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Covid-19, Lying, Mask-less Exposures and Disability During a Pandemic

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COVID-19, LYING, MASK-LESS EXPOSURES AND DISABILITY DURING A PANDEMIC

Madeleine M. Plasencia*

This article focuses on disability law in the context of COVID-19. In dealing with this pandemic, businesses, schools and other covered entities have to navigate and manage (at least) three different categories of people congregating. First are those who act as if there were no pandemic at all; they simply do not care if they are contagious and insist upon not complying with safety precautions, such as mask-wearing and social distancing; second are people who have medical conditions that make them especially vulnerable and at high-risk for severe symptoms associated with the infection; third are people who have already contracted COVID-19, and are currently experiencing symptoms, or have recovered from COVID.

The point of this article is to discuss law that protects the second and third groups, especially against the first group. In part I, I identify the special pandemic-focused problems that arise when these groups interact. In part II, I discuss the global and local

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statistics related to the spread of the virus, especially as they relate to the housing needs and demographics in Miami-Dade County, Florida. Miami, Florida is exemplary because it is the fourth-largest urban area in the United States (U.S.), with a population of approximately 5.5 million, and a density of nearly 4,500 persons per square mile. With daily nonstop flights between Miami International Airport and Paris, Warsaw, Morocco and London, Miami -Dade County is a world-class hot spot for coronavirus, ranking fourth in the U.S. for highest number of confirmed coronavirus cases. Thus, Miami is a site where we see the three categories of people—mask-less individuals, those who are medically vulnerable to COVID-19, and those who have currently or previously tested positive for COVID—have come unwittingly together, explosively challenging the legal frameworks. In part III, I revisit significant pre-COVID-19 contagion cases for a discussion of historical and recurring problems of discrimination and containment. In part IV, I discuss the role of the state in protecting vulnerable persons against the mask-less. Part V addresses the emerging U.S. Supreme Court COVID-19 jurisprudence in the context of religious freedom, which I argue are arguably contagion non-containment cases. Part VI concludes that state “contagion law” and federal disability law can be understood to work together to keep everyone safe, especially during a pandemic.

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I. THE GENESIS AND SPREAD OF THE NOVEL CORONAVIRUS,
AND THE DEADLY MASK-LESS THREAT

In as early as December 2019, hospitals in the Chinese city of Wuhan were filled with patients fighting for their lives suffering from a pneumonia of unknown origin, which would be later named the novel coronavirus (COVID-19). The global spread of COVID-19 was almost immediate, reaching virtually every country in the world, including the United States. By January 30, 2020, the World Health Organization (WHO) declared a Public Health Emergency of International Concern.

The WHO's self-described primary role is "to direct [] and coordinate international health within the United Nations system" and to lead partners in global health responses.¹ On March 11, 2020, the WHO held a "virtual press conference" televised on WHO Twitter, WHO Facebook, WHO YouTube, and on Zoom.² The WHO Director-General, Dr. Tedros Adhanom Ghebreyesus, declared, "[the] WHO has been assessing this outbreak around the clock and we're deeply concerned both by the alarming levels of spread and severity and by the alarming levels of inaction."³ Then he announced what was until then unprecedented in the world's history—a pandemic caused by a coronavirus:

We have therefore made the assessment that COVID-19 can be characterized as a pandemic. Pandemic is not a word to use lightly or carelessly. It's a word that, if misused, can cause unreasonable fear or unjustified acceptance that the fight is over, leading to unnecessary suffering and death.

We have never before seen a pandemic sparked by a coronavirus. This is the first pandemic caused by a coronavirus.

And we have never before seen a pandemic that can be controlled, at the same time.⁴

¹ *About WHO*, WORLD HEALTH ORGANIZATION [WHO], <https://www.who.int/about> (last visited Jan. 8, 2021).

² *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020*, WHO (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

³ *Id.*

⁴ *Id.*

Dr. Ghebreyesus struck a balance. On the one hand, he encouraged the world's citizens to take care of each other even in the face of a formidable disease that threatened to infect every corner of the entire globe, without simultaneously understating the seriousness of the situation. He implored world leaders to communicate to the people the risks and educate them on how they can protect themselves—“let's all look out for each other, because we need each other.”⁵ The linchpin in the history of contagions in the world was to take care and protect against infection spreading farther because in the global battle against coronavirus devastation—“this is everybody's business.”⁶

Notwithstanding the pressing need for global collaboration, in the United States, perhaps as a matter of cultural heritage or social incentive, Americans suffering from COVID-19 are hiding or evading reporting symptoms or test results when accessing facilities.⁷ Misrepresenting one's COVID-19 status is not a small matter. Indeed, honest reporting of one's COVID-19 risky activities and symptoms is critical to managing the pandemic as a matter of public welfare. And yet, a recent Brock University study of 451 adults ages twenty to eighty-two living in the U.S. found that people who believed they had contracted the virus lied about their social distancing practices, their test results, and their symptoms. In fact, one in three persons reported that they had untruthfully denied their positive COVID-19 status and denied having symptoms when asked by others, and a full fifty-five percent reported some level of knowing concealment of their symptoms.⁸

Coupled with this finding are the beliefs projected by interviewees who attended Trump rallies that COVID-19 is a hoax invented to destroy the United States.⁹ The followers of this belief assert that it is their “prerogative” to not wear a mask.¹⁰ This is former President Trump's base.

⁵ *Id.*

⁶ *Id.*

⁷ *E.g.*, Derrick Bryson Taylor, *Are You Lying More in the Pandemic? Some Certainly Are*, N.Y. TIMES (Sep. 11, 2020), <https://www.nytimes.com/2020/09/11/us/pandemic-lies.html>.

⁸ Alison M. O'Connor & Angela D. Evans, *Dishonesty during a Pandemic: The Concealment of COVID-19 Information*, J. OF HEALTH PSYCH., 1, 6 (2020), <https://journals.sagepub.com/doi/pdf/10.1177/1359105320951603> (“thirty-four percent of Covid-19-positive participants said they had denied having symptoms when asked by others, and 55 percent reported some level of concealment of their symptoms.”).

⁹ *See Fact Check: COVID-19 is Not a Hoax, It Can Cause Pneumonia and the Vaccine Will Not Contain a Microchip*, REUTERS (Dec. 2, 2020), <https://www.reuters.com/article/uk-factcheck-pandemic-idUSKBN28C3DJ> [hereinafter *See Fact Check: COVID-19*].

¹⁰ *See* Egberto Willies, *CNN Panelist Shocked at Maskless Trump Supporters' Statements at Rally. It Puts Trump in a New Light*, DAILY KOS (Sep. 11, 2020, 4:09 PM),

Whatever the former President may or may not believe about COVID-19, many, if not all who attended his rallies, refused to wear a mask.¹¹ Even when confronted with an assertion that the former President concede that the epidemic is real and deadly, “the Trump supporter said that was the President’s opinion.”¹² He then went on to give false CDC (Centers for Disease Control and Prevention) info claiming that only ten percent of the reported dead are really from COVID-19.¹³ Examples abound of would-be-customers attempting to enter and walkabout stores such as Walmart, Costco, and Krogers without a mask, only to be intercepted by greeters, stock clerks and cashiers. Video clips of people shouting and speechifying that it is their prerogative not to wear a mask and that the First Amendment guarantees the right to refuse wearing a mask in public spaces have gone viral on social media.¹⁴

Compounding individual human frailty and impulses to downplay illness and symptoms was the confusing and contradictory messaging emanating from government officials, especially in the early days of the spread of the virus. For example, Alex M. Azar, an attorney and former pharmaceutical company lobbyist, Secretary of the Department of Health and Human Services and, until his removal, as the original head of the Coronavirus Task Force, was later reported to have been “incautious” and responsible for a “tragic health care disservice” as the virus without warning and unimpeded, ripped through the U.S. population unchecked by any measures in place to protect the public.¹⁵ Moreover, the first weeks of the spread of the coronavirus in the U.S. was a confused time. The pole

<https://www.dailykos.com/stories/2020/9/11/1976763/-CNN-panelist-shocked-at-maskless-Trump-supporters-statements-at-rally-It-puts-Trump-in-a-new-light>.

¹¹ *See id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *State Police: Customer Shot in Flint Liquor Store after Attacking Security Guard*, ABC 12 NEWS (May 17, 2020, 10:34 PM), <https://www.abc12.com/content/news/Customer-shot-in-Flint-liquor-store-after-attacking-security-guard-570551281.html>; Nathaniel Meyersohn, *Security Guards Risk Their Lives by Asking Customers to Wear Masks*, CNN, <https://www.cnn.com/2020/05/26/business/security-guard-grocery-stores-coronavirus/index.html> (last updated May 26, 2020, 3:38 PM); David Williams, *Target Employee Breaks Arm in Fight with Shoppers Who Wouldn't Wear Masks, Police Say*, CNN, <https://www.cnn.com/2020/05/12/us/coronavirus-california-target-mask-assault-trnd/index.html> (last visited Dec. 16, 2020); Nathaniel Meyersohn, *Walmart and Others Will Still Serve Customers Who Refuse to Wear Masks, despite New Rules*, CNN, <https://www.cnn.com/2020/07/24/business/masks-walmart-home-depot-lowes-cvs/index.html> (last updated May 12, 2020, 6:45 PM).

¹⁵ Dan Diamond & Adam Cancryn, *Azar in the Crosshairs for Delays in Virus Tests*, POLITICO (Mar. 2, 2020, 1:04 PM), <https://www.politico.com/news/2020/03/02/azar-crosshairs-delays-coronavirus-tests-118796>.

star to help protect oneself and reduce the risk of exposure—wearing a mask—for the average citizen was not fraught with political meaning so much as with honest confusion over the efficacy of masks. For example, on February 29, 2020 via social media and the CDC website, the public was specifically (and emphatically) directed by the U.S. Surgeon General, Dr. Jerome M. Adams, *not* to buy (nor presumably wear) masks, tweeting

Seriously people- STOP BUYING MASKS! They are NOT effective in preventing general public from catching [#Coronavirus](#), but if healthcare providers can't get them to care for sick patients, it puts them and our communities at risk!¹⁶

In a “Coronavirus Task Force Briefing” held on April 3, 2020, huddled at the dais in close quarters with Secretary Alex Azar, Dr. Deborah Birx, Vice-President Michael Pence, and former President Donald Trump, the Surgeon General discussed the conflict regarding masks, “to unpack the evolution of our guidance on masks because it has been confusing to the American people” recommending the general public wear a “cloth face covering in public settings, . . . when speaking in close proximity to others” but on a voluntary basis and “if you choose to.”¹⁷ And yet, none of the participants at the briefing itself standing shoulder to shoulder, including Dr. Adams and Dr. Birx were wearing masks. In fact, former President Trump immediately further undermined the Surgeon General’s guidance underscoring that mask-wearing was “a voluntary thing” adding, “I don’t think I’m going to be doing it. [. . .] I’m choosing not to do it.”¹⁸

¹⁶ See Leah Asmelash, *The Surgeon General Wants Americans to Stop Buying Face Masks*, CNN, <https://www.cnn.com/2020/02/29/health/face-masks-coronavirus-surgeon-general-trnd/index.html> (last updated Mar. 2, 2020, 9:39 AM).

