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## Governing by Executive Order During the Covid-19 Pandemic: Preliminary Observations Concerning the Proper Balance Between Executive Orders and More Formal Rule Making

Kelly J. Deere

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## **Governing by Executive Order During the Covid-19 Pandemic: Preliminary Observations Concerning the Proper Balance Between Executive Orders and More Formal Rule Making**

*Kelly J. Deere\**

### ABSTRACT

*As the United States entered 2021, almost all fifty states were still operating under a state of emergency due to COVID-19 more than nine months later. Governors using emergency powers provided to them under their respective emergency disaster statutes and state constitutions continued to govern their state by executive order. These executive orders have had significant impacts on citizens' everyday lives including stay-at-home orders, limits on non-essential gatherings, non-essential business closures and moratoriums on evictions. And these emergency orders have been opposed at almost every turn from citizens gathering in public protest shouting "Liberate Michigan," to constitutional legal challenges to these orders. Even with three promising vaccines receiving emergency authorization at the time of this article's submission, it will be months or longer before life returns to normal. Therefore, it becomes incumbent to ask the question whether governors should continue to wield this emergency power*

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\*Clinical Assistant Professor of Law, Rutgers University School of Law. I would like to thank George Morton for his thorough research on many aspects of this piece. I am grateful to Beth Stephens and Robert Williams for their honest assessment, mentorship and comments throughout the writing of this article. A special thanks to Amy Widman for her support and advice. Andrew Hoy provided invaluable help in getting this article ready for submission. And thank you to the *Missouri Law Review* editors for their keen observations, thoughtful comments and valuable edits. This work was made possible from the generous support of the Rutgers Law School Endowment for Faculty Research.

*or whether state legislatures and/or state agencies should take on more responsibility. In answer to this question, this article concludes that governors should use executive orders in some measure as long as COVID-19 is being transmitted in their communities but not for all areas. Since COVID-19 is a highly contagious disease and is difficult to contain, governors need to be able to quickly and nimbly issue orders to curb transmission as long as there is a reasonable check on their power to do so. However, state legislatures and/or state agencies should enact emergency statutes or regulations following the more formal rule making process in areas that do not require immediate action such as requiring facial coverings in public spaces. This article draws its conclusion by examining three key areas. First, most governors have a meaningful check on their emergency powers from both the judiciary and the state legislature. Second, governors and litigants can learn from prior cases to ensure executive orders do not single out a group or unnecessarily burden another. Third, since some states have had success in enacting emergency regulations, statutes or guidelines concerning COVID-19, more states should follow suit.*

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## I. INTRODUCTION

Between March 2020 and June 2020, Michigan Governor Gretchen Whitmer issued more than 130 executive orders concerning the COVID-19 pandemic.<sup>1</sup> Colorado Governor Jared Polis issued about 115 executive orders and New Jersey Governor Phil Murphy issued over fifty in the same span.<sup>2</sup> Even those state governors that used executive orders more sparingly still issued a fair number with the Idaho Governor signing twenty executive orders and Missouri Governor signing fifteen.<sup>3</sup> These executive orders significantly affected citizens' everyday lives including requiring its citizens to stay-at-home, limiting gathering sizes and mandating the wearing of facial coverings in public spaces.<sup>4</sup> Many of these executive orders required non-essential businesses to shut their physical locations.<sup>5</sup> With most Americans at home and many out of work, governors or state public health officials issued executive orders with wide-ranging economic consequences such as placing a moratorium on evictions and banning a shut-off of utilities.<sup>6</sup> Some citizens, businesses and even some state legislatures did not simply accept these orders, but rather gathered in protest or legally challenged the orders as violating their constitutional rights.<sup>7</sup> But unlike most other emergencies in recent memory such as hurricanes, wildfires or even 9/11, COVID-19's reach goes beyond a city, county, state or even region. COVID-19 is not simply an American problem but has found its way to all corners of the globe.<sup>8</sup> In late fall of 2020, the pandemic virtually exploded with cases rising practically everywhere across the United States.<sup>9</sup> And with COVID-19 stretching into 2021 and beyond, governors continue to issue executive orders concerning the pandemic as the disease has evolved and more highly transmissible variants threaten to undermine vaccination efforts.<sup>10</sup> Indeed, as of May 1,

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<sup>1</sup> *Executive Orders Issued by Governors and State Agencies in Response to the Coronavirus*, BALLOTPEDIA, [https://ballotpedia.org/Executive\\_orders\\_issued\\_by\\_governors\\_and\\_state\\_agencies\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020](https://ballotpedia.org/Executive_orders_issued_by_governors_and_state_agencies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020) [https://perma.cc/X5BY-SJ28] (last visited Dec. 2, 2020).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [https://perma.cc/92YS-785B] (last visited Dec. 30, 2020).

<sup>10</sup> *See generally infra* Part II and Part IV.

2021, forty-seven states still had an active state of emergency for COVID-19.<sup>11</sup>

Emergency executive orders do not go through the same rulemaking process as a statute passed by the legislature or even a state regulation that is required to go through the state's administrative procedure act.<sup>12</sup> Over more than a year into the pandemic, most governors had largely used executive orders to curb transmission as well as take aggressive economic action over the past year.<sup>13</sup> But should they? And if so to what extent?

Part I of this article examines the nature of state executive orders and how they are used in emergency situations. As shown through Appendix A, the article examines the various state emergency disaster statutes and the types of legislative limits on governors' powers. Part II provides background of the COVID-19 pandemic and how executive orders have played a defining role during this time. In Part III, the article reviews the litigation landscape surrounding emergency executive orders during the pandemic. Specifically, the article looks at recent civil rights challenges to certain types of executive orders. The article also reviews challenges by government officials such as the state legislature or governor concerning the statutory process for declaring an emergency or the constitutional validity of the statute itself. In Part IV, the article surveys four states' approach to the pandemic through 2020. And finally, Part V evaluates whether governors should use emergency executive orders where the pandemic is likely to go on for longer than a year. This article argues that governors should be able to quickly respond in some measure as long as COVID-19 is being transmitted in the communities but not for all areas. For those areas where there is a long-term ongoing response to COVID-19, the state legislature should pass an emergency or temporary statute, or a state agency should promulgate regulations to address a particular concern. Likewise, the state legislature may need to step in when the governor is not doing enough.

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<sup>11</sup> *Each States COVID-19 Reopening and Reclosing Plans and Mask Requirements*, NAT'L ACADEMY FOR STATE & HEALTH POLICY, (April 19, 2021) <https://www.nashp.org/governors-prioritize-health-for-all/> [<https://perma.cc/W2LE-NT5H>] [hereinafter *COVID-19 Reopening and Reclosing Plans*].

<sup>12</sup> See Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L.J. 987, 989–90 (1999).

<sup>13</sup> See *COVID-19 Reopening and Reclosing Plans*, *supra* note 11. As of May 1, 2021, only Alaska, Wisconsin and Michigan did not have a current COVID-19 state of emergency. *Id.*

## II. EXECUTIVE ORDERS AND STATE EMERGENCY DISASTER STATUTES

In most every state constitution, the governor is vested with the chief executive power of the state and is commander in chief.<sup>14</sup> While in the early 20<sup>th</sup> century the office was viewed as weak, governors today garner greater powers and their responsibilities and duties have significantly increased.<sup>15</sup> For example, governors have “longer terms in office, increased veto power, and stronger budgetary authority.”<sup>16</sup> During non-emergency times, governors are responsible for executing the state laws and managing the state executive branch.<sup>17</sup> One of the governor’s most important duties is to submit an annual budget for review and approval by the state legislature.<sup>18</sup> Governors also have the power to appoint executive officers in the state agencies and in their cabinet.<sup>19</sup> And, as an important check on the legislative branch, all fifty state governors have the power to veto “whole legislative measures.”<sup>20</sup> In a state of emergency, most governors have much broader powers.<sup>21</sup> They exercise these powers through emergency executive orders in order to prepare and respond to disasters of all sizes and shapes.<sup>22</sup>

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<sup>14</sup> *Governor’s Power and Authority*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/governors/powers-and-authority/> [https://perma.cc/8LQC-YAAQ] (last visited Nov. 22, 2020).

