<i>Abbott II</i>), 800	April 10, 2020	United States Court of	Partial stay of temporary

F. App'x 293 (5th Cir. 2020).		Appeals for the Fifth Circuit	restraining order granted
Robinson v. Marshall, No. 2:19cv365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020).	April 12, 2020	United States District Court for the Middle District of Alabama	Preliminary injunction granted in part
<i>In re Abbott (Abbott III)</i> , 809 F. App'x 200 (5th Cir. 2020).	April 13, 2020	United States Court of Appeals for the Fifth Circuit	Motion to stay temporary restraining order denied
Little Rock Family Planning Servs. v. Rutledge, No. 4:19-cv-00449-KGB, 2020 WL 1862830 (E.D. Ark. Apr. 14, 2020), <i>vacated in part</i> , 2020 WL 2079224 *1 (E.D. Ark. Apr. 22, 2020).	April 14, 2020	United States District Court for the Eastern District of Arkansas	Temporary restraining order provisionally granted
Robinson v. Marshall, No. 2:19cv365-MHT, 2020 WL 1892578 (M.D. Ala. Apr. 16, 2020).	April 16, 2020	United States District Court for the Middle District of Alabama	Objections to the Court's prior order granting plaintiffs' leave to file a supplemental complaint overruled
<i>In re Abbott (Abbott IV)</i> , 956 F.3d 696 (5th Cir. 2020).	April 20, 2020	United States Court of Appeals for the Fifth Circuit	Temporary restraining order partially vacated

S. Wind Women's Ctr. LLC v. Stitt, No. CIV-20-277-G, 2020 WL 1932900 (W.D. Okla. Apr. 20, 2020).	April 20, 2020	United States District Court for the Western District of Oklahoma	Preliminary injunction granted in part
<i>In re</i> Rutledge, 956 F.3d 1018 (8th Cir. 2020).	April 22, 2020	United States Court of Appeals for the Eighth Circuit	Temporary restraining order dissolved
Preterm-Cleveland v. Attorney Gen. of Ohio, No. 1:19-cv-00360, 2020 WL 1957173 (S.D. Ohio Apr. 23, 2020).	April 23, 2020	United States District Court for the Southern District of Ohio	Preliminary injunction granted
Robinson v. Attorney Gen., 957 F.3d 1171 (11th Cir. 2020).	April 23, 2020	United States Court of Appeals for the Eleventh Circuit	Motion for stay of preliminary injunction pending appeal denied
Adams & Boyle, P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020).	April 24, 2020	United States Court of Appeals for the Sixth Circuit	Preliminary injunction narrowed
Little Rock Family Planning Servs. v. Rutledge, No. 4:20-CV-00470 BSM, 2020 WL 2240105 (E.D. Ark. May 7, 2020).	May 7, 2020	United States District Court for the Eastern District of Arkansas	Temporary restraining order denied

Freedom of Speech, Petition, Assembly

Case	Date	Court	Outcome
Givens v. Newsom, No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224 (E.D. Cal. May 8, 2020).	May 8, 2020	United States District Court for the Eastern District of California	Temporary restraining order denied
SH3 Health Consulting, LLC v. Page, No. 4:20-cv-00605 SRC, 2020 WL 2308444 (E.D. Mo. May 8, 2020).	May 8 2020	United States District Court for the Eastern District of Missouri	Temporary restraining order denied
Henry v. DeSantis, No. 20-cv-80729-SINGHAL, 2020 WL 2479447 (S.D. Fla. May 14, 2020).	May 14, 2020	United States District Court for the Southern District of Florida	Case dismissed with prejudice
Fight for Nev. v. Cegavske, No. 2:20-cv-00837-FRB-EJY, 2020 WL 2614624 (D. Nev. May 15, 2020).	May 15, 2020	United States District Court for the District of Nevada	Temporary restraining order denied
Geller v. De Blasio, No. 20cv3566 (DLC), 2020 WL 2520711 (S.D.N.Y. May 18, 2020).	May 18, 2020	United States District Court for the Southern District of New York	Temporary restraining order denied

Amato v. Elicker, No. 3:20-cv-464 (MPS), 2020 WL 2542788 (D. Conn. May 19, 2020).	May 19, 2020	United States District Court for the District of Connecticut	Temporary restraining order and preliminary injunction denied
Best Supplement Guide, LLC v. Newsom, No. 2:20-cv-00965-JAM-CKD, 2020 WL 2615022 (E.D. Cal. May 22, 2020).	May 22, 2020	United States District Court for the Eastern District of California	Temporary restraining order denied

Free Exercise of Religion

Case	Date	Court	Outcome
On Fire Christian Ctr., Inc. v. Fischer, No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020).	April 11, 2020	United States District Court for the Western District of Kentucky	Temporary restraining order granted
Legacy Church, Inc. v. Kunkel, No. CIV 20-0327 JB\SCY, 2020 WL 1905586 (D.N.M. Apr. 17, 2020).	April 17, 2020	United States District Court for the District of New Mexico	Temporary restraining order denied
First Baptist Church v. Kelly, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020).	April 18, 2020	United States District Court for the District of Kansas	Temporary restraining order granted