¹⁷ *User Clip - Surgeon General Adams' Comments on Face Coverings*, C-SPAN (Apr. 3, 2020), <https://www.c-span.org/video/?c4865964/user-clip-surgeon-general-adams-comments-face-coverings>.

¹⁸ *White House Announces New CDC Face Mask Guidelines*, C-SPAN (Apr. 3, 2020), <https://www.c-span.org/video/?c4865960/white-house-announces-cdc-face-mask-guidelines>. See *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, WHITE HOUSE (Apr. 23, 2020, 5:48 PM), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-31/>. Compare @JoeBiden, TWITTER (Jan. 17, 2021, 1:50 PM), <https://twitter.com/JoeBiden/status/1350878051710750725?s=20> with Eliza Relman, *Trump Shares Tweet that Argues Face Masks Represent “Silence, Slavery, and Social Death,”* BUSINESS INSIDER, <https://www.businessinsider.com/trump-shares-tweet-that-says-masks-represent-slavery-and-social-death-2020-5> (last visited Dec. 10, 2020). Masks have been at the center of political controversy. See e.g., Isaac Stanley-Becker & Griff Witte, *Why Georgia Gov. Brian Kemp Stands Alone on Masks*, WASHINGTON POST (July 20, 2020, 7:29 PM), <https://www.washingtonpost.com/national/why-georgia-gov-brian>

A. The challenge of navigating between disability protection and contagion containment

The spread of COVID-19 throughout the world paints an alarming scene. On the world stage, the United States gets first place for highest number of COVID-19 cases and highest number of COVID-19 related deaths.¹⁹ As of September 9, 2020, the United States continued to hold first place in global cases by country, with 6,333,316; and in deaths from COVID-19, at 189,733, as documented by the Center for Systems Science and Engineering at Johns Hopkins University.²⁰ When updated on December 18, 2020, those impressive numbers had swelled to over 17.5 million cases, and over 300,000 deaths.²¹ Second and third place go to India and Brazil, with 4,370,128 and 4,162,073 cases by country, respectively.²² Brazil though has a higher number of deaths than India, by a significant factor, 127,464 deaths in Brazil compared to 73,890 deaths in India.²³ For further comparison, on September 9, Russia ranked fourth recording overall significantly fewer cases, 1,037,526.²⁴

kemp-stands-alone-on-masks/2020/07/20/2365b294-caba-11ea-bc6a-6841b28d9093_story.html; @DWUhlfelderLaw, TWITTER (Feb. 10, 2021), <https://twitter.com/DWUhlfelderLaw/status/1359564283047215108?s=20>; Silvia Foster-Frau & Scott Wilson, *New Texas Confronts the Old with Debates about Mask Mandates and Winter Storm Response*, WASHINGTON POST (Mar. 4, 2021, 7:28 PM), https://www.washingtonpost.com/national/new-texas-confronts-the-old-with-debates-about-mask-mandates-and-winter-storm-response/2021/03/04/1880df60-77a4-11eb-a7be-30ae6405e4b1_story.html; Aaron Gregg & Yeganeh Torbati, *Pentagon Used Taxpayer Money Meant for Masks and Swabs to Make Jet Engine Parts and Body Armor*, WASHINGTON POST (Sep. 20, 2020), <https://www.washingtonpost.com/business/2020/09/22/covid-funds-pentagon/>; confrontations in and around mask wearing have escalated from angry rhetoric to outright violence. See e.g., @AyannaPressley, TWITTER (Jan. 12, 2021), <https://twitter.com/ayannapressley/status/1349047072977252358?lang=en>; Michael Laris, *Sneezed on, Cussed at, Ignored: Airline Workers Battle Mask Resistance with Scant Government Backup*, WASHINGTON POST (Jan. 1, 2021), https://www.washingtonpost.com/local/trafficandcommuting/coronavirus-mask-airplanes/2020/12/31/09c12d52-4565-11eb-975c-d17b8815a66d_story.html.

¹⁹ *COVID-19 Map*, JOHNS HOPKINS UNIV. OF MED. CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/map.html> (last visited Dec. 18, 2020).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* (By December 18, 2020, there were a recorded 9.9 million positive cases in India and 7.1 million positive cases in Brazil).

²³ *Id.* (By December 18, 2020, the difference in positive cases between Brazil and India had narrowed with Brazil recording 184,827 deaths, and India recording 144,789 deaths).

²⁴ *Id.* (By December 18, 2020, Russia registered a total of 2.7 million cases).

By state, within the United States, California led as the state with the highest number of cases, followed by Texas, and Florida.²⁵ New York led in deaths, with 33,016 total deaths, followed by New Jersey, California, Texas, then Florida.²⁶ By December 18, 2020, California experienced a new and higher surge in cases—with Los Angeles county topping the list for highest number of confirmed cases, followed by Cook, Maricopa, and Miami-Dade.²⁷ On September 9, North and South Dakota were under an active outbreak risk; Vermont was the only state “on track to contain COVID-19.” By December, the entire United States was at risk of outbreak on risk level maps, with only the Northern Mariana Islands on track to contain COVID-19.²⁸

In Florida, there have been a total of nearly 13,000 deaths, concentrated in Miami-Dade County, with nearly 165,000 cases, representing one quarter of the state’s cases.²⁹ There have been a total of 11,915 deaths, as of September 9.³⁰ On September 10, there were an additional 213 deaths.³¹ These cases and total deaths are concentrated in Miami-Dade County, with 173,812 cases, representing 24.9% of the state’s cases, and 2,809 deaths.³² On September 10, there were forty-nine additional deaths in Miami-Dade county alone.³³ In December, Miami-Dade county surged again with daily new cases of residents, nearing 2,500 confirmed new cases each day.³⁴ Of the total of 1,161,953 positive Florida residents, Miami-Dade county accounted for 269,096. Of these, 20,867 were Black, 154,957 were Hispanic, 138,122 were female, and 10,155

²⁵ CDC COVID Data Tracker, CENTERS FOR DISEASE CONTROL AND PREVENTION [CDC], <https://www.cdc.gov/covid-data-tracker> (last visited Sep. 9, 2020).

²⁶ *Id.*

²⁷ COVID-19 United States Cases by County, JOHNS HOPKINS UNIV. OF MED. CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/us-map> (last visited Dec. 18, 2020) (On December 18, 2020, Los Angeles confirmed 597, 400 cases; Miami Dade confirmed 269,700).

²⁸ See U.S. COVID Risk & Vaccine Tracker, COVID ACT NOW, <https://covidactnow.org> (last updated Feb. 25, 2021).

²⁹ See CSSEGISandData/COVID-19: Novel Coronavirus (COVID-19) Cases, provided by JHU CSSE, GITHUB, <https://github.com/CSSEGISandData/COVID-19> (last visited Dec. 19, 2020) [hereinafter CSSEGIS].

³⁰ Florida COVID Action - A New Experience, FLORIDA COVID ACTION, https://experience.arcgis.com/experience/d2726d6c01c4486181fec2d4373b01fa/page/page_3/ (last updated Feb. 24, 2021, 7:45 PM).

³¹ *Id.*

³² This data is supplied by the University of South Florida in collaboration with the Florida Department of Environmental Protection. See CSSEGIS, *supra* note 29.

³³ *Id.*

³⁴ Florida’s COVID-19 Data and Surveillance Dashboard, FLORIDA HEALTH, <https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429> (last visited Dec. 19, 2020).

were male.³⁵ The CDC began to track COVID-19 hospitalization and death rates by race and ethnicity finding rate ratios compared to White, Non-Hispanic persons for Black or African American Non-Hispanic persons of 2.9x (hospitalization) and 1.9x (death), and Hispanic or Latino persons were 3.1x (hospitalization) and 2.3x (death).³⁶

Race and ethnicity are risk markers for underlying conditions, which predictably and as can be seen from the hospitalization and death rates above, affect health. The health affecting conditions marked by race and ethnicity include socioeconomic status, access to health care, and exposure to COVID-19 in crowded housing, or in occupations such as frontline, essential and critical infrastructure workers.³⁷ Miami-Dade County's Property Appraiser Department reported in 2008 that 44.9% of homes were multi-family homes,³⁸ and 53.7% of housing units were single family homes.³⁹ That means that nearly half of the county's population are squeezed into structures that account for only eleven percent of the total of building types. That is high density.

II. A TALE OF MULTIPLE CITIES, AND HEIGHTENED RISKS

In Miami-Dade County, race and ethnic diversity is quite different than in the United States or even in overall Florida. Non-Hispanic Whites comprise only 12.9% of the county population, whereas the majority is either Hispanic (69.4%) or African American (17.7%).⁴⁰ The specific places of highest numbers of COVID-19 cases are locally concentrated in the cities of Miami Beach, Hialeah, and adjoining Brownsville.⁴¹ But the similarities stop there. Miami Beach has an estimated population of

³⁵ *Id.*

³⁶ *Risk for COVID-19 Infection, Hospitalization, and Death By Race/Ethnicity*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/covid-data/hospitalization-death-by-race-ethnicity.pdf> (last updated Feb. 18, 2021).

³⁷ *Id.*

³⁸ Florida International University & Metropolitan Center, *Miami-Dade Community Action Agency Comprehensive Community Needs Assessment*, 44 (2008), <https://metropolitan.fiu.edu/research/services/economic-and-housing-market-analysis/caa-comprehensive-needs-assessment-1.pdf>.

³⁹ *Id.*

⁴⁰ *QuickFacts: Miami Beach City, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/miamidadecountyflorida,miamibeachcityflorida/PST045219> (last visited Mar. 18, 2021).

⁴¹ See Larry Livingston, *Hialeah has Florida's second-most COVID-19 cases; mayor says he's gotten no help from DeSantis*, LOCAL 10 NEWS (June 2020) <https://www.local10.com/news/local/2020/06/17/hialeah-has-floridas-second-most-covid-19-cases-mayor-says-hes-gotten-no-help-from-desantis/>.

88,885.⁴² Exactly 35.6% are reportedly White alone, not Hispanic or Latinx, according to the July 2019 U.S. Census Bureau.⁴³ In contrast, Hialeah and Brownsville report a White only, not Hispanic or Latinx population of 2.7%, and 2.9%, respectively.⁴⁴ Relatedly, Miami Beach reports a Black or African American population of 4.7%, whereas Hialeah and Brownsville report 2.3% and 57.7%, respectively.⁴⁵ Stay at home orders reduced public transportation by sixty-four percent in April of 2020, and are still down by thirty-seven percent compared to April of 2019.⁴⁶

Demographics in Florida reveal a triple threat in this era of COVID-19—age, risk factors, and race. Florida has the greatest proportion (19%) of older population (65 years or older) in the United States.⁴⁷ A disproportionate number of Floridians living in Miami-Dade County suffer from chronic diseases, particularly cardiovascular diseases.⁴⁸ For example, eight out of ten households surveyed in 2013 had at least one member that was diagnosed with high blood pressure.⁴⁹ Compare this high figure to the overall seventy-two percent reported by the American Heart Association in 2014 for the sixty-five years and older U.S. population.⁵⁰ Compounding the high prevalence of chronic diseases in Miami-Dade, Little Haiti, and South Miami in a recent study conducted by the Herbert Wertheim College of Medicine, Florida International University shows “a predominantly elderly, female, uninsured, and poor minority population[] living in [Miami-Dade County], FL.”⁵¹ Emergency room use was often reported as a main resource for health care. Cardiovascular disease, cancer, bone fractures, and related risk factors were the most prevalent health outcomes.⁵²

⁴² *QuickFacts: Miami Beach City, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/miamibeachcityflorida/POP060210> (last visited Sep. 10, 2020).