<sup>15</sup> See Ann O’M. Bowman & James H. McKenzie, *Managing a Pandemic at Less Than Global Scale: Governors Take the Lead*, 50 AM. REV. OF PUB. ADMIN. 551, 551 (2020); Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 484, 493 (2017) (arguing that the modern governor “originally created to be powerless figureheads have emerged as the drivers of state government”). For example, the New Jersey Constitution in 1776 gave little power to the governor and did not even provide for a separate executive branch. The New Jersey Governor was elected by the upper branch of the state legislature. Herman, *supra* note 12, at 988.

<sup>16</sup> See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 303 (2009); Seifter, *supra* note 15, at 499–515 (outlining a governor’s set of six tools to control agency action which include directives, centralized regulatory review, reorganization, line-item veto power, privatization and removal of state agency heads).

<sup>17</sup> *Governor’s Power and Authority*, *supra* note 14.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See generally *infra* Part I.C.

<sup>22</sup> *Governor’s Power and Authority*, *supra* note 14.

A gubernatorial executive order is a rule or order issued by the governor.<sup>23</sup> An executive order is usually comprised of three sections.<sup>24</sup> The first section, also known as the “whereas” section, contains the purpose of the order.<sup>25</sup> In this section, the governor articulates the reasons for the order and what she hopes to accomplish by it.<sup>26</sup> The second section contains the authority for issuing the order either from the state constitution or by state statute.<sup>27</sup> And finally, the third section comprises the substance of the actual order.<sup>28</sup> An executive order may be issued immediately and does not need to go through the same formal rule making process as a bill passed by the legislature or a regulation promulgated by a state agency.<sup>29</sup>

Some state constitutions give their governors significant power during an emergency while others are essentially silent.<sup>30</sup> All fifty state constitutions give their governor power to call for a special session of the legislature.<sup>31</sup> Still, most governors rely on emergency powers granted to them by their state legislature through some type of emergency disaster statute.<sup>32</sup> This statutory framework grants to the governor (or in some cases a state health official) the authority to declare a state of emergency

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<sup>23</sup> See *Friends of Danny Devito v. Wolf*, 227 A.3d 872, 892 (Pa. 2020). These executive orders can be broken down into three areas: 1) ceremonial proclamations; 2) directives to subordinate executive officials for execution of their particular duties; and 3) interpretation or implementation of statutory or other law. See Herman, *supra* note 12, at 994.

<sup>24</sup> Herman, *supra* note 12, at 992.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 992–93.

<sup>28</sup> *Id.* at 994.

<sup>29</sup> *Id.*

<sup>30</sup> For example, both the Louisiana and Oregon state constitutions give their governors broad powers. See LA. CONST. art. IV., § 5 (giving the Governor the power “to preserve law and order, to suppress insurrection . . .”); OR. CONST. art. X-A, § 2 (providing for the governor to “manage the immediate response of the disaster.”). In contrast, in Idaho and South Carolina those powers come only from state statute. See HEATHER PERKINS, *THE BOOK OF STATES* (Council of State Gov’ts 2019), <http://knowledgecenter.csg.org/kc/content/book-states-2019-chapter-4-state-executive-branch> [<https://perma.cc/F3YF-QC35>]; see also Daniel B. Rodriguez, *Public Health Emergencies and State Constitutional Quality*, 72 RUTGERS L. REV. 1223, 1224 (2020) (offering a “thought experiment . . . at how we might redesign state constitutions to enable government to respond most effectively to [public health] emergencies.”).

<sup>31</sup> *Special Sessions*, NAT’L CONF. STATE LEG. (March 9, 2020), <https://www.ncsl.org/research/about-state-legislatures/special-sessions472.aspx> [<https://perma.cc/YBT9-ACBS>].

<sup>32</sup> See Appendix A. I use the term state emergency disaster statute to generally refer to the statutory scheme by which the governor can declare a state of emergency and trigger accompanying powers.



and to issue executive orders to prepare, prevent, respond and recover in connection with the emergency.<sup>33</sup> Most of these emergency disaster statutes were enacted post World War II with many of them passed in the 1970's.<sup>34</sup> One reason for granting governors such broad powers under these statutes is clear: some state legislatures meet “infrequently and often for only a few months each year.”<sup>35</sup> For example, in March 2020, the New York State Legislature amended the Executive Law to give its Governor additional powers to “issue directives when a state disaster emergency is declared.” It did so because these “changes ensure that the Governor has legal authority to confront these emergencies.”<sup>36</sup> When a governor declares a state of emergency, he will likely need to state the nature of the emergency, define the specific regions or geographic areas subject to the declaration, the conditions which brought about the emergency, the duration of the emergency, and the authorities responding to it.<sup>37</sup>

Under many of these emergency disaster statutes, governors have the authority to issue executive orders in response to a natural disaster - including a pandemic.<sup>38</sup> These orders are enacted swiftly with little warning or notice, much like the emergency these orders seek to address.<sup>39</sup> Once the emergency is declared, the governor may issue orders immediately.<sup>40</sup> For most states, their governor's powers under a state of emergency are broad, giving her the authority to suspend or amend any regulatory statute.<sup>41</sup> Most of these emergency disaster statutes provide the governor with the power to garner resources to address the emergency,

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<sup>33</sup> *Id.*

<sup>34</sup> See generally, PATRICK S. ROBERTS, DISASTERS AND THE AMERICAN STATE 127–45 (2013).

<sup>35</sup> Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237, 241 (2006).

<sup>36</sup> Ethan Geringer-Sameth, *The State Legislature in a State of Emergency*, GOTHAM GAZETTE, (Mar. 24, 2020), <https://www.gothamgazette.com/state/9231-new-york-state-legislature-cuomo-state-of-emergency-coronavirus> [<https://perma.cc/8M7T-4H2S>]; see also S.B. 7919, 2020 Leg. (N.Y. 2020).

<sup>37</sup> See, e.g., CONN. GEN. STAT. § 19a-131a(b)(1) (2020); MICH. COMP. LAWS § 30.403(3) (2020); 35 PA. CON. STAT. § 7301(c) (2020).

<sup>38</sup> See *Friends of Danny Devito v. Wolf*, 227 A.3d 872, 888 (Pa. 2020) (finding that while the PA Emergency Code does not include the word pandemic in its list of catastrophes, it is included as a natural disaster).

<sup>39</sup> Bowman & McKenzie, *supra* note 15, at 553.

<sup>40</sup> See *Friends of Danny Devito*, 227 A.3d at 890.