Lawrence v. Colorado, No. 1:20-cv-00862-DDD-SKC, 2020 WL 2737811 (D. Colo. Apr. 19, 2020).	April 19, 2020	United States District Court for the District of Colorado	Preliminary injunction denied
Gish v. Newsom, No. EDCV 20-755 JGB (KKx), 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020).	April 23, 2020	United States District Court for the Central District of California	Temporary restraining order denied
Lighthouse Fellowship Church v. Northam, No. 2:20cv204, 2020 WL 2110416 (E.D. Va. May 1, 2020).	May 1, 2020	United States District Court for the Eastern District of Virginia	Temporary restraining order and preliminary injunction denied
Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020).	May 2, 2020	United States Court of Appeals for the Sixth Circuit	Preliminary injunction granted
Cassell v. Snyders, No. 20 C 50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020).	May 3, 2020	United States District Court for the Northern District of Illinois	Temporary restraining order and preliminary injunction denied
Cross Culture Christian Ctr. v. Newsom, No. 2:20-cv-00832-JAM-CKD, 2020 WL 2121111	May 5, 2020	United States District Court for the Eastern District of California	Temporary restraining order denied

(E.D. Cal. May 5, 2020).			
Tabernacle Baptist Church, Inc. v. Beshear, No. 3:20-cv-00033-GFVT, 2020 WL 2305307 (E.D. Ky. May 8, 2020).	May 8, 2020	United States District Court for the Eastern District of Kentucky	Temporary restraining order granted
Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020).	May 9, 2020	United States Court of Appeals for the Sixth Circuit	Preliminary injunction granted
Calvary Chapel of Bangor v. Mills, No. 1:20-cv-00156-NT, 2020 WL 2310913 (D. Me. May 9, 2020).	May 9, 2020	United States District Court for the District of Maine	Temporary restraining order denied
Elim Romanian Pentecostal Church v. Pritzker, No. 20 C 2782, 2020 WL 2468194 (N.D. Ill. May 13, 2020).	May 13, 2020	United States District Court for the Northern District of Illinois	Temporary restraining order and preliminary injunction denied
Spell v. Edwards, No. 20-00282-BAJ-EWD, 2020 WL 2509078 (M.D. La. May 15, 2020).	May 15, 2020	United States District Court for the Middle District of Louisiana	Temporary restraining order and preliminary injunction denied
Elim Romanian Pentecostal Church v. Pritzker, No. 20-1811, 2020 WL	May 16, 2020	United States Court of Appeals for the Seventh Circuit	Injunction pending appeal denied

2517093 (7th Cir. May 16, 2020).			
Berean Baptist Church v. Cooper, No. 4:20-CV-81-D, 2020 WL 2514313 (E.D.N.C. May 16, 2020).	May 16, 2020	United States District Court for the Eastern District of North Carolina	Temporary restraining order granted
Antietam Battlefield KOA v. Hogan, No. CCB-20-1130, 2020 WL 2556496 (D. Md. May 20, 2020).	May 20, 2020	United States District Court for the District of Maryland	Temporary restraining order and preliminary injunction denied
S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938 (9th Cir. 2020).	May 22, 2020	United States Court of Appeals for the Ninth Circuit	Injunction pending appeal denied
S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.).	May 29, 2020	United States Supreme Court	Application for injunctive relief denied

Miscellaneous

Case	Date	Court	Type of Claim	Outcome
CommCan, Inc. v. Baker, No. 2084CV0080 8-BLS2, 2020 WL 1903822 (Mass. Super. Ct. Apr. 16, 2020).	April 16, 2020	Superior Court of Massachusetts	Arbitrary & capricious	Preliminary injunction denied
Hartman v. Acton, No. 2:20-CV-1952, 2020 WL 1932896 (S.D. Ohio Apr. 21, 2020).	April 21, 2020	United States District Court for the Southern District of Ohio	Void for vagueness (Due Process)	Temporary restraining order denied
Mega Vape, LLC v. City of San Antonio, No. SA-20-CV-0454-JKP, 2020 WL 1933938 (W.D. Tex. Apr. 22, 2020).	April 22, 2020	United States District Court for the Western District of Texas	Due Process claim under Texas Constitution, interference with contracts	Case remanded to state court
Shows v. Cochran, No. 1:20-CV-00088-MOC-WCM, 2020 WL 1953621 (W.D.N.C. Apr. 23, 2020).	April 23, 2020	United States District Court for the Western District of North Carolina	Privileges & Immunities Clause	Temporary restraining order denied

Coleman v. Newsom, No. 2:90-cv-0520 KJM DB P, 2020 WL 1974229 (E.D. Cal. Apr. 24, 2020).	April 24, 2020	United States District Court for the Eastern District of California	Violation of prior court order	Prior order upheld
Lynchburg Range & Training, LLC v. Northam, No. CL20000333, 2020 WL 2073703 (Va. Cir. Ct. Apr. 27, 2020).	April 27, 2020	Circuit Court of Virginia	Second Amendment	Temporary injunction granted
Frank v. City of St. Louis, No. 4:20-CV-00597 SEP, 2020 WL 2116392 (E.D. Mo. May 2, 2020).	May 2, 2020	United States District Court for the Eastern District of Missouri	Cruel and unusual punishment under the Eighth Amendment	Temporary restraining order denied
McGhee v. City of Flagstaff, No. CV-20-08081-PCT-GMS, 2020 WL 2308479 (D. Ariz. May 8, 2020).	May 8, 2020	United States District Court for the District of Arizona	Ultra vires	Temporary restraining order and preliminary injunction denied
Wis. Legislature v. Palm, 942	May 13, 2020	Supreme Court of Wisconsin	Ultra vires	Executive Order invalidated

N.W.2d 900 (Wis. 2020).				
Open Our Or. v. Brown, No. 6:20-cv- 773-MC, 2020 WL 2542861 (D. Or. May 19, 2020).	May 19, 2020	United States District Court for the District of Oregon	Ultra vires	Temporary restraining order denied
Benner v. Wolf, No. 20- cv-775, 2020 WL 2564920 (M.D. Pa. May 21, 2020).	May 21, 2020	United States District Court for the Middle District of Pennsylvania	Procedural Due Process	Temporary restraining order denied