⁴³ *Id.*

⁴⁴ Data and Surveillance Dashboard, <https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429> (last visited Dec. 19, 2020).

⁴⁵ *Id.*

⁴⁶ Kristen Sanchez, *Pandemic Takes a Toll on Miami-Dade's Public Transit System*, NBC Miami (Mar. 2021), <https://www.nbcmiami.com/news/local/pandemic-takes-a-toll-on-miami-dades-public-bus-transit-system/2399933/>.

⁴⁷ The National Institute of Health in collaboration with Florida International University research teams published one of the few demographic studies available. See Juan C. Zevallos et al., *Profile of the Older Population Living in Miami-Dade County, Florida: An Observational Study*, *MEDICINE* 1, 1 (May 2016).

⁴⁸ *Id.* at 6.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.*

⁵¹ *Id.* at 1.

⁵² *Id.*

A. *The Gender Divide*

From inception of the pandemic, women, and especially those living in the world's poorer countries are at greatest risk of contracting and dying from COVID-19.⁵³ Moreover, women are disproportionately represented in essential occupations—such as nurses and caregivers—placing them at greater risk of contracting the virus, further exacerbating the gender divide.⁵⁴

One of the few female leaders at the top of global health organizations, Dr. Ngozi Okonjo-Iweala, chair of the board of the Global Alliance for Vaccinations and Immunization (GAVI), the Coalition for Epidemic Preparedness Innovation (CEPI), and the WHO, has argued that the COVAX facility, established for raising money and bulk procurement of vaccines to subsidize the cost of vaccines for poorer member countries, is “the only game in town” to end the pandemic.⁵⁵ As she explained, “[w]hen we say ‘everyone has access,’ we mean that not only people in rich countries but also people in poor countries have access. Vaccine nationalism with COVID-19 is not going to work. You are not safe, even in a rich country, with all your people vaccinated, until everyone in the poor countries are also vaccinated.”⁵⁶ It is that ineluctable logic that applies equally on the local level in a pandemic. Miami follows this global demographic trend. As noted, studies show that Miami is predominantly “elderly, female, uninsured, poor, and minority.”⁵⁷

B. *Black and Latinx children at a higher risk*

Regardless of age, the risk of experiencing severe COVID-19 symptoms increases dramatically for persons with certain conditions. The Centers for Disease Control and Prevention (CDC) issued a list of these conditions, which includes the following:

cancer, chronic kidney disease, COPD (chronic obstructive pulmonary disease), Immunocompromised

⁵³ Alisha Haridasani Gupta, *Why Women May Face a Greater Risk of Catching Coronavirus*, N.Y. TIMES, <https://www.nytimes.com/2020/03/12/us/women-coronavirus-greater-risk.html> (last updated Nov. 16, 2020).

⁵⁴ *Id.* (“Around the world, women make up a majority of health care workers, almost 70 percent according to some estimates, and most of them occupy nursing roles”).

⁵⁵ *Women and Leadership: Looking Beyond the Global Health Crisis*, N.Y. TIMES, <https://www.nytimes.com/2020/11/17/business/women-leaders-pandemic.html> (last updated Dec. 11, 2020).

⁵⁶ *Id.* (“The idea of the COVAX facility is to be able to ensure that poor countries have equitable and affordable access when these vaccines become available. Right now, on one side, we have 92 member countries called the advanced market commitment side, which are going to be subsidized.”)

⁵⁷ Zevallos et al., *supra* note 47, at 1.

state (weakened immune system) from solid organ transplant, Obesity (defined as body mass index [BMI] of 30 or higher), serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies, sickle cell disease, Type 2 diabetes. Mellitus.⁵⁸

Many more people may find themselves at great risk of severe COVID-19, considering the expanded list includes numerous medical conditions which have been found might increase risk of severe illness from COVID-19.⁵⁹ This non-exhaustive list captures a significantly larger percentage of the population.

On September 18, the CDC published a report finding that Black and Latinx children die from COVID-19 more often than white children.⁶⁰ Suffering from the same structural disability as older adults, these children suffer from lung problems, obesity and heart problems.⁶¹ Hispanic, non-Hispanic Black and non-Hispanic American Indian/Alaskan Native accounted for seventy-eight percent of deaths among persons younger than twenty-one from SARS-CoV-2; and more than one-third of these deaths took place outside of a hospital.⁶²

III. IS COVID-19 A DISABILITY: LESSONS FROM AIDS (AND OTHER) EPIDEMICS

A. *COVID-19 and the Americans with Disabilities Act*

From the beginning of the pandemic, it was urged that COVID-19 should be recognized and categorized as a disability under the U.S. Equal

⁵⁸ *Certain Medical Conditions and Risk for Severe COVID-19 Illness*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated Feb. 22, 2021).

⁵⁹ *Id.* (“Asthma [moderate-to-severe], Cerebrovascular disease [affects blood vessels and blood supply to the brain], Cystic fibrosis, Hypertension or high blood pressure, Immunocompromised state [weakened immune system] from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines, Neurologic conditions, such as dementia, Liver disease, Pregnancy, Pulmonary fibrosis [having damaged or scarred lung tissues], Smoking, Thalassemia [a type of blood disorder], Type 1 diabetes mellitus.”).

⁶⁰ *COVID-19 Science Update released: September 18, 2020 Edition 49*, CENTER FOR DISEASE CONTROL, https://cdc.gov/library/covid19/091820_covidupdate.html (citing to Cheng et al., *COVID-19 death rates are higher in rural counties with larger shares of Blacks and Hispanics*, JOURNAL OF RURAL HEALTH (Sept. 7, 2020)).

⁶¹ Danae Bixler et al., *SARS-CoV-2–Associated Deaths Among Persons Aged 21 Years — United States, February 12–July 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. [MMWR], 1324, 1325 (2020).

⁶² *Id.*

Employment Opportunity Commission (“EEOC”) guidelines, to deter employers from discriminating against employees with COVID-19.⁶³ Even so, EEOC senior attorney adviser Sharon Rennert in a webinar held on March 27, 2020, stated “it is unclear at this time whether COVID-19 is or could be a disability under the ADA [(Americans with Disabilities Act)].”⁶⁴ And yet, as reported in the Washington Post, doctors keep discovering new ways COVID-19 attacks the body.⁶⁵ It may very well be many years before it is understood how COVID-19 “damages organs and how medications, genetics, diets, lifestyles and distancing impact its course.”⁶⁶ In some cases, patients complain of fatigue and brain fog long after they have “recovered” from the disease.⁶⁷ Whether the scope and implications of disabilities caused by COVID-19 are likely to be transient has yet to be documented and formally understood. But in a lived life, legal recognition of a disability, even a short-term disability, is highly consequential. “Short-term disability typically lasts [twenty-six] weeks and covers 60% to 100% of the employee’s salary. The amount is determined by the employer. If the employee is still disabled when the short-term disability benefits expire, long-term disability insurance may be an option.”⁶⁸

The statutory and regulatory definitions of the ADA would be met when the infection is a “physical or mental . . . impairment that substantially limits . . . major life activities,” or is so perceived. Major life activities would include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.⁶⁹

A federal district court judge will tell you that there are three criteria a plaintiff must meet in order to establish a prima facie case of

⁶³ Gary Phelan et al., *EEOC Should Classify COVID-19 As A Disability Under ADA*, LAW360 (June 10, 2020, 4:36 PM), <https://www.law360.com/articles/1280583/eec-should-classify-covid-19-as-a-disability-under-ada>.

⁶⁴ *Id.*

⁶⁵ Lenny Bernstein & Ariana Eunjung Cha, *Doctors Keep Discovering New Ways the Coronavirus Attacks the Body*, WASH. POST (May 10, 2020), <https://www.washingtonpost.com/health/2020/05/10/coronavirus-attacks-body-symptoms/?arc404=true>.

⁶⁶ *Id.*

⁶⁷ Lydia Wheeler & Paige Smith, *‘My Brain’s Not as Sharp’: Covid Woes Stalk Workers Back on Job*, BLOOMBERG LAW (Oct. 6, 2020, 3:27 AM), <https://news.bloomberglaw.com/health-law-and-business/my-brains-not-as-sharp-covid-woes-stalk-workers-back-on-job>.

⁶⁸ *Id.*

⁶⁹ Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (2)(A) (1990).

discrimination under the ADA.⁷⁰ The first criterion requires individuals establish that: a) they have a disability; b) the defendant discriminated against them; and c) the discrimination was on the basis of the disability.⁷¹ But cases often fail to advance beyond prong (a) – that is, having the court recognize they have a disability within the meaning of the statute and regulations. Following past cases such as cancer, cancer in remission, AIDS or HIV, a person who has contracted COVID-19 would presumably be permitted to meet the ADA definition of disability by showing an impairment which substantially limits one or more of such person’s major life activities, a record of impairment, or that such person is “regarded as” having an impairment.

1. COVID-19 and “regarded as” discrimination

Much of what has been written and analyzed recently in connection with COVID-19 relates to the protections of persons either with COVID-19, or “regarded as” having COVID-19.⁷² However, there is a significant issue emerging with regard to the consideration and protection of those who are vulnerable to the most severe symptoms of COVID-19, and the failure of many to comply with basic guidelines and law devised to protect others from contracting COVID-19. Moreover, the CDC has specifically identified groups of people who may experience stigma during the COVID-19 pandemic as “[p]eople who tested positive for COVID-19, have recovered from being sick with COVID-19, or were released from COVID-19 quarantine.”⁷³ And the CDC includes a list of “dos and don’ts” on language when talking about COVID-19 such as, “[d]on’t attach locations or ethnicity to the disease, this is not a “Wuhan Virus,” “Chinese Virus,” or “Asian Virus.”⁷⁴ As with any invisible disability—COVID-19 in many cases may very well be “regarded as a disease limiting life itself.”⁷⁵

⁷⁰ See, e.g., *Howe v. Hull*, 873 F. Supp. 72 (N.D. Ohio 1994). *Accord* *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987).

⁷¹ 42 U.S.C. § 12182(a), (b) (1990); see also 28 C.F.R. § 36.104(1)(B)(ii).

⁷² See Phelan et al., *supra* note 63 and accompanying text.

⁷³ *Reducing Stigma*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/reducing-stigma.html> (last updated June 11, 2020). As of February 2020, the U.S. Department of Justice Civil Rights Division Disability Rights Section lists the federal laws which may be applicable, depending upon the nature of the business or facility. See *A Guide to Disability Rights Laws*, ADA, <https://www.ada.gov/cguide.htm> (last updated Feb. 24, 2020).

⁷⁴ *Social Stigma associated with COVID-19*, WHO, <https://www.who.int/docs/default-source/coronaviruse/covid19-stigma-guide.pdf> (last updated Feb. 24, 2020).