<sup>41</sup> For example, during Hurricane Katrina Governor Blanco in one executive order suspended the laws, rules and regulations concerning medical professionals in order to allow out of state medical personnel to provide immediate care to Louisiana citizens. La. Exec. Order No. KBB 05-33 (Sept. 12, 2005), <https://www.doa.la.gov/media/ci51wdfy/0509.pdf> [<https://perma.cc/7MJ2-MT9Z>].

assemble the national guard, order evacuations and seize property.<sup>42</sup> Some governors have the power to issue orders for the protection of the health, safety and welfare of its people.<sup>43</sup> However, governors do not appear to have the authority to exempt constitutional state requirements during an emergency.<sup>44</sup>

Under an emergency declaration, executive orders give the governor the ability to adapt to an ever-changing situation.<sup>45</sup> As more information becomes known about an emergency, the governor can modify, amend or even rescind an executive order as quickly as she issued one in the first place.<sup>46</sup> For example, on August 3, 2020, New Jersey Governor Phil Murphy issued Executive Order 173, which decreased indoor gatherings from 100 persons to twenty-five persons because many recent infections were the result of larger house party gatherings.<sup>47</sup> In doing so, Governor Murphy rescinded paragraph one of Executive Order 156 issued six weeks earlier which allowed for larger gatherings.<sup>48</sup>

Most state emergency statutes define emergency quite broadly.<sup>49</sup> Most typically, governors have declared a state of emergency in the wake

<sup>42</sup> See Maggie Davis et. al., 12 CONLAWNOW 95 (2020); see, e.g., COLO. REV. STAT. § 24-33.5-704 (2020); OR. REV. STAT. §§ 401.68, 401.75 (2020).

<sup>43</sup> See, e.g., MISS. CODE ANN. § 33-15-11(c)(4) (2020) (“To perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population in coping with a disaster or emergency.”); MO. REV. STAT. § 44.100 1(3)(j) (2020) (“Perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population.”); OKLA. STAT. tit. 63, § 683.9.5 (2020) (“To perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population . . .”).

<sup>44</sup> See *Ritchie v. Polis*, 467 P.3d 339, 345 (Colo. 2020) (holding that Governor does not have authority under Colorado Disaster Emergency Act to suspend signature requirement on ballot initiative petitions since it is a constitutional requirement).

<sup>45</sup> *Governor’s Power and Authority*, *supra* note 14.

<sup>46</sup> *Id.*

<sup>47</sup> N.J. Exec. Order No. 173 (Aug. 3, 2020), <https://nj.gov/infobank/circular/eocc173.pdf> [<https://perma.cc/LWC7-DV64>].

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., 35 PA. CONS. STAT. § 7102 (2020) (defining natural disaster in the Emergency Code as “[a]ny hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life”); OR. REV. STAT. § 401.025 (2020) (defining emergency as “[f]ire, explosion, flood, severe weather, landslides or mud slides, drought, earthquake, volcanic activity, tsunamis or other oceanic phenomena, spills or releases of oil or hazardous material as defined in ORS 466.605, contamination, utility or transportation emergencies, disease, blight, infestation, civil disturbance, riot, sabotage, acts of terrorism and war”).

of a natural disaster such as a hurricane or a tornado.<sup>50</sup> Recently, state governors in the western part of the United States declared a state of emergency due to uncontrolled wildfires in the area.<sup>51</sup> On the national security front, New York and New Jersey's governors declared a state of emergency in 2001 in response to the terrorist attacks on September 11.<sup>52</sup> State governors do not respond to emergencies in a vacuum. The federal government takes on a role, but its role is usually secondary to state and local governments.<sup>53</sup> Under the Stafford Act, the U.S. president can declare a federal emergency, but any federal resources are considered to supplement state and local resources.<sup>54</sup> Therefore, the governor's role during an emergency is of prime importance.

During an emergency, state legislatures typically do not play a significant role in recovery efforts.<sup>55</sup> This article argues that state legislatures should assume a more comprehensive role during a state of emergency.<sup>56</sup> Most state legislatures serve two purposes in an emergency: (1) serving as a check on gubernatorial powers; and (2) providing funds aimed at directly addressing a state of emergency.<sup>57</sup> Yet, state legislatures are not precluded from enacting legislation addressing an emergency and some certainly do even during this pandemic.<sup>58</sup> It would just need the time to do so. Each state legislature has a formal rule making process which often requires multiple steps from a bill's initial introduction to its final

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<sup>50</sup> See, e.g., La. Proclamation No. 133 JBE 2020 (Oct. 6, 2020), <https://gov.louisiana.gov/assets/Proclamations/2020/133-JBE-2020-SOE-Hurricane-Delta.pdf> [<https://perma.cc/2SGN-HYZG>] (declaring a state of emergency concerning hurricane delta).

<sup>51</sup> See Or. Exec. Order No. 20-35, (Aug. 20, 2020), [https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_20-35.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_20-35.pdf) [<https://perma.cc/JYU6-8ZPA>]; Wash. Exec. Order No. 20-68, (Aug. 19, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-68%20Wildfires%20%28tmp%29.pdf> [<https://perma.cc/RF4B-FYRE>].

<sup>52</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 5.113 (Sept. 11, 2001); N.J. Exec. Order No. 131 (Sept. 11, 2011), <https://nj.gov/infobank/eo/056murphy/pdf/EO-131.pdf> [<https://perma.cc/8TRY-BNFJ>].

<sup>53</sup> Rossi, *supra* note 35, at 924.

<sup>54</sup> *Id.*

<sup>55</sup> See Thom Little, *Who's in Charge Here? Checks and Balances During a State of Emergency*, STATE LEGIS. LEADERS FOUND. (May 20, 2020), <https://www.sllf.org/whos-in-charge-here-checks-and-balances-during-a-state-of-emergency/> [<https://perma.cc/8K46-NPL2>].

<sup>56</sup> This article argues, in part, that state legislatures should do more in areas less emergent. See *infra* Part V.C.

<sup>57</sup> See Eric Daleo, *State Constitution and Legislative Continuity in a 9/11 World: Surviving and "Enemy Attack,"* 58 DEPAUL L. REV. 919, 924–25 (2009) (explaining that state legislatures still “have a defined role in budgeting, lawmaking, and ‘checking’ the executive branch in the system of checks and balances.”).

<sup>58</sup> See generally *infra* Part IV.A., C.

passage.<sup>59</sup> At a minimum, this process can take days, but it often takes weeks, months or even a year.<sup>60</sup> Moreover, about forty states have part-time legislatures with some state legislatures meeting for only a few months out of the year.<sup>61</sup>

### A. Public Health Emergencies

While all fifty states have some type of emergency disaster statute, some state legislatures have included a separate public health emergency component to its disaster statute or passed separate public health emergency legislation.<sup>62</sup> This came about after the terrorist attacks in 2001 and the subsequent anthrax attack, where there were federal and state level efforts to strengthen the public health infrastructure.<sup>63</sup> In 2003, the Centers for Disease Control and Prevention (“CDC”) commissioned public health law experts at John Hopkins and Georgetown Universities to draft what is called the Model State Emergency Health Powers Act (“MSEHPA”).<sup>64</sup> The MSEHPA is a comprehensive model act designed for state legislature contemplation to provide state actors with powers “to *detect* and *contain* a potentially catastrophic disease outbreak... .”<sup>65</sup> The MSEHPA provides detailed sections on the mechanisms for declaring a public health state of emergency as well as those special powers that accompany such a declaration.<sup>66</sup>

While criticized for failing to provide enough individual protections, a large number of states adopted some parts of the MSEHPA into

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<sup>59</sup> See, e.g., *The Path of Legislation in New Jersey*, N.J. STATE HOUSE TOURS, [https://njstatehousetours.org/tour/wp-content/uploads/2017/12/2017Insidepage\\_LegProcside2.pdf](https://njstatehousetours.org/tour/wp-content/uploads/2017/12/2017Insidepage_LegProcside2.pdf) [<https://perma.cc/WJ26-X9WG>] (last visited July 21, 2021).

<sup>60</sup> See, e.g., *id.* Additionally, the Michigan legislature acted quickly to enact legislation for some of Governor Whitmer’s executive orders that will no longer valid. Even on a time sensitive basis, these six bills took between two and three weeks to pass. See H.B. 6137, 100th Leg., Reg. Sess. (Mich. 2020), H.B. 6293, 100th Leg., Reg. Sess. (Mich. 2020); H.B. 2694, 100th Leg., Reg. Sess. (Mich. 2020).

<sup>61</sup> *Full- and Part-time Legislatures*, NAT’L CONF. STATE LEGS. (June 14, 2017), [https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx#side\\_by\\_side](https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx#side_by_side) [<https://perma.cc/H8F4-R5LG>].

<sup>62</sup> Lainie Rutkow, *An Analysis of State Public Health Emergency Declarations*, 104 AM. J. OF PUB. HEALTH 1601 (Sept. 2014).

<sup>63</sup> Lawrence Gostin, *The Model State Emergency Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX 3 (2013).

<sup>64</sup> MODEL STATE EMERGENCY HEALTH POWERS ACT, ACLU, <https://www.aclu.org/other/text-msehpa> [<https://perma.cc/U4Z9-LL7M>] (last visited Sept. 5, 2021) [hereinafter MSEHPA].

<sup>65</sup> Gostin, *supra* note 63, at 5.

<sup>66</sup> See generally MSEHPA *supra* note 64.

restructuring their own public health emergency response.<sup>67</sup> In all, twenty-four states have incorporated a specific declaration of a state public health emergency with some accompanying public health emergency powers in their laws.<sup>68</sup> For states declaring a public health emergency, this triggers a certain specific set of emergency powers.<sup>69</sup>

Public health legal scholar Lindsay Wiley argues that the MSEPHEA was not designed with the current COVID-19 pandemic in mind.<sup>70</sup> Wiley explains “the MSEPHEA and the initial legislation it inspired focused predominantly on individually targeted measures to achieve *containment* – stopping the spread of infection from initial cases (typically transmitted from international travelers) to other people before community transmission becomes widespread primarily through screening, isolation and quarantine of individuals.”<sup>71</sup> The drafters of the MSEPHEA did not likely contemplate a contagion such as COVID-19, which spreads in pre-symptomatic individuals and to some extent asymptomatic individuals often without detection<sup>72</sup> And as a result, the MSEPHEA and the state statutes modeled in part after it failed to incorporate community mitigation efforts such as the wearing of facial coverings and other social distancing measures.<sup>73</sup>

For those states having a public health emergency statute, the governor is not necessarily precluded from using the more general

<sup>67</sup> In 2003, thirty-nine states and the District of Columbia enacted or were expected to enact some version of the MSEPHEA. Gostin, *supra* note 63, at 5. Criticisms of the MSEPHEA abounded in the civil rights context. In particular, the ACLU criticized the MSEPHEA as being “replete with civil liberties problems” including insufficient checks and balances on state executives among other concerns. *Model State Emergency Health Powers Act: Q&A on the Model State Emergency Powers Act*, AMER. CIV. LIBERTIES UNION, <https://www.aclu.org/print/node/24150> [<https://perma.cc/BY6P-4F84>] (last visited Dec. 1, 2020).

<sup>68</sup> Rutkow, *supra* note 62. In 2003, thirty-nine states and the District of Columbia enacted or were expected to enact some version of the MSEPHEA. Gostin, *supra* note 63, at 5.

<sup>69</sup> See, e.g., N.J. STAT. ANN. § 26:13-3 (West 2020) (providing powers to the health commissioner to respond to public health emergency); N.M. STAT. ANN. § 12-10A-6 (2020) (authorizing secretary of health and secretary of public safety special powers during public health emergency such as utilizing health care facilities for public use and rationing health care supplies).

<sup>70</sup> See Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 YALE J. OF HEALTH POL’Y & ETHICS 50, 64 (2020).

<sup>71</sup> *Id.* at 64.

<sup>72</sup> Mark K. Slivka, *Is Presymptomatic Spread a Major Contributor to COVID-19 Transmission?*, 26 NATURE MED. 1531, 1531–33 (Aug. 17, 2020) (reviewing several COVID-19 case studies found multiple instances of transmission prior to symptom onset though it is difficult to quantify), <https://www.nature.com/articles/s41591-020-1046-6#citeas> [<https://perma.cc/XP2B-KKZ3>].

<sup>73</sup> Wiley, *supra* note 70, at 66.

emergency disaster statute for her state.<sup>74</sup> In fact, at least five governors declared a public health emergency along with a broader state of emergency or disaster for COVID-19, and at least one governor issued a general state of emergency instead of a more specific public health emergency.<sup>75</sup>

### *B. Key Components of State Emergency Disaster Statutes*

During the height of the pandemic in 2020, many state emergency disaster statutes provided that the state of emergency declaration last for a short duration such as fifteen, thirty, forty-five, or sixty days and one for six months.<sup>76</sup> Indeed, the vast majority of state emergency disaster statutes employ some type of durational limitation.<sup>77</sup> If the emergency persists, the governors in a few states may renew the declaration.<sup>78</sup> However, in seven states only the legislature may renew by concurrent resolution.<sup>79</sup> For

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<sup>74</sup> See Wiley, *supra* note 70, at 90.

<sup>75</sup> Florida, Maryland, Oklahoma, Utah, and Wyoming declared both public health emergencies and general state of emergencies. See Fla. Exec. Order No. 20–51 (March 1, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-51.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-51.pdf) [<https://perma.cc/L7HM-RVER>] (ordering state health officer to declare public health emergency); Md. Proclamation (March 5, 2020), <https://governor.maryland.gov/wp-content/uploads/2020/03/Proclamation-COVID-19.pdf> [<https://perma.cc/T7FS-DKGL>] (declaring state of emergency and existence of catastrophic health emergency); Okla. Exec. Order No. 2020-12 (Apr. 2, 2020), <https://www.sos.ok.gov/documents/executive/1927.pdf> [<https://perma.cc/EYV4-CRXJ>] (declaring public health emergency); Utah State Pub. Health Order No. 2020-17 (Oct. 14, 2020), <https://coronavirus-download.utah.gov/Health/UPHO-2020-17-Public-Health-Emergency-Declaration.pdf> [<https://perma.cc/A27L-V45A>] (declaring public health emergency); Utah Exec. Order 2020-63 (Sept. 19, 2020), <https://rules.utah.gov/wp-content/uploads/Utah-Executive-Order-No.-2020-63.pdf> [<https://perma.cc/WR4B-R4GH>] (declaring state of emergency); Wy. Exec. Order 2020-2 (March 13, 2020), [https://drive.google.com/file/d/19mX3feCje2NKRrKi\\_GPiKvwckGV0VBh/view](https://drive.google.com/file/d/19mX3feCje2NKRrKi_GPiKvwckGV0VBh/view) [<https://perma.cc/4YZR-QHT4>] (declaring state of emergency and public health emergency); *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 46 (Or. 2020) (recognizing that the Oregon Public Health emergency statute provided the governor with an option short of declaring a state of disaster but holding that she was not required to take that route).

<sup>76</sup> See Appendix A.