⁷⁵ See generally *Bragdon v. Abbott*, 524 U.S. 624, 656 (1998) (Ginsburg, J., concurring) (explaining that HIV “has been regarded as a disease limiting life itself.”).

2. Affirmative defenses

In COVID-19 related litigation, in order to be covered under the ADA, the Court might demand an individualized assessment for each individual as well as the possible “direct threat” risks of the spread of the virus. If raised as an affirmative “direct threat” defense, a public accommodation is not “require[d] to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages, and accommodations . . . where such individual poses a direct threat to the health or safety of others.” Under the pertinent regulations, a public accommodation must:

make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.⁷⁶

The phrase “qualification standard” appearing in Section 102 of the ADA, thus may include a requirement that an individual shall not pose a “direct threat to the health or safety of the individual or others in the workplace.”⁷⁷

⁷⁶ 28 C.F.R. § 36.208 (b) (2010) (direct threat exception in public accommodations and in commercial facilities context); *In re H.C.*, 187 A.3d 1254 (D.C. 2018) (direct threat exception in state and local government services context); *See generally* MyLinda K. Sims, *When Pigs Fly: Does the ADA Cover Individuals with Communicable Diseases Such as Novel H1N1 Influenza, “Swine Flu”?*, 37 N. KY. L. REV. 463, 468 (2010) (“The provisions of the ADA that Congress did not alter are equally significant as those provisions that were changed. Congress did not change the following statutory terms: ‘reasonable accommodation’, ‘undue hardship’, ‘essential functions’, ‘qualified individual’, or ‘direct threat’. These definitions and the case law discussing them remain unaltered and continue to serve as the standard. Thus, employers can raise ‘direct threat’ or ‘otherwise qualified’ as affirmative defenses when accused of discriminating against a person with a communicable disease. These unaltered definitions will also be instrumental in properly evaluating whether an individual with an infectious disease is afforded the protection of the ADA.”).

⁷⁷ 29 C.F.R. § 1630.15(b)(2) (2001); *see* *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85 n. 5 (2002) (“[T]he EEOC has required that judgments based on the direct threat provision be made on the basis of individualized risk assessments.”); *see also* *Baldwin v. Wilkie*, No. 5:15-CV-594-OC-34PRL, 2019 WL 480503 (M.D. Fla. 2019).

B. Lessons from Arline and Bragdon (and Camus): Fear of Contagion

1. Tuberculosis: School Board. of Nassau City v. Arline

As it turns out, humanity has had one hundred thousand years to behave badly in a pandemic.⁷⁸ As the U.S. Supreme Court observed thirty-three years ago in *School Board of Nassau City v. Arline*,

Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The [Rehabilitation] Act is carefully structured to replace such reflexive reactions to actual or perceived dis/abilities with actions based on reasoned and medically sound judgments: the definition of “handicapped individual” is broad, . . . The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were “otherwise qualified.” Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.⁷⁹

In *Arline*, the Court held that a school board’s decision to fire a teacher living with tuberculosis violated the Rehabilitation Act.⁸⁰ Justice Kennedy explained the stigma and irrational shunning endured by people who are afflicted with a contagious disease.⁸¹ Responding to concerns raised by dissenting Justices Rehnquist and Scalia, Justice Kennedy noted that coverage under the disability statute would not extend “beyond manageable bounds” because “[a] person who poses a significant risk of

⁷⁸ Corey S. Powell, *Did Another Advanced Species Exist on Earth before Humans?*, NBC, <https://www.nbcnews.com/mach/science/did-another-advanced-species-exist-earth-humans-ncna869856> (last updated Apr. 30, 2018, 11:27 AM).

⁷⁹ Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 285 (1987).

⁸⁰ See *id.* at 289.

⁸¹ See *id.* at 284.

communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children.”⁸²

The *Arline* court explained that an “individualized inquiry into the health risks, if any, presented by the . . . disease” is essential to preventing against “stereotypes, or unfounded fear[.]”⁸³ That is, people perceived to be contagious could be “vulnerable to discrimination on the basis of mythology.”⁸⁴ Specifically, in the context of a contagious disease, such as tuberculosis, the Court recognized that Congress acknowledged and was concerned “that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”⁸⁵

2. HIV: *Bragdon v. Abbott*

A decade later, in *Bragdon v. Abbott*, Justice Ginsburg noted that an asymptomatic viral infection, HIV, “pervades life’s choices: education, employment, family and financial undertakings.”⁸⁶ Similar to COVID-19, Justice Ginsburg underscored that “[the disease] affects the need for and, . . . the ability to obtain health care because of the reaction of others to the impairment.”⁸⁷ At the time of the HIV epidemic, it was compellingly argued that the unique and emergent facts of the AIDS crisis justified an AIDS jurisprudence. It was urged to the Court that,

This jurisprudence would recognize that epidemics threaten the ties that bind communities together. Some are driven to victimize others in order to bind the rest back together. AIDS discrimination laws combat this by establishing standards of reasonable behavior for members of a community, even when they are frightened, indeed, especially when they are frightened.⁸⁸

The parties argued that the law’s role (and the Court’s role) in the face of this unprecedented crisis was to erupt with a “new jurisprudence, a new

⁸² *Id.* at 287.

⁸³ *Id.* at 287.

⁸⁴ *Id.* at 285.

⁸⁵ *Id.* at 284.

⁸⁶ *Bragdon v. Abbott*, 524 U.S. 624, 656 (1998).

⁸⁷ *Id.*

⁸⁸ Brief of City of L.A. as Amicus Curiae in Support of Respondents, *Bragdon*, 524 U.S. 624 (No. 97-156), 1998 U.S. S. Ct. Briefs LEXIS 287, at *8 [hereinafter Brief of City of L.A.].

legal frame.”⁸⁹ Educating the public about the method of transmission of the then deadly virus would not only save individual lives, but it would also save the republic by combatting “the ancient impulse to fracture during epidemics, and thereby maintains the health of the body politic.”⁹⁰

3. Common Decency: Albert Camus, *The Plague*

If the AIDS epidemic was both novel and significant as a health crisis, then COVID-19 has presented a peer or match in health crises with a similar need for the citizenry to embrace humanity, taking care to treat each other with the basic respect and decency called for in Albert Camus’ *La Peste*. Borrowing from the insights of Justice Breyer in his lecture to the New York City high schoolers in the first wave (and first full shut down) of the COVID-19 crisis, and from the attorneys in the amicus brief filed in *Bragdon* arguing for human decency in the midst of the raging AIDS epidemic, the only way to fight contagion is with common decency and respect for your fellow humans. As Camus’ Doctor Rieux explains to the journalist in *La Peste*,

However, there’s one thing I must tell you: there’s no question of heroism in all this. It’s a matter of common decency. That’s an idea which may make some people smile, but the only means of fighting a plague is - common decency.⁹¹

Acknowledging that we are living in a pandemic should not “cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death.” On the contrary, a pandemic triggers the survival skills necessary to stop the spread of the virus through communication of risks and education about ways to protect oneself against infection. This is a story that has unfolded many times before: Camus instructs through the moral lessons taught by Tarrou, another character in *La Peste*, who teaches Rieux on the lessons of human duties to preserve life in a contagion. Tarrou instructs humanity:

All I maintain is that on this earth there are pestilences and there are victims, and it’s up to us, so far as possible, not to join forces with the pestilences. That may sound simple to the point of childishness; I can’t judge if it’s simple, but I know it’s true. You see, I’d heard such

⁸⁹ *Id.* at 9.

⁹⁰ *Id.*

⁹¹ *Id.* at 10. (quoting ALBERT CAMUS, *THE PLAGUE* (Stuart Gilbert trans., Vintage Books ed. (1972)).

quantities of arguments, which very nearly turned my head, and turned other people's heads enough to make them approve of murder; and I'd come to realize that all our troubles spring from our failure to use plain, clean-cut language. So, I resolved always to speak—and to act—quite clearly, as this was the only way of setting myself on the right track.⁹²

In that case, as in *Bragdon*, the argument advanced was that although a risk of infection may be very real to health care professionals, and for police or firefighters on the front line of harm, refusing care should not be an option.⁹³

IV. CONTAGION CONTAINMENT

States and governmental officials charged with the responsibility of contagion containment must ensure that all are protected under the law—especially, those who are medically vulnerable to severe to deadly COVID-19 symptoms. As part of contagion containment, the courts would need to evaluate the risk of spreading the virus. As explained in *Doe v. Deer Mt. Day Camp, Inc.*, “these factors provide for the evaluation of objective medical evidence while ‘protecting others from significant health and safety risks, resulting, for instance, from a contagious disease.’”⁹⁴ In each case involving a contagious virus, such as HIV, the defendant had to present medical evidence to support their threat determination. And the objective medical evidence provided must establish that the virus is communicable in ways that make the threat direct. For example, in the case of HIV it was shown that HIV cannot survive outside the body, cannot survive in a swimming pool, or on a toilet seat, and it is highly unlikely that it can be transmitted through contact sports.⁹⁵ Therefore, prohibiting a child with HIV from attending a summer camp was unlawful exclusion.⁹⁶ There is no doubt that there is an obligation to protect others from a very serious, life-threatening viral infection; however, “this obligation does not excuse . . . actions when based on unsubstantiated fears.”⁹⁷

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Doe v. Deer Mt. Day Camp, Inc.*, 682 F. Supp. 2d 324, 346 (S.D.N.Y. 2010).

⁹⁵ *Id.* at 346–47.

⁹⁶ *Id.* at 348. (A defendant “must provide ‘a credible scientific basis for deviating from the accepted norm.’”) (quoting *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987)).

⁹⁷ *Id.* at 350.

A. *History of contagions in the United States*

New York is no stranger to contagions.⁹⁸ In the early 19th century, Bellevue Hospital found itself the center of an epidemic, with tents erected on its grounds to accommodate that century's epidemic patients. "Bellevue hospital has been the battleground for epidemics for centuries—yellow fever in the 1700s, cholera in the 1800s and AIDS in the 1980s. It even successfully treated New York City's lone case of the Ebola virus in 2014. But little could have prepared Bellevue for COVID-19. Arguably one of the best-positioned public hospitals in the nation to deal with the pandemic, Bellevue normally has more than 800 beds and support from New York University (NYU)."⁹⁹ Within weeks of the WHO's announcement, the hospital "made sweeping changes in order to staff numerous new COVID-19 wards at the hospital, as well as the existing emergency room and ICUs."¹⁰⁰ On April 10, 2020, New York recorded the highest number of coronavirus cases in the world, higher than any single country—with nearly 162,000 cases, and 7,844 deaths.¹⁰¹ By May, 2020, according to a study conducted by a large consortium of service providers, including New York Disability Advocates, "residents of group homes and similar facilities in New York City and surrounding areas were 5.34 times more likely than the general population to develop COVID-19 and 4.86 times more likely to die from it."¹⁰² For those who never returned home, workers in hazmat suits stacked pinewood coffins in lines buried in deep trenches in New York's Hart Island—the resting place for the indigent and those with no identifiable next-of-kin.¹⁰³

Only weeks into the pandemic, around hospital emergency rooms in Nebraska, makeshift morgues and army green surge tents appeared.¹⁰⁴

⁹⁸ New York was at the center of the first recorded epidemic of yellow fever between 1668 and 1699. See Susan Brink, *Yellow Fever Timeline: The History Of A Long Misunderstood Disease*, NPR (Aug. 28, 2016, 7:00 AM), <https://www.npr.org/sections/goatsandsoda/2016/08/28/491471697/yellow-fever-timeline-the-history-of-a-long-misunderstood-disease>.