<sup>77</sup> See *id.*

<sup>78</sup> *Id.* The emergency disaster statutes for Alabama, Florida, Mississippi, and New York specifically provide for the governor to renew or extend the emergency. Most other state emergency disaster statutes are silent on the point. *Id.*

<sup>79</sup> *Id.* Those seven states or U.S. territories are Alaska, Kansas, Michigan, South Carolina, U.S. Virgin Islands, Washington, and Wisconsin. Alabama provides that either the governor or legislature may extend. *Id.* Oklahoma provides that the legislature must approve the initial public health emergency. *Id.* As discussed more fully in *infra* Part III.B and Part IV, Kansas, Michigan and Wisconsin have all had

a number of states, the emergency declaration stays in place until rescinded or amended.<sup>80</sup> A majority of state emergency statutes provide the state legislature with authority to terminate an emergency declaration, usually by concurrent resolution.<sup>81</sup> The New York COVID-19 emergency disaster statute appears to be by itself in providing the legislature with additional authority to terminate emergency executive orders by concurrent resolution.<sup>82</sup> For state emergency disaster statutes that do not provide the state legislature with any specific authority to extend or terminate emergency declarations, the legislature always has the option to amend or repeal the statute.<sup>83</sup>

State declarations of emergency often do not go beyond the initial declaration lasting typically just days, weeks or sometimes months.<sup>84</sup> However, while uncommon, some emergencies last significantly longer. For example, a number of states had declared a state of emergency in response to the Opioid crisis with some of these emergency declarations lasting several years.<sup>85</sup> And the New Jersey Supreme Court finally held that after “almost twelve years, prison overcrowding was no longer an ‘emergency’ under the Disaster Control Act.”<sup>86</sup>

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hotly contested litigation between the governor and legislature stemming from the legislature’s sole authority to renew the state of emergency.

<sup>80</sup> *Id.* The states that do not have a specified durational limitation are Arizona, California, Connecticut, Kentucky, Massachusetts, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Puerto Rico, Vermont, Virginia, and West Virginia. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *See* N.Y. Exec. Law § 20-A(4) (LexisNexis effective Mar. 7, 2020 until Apr. 29, 2021). The statute was repealed about two months before it was to expire. *See* S.B. 5357, 2021-2022 Gen Assemb., Reg. Sess. (N.Y. 2021).

<sup>83</sup> *Id.*

<sup>84</sup> *See, e.g.,* Tenn. Exec. Order No. 7 (Mar. 7, 2019), <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee7.pdf> [<https://perma.cc/L479-8LVN>]. For example, on March 7, 2019, Tennessee Governor Bill Lee issued Executive Order No. 7 declaring a state of emergency in response to severe storms, flooding and wind. *Id.* That executive order lasted for 30 days. *Id.*

<sup>85</sup> Jeffrey Locke, et. al., *The Role of State Emergency Powers in Curbing the Opioid Epidemic: A Case Study in Lessons Learned*, 51 ARIZ. ST. L.J. 629, 646–53 (2019). The authors found that Massachusetts and South Carolina Governors issued state of emergencies concerning the Opioid crisis in 2017 and that those emergency declarations were still in effect as of the date of the article’s submission in 2019.

<sup>86</sup> Herman, *supra* note 12, at 101 (citing *County of Gloucester v. State*, 623 A.2d 763, 767 (1993)).

### C. Ongoing Debate About Executive's Emergency Powers

At the national level, legal scholars disagree about the extent of an executive's power during times of crisis.<sup>87</sup> Some argue that in a time of crisis both the judicial and legislative branches will delegate significant powers to the executive.<sup>88</sup> These scholars believe that the executive, armed with the information and the ability to quickly act, is the only branch that can aptly respond to a crisis.<sup>89</sup> This argument stems from the classic Carl Schmitt view of executive authority which finds that even if the law attempts "to constrain the powers of government, during a time of crisis, there is always someone who must decide to invoke the state of exception as a discretionary matter."<sup>90</sup> This view argues that deference from both the judicial and legislative branches is key for the executive's ability to respond in an emergency.<sup>91</sup>

Others also argue for a strong executive during a time of emergency but find that the executive should be bound by checks and balances.<sup>92</sup> While scholars here recognize that the judiciary and legislature may afford some degree of deference to the executive during an emergency, they find that both of these branches should still play an important role in "constraining national executives."<sup>93</sup> They also argue that the type of emergency may affect the degree of deference the judiciary and legislature afford executives.<sup>94</sup> For a national security emergency, courts and legislatures may give the executive a great degree of deference where there

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<sup>87</sup> See Daniel Farber, *The Long Shadow of Jacobson v. Massachusetts: Public Health, Fundamental Rights, and the Courts*, at 834 n. 10 (July 7, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3635740](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635740) [<https://perma.cc/894G-2AKZ>]; Rossi, *supra* note 35, at 261 n.5 (defining "crisis" as the "triggering event" and "emergency" as "the legal status for the assertion of executive powers").

<sup>88</sup> See, e.g., Rossi, *supra* note 35, at 240.

<sup>89</sup> ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 15–16 (2007). Posner and Vermeule find that the judiciary and legislative branches are not quick to respond in an emergency. *Id.*

<sup>90</sup> Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic* 8 (Va. Pub. L. & Legal Theory Rsch Paper No. 2020-52, Univ. of Chicago, Pub. L. Working Paper No. 747, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3608974](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608974) [<https://perma.cc/5CCF-JYHH>].

<sup>91</sup> *Id.*; see also Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 609 (2003). These scholars recognize that a high degree of deference particularly from the judiciary may lead to executive abuse whereby an executive may be able to hold onto power and squash any legal opponents. *Id.*

<sup>92</sup> Ginsburg & Versteeg, *supra* note 90, at 8.

<sup>93</sup> *Id.* at 1.

<sup>94</sup> *Id.* at 19–20.



is a need for secrecy, whereas a pandemic emergency requires a broad set of participants such as those from local government, drug companies and hospitals.<sup>95</sup> Some argue in the context of a pandemic, courts and legislatures may see themselves as helping in the response rather than being in the way.<sup>96</sup> Similarly, executives have used their emergency powers to respond to natural disasters and other health crises that last a short time and both the judiciary and legislature may often step aside to allow a quick response.<sup>97</sup> Those emergencies differ significantly from that of a pandemic or other prolonged public health crisis.<sup>98</sup>

At the state level prior to the pandemic, scholarship was sparse about how broad the governor's powers should be during a state of emergency.<sup>99</sup> Clearly, the scholarship is emerging. But the different theories concerning emergency powers of national executives could apply equally as well at the state or sub-national level.<sup>100</sup> As discussed more in *infra* Part V, governors require broad emergency powers during the COVID-19 pandemic in order to curb the transmission of the virus. However, these emergency powers should also be subject to some degree of judicial and legislative oversight, so a governor does not overstep her bounds. Judicial and legislative oversight should not amount to active participation in what is considered an executive function during a crisis.<sup>101</sup>

### III. IMPACT AND RESPONSE TO COVID-19 IN THE UNITED STATES

With a federalist system, the United States' response to the pandemic has been fraught with problems, inconsistencies and occasional successes. To better understand the role of governors, state legislatures and state agencies in this ongoing crisis, this section provides background on COVID-19 and how it first arrived in the United States. Next it looks at

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 20.

<sup>97</sup> See Appendix A. Indeed, more than thirty state emergency disaster or public health emergency statutes limit the initial declaration of emergency to thirty or sixty days.

<sup>98</sup> See, e.g., Locke, *supra* note 85, at 637.

<sup>99</sup> Professor Rossi argues that there should be a presumption of state executive power during times of crisis. Rossi, *supra* note 35, at 238–39. Rossi says that the “lack of clarity” concerning the governor’s role in a crisis affects the governor’s ability to properly respond. *Id.* at 276; see generally Seifter, *supra* note 15 (providing a general overview of the modern gubernatorial regime).

<sup>100</sup> Rossi, *supra* note 35, at 273–74. Rossi cites to the scholarship surrounding the argument for a strong federal executive during times of crisis. *Id.* He argues that the “case for a strong executive at the state level is stronger” than at the national level since civil right remedies are more likely to be in conflict at the national level. *Id.*

<sup>101</sup> See Rossi, *supra* note 35, at 268.

how governors initially responded to the pandemic. And finally, this section describes the impact the pandemic has had on the economy.

### A. COVID-19 in the United States

In March 2020, COVID-19, a respiratory disease caused by the newly discovered Coronavirus, shut down much of the United States.<sup>102</sup> While Washington state officially had the first COVID-19 case in January, California was the first state to declare an emergency due to the virus.<sup>103</sup> By March 17, 2020, forty-eight states had declared emergencies due to COVID-19.<sup>104</sup> And by April 7, 2020, forty-two state governors plus the District of Columbia and Puerto Rico had ordered their people to shelter in place.<sup>105</sup> From there, many state governors issued a plethora of executive orders in connection with the COVID-19 pandemic.<sup>106</sup>

In the beginning, COVID-19 was a bit of a mystery, but the CDC indicated that the virus was highly contagious.<sup>107</sup> The virus is transmitted through person to person contact such as touching or shaking hands of an infected individual, inhaling airborne particles of the virus left by an infected individual, or coming into contact with the respiratory droplets of an infected individual.<sup>108</sup> The virus can have a long incubation period whereby an individual may not show symptoms for up to 14 days.<sup>109</sup> And

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<sup>102</sup> See generally *Coronavirus*, WORLD HEALTH ORG., [https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1) [<https://perma.cc/E6EL-XSSZ>] (last visited Feb. 1, 2021).

<sup>103</sup> Cal. Exec. Order No. N-33-20 (March 19, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf> [<https://perma.cc/4GFW-GYS4>] (On March 4, 2020 California declared a state of emergency.).

<sup>104</sup> Rosie Perper et al., *Almost all US States have declared states of emergency to fight coronavirus – here’s what it means for them*, BUS. INSIDER (Mar. 17, 2020), <https://www.businessinsider.com/california-washington-state-of-emergency-coronavirus-what-it-means-2020-3> [<https://perma.cc/YVF8-UMK9>].

<sup>105</sup> Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [<https://perma.cc/J7LG-XJ6S>].

<sup>106</sup> *Id.*

<sup>107</sup> Steven Sanche et. al., *High Contagiousness and Rapid Spread of Severe Acute Respiratory Syndrome Coronavirus 2*, 26 *Emerging Infectious Diseases* 1470, 1471 (2020).

<sup>108</sup> *COVID-19 Overview and Infection Prevention and Control Priorities in non-US Health Care Settings*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/non-us-settings/overview/index.html> [<https://perma.cc/8XDX-PAB6>] (last visited Aug. 12, 2020). The CDC says that there is insufficient evidence supporting long range aerosol transmission of COVID-19 but that short-range transmission of the virus via aerosol is a possibility. *Id.*

<sup>109</sup> *Id.*

a significant number of those infected may not show symptoms and otherwise be asymptomatic.<sup>110</sup> This aspect of the disease has made the traditional method of containment difficult at best.<sup>111</sup>

### *B. Initial Governors' Response to the Pandemic*

To curb the spread of the virus, mitigation measures were put in place to reduce person to person contact.<sup>112</sup> That meant keeping socially distant from one another.<sup>113</sup> For most states, the governors issued shelter in place orders requiring its residents to stay at home other than attending to basic needs such as going to the grocery store, pharmacy or getting some exercise.<sup>114</sup> For the most part, only essential workers were out and about during the stay-at-home orders.<sup>115</sup> Beginning as early as April 20, 2020, states slowly reopened their economies.<sup>116</sup> In April 2020, the CDC along with the White House issued guidelines for “Opening Up America Again.”<sup>117</sup> As of the date of this article, all fifty states had reopened their economies to some extent.<sup>118</sup> Even though states began reopening their economies, restrictions still abounded.<sup>119</sup> A number of states, for example, still limited sizes of mass gatherings, placed restrictions on indoor dining, restricted capacity at fitness centers and bars, as well as kept public schools closed.<sup>120</sup> Many states also had different regions of their state move more

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<sup>110</sup> *Id.*

<sup>111</sup> See Wiley, *supra* note 70, at 69–71 (recounting early parts of pandemic where traditional methods of isolation, quarantine and containment failed to reduce community transmission of COVID-19); Monica Gandhi et. al. *Asymptomatic Transmission: the Achilles' Heel of Current Strategies to Control Covid-19*, 382 NEW ENG. J. OF MED. 2158 (2020).

<sup>112</sup> See Wiley, *supra* note 70, at 72-73.

<sup>113</sup> *Id.*

<sup>114</sup> See Mervosh, *supra* note 105.

<sup>115</sup> See *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Mar. 19, 2020), <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf> [<https://perma.cc/7YZH-B6RU>].

<sup>116</sup> See Jasmine C. Lee et. al., *See Reopening Plans and Mask Mandates for All 50 States*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html> [<https://perma.cc/8AGK-VG46>] (last visited Aug. 4, 2020).

<sup>117</sup> *Guidelines: Opening Up America Again*, WHITE HOUSE & CTRS. FOR DISEASE CONTROL & PREVENTION, <https://trumpwhitehouse.archives.gov/openingamerica/> [<https://perma.cc/8T5V-3FAV>] (last visited Sept. 13, 2021).

<sup>118</sup> *Id.*

<sup>119</sup> Lee, *supra* note 116.

<sup>120</sup> *Id.*

quickly into reopening phases than others.<sup>121</sup> For a vocal minority, the states' reopening plans did not move quickly enough.<sup>122</sup> For example, in April 2020, protestors converged on state capitols in Michigan and Minnesota chanting "liberate Michigan" and "liberate Minnesota."<sup>123</sup> Those protestors echoed President Trump's tweets rebuking the Michigan and Minnesota democratic governors who had issued social distancing restrictions.<sup>124</sup> Yet in 2020 the majority of Americans largely approved of these social distancing measures.<sup>125</sup>

As states began to reopen their economies, many governors issued state-wide mask mandates.<sup>126</sup> Connecticut was the first state to issue a statewide face mask requirement in early April 2020.<sup>127</sup> As of early November 2020, only thirty-three states had a statewide mask mandate with many of the state governors having issued the mandate in the late spring and summer of 2020.<sup>128</sup> One state, Mississippi, lifted its mask order on September 30, 2020.<sup>129</sup> While the CDC had sent mixed messaging in the beginning, the scientific evidence is clear that facial coverings protect

<sup>121</sup> *Reopening New York: Implementing CDC Guidance*, N.Y. STATE, [https://www.governor.ny.gov/sites/default/files/2021-05/NYS\\_CDCGuidance\\_Summary.pdf](https://www.governor.ny.gov/sites/default/files/2021-05/NYS_CDCGuidance_Summary.pdf) [<https://perma.cc/G7WR-AF7L>] (last visited June 7, 2020).

<sup>122</sup> See Lee, *supra* note 116.

<sup>123</sup> *Id.*

<sup>124</sup> Michael D. Shear & Sarah Mervosh, *Trump Encourages Protests Against Governors Who Have Imposed Virus Restrictions*, N.Y. TIMES (April 17, 2020), <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html> [<https://perma.cc/ST64-3Y4A>].

<sup>125</sup> Andrew Daniller, *Americans Remain Concerned that States Will Lift Restrictions Too Quickly, But Partisan Differences Widen*, Pew Research Ctr., (May 7, 2020), <https://www.pewresearch.org/fact-tank/2020/05/07/americans-remain-concerned-that-states-will-lift-restrictions-too-quickly-but-partisan-differences-widen/> [<https://perma.cc/AZ7N-LN2S>].

<sup>126</sup> See *State-Level Mask Requirements in Response to the Coronavirus (COVID-19) Pandemic 2020-2021*, BALLOTPEDIA, [https://ballotpedia.org/State-level\\_mask\\_requirements\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020-2021](https://ballotpedia.org/State-level_mask_requirements_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021) [<https://perma.cc/R2KW-7NWP>] (last visited July 21, 2021).