⁹⁹ Jessica Glenza & Ankita Rao, *The Historic US Hospital that Fought Cholera and Aids Faces Battle of Its Life*, THE GUARDIAN, <https://www.theguardian.com/us-news/2020/apr/03/new-york-hospitals-coronavirus-bellevue> (last modified July 1, 2020).

¹⁰⁰ *Id.*

¹⁰¹ *Coronavirus: New York Ramps up Mass Burials amid Outbreak*, BBC NEWS (Apr. 10, 2020), <https://www.bbc.com/news/world-us-canada-52241221>.

¹⁰² Danny Hakim, *'It's Hit Our Front Door': Homes for the Disabled See a Surge of Covid-19*, N.Y. TIMES, <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-disabilities-group-homes.html> (last updated Apr. 17, 2020).

¹⁰³ W.J. Hennigan, *Lost in the Pandemic: Inside New York City's Mass Graveyard on Hart Island*, TIME (Nov. 18, 2020, 9:11 PM), <https://time.com/5913151/hart-island-covid/>.

¹⁰⁴ Julie Anderson, *Temporary Surge Tent at Nebraska Medical Center Just One of the Ways Hospitals Prepare for Virus*, OMAHA WORLD HERALD,

These early signs of the devastating drain COVID-19 would come to impose on local medical and health facilities pointed to the coming crisis out of control spread of the virus that would spike nine months later, in December 2020, topping 153,400 positive cases in Nebraska alone.¹⁰⁵ Local ordinances throughout Nebraska were passed, in places like Omaha, Lincoln, Norfolk and Ralston, to mandate mask-wearing even as Governor Pete Ricketts continued to resist issuing a statewide mask mandate.¹⁰⁶

Meanwhile, 81-year-old Justice Stephen Breyer offered a free lecture online on Vimeo.¹⁰⁷ High schoolers attending the United Nations International School in Manhattan questioned the constitutionality of the shelter in place orders. Referencing Albert Camus's wartime *La Peste*, Justice Breyer warned that we have seen these times before because "the germ of the plague never goes away."¹⁰⁸ Justice Breyer explained that Camus wrote the book to tell the story of how people behave badly during the period of isolation in the midst of the plague, noting that although he may have used the plague as an allegory for Naziism, that "we are right there, right now."¹⁰⁹ "The germ of the plague never dies, [like Naziism] . . . it just goes into remission. It lurks . . . for one day to reemerge for the . . . misfortune of mankind," Justice Breyer chillingly warned the students.¹¹⁰

The difficult task of containing a worldwide contagion is further vexed by the alternative reality projected by people professing that "COVID-19 is a hoax" invented to destroy the United States¹¹¹ and "that a vaccine against the novel coronavirus will deliver a microchip to the recipient."¹¹² Reaching fans via social media, some international and business celebrities in the U.S. and abroad have spread their critical views on the

https://omaha.com/livewellnebraska/health/temporary-surge-tent-at-nebraska-medical-center-just-one-of-the-ways-hospitals-prepare-for/article_5c604bac-5423-569a-bfde-1b0305e387ad.html (last updated Mar. 30, 2020).

¹⁰⁵ *December 31: Nebraska reports more than 1,501 new COVID-19 cases, 40 deaths*, SIOUXLANDPROUD,

<https://www.siouxlandproud.com/community/health/coronavirus/december-1-nebraska-reports-62-new-covid-19-related-deaths/> (last updated Dec. 31, 2020, 08:03 PM).

¹⁰⁶ *2 More Nebraska Cities Require Masks amid COVID-19 Surge*, ASSOCIATED PRESS (Nov. 25, 2020), <https://apnews.com/article/pete-ricketts-lincoln-norfolk-omaha-grand-island-f0b939921dacf0f719d798380ee43a8e>.

¹⁰⁷ *See Distance Learning: Master Classes*, U.N. INT'L SCH. [UNIS], <https://www.unis.org/academics/unis-master-class> (last visited Dec. 18, 2020); *UNIS Master Class Series Episode 1: Stephen Breyer*, UNIS (Apr. 3, 2020), <https://vimeo.com/403853565>.

¹⁰⁸ *Id.* at 41:50-42:18.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 41:00-43:00.

¹¹¹ See Fact Check: COVID-19, *supra* note 9.

¹¹² *Id.*

pandemic, questioning the existence of the novel coronavirus, and advocating against the use of masks.¹¹³ Space X founder Elon Musk has referred to tests for COVID-19 as “bogus,” promoting theories that healthcare companies inflated COVID-19 positive case numbers for financial gain, promoted the benefits of later discredited COVID-19 treatment chloroquine, referred to stay-at-home orders as “fascist”, and retweeted calls to end all social distancing measures.¹¹⁴ Add to this chorus of anti-masker voices, the then-President himself, Donald Trump. Sharing messages with his more than eighty million Twitter followers that masks signal a “culture of silence, slavery, and social death,” President Trump eschewed wearing masks in public, even when social distancing is not possible.¹¹⁵ Countering this movement are people like President Joe Biden, former President Barack Obama, who happens to have the most followed Twitter account with 127 million-plus followers, and the scientist Bill Nye.¹¹⁶

¹¹³ Alonso Collantes, *Miguel Bosé Disappears from Social Networks and this is the Reason for his Decision*, HOLA!, <https://us.hola.com/es/celebrities/20200901fqso5uvcgx/miguel-bose-desaparece-redes-sociales-explica-motivo> (“[H]is Twitter account was censored after his support for the march against the use of masks. As a result, he was constantly active on his platforms, maintaining his critical stance on the pandemic.”) (last updated Sep 2., 2020); @ScottBaio, TWITTER (Apr. 5, 2020, 2:37 PM), <https://twitter.com/scottbaio/status/1246869709594619904?lang=en> (posting pictures on social media to his 26,184 Twitter followers mocking mask wearing by showing people wearing costumes when shopping for groceries); Ryan Perry, *Anti-Masker Scott Baio Says “Let Me Live My Life,”* MSN (Sept. 30, 2020), <https://www.msn.com/en-us/tv/celebrity/anti-masker-scott-baio-says-let-me-live-my-life/ar-BB19AchB>.

¹¹⁴ Neil E. Boudette & Emily Flitter, *Elon Musk Lashes Out at Officials Keeping Tesla Plant Closed Over Virus*, N.Y. TIMES, <https://web.archive.org/web/20200901054355/https://www.nytimes.com/2020/05/09/business/coronavirus-elon-musk-tesla-california.html> (last updated May 19, 2020); *Elon Musk Claims He Tested Positive and Negative for Coronavirus on the Same Day After Four Tests*, EVENING STANDARD (Nov. 13, 2020), <https://www.standard.co.uk/news/uk/elon-musk-coronavirus-tests-positive-negative-b69559.html>; Russell Brandom, *Elon Musk is Dangerously Wrong about the Novel Coronavirus*, THE VERGE (Apr. 19, 2020), <https://www.theverge.com/2020/4/29/21241180/elon-musk-coronavirus-conspiracy-misinformation-tesla>. See generally @elonmusk, TWITTER, <https://twitter.com/elonmusk> (last visited Mar. 1, 2020).

¹¹⁵ Eliza Relman, *Trump Shares Tweet that Argues Face Masks Represent ‘Silence, Slavery, and Social Death,’* BUSINESS INSIDER (May 28, 2020), <https://www.businessinsider.com/trump-shares-tweet-that-says-masks-represent-slavery-and-social-death-2020-5>; Rachel Lerman, *Trump Says Twitter is Trying to ‘Silence’ Conservatives. His Growing Number of Followers Suggests Otherwise.*, WASH. POST (May 28, 2020), <https://www.washingtonpost.com/technology/2020/05/28/trump-twitter-by-numbers/>.

¹¹⁶ Ellissa Bain, *WATCH: Bill Nye Explains Why We Should Wear a Mask in TikTok Video!*, HITC, <https://www.hitc.com/en-gb/2020/12/05/bill-nye-mask-tiktok/> (last visited Dec. 10, 2020); @billnye, TIK TOK (Dec. 3, 2020), <https://www.tiktok.com/@billnye/video/6902187618339917061> (Nye posts to his 6.6

B. Small Pox and States' Rights: Jacobson v. Massachusetts

In the context of an outbreak of smallpox in the first decade of the 20th century, the Supreme Court invoked proper and enduring States' rights, which the Court strongly affirmed had survived the Civil War, to uphold the right of the state of Massachusetts to compel a Lutheran minister to submit to the smallpox vaccination.¹¹⁷ On the matter of the commonly called "police power" Justice Harlan wrote for the Court:

The authority of the State to enact this statute is to be referred to what is commonly called the police power . . . a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the *police power of a State* must be held to embrace, at least, such reasonable regulations established directly by legislative enactment *as will protect the public health and the public safety*.¹¹⁸

The state's broad police power could be enlisted to protect the people *en masse*, elevating the good of the whole over the preference of the few. Justice Harlan wrote, "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."¹¹⁹ On the limits to act according to one's own will, Justice Harlan invoked late 19th century jurisprudence. In 1890, in *Crowley v. Christensen*, Justice Field wrote for the Court:

The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety,

million Tik Tok followers: "I don't know who needs to hear this but . . . #masks work. Wear one. Carry on . . . #tiktokpartner #learnontiktok"); *See generally* @BarackObama, TWITTER, <https://twitter.com/BarackObama> (last visited Mar. 1, 2020).

¹¹⁷ *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905). See MICHAEL WILLRICH, *POX: AN AMERICAN HISTORY* (Penguin Books 2011), for a historical account of the case.

¹¹⁸ *Jacobson*, 197 U.S. at 24-25.

¹¹⁹ *Id.* at 27.

health, peace, good order and morals of the community. *Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will.* It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.¹²⁰

Justice Harlan reaffirmed this limitation on the right of the individual for the common good, writing:

But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.¹²¹

* * *

We come, then, to inquire whether any right given, or secured by the Constitution, is invaded by the statute as interpreted by the state court. The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or *refusing to submit to vaccination*; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who

¹²⁰ *Id.* at 26-27 (quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890) (involving a challenge to a San Francisco ordinance regulating licenses for the sale of alcohol)) (emphasis added).

¹²¹ *Id.* at 27 (emphasis added).

objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.¹²²

The Court delineated the boundary between individual and collective rights in the starkest terms, establishing the bounds of law and liberty, announcing “[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.”¹²³

The fundamental holding of *Jacobson* supporting state police power, presumably whether exercised in the context of a municipal ordinance, state law, or gubernatorial executive order, in the context of a public health emergency, appears to still be good law.¹²⁴ Prior to *Roman Catholic Diocese* discussed *infra*, the Court had two occasions to review a State’s publicly elected officials’ regulations in connection with managing the COVID-19 pandemic—*South Bay United Pentecostal Church v. Newsom* and *Calvary Chapel Dayton Valley v. Sisolak*.¹²⁵ In each of those two instances, the Court deferred to the state or local government’s policies and plans in place to respond to the dire crisis.