<sup>127</sup> Lindsay K. Cloud et. al., *A Chronological Overview of the Federal, State, and Local Response to COVID-19*, in *ASSESSING LEGAL RESPONSES TO COVID-19* (Scott Burris et al. ed. August 2020).

<sup>128</sup> Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AM. ASSN. RETIRED PERS. (Nov. 6, 2020), <https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html> [<https://perma.cc/NKB9-D9MB>].

<sup>129</sup> Nicholas Reimann, *Mississippi Becomes First State to Lift Mask Mandate*, FORBES (Sept. 30, 2020), <https://www.forbes.com/sites/nicholasreimann/2020/09/30/mississippi-becomes-first-state-to-lift-mask-mandate/?sh=22c212377f13> [<https://perma.cc/QFA8-WJT7>].

the wearer as well as those around him.<sup>130</sup> Moreover, recent scientific studies suggest that masking may not only protect against infection, but from severe illness.<sup>131</sup>

State governors also issued executive orders to help their state survive the economic devastation that corresponded when businesses were largely closed and citizens were ordered to shelter in place.<sup>132</sup> A number of states issued a moratorium on evictions as well a moratorium on utility shut-offs, though most of these orders have since expired.<sup>133</sup> Some governors issued orders to provide for income tax extensions as well as to expedite unemployment benefits.<sup>134</sup>

The initial set of stay-at-home and other social distancing executive orders had a positive effect of reducing COVID-19 transmission nationwide, particularly in the New York City area.<sup>135</sup> However, in the

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<sup>130</sup> *Scientific Brief: Use of Cloth Masks to Control the Spread of SARS-CoV-2*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html> [<https://perma.cc/ETG7-Q3PF>] (last updated May 7, 2021) [hereinafter *Scientific Brief*].

<sup>131</sup> Lynn Peebles, *Face Masks: What the Data Say*, NATURE (Oct. 6, 2020), <https://www.nature.com/articles/d41586-020-02801-8> [<https://perma.cc/RZ73-PE2Q>].

<sup>132</sup> See, e.g., Cal. Exec. Order N-40-20 (March 30, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.30.20-N-40-20.pdf> [<https://perma.cc/3Z6F-4JNV>] (providing relief for small businesses impacted by COVID-19 closures). In February 2020, the United States had unprecedented low unemployment at 3.4% and in June 2020, the unemployment rate rose to a staggering 11.1%. See News Release 20-0495, U.S. Dep't of Lab., Bureau of Lab. Stats., State Employment and Unemployment – February 2020 (Mar. 27, 2020), [https://www.bls.gov/news.release/archives/laus\\_03272020.htm](https://www.bls.gov/news.release/archives/laus_03272020.htm) [<https://perma.cc/K3RU-8GLB>]; News Release 20-1310, U.S. Dep't of Lab., Bureau of Lab. Stats., The Employment Situation – June 2020 (Jul. 2, 2020), [https://www.bls.gov/news.release/archives/empstat\\_07022020.pdf](https://www.bls.gov/news.release/archives/empstat_07022020.pdf) [<https://perma.cc/53NW-EKUT>].

<sup>133</sup> *Eviction, Mortgage & Foreclosure Relief During COVID-19: 50 State Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/eviction-mortgage-foreclosure-relief-during-covid-19-50-state-resource/> [<https://perma.cc/ACL4-WZAV>] (last updated Oct. 2020).

<sup>134</sup> See, e.g., Colo. Exec. Order No. D 2020 105 (June 15, 2020), <https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20105%20Income%20Tax%20Extension.pdf> [<https://perma.cc/CBW3-GFU3>] (extending income tax payment deadlines); Mich. Exec. Order No. 2020-76 (May 6, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-528456--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-528456--,00.html) [<https://perma.cc/L6V8-AS5Z>] (expediting unemployment benefits).

<sup>135</sup> See Nathan Layne & Maria Caspani, *New York Hospitalizations Fall for First Time in Coronavirus Pandemic*, REUTERS (Apr. 14, 2020, 11:26 AM), [https://www.reuters.com/article/us-health-coronavirus-usa-new-york-](https://www.reuters.com/article/us-health-coronavirus-usa-new-york/new-york-)

summer of 2020, the pandemic moved from the NYC metropolitan area to the sunbelt.<sup>136</sup> Florida, Texas and Arizona, as the new hot spots, were criticized by medical experts for reopening their economies too soon.<sup>137</sup> By early fall, the pandemic centered in many of the midwestern states with climbing positivity rates in Iowa, Wisconsin and Illinois.<sup>138</sup> By November 2020, almost all fifty states were experiencing a surge in COVID-19 cases.<sup>139</sup> Just in November 2020 alone, the United States recorded four million cases and as of December 1, 2020, COVID-19 had claimed over 268,000 lives.<sup>140</sup> With the surge in cases throughout the United States in the fall, a number of state governors or health officials imposed new or additional restrictions on their citizens to curb the spread of the virus.<sup>141</sup> For example, in mid-November, both New Mexico and Oregon issued stay-at-home orders in an effort to curb the rising number of cases.<sup>142</sup> Curfews were issued in both Ohio and in most parts of California.<sup>143</sup> Still,

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hospitalizations-fall-for-first-time-in-coronavirus-pandemic-governor-idUSKCN21W2DH [https://perma.cc/66F9-6JK3].

<sup>136</sup> William H. Frey, *A Roaring Sun Belt Surge Has Inverted the Demographics and Politics of COVID-19*, BROOKINGS (July 2, 2020), <https://www.brookings.edu/blog/the-avenue/2020/06/19/covid-19s-sun-belt-surge-has-recast-the-pandemics-impact/> [https://perma.cc/V2DP-TFAX].

<sup>137</sup> See Steve Almasy et. al., *Dr. Fauci Says States Like Florida Reopened Too Quickly*, CNN (July 9, 2020, 9:11 PM), <https://www.cnn.com/2020/07/09/health/us-coronavirus-thursday/index.html> [https://perma.cc/6H3X-MLQV].

<sup>138</sup> Antonia Noori Farzan et. al., *More Than 20 States Have Set Records for New Coronavirus Cases in Recent Days*, WASH. POST (Oct. 13, 2020, 10:30 PM), <https://www.washingtonpost.com/nation/2020/10/13/coronavirus-covid-live-updates-us/> [https://perma.cc/FH6K-27G2].

<sup>139</sup> Christina Maxouris, *Here's Exactly How Bad COVID-19 was in November*, CNN (Dec. 1, 2020, 8:18 AM), <https://www.cnn.com/2020/12/01/us/covid-november-numbers-records/index.html> [https://perma.cc/7WP6-W5EA].

<sup>140</sup> Tariro Mzezewa & Sarah Calahan, *U.S. Coronavirus Cases Pass 4 Million for the Month of November, Doubling the Record Set in October*, N.Y. TIMES (Dec. 1, 2020, 6:47 AM), <https://www.nytimes.com/live/2020/11/28/world/covid-19-coronavirus> [https://perma.cc/T4H9-AST4].

<sup>141</sup> Maxouris, *supra* note 139.

<sup>142</sup> New Mexico's stay at home order was issued by its public health official whereas the Oregon order was issued by its Governor. See N.M. Pub. Health Order (Nov. 13, 2020), [https://www.rld.state.nm.us/uploads/PressRelease/b88957513a09474898000e52177885b3/111320\\_PHO\\_1.pdf](https://www.rld.state.nm.us/uploads/PressRelease/b88957513a09474898000e52177885b3/111320_PHO_1.pdf) [https://perma.cc/2XD4-RYJ5]; Or. Exec. Order No. 20-65 (Nov. 17, 2020), [https://www.oregon.gov/gov/admin/Pages/eo\\_20-65.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-65.aspx) [https://perma.cc/98HL-9K26] (issuing temporary freeze to address surge in COVID-19 cases in Oregon).