V. A COVID-19 CONTAGION NON-CONTAINMENT JURISPRUDENCE: TOWARD *STRICT SCRUTINY* IN A PANDEMIC

In the first few months that followed the official announcement on March 11, 2020 by the WHO, two requests for emergency injunctive relief were docketed with the Supreme Court. The petitions sought relief from pandemic restrictions that restricted in-person attendance in religious houses of worship. The petitions complained of similar facts—confronting

¹²² *Id.* at 25–26 (emphasis added).

¹²³ *Id.* at 27.

¹²⁴ James R. Steiner-Dillon & Elisabeth J. Ryan, *Jacobson 2.0: Police Power in the Time of COVID-19*, 84 ALB. L. REV. (forthcoming 2021) (urging an updated approach to the Jacobson doctrine conforming to constitutional norms evolved in the area of public health); Stephen I. Vladeck & Lindsay F. Wiley, *Coronavirus, Civil Liberties, and the Courts: The Case Against ‘Suspending’ Judicial Review*, 133 HARV. L. REV. F. 179, 180–81 (July 2020) (discussing recent applications of the Jacobson doctrine by the Fifth Circuit to uphold a Texas executive order treating all abortions as elective medical procedures, suspending them during the pandemic); *Toward a Twenty-First-Century Jacobson v. Massachusetts*, 121 HARV. L. REV. 1820, 1820 (2008) (ominously proclaiming that Jacobson’s reach is waning, “Biomedical advances are pushing the foundational public health law case *Jacobson v. Massachusetts* towards obsolescence.”).

¹²⁵ *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

a surge in the number of COVID-19 related deaths and positive cases, governors and locally elected political leaders declared a State of Emergency and implemented severe restrictions on many activities from a complete lockdown and stay-at-home orders, to capacity caps and restrictions in buildings and places where people gathered.¹²⁶ However, exemptions from the most severe restrictions were created. These exemptions were designated by sectors in which activities and businesses deemed essential could continue their work, in-person.

For example, in May 2020, California Governor Gavin Newsom implemented orders designating thirteen essential industries designated as “critical to protect the health and well-being of all Californians.”¹²⁷ The list of essential critical industries and businesses allowing in-person activities included the Hollywood movie industry, but excluded places of worship.¹²⁸ According to the petitioners, clergy providing faith-based services were the only workforce group restricted from working in person on the list of eighteen workforce descriptions designated “Government Operations and Other Community-Based Essential Functions.”¹²⁹

*A. South Bay United Pentecostal Church v. Newsom: 5 to 4 for Judicial Deference*¹³⁰

Early in the pandemic, there was little scientific or medical knowledge of the novel coronavirus. Virus hot zones emerged in the United States. The state of California, in particular, confronted an “extraordinary health emergency.” On March 19, 2020, amid then astronomical numbers of positive COVID-19 cases, and thousands of COVID-19 related deaths in California, Governor Gavin Newsom proclaimed a State of Emergency, ordering all individuals to stay at home.¹³¹ Seven weeks later, the pandemic was said to have “stabilized,” and California embarked on a reopening plan, allowing limited gatherings in places of worship to twenty-five percent of building capacity or a maximum of 100 attendees. Certain secular activities—operating grocery stores, banks, and laundromats—however, were exempted from these capacity restrictions. In the days that followed California’s “Stay-at-Home” Order, it became immediately evident that the scope of a State’s authority to impose restrictions designed to curtail the spread of the novel coronavirus would come under sharp and

¹²⁶ See generally *Coronavirus State Actions*, NAT’L GOVERNORS ASS’N (last visited Feb. 12, 2021), <https://www.nga.org/coronavirus-state-actions-all/>.

¹²⁷ Petition for Writ of Certiorari Before Judgment at 6, *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (No. 20-746) [hereinafter *Petition for Writ*].

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020).

¹³¹ *Petition for Writ*, *supra* note 127, at 6.

contested scrutiny. South Bay United Pentecostal Church rushed to file a motion for temporary restraining order in the U.S. District Court for the Southern District of California, which was denied on May 15, 2020.

Following denials from both the district court and of a motion for an injunction pending appeal by the U.S. Court of Appeals for the Ninth Circuit, South Bay United Pentecostal Church presented an Emergency Application for Writ of Injunctive Relief to Justice Kagan, who referred the application to the U.S. Supreme Court on May 26, 2020.¹³² This application was denied by the Court on May 30, 2020. Justice Kavanaugh, with whom Justices Thomas and Gorsuch joined, dissented from denial of the application. Relief was not to come, at least not in this case.

In a key decision that deprived the necessary majority or fifth vote needed by South Bay Pentecostal Church to prevail on its petition, Chief Justice Roberts concurred in the denial of application for injunctive relief in a 525 word opinion, spanning a handful of paragraphs.¹³³ The California executive order did not appear to run afoul of the free exercise clause of the First Amendment, in Justice Roberts' estimation.¹³⁴ Houses of worship were evaluated as similar or dissimilar to nonreligious or secular places in terms of the activities that took place there and the then prevailing understandings regarding transmissibility risks of the novel coronavirus.¹³⁵ The principal method of transmission involves the expulsion of respiratory droplets into the air when speaking, singing and even breathing.¹³⁶ An infected person, even if asymptomatic, can unwittingly shed the virus into the air via exhaled droplets and infect people in their immediate vicinity, that is, within six and up to twelve feet. The risk of infection was measured by crowd density, viral load likely based on time exposure, and distance between people. Therefore, secular gatherings that featured large groups, in close proximity, for extended periods of time—lectures, concerts, movie screenings spectator sports and theatrical performances—were similarly restricted.

The concurrence relied on doctrine and precedent, not on “second-guessing” better policy outcomes.¹³⁷ A total of three cases were cited as providing the needed guidance. First, *Jacobson v. Massachusetts*, the smallpox contagion case from the early nineteenth century was quoted as assigning the proper Constitutional role of determining when to impose

¹³² Emergency Application for Writ of Injunction Relief, *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (No. 19A1044) (Kagan, J., in chambers).

¹³³ *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613-14. (Roberts, C. J., concurring).

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ Petition for Writ, *supra* note 127, at 24.

¹³⁷ *S. Bay United Pentecostal Church*, 140 S. Ct. at 1614. (Roberts, C. J., concurring).

and lift social restrictions in a pandemic to elected public officials.¹³⁸ Second, *Marshall v. United States*, involving a constitutional equal protection challenge to the Narcotic Addict Rehabilitation Act and Congress's authority to exclude from consideration for rehabilitative commitment in lieu of penal incarcerations persons with two or more felony convictions, was quoted for recognizing the "especially broad" latitude that must be accorded to those officials when they "undertake[] to act in areas fraught with medical and scientific uncertainties."¹³⁹ Lastly, *Garcia v. San Antonio Metropolitan Transit Authority*, discussing a Tenth Amendment immunity challenge to the minimum and overtime pay provisions of the Fair Labor Standards Act, was quoted for the general proposition that within the sphere of constitutional action, elected legislative representatives, and not the courts, wield the power to determine restrictions as the public welfare requires.¹⁴⁰

It became immediately evident that the scope of a state's authority to impose restrictions designed to curtail the spread of the novel coronavirus would come under sharp and contested scrutiny. Justice Roberts' pronouncement that the Constitution entrusted the broad decision-making regarding the safety and health of Americans in an emergency of this historic global impact, and under "dynamic and fact-intensive" circumstances to publicly elected officials and not to an "unelected federal judiciary" prompted a sharp rebuke by dissenting Justice Kavanaugh, joined by Justices Thomas and Gorsuch.¹⁴¹

We learn, from Justice Kavanaugh's dissent, that California's list of exempted secular activities reached farther than grocery stores.¹⁴² Among the protected activities, Governor Newsom saw fit to include in those early days of the pandemic, before a second wave of infections surged among Californians, were pet grooming shops, bookstores, florists, hair salons,

¹³⁸ *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905).

¹³⁹ *Marshall v. United States*, 414 U.S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974).

¹⁴⁰ *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). *Garcia*, in turn, relies heavily on the reaffirmation of federalism principles and the words of Justice Hugo Black found in *Helvering v. Gerhardt*:

"There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires." *Helvering v. Gerhardt*, 304 U.S. [405, 427 (1938)] ([Black, J.,] concurring opinion).

Garcia, 469 U.S. at 546.

¹⁴¹ *S. Bay United Pentecostal Church*, 140 S. Ct. at 1614-15. (Kavanaugh, J., dissenting).

¹⁴² *Id.* at 1615. (Kavanaugh, J., dissenting).

and cannabis dispensaries.¹⁴³ Ah, perhaps that last one really is the zinger. Encountering a “stoic minister” ought to be treated the same as a “brave delivery-woman,” walking down a grocery aisle the same as a pew, argues Justice Kavanaugh.¹⁴⁴ How apt the Justice’s “same as” analysis is might be highly debatable given that it would be entirely odd or absurd for grocery store shoppers to congregate in the food aisle, and plop down, sitting together there for an hour or longer, as if or “same as” in a church pew. Moreover, a major study had specifically identified religious services as super-spreader events, noting that “[s]ome special settings have also been identified. Super spreading events have been linked to religious services, choir practice, and large family gatherings, among others.”¹⁴⁵

If social distancing and hygiene protocols are followed in places of worship, how is the risk of religious worship different and more likely to spread the virus than the exempted secular activities? On this last point discussing social distancing and hygiene protocols, Justice Kavanaugh insisted that “California has not justified this discriminatory treatment by showing a compelling governmental interest . . . narrowly tailored to advance that interest.”¹⁴⁶ Siding with and relying heavily upon the Sixth Circuit’s logic in *Roberts v. Neace*,¹⁴⁷ another case involving a similar gubernatorial ban on attending in-person worship services in Kentucky issued during the early days of COVID-19, Kavanaugh complained that the church and its congregants just wanted to be treated the same as comparable secular businesses,

The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot “assume the worst when people go to worship but assume the best when people go

¹⁴³ See *id.* (Kavanaugh, J., dissenting).

¹⁴⁴ See *id.* (Kavanaugh, J., dissenting).

¹⁴⁵ Caitlin Rivers et al., *Public Health Principles for a Phased Reopening During COVID-19: Guidance for Governors*, JOHN HOPKINS, BLOOMBERG SCH. OF PUBLIC HEALTH, CTR. FOR HEALTH SEC. 1 (Apr. 17, 2020), https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/200417-reopening-guidance-governors.pdf; *Report from Johns Hopkins experts aims to help governors navigate the road to reopening*, JOHNS HOPKINS, HUB (Apr. 17, 2020), <https://hub.jhu.edu/2020/04/17/roadmap-for-governors-report-center-for-health-security/>.

¹⁴⁶ *S. Bay United Pentecostal Church*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting) (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-32, 113 S. Ct. 2141, 2217, 124 L.Ed.2d 472 (1993)).

¹⁴⁷ 958 F.3d 409 (6th Cir. 2020).

to work or go about the rest of their daily lives in permitted social settings.¹⁴⁸

In a nutshell, Justice Kavanaugh bluntly states, that even in an emergency, “the State may not discriminate against religion.”¹⁴⁹ Notably, no mention is made of mask-wearing, perhaps as federal guidance on that specific safety measure was muddled at that time.

Both on a federal and state level, regulation in the area of contagious disease has a long history. As discussed in *Arline* by Justices Rehnquist and Scalia in the dissent, “[f]rom as early as 1796, Congress has legislated directly in the area of contagious diseases. Congress has also, however, left significant leeway to the States, which have enacted a myriad of public health statutes designed to protect against the introduction and spread of contagious diseases.”¹⁵⁰ Invoking the existing broad coverage of state statutory power to regulate contagious diseases, Justice Rehnquist noted a number of state laws passed to protect against contagious diseases.¹⁵¹ Yet, *Arline* was not cited by Chief Justice Roberts. Instead, *Jacobson* would have to bear the load of authority.

B. *Calvary Chapel Dayton Valley v. Sisolak: Dissenters Against Containment Discrimination*

On July 24, 2020, three months prior to the confirmation date of Amy Coney Barrett, the Court again denied the application for injunctive relief by a church seeking to overturn COVID-19-related restrictions.¹⁵² The denial of the application prompted Justices Alito, Thomas, Kavanaugh and Gorsuch to dissent, passionately.¹⁵³ Each of the dissents in various forms

¹⁴⁸ *Id.* (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam). Interestingly, the Seventh Circuit declined to follow the Sixth Circuit in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (Easterbrook, J.). *But see* *Capitol Hill Baptist Church v. Bowser*, No. 20-cv-02710 (TNM), 2020 U.S. Dist. LEXIS 188324, at *1 (D.D.C. Oct. 9, 2020) (McFadden, J.) (granting preliminary injunction specifically refers to masked outdoor worship services banned while the District’s mayor “lifted other restrictions and welcomed mass protests to the city[.]”).

¹⁴⁹ *S. Bay United Pentecostal Church*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting).

¹⁵⁰ *Sch. Bd. Of Nassau Cnty. v. Arline*, 480 U.S. 273, 290–91, 107 S. Ct. 1123, 1133 (1987).

¹⁵¹ *Id.* at 290 n.2 (“*See, e.g.,* Ariz. Rev. Stat. Ann. § 36.621 et seq. (1986) (reporting requirements); Conn. Gen. Stat. §§ 19a-207, 19a-221 (1985) (quarantines); Fla. Stat. §§ 741.051-741.055 (1985) (marriage licenses); Mass. Gen. Laws § 71:55B (1984) (certification requirements for school employees); Miss. Code Ann. § 37-7-301(i) (Supp. 1986) (compulsory immunization of school students); W. Va. Code § 16-3-4a (1985) (medical testing).”).

¹⁵² *See* *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360 (2020).

¹⁵³ *See id.* at 1 (Alito, J. dissenting).

and iterations repeated the same objection—that these restrictions violate the First Amendment guarantee of the exercise of religion.

Justice Alito, joined by Justices Thomas and Kavanaugh protested in a searing dissent that the Governor of Nevada had claimed “virtually unbounded power to restrict constitutional rights during the COVID-19 pandemic”¹⁵⁴ Justice Alito hastened to point out that casinos and “certain other favored facilities” were permitted under the restrictions to fill up to fifty percent of their capacity, but a church, synagogue, or mosque were mandated to limit their attendance to no more than fifty persons, instead of the requested ninety worshippers. These restrictions were, according to Justice Alito, “hard to swallow,” amounted to “disparate treatment,” and “considered discriminatory treatment of places of worship” in favor of the “powerful gaming industry.”¹⁵⁵ Importantly in Calvary Chapel’s favor was the fact that mask-wearing and other risk-lowering protocols were carefully followed and enforced, wrote Justice Alito. This justified exempting Calvary Chapel from the fifty-person rule:

Worshippers can be required to wear masks throughout the service or for all but a very brief time. Worshippers do not customarily travel from distant spots to attend a particular church; nor do they generally hop from church to church to sample different services on any given Sunday. Few worship services last two hours. (Calvary Chapel now limits its services to 45 minutes.) And worshippers do not generally mill around the church while a service is in progress.¹⁵⁶

In this body of COVID-19 jurisprudence, recurring objections by Justices Gorsuch and Kavanaugh to state and governmental imposed COVID-19 related restrictions begin to emerge. The state or government has privileged secular activities, even when these might foreseeably pose the very same or similar heightened risk of spreading the virus—gatherings in large groups, in close proximity, indoors, for extended periods of time. Literally hundreds of people could be admitted to a casino and be found huddling around craps and roulette tables.¹⁵⁷ Hair salons were permitted to operate under looser restrictions, and patrons might pick up a bottle of wine at the local wine shop and explore their distal points

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1, 4–5, 6.

¹⁵⁶ *Id.* at 5 (emphasis added).

¹⁵⁷ *Id.* (Gorsuch, J., dissenting); *see also id.* at 1 (Kavanaugh, J., dissenting) (“And given the safety measures that Calvary Chapel and other places of worship are following—including social distancing, mask wearing, and certain additional voluntary measures”).

and meridians in acupuncture therapy sessions held in very close quarters well within six feet, unimpeded by capacity barriers imposed on congregants seeking to attend in-person religious services.¹⁵⁸

Instead, in *Calvary Chapel*, for example, the Nevada fifty-person ban is applied only to houses of worship, “no matter how large the building, how distant the individuals, how many wear face masks, no matter the precautions at all.”¹⁵⁹ Justice Gorsuch reasons this is so because of the gaming industry’s heavy influence in Nevada where he concludes,

In Nevada, it seems, it is better to be in entertainment than religion. Maybe that is nothing new. But the First Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.¹⁶⁰

Strictly as a matter of public health and safety, there is an incoherence, to be sure, in a public health policy that allows diners to remove their masks to eat and drink indoors at restaurants, even if tables are spaced six feet apart, while prohibiting congregants to sit indoors, wearing masks at all times, and spaced at least six feet apart for a forty-five-minute service. The answer to incoherent or ineffective rules should not be to allow large groups to congregate indoors and remain for extended periods of time. Seconding Justice Alito’s logic, Justice Kavanaugh added his own comments regarding mask-wearing: “given the safety measures that Calvary Chapel and other places of worship are following—including social distancing, mask wearing, and certain additional voluntary measures—it is evident that people interact with others at restaurants, bars, casinos, and gyms at least as closely as they do at religious services.”¹⁶¹

Frankly, Justice Kavanaugh made the quite reasonable point that, in a pandemic (particularly one as devastating as COVID-19), severe restrictions may be imposed by the state, but not unevenly; that is, secular and religious organizations ought to be treated the same.¹⁶² Then, he lays out a mini-exegesis of what he terms “religion jurisprudence.”¹⁶³ Summing up the proposed proper analysis by then-Judge Alito in *Fraternal Order of*

¹⁵⁸ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (Gorsuch, J., concurring).

¹⁵⁹ *Calvary Chapel*, No. 19A1070, at 1 (Gorsuch, J., dissenting).

¹⁶⁰ *Id.* (Gorsuch, J., dissenting).

¹⁶¹ *Id.* (Kavanaugh, J., dissenting) (emphasis added).

¹⁶² *Id.* at 2. (Kavanaugh, J. dissenting).

¹⁶³ *Id.* (Kavanaugh, J. dissenting).

Police Newark Lodge No. 12 v. Newark, Justice Kavanaugh articulated a two-step inquiry applicable to all cases involving state regulation of religious organizations:

[D]oes the law create a favored or exempt class of organizations and, if so, do religious organizations fall outside of that class? That threshold question does not require judges to decide whether a church is more akin to a factory or more like a museum, for example. Rather, the only question at the start is whether a given law on its face favors certain organizations and, if so, whether religious organizations are part of that favored group. If the religious organizations are not, the second question is whether the government has provided a sufficient justification for the differential treatment and disfavoring of religion.¹⁶⁴

Within the framework of Justice Kavanaugh’s dissent, the impermissible discrimination complained of in *Calvary Chapel* boils down to this simple point—placing religious organizations in a disfavored category raises concerns as to “why they are in the disfavored category to begin with,” no matter that other organizations, secular ones, are also in that disfavored category.¹⁶⁵ If a religious organization is in a more strict and disfavored category, in the absence of a sufficient public health rationale for that specific categorization, the state has crossed a “constitutional red line.”¹⁶⁶ Crises do not permit states to engage in racial discrimination, religious discrimination, or content-based suppression of speech. According to Justice Kavanaugh, “COVID–19 is not a blank check for a State to [. . .] discriminate against religious people, religious organizations, and religious services.”¹⁶⁷ Importantly for high-density, populous communities, Justice Kavanaugh agrees that mask-wearing is essential, and defers to states on this specific point, affirming that:

[u]nder the Constitution, state and local governments, not the federal courts, have the primary responsibility for addressing COVID–19 matters such as quarantine requirements, testing plans, *mask mandates*, phased reopening[‘]s, school closures, sports rules, adjustment of

¹⁶⁴ *Id.* at 7. (Kavanaugh, J. dissenting).

¹⁶⁵ *Id.* at 8. (Kavanaugh, J. dissenting).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 10. (Kavanaugh, J. dissenting).

voting and election procedures, state court and correctional institution practices, and the like.¹⁶⁸

Even so, Justice Kavanaugh balks at an “unduly deferential judicial approach” to cases involving governmental exercise of emergency powers in a crisis.¹⁶⁹

C. *Roman Catholic Diocese of Brooklyn v. Cuomo*

One-hundred and fifteen years later, *Jacobson* would continue to influence and shape rights during a public health emergency. But not without ultimately sending Justice Gorsuch into a fit of sorts. By November 25, 2020, the tables had turned, and Justices Alito, Thomas, Gorsuch, Kavanaugh, are joined by the newly confirmed Justice Amy Coney Barrett, and Justice Roberts finds himself among the dissenters. This case is as much about the reach of *Jacobson*, as it is about the newly constituted court, giving full release to the percolated passions apparently inciting Justices Gorsuch and, to some degree, Kavanaugh.

The main stage of dueling Justices features an incendiary opinion by Justice Gorsuch singling out a seemingly miffed Chief Justice Roberts, now in dissent. Justice Gorsuch’s tone is not lost on Justice Roberts, who, responds by defending his “dissenting colleagues,” pointing out that they are not “cutting the Constitution loose during a pandemic,” or yielding to “a particular judicial impulse to stay out of the way in times of crisis,” or “shelter[ing] in place when the Constitution is under attack.”¹⁷⁰

1. The battle of “solo concurrences”

Now casting a top vote in this Court, Justice Gorsuch took a glancing shot at his colleagues’ pointing to “a solo concurrence in *South Bay Pentecostal Church v. Newsom* . . . in which the Chief Justice expressed willingness to defer to executive orders in the pandemic’s early stages based on the newness of the emergency and how little was then known about the disease.”¹⁷¹ In the dissent, Chief Justice Roberts’ answered, writing, “[o]ne solo concurrence today takes aim at my concurring opinion in *South Bay*.”¹⁷² Regarding his reliance on *Jacobson* in the *South Bay* case, he noted that three pages of Justice Gorsuch’s concurring opinion tore into *Jacobson*, while Justice Roberts’ *South Bay* concurrence, an

¹⁶⁸ *Id.* (Kavanaugh, J. dissenting) (emphasis added).