<sup>143</sup> *COVID-19 Update: 21-Day Statewide Curfew*, OHIO DEP'T OF HEALTH (Nov. 17, 2020), <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/news-releases-news-you-can-use/covid-19-update-11-17-20> [https://perma.cc/SDP2-CAW3]; Kari Paul, *California Coronavirus Curfew: What are the Rules and will it Work?*, THE GUARDIAN (Nov. 20, 2020, 2:36 PM), <https://www.theguardian.com/us->

the White House Coronavirus Task Force found that some governors' actions in the late fall fell short of what was needed to curb further transmission of the virus and asked that local public health officials alert the local population directly.<sup>144</sup>

Many state legislatures have passed few bills concerning the COVID-19 pandemic leaving it to their governor or state health official to issue emergency orders concerning the pandemic.<sup>145</sup> If anything, as discussed more fully in *infra* Part III.B., some state legislatures sought judicial intervention to limit their governor from exercising some of her emergency powers.<sup>146</sup>

In the late winter and spring of 2021, about eight state legislatures – most notably Kentucky and New York – enacted legislation to limit their governor's emergency powers.<sup>147</sup> In response to pressures from businesses and what can be described as “pandemic fatigue,” the Kentucky legislature passed four bills overriding Governor Beshear's veto, vastly

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news/2020/nov/20/california-curfew-coronavirus-rules-explained  
[https://perma.cc/UC2D-6EY6].

<sup>144</sup> Betsy Klein, *White House Coronavirus Task Force Warn States: “We are in a Very Dangerous Place,”* CNN (Dec. 2, 2020, 10:07 AM), <https://www.cnn.com/2020/12/02/politics/white-house-coronavirus-task-force-states-report/index.html> [https://perma.cc/65LL-HRJ6].

<sup>145</sup> *State Laws in Response to the Coronavirus (COVID-19) Pandemic 2020*, BALLOTPEDIA, [https://ballotpedia.org/State\\_laws\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020](https://ballotpedia.org/State_laws_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020) [https://perma.cc/LR5M-ZNSQ] (last visited Dec. 6, 2020). For example, more than ten states including large states like Florida and Texas introduced less than 10 bills since the beginning of the pandemic. *Id.* A few states like Pennsylvania, Minnesota, New Jersey and New York were much more active all introducing more than 300 bills. *Id.* But these states were certainly the exception. *Id.*

<sup>146</sup> Trip Gabriel, *State Lawmakers Defy Governors in a COVID-Era Battle for Power*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/02/22/us/politics/republicans-democrats-governors-covid.html> [https://perma.cc/9PX3-TMK7] (commenting that more than thirty state legislatures were attempting to restrict their governor's emergency powers).

<sup>147</sup> Samuel Wonacott, *Eight States Have Enacted Laws Limiting Governors' Emergency Powers Since the Start of the Pandemic*, HEARTLAND DAILY NEWS (Apr. 17, 2021), <https://heartlanddailynews.com/2021/04/eight-states-have-enacted-laws-limiting-governors-emergency-powers-since-the-start-of-the-pandemic/> [https://perma.cc/63QF-Z25B]. In addition to Kentucky and New York, the state legislatures in Arkansas, Colorado, Indiana, Kansas, Ohio, Pennsylvania and Utah all passed bills limiting their governor's powers to respond in an emergency. *Id.*; see also Sarah Nelson & Kaitlin Lange, *Gov. Holcom Vetoes Bill that Would Limit Governor's Emergency Powers*, INDY STAR (Apr. 9, 2021, 4:36 PM), <https://www.indystar.com/story/news/politics/2021/04/09/eric-holcomb-vetoes-emergency-powers-bill-indiana-governor/7164794002/> [https://perma.cc/93GD-LW48].

limiting the governor's emergency powers.<sup>148</sup> The New York legislature passed a bill revoking then-Governor Cuomo's additional powers granted to him to manage the pandemic.<sup>149</sup>

State agencies have generally issued guidance on COVID-19 but have not promulgated regulations going through the more formal notice and comment rule-making process.<sup>150</sup> Virginia went a different route by promulgating an emergency regulation which was "designed to establish requirements for employers to control, prevent, and mitigate the spread of [COVID-19]."<sup>151</sup> The Virginia Department of Labor and Industry posted notice of an emergency meeting to consider establishing workplace safety standards and also opened up a ten-day public comment forum.<sup>152</sup> After

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<sup>148</sup> See H.B. 1, 2021 Reg. Sess. (Ky. 2021) (allowing businesses, schools and associations to remain open if their plan meets or exceeds current CDC guidance); H.B. 5, 2021 Reg. Sess. (Ky. 2021) (limiting the authority of governor to temporarily reorganize administrative agencies without legislative approval); S.B. 1, 2021 Reg. Sess. (Ky. 2021) (limiting executive orders concerning in-person meetings to thirty days unless extended by legislature); S.B. 2, Reg. Sess. (Ky. 2021) (requiring state agencies to submit documentation to legislative subcommittee before issuing emergency regulations).

<sup>149</sup> See S.B. 5357, 2021-2022 Gen. Assemb., Reg. Sess. (N.Y. 2021). This bill was enacted largely in response to the several recent scandals including allegations of the Governor's sexual misconduct toward female aides and allegations that the Governor's aides altered a health department report undercounting the COVID-19 fatalities at long-term care facilities. See Jesse McKinley & Luis Ferré-Sadurni, *Cuomo Faces Revolt as Legislators Move to Strip Him Pandemic Powers*, N.Y. TIMES (Feb. 17, 2021), <https://www.nytimes.com/2021/02/17/nyregion/cuomo-nursing-homes-deaths.html> [<https://perma.cc/Z47V-DJBA>].

<sup>150</sup> See Kelly Deere & Christine Gottesman, *We Can Do This: Reopening the Non-Public Office Sector and Keeping it Open During the COVID-19 Pandemic*, 16 RUTGERS BUS. L. REV. 10, 17 (2020); *Administrative Responses to a Global Pandemic: Emergency Rulemaking and Other Mechanisms Agencies Are Employing to Respond to COVID-19*, ROPES & GRAY (May 26, 2020), <https://www.ropesgray.com/en/newsroom/alerts/2020/05/Administrative-Responses-to-a-Global-Pandemic-Emergency-Rulemaking-and-Other-Mechanisms> [<https://perma.cc/ZP2Q-ZRKN>].

<sup>151</sup> See Emergency Temporary Standard, Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16 VA. ADMIN. CODE § 25-220 (July 15, 2020), adopted VA. ADMIN. CODE §§ 25-220-10 *et seq.* (Jan. 27, 2021). The regulation provided, among other things, social distancing measures, requiring the wearing of facial coverings, access to hand sanitizer and handwashing facilities and increased cleanings. *Id.* at 2–35.

<sup>152</sup> Lexie Reynolds, et al., *Virginia Becomes First State to Pass Permanent Workplace Coronavirus Rules*, PROSKAUER (Jan. 28, 2021), <https://www.lawandtheworkplace.com/2021/01/virginia-becomes-first-state-to-pass-permanent-workplace-coronavirus-rules/> [<https://perma.cc/492E-YSQZ>]. The Virginia agency received over 3400 comments to the proposed regulation. *Public Comment Forum: Safety and Health Codes Board Electronic Emergency Meeting June 24, 2020*, VA. REGUL. TOWN HALL,



several iterations in June and July of 2020, the Virginia Safety and Health Codes Board adopted the emergency regulation which took effect on July 27, 2020 after publication in a Richmond newspaper.<sup>153</sup>

#### IV. JUDICIAL REVIEW

With governors issuing numerous executive orders limiting the