¹⁶⁹ *Id.* at 10–11. (Kavanaugh, J. dissenting).

¹⁷⁰ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (Gorsuch, J., concurring).

¹⁷¹ *Id.* at 69. (Gorsuch, J., concurring) (emphasis added).

¹⁷² *Id.* at 75. (Roberts, C.J., dissenting) (emphasis added).

opinion which Justice Gorsuch finds so “discomfiting” occupied exactly one sentence in *South Bay*.¹⁷³

Chief Justice Roberts agrees with his colleagues, but only on facially immaterial points. For example, on the one hand, he concedes to Justice Kavanaugh that the immediate case was distinguishable from *South Bay*, and *Calvary Chapel*; and to Justice Gorsuch that the numerical restrictions in place—ten to twenty-five people—do “seem unduly restrictive.”¹⁷⁴ However, since the Governor of New York revised the designations of the relevant locations, therefore, the Chief Justice reasoned, it was no longer necessary to tell the Governor not to do something he was not doing.¹⁷⁵ Given the uncertainty that the Governor might reinstate the severe restrictions, it would be imprudent to rule on public health regulations given the significance of the public health crisis confronting the public health officials mandating restrictions. “And it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic[.]”¹⁷⁶ Chief Justice Roberts warned.

2. The Science of Public Health v. the Theatrics of Judicial Activism: Postcards from Once and Future Majority

Dissenting separately, Justice Breyer is joined by Justices Sotomayor and Kagan.¹⁷⁷ In disagreement that there is any genuine emergency presented, Justice Breyer argued that it is preferable to allow the Second Circuit to review a full briefing of the issues and render its opinion on a full record, especially given that the applicant churches and synagogues are no longer located within the red or orange zones and may therefore hold services up to fifty percent of maximum capacity, consistent with their new designations within the yellow zone.¹⁷⁸

Next, Justice Breyer asserts that the applicants failed to meet the “extraordinary remedy of injunction” necessary to set aside the admittedly high restrictive limitations (irrespective of following protocols such as, mask-wearing and social distancing).¹⁷⁹ Pointing to the state of affairs provoking the dire crisis—a pandemic that has spread to infect twelve million Americans and caused more than 250,000 deaths, of which 26,000 were in the state of New York, and 16,000 of those deaths occurred in New

¹⁷³ *Id.* (Roberts, C.J., dissenting).

¹⁷⁴ *Id.* at 1. (Roberts, C.J., dissenting).

¹⁷⁵ *Id.* (Roberts, C.J., dissenting).

¹⁷⁶ *Id.* (Roberts, C.J., dissenting).

¹⁷⁷ *Id.* at 76-8. (Breyer, J., Sotomayor, J., and Kagan, J. dissenting).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 77.

York City alone—Justice Breyer concluded (along with Justice Sotomayor) that it is debatable that the restrictions imposed on the applicants under these circumstances even amounted to a constitutional violation, and that the prudent path under these extraordinary facts lies in a full review of all these considerations at a later time. Justice Breyer explains:

The nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants’ First Amendment challenges.¹⁸⁰

Then, Justice Breyer turns to the relevant precedents that guide the Court. Here, Justice Breyer instructs that the Court must yield to the “broad discretion” granted to elected officials operating in “areas fraught with medical and scientific uncertainties.”¹⁸¹ And again, Justice Breyer, quotes the sentence referred to by Roberts in the *South Bay* concurrence: “[t]hat is because the ‘Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.’”¹⁸² For good reason, the conditions in the field change rapidly, leaving courts poorly equipped and lacking the scientifically-based data to respond as necessary for the safety and welfare of the public in a crisis.

Lastly, Justice Sotomayor dissents separately, joined by Justice Kagan, on the grounds that in fact, the applicants were neither targeted nor singled out for uneven treatment. The restrictions imposed on the applicants falls “comfortably” within the limitations imposed on “comparable secular institutions,” wrote Justice Sotomayor.¹⁸³ That is, scenarios convoking large gatherings of people in close proximity for extended periods of time—lectures, concerts, movie showings, spectator sports, and theatrical performances—were closed entirely across the board, whereas houses of worship in specially designated areas that had surged with COVID-19 cases, were permitted to operate, albeit with capacity restrictions.

In contrast, a more lenient restriction regime was applied to grocery stores, banks, and laundromats, where people neither congregate in large

¹⁸⁰ *Id.* at 5. (Breyer, J. dissenting).

¹⁸¹ *Id.* (Breyer, J. dissenting) (citing *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, __ (2020) (Roberts, C. J., concurring) (slip op., at 2)).

¹⁸² *Id.* (citing *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring)

¹⁸³ *Id.* at 2. (Sotomayor, J., dissenting).

groups or in close proximity for extended time periods. Sotomayor accuses the majority of playing a “deadly game” with Americans’ lives by second-guessing the experts, and epidemiologists in particular, who opined that places of worship involve more risk for becoming super-spreaders sites by featuring singing and speaking in close proximity indoors.¹⁸⁴ These risky activities or conditions do not generally take place in a bike repair shop or liquor store, Justice Sotomayor points out.¹⁸⁵ Justice Gorsuch does not respond to this dissent.

In this particular context, and given the available expert evidence driving the decision-making, it would simply continue the long history of state regulation in the area of contagious diseases. As noted, so many times in the past states have fulsomely (and with the approval of the courts) exercised their authority and broad power to regulate in the area of public welfare. More recently, in *Doe v. Deer Mt. Day Camp, Inc.*, the District Court for the Southern District of New York remarked, “[t]here is no doubt there is an obligation to protect others from a very serious, life-threatening viral infection.”¹⁸⁶

If the AIDS epidemic was both novel and significant when it first erupted as a public health crisis, the COVID-19 pandemic presents an analogous crisis, but with a very different twist in the Supreme Court. What new legal framework is the Court crafting in response to Covid 19? The Court is concerned with discrimination, but not against the vulnerable and dis/abled in the second and third categories, but against those in the first. This is *contagion non-containment jurisprudence* in which the Court swings to protect the first category in the name of religious freedom.

VI. POST SCRIPT

Commingling Christian identity with pro-Trump American “patriots” identity, the sweeping legal victory was widely celebrated by Calvary Chapel Dayton Valley on its social media account.¹⁸⁷ As of this writing, emergent decisions have added to this Court’s pattern of enlarging First Amendment free exercise clause jurisprudence in “shadow docket”

¹⁸⁴ *Id.* at 3. (Sotomayor, J., dissenting).

¹⁸⁵ *Id.* (Sotomayor, J., dissenting).

¹⁸⁶ *Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d 324, 350 (S.D.N.Y. 2010) (citing *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 287 (1987)).

¹⁸⁷ *Calvary Chapel Dayton Valley*, FACEBOOK, <https://www.facebook.com/CCDVChurch/> (last visited Apr. 18, 2021) (<https://www.facebook.com/211212558929316/videos/403402240894124/>) (<https://www.facebook.com/211212558929316/videos/2840887402867513/>).

cases.¹⁸⁸ In a handful of enormously consequential cases, the Court has accelerated its pace of granting emergency relief to religious groups seeking relief from government imposed COVID-19 pandemic-related restrictions.¹⁸⁹

In *South Bay II*, the Court enjoined California’s absolute ban on indoor worship services. However, the 25% capacity limitation on indoor worship services and the prohibition on singing and chanting during indoor services were upheld in this “evolving” case.¹⁹⁰

In *Tandon*, the Court again granted an application for injunctive relief filed, this time, by a group seeking to congregate at-home for religious worship.¹⁹¹ They argued that “California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, and indoor restaurants to bring together more than three households at a time.”¹⁹²

Chief Justice Roberts would have denied the application, but no further statement is made. Justice Kagan, joined by Breyer and Sotomayor, largely repeated her view that public health decisions should be made by health experts based on scientific evidence, but there is a significant new point made in the dissent---Justice Kagan claimed that the per curiam’s analysis “defies the factual record.”¹⁹³ That is, the per curiam opinion assigned a finding to the appellate court inconsistent with the compiled expert testimony of California public-health experts and the appellate record which had found that gatherings at hair salons and hardware stores

¹⁸⁸ Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019)(explaining that the phrase “shadow docket” refers to “the significant volume of orders and summary decisions that the Court issues without full briefing and oral argument.” (citing William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3-5 (2015))).

¹⁸⁹ *Harvest Rock Church v. Newsom*, 2020 LEXIS 5709 (2020); *S. Bay Pentecostal Church v. Newsom* (South Bay II), 141 S. Ct. 716 (Feb. 5, 2021); *Gish v. Newsom*, 141 S. Ct. 1290 (Feb. 8, 2021); *Gateway City Church v. Newsom*, 2021 WL 753575 (Feb. 26, 2021); *Tandon v. Newsom*, 2021 WL 1328507 (Apr. 9, 2021).

¹⁹⁰ *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (Feb. 5, 2021) (Roberts, C.J., concurring). Some are forecasting the Court will overturn *Employment Div. v. Smith*, 494 U.S. 872 (1990), in the next free exercise clause case, *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020)(No. 19-123); Jim Oleske, *Tandon Steals Fulton’s Thunder: The Most Important Free Exercise Decision since 1990*, SCOTUSblog (Apr. 15, 2021), <https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/>; The Daily, *A Legal Winning Streak for Religion*, THE NEW YORK TIMES, at 26:38 (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/podcasts/the-daily/supreme-court-religious-cases.html?views> of Supreme Court reporter Adam Liptak).

¹⁹¹ *Tandon v. Newsom*, 2021 WL 1328507 (Feb. 9, 2021).

¹⁹² *Id.* at *2 (citing Brief for Petitioner at 183-89)(per curiam).

¹⁹³ *Id.* (Kagan, J., dissenting).

generally pose fewer or diminished risks than in-home gatherings, due to longer social interactions in less ventilated areas in at-home settings, explained Justice Kagan.¹⁹⁴

In this particular context, and given the available expert evidence, the Court could continue the long history of state regulation in the area of contagious diseases to protect the 2nd & 3rd categories against the 1st.¹⁹⁵ Instead, a majority of the Court is now apparently engaged in making Covid-19 the occasion not for a new disability protection jurisprudence, but rather for a new contagion non-containment jurisprudence.

VII. CONCLUSION

Imagine the substantial number of Floridians as identified in the FIU study attempting to go about their lives in Miami-Dade County, sheltering-at-home, using the stairway, elevator, common hallways and walking or traveling to the grocery store only to encounter a multitude of people, mask-less proclaiming their right to freely roam without any protective face covering or mask in the midst of this historic pandemic. Based on the *Arline* decision itself, including Rehnquist's dissent, it is clear that the law does not privilege Miami's mask-less disregard of the pandemic over the state's authority to protect the vulnerable against contagious diseases.

¹⁹⁴ *Id.*

¹⁹⁵ *See supra* text accompanying notes 35-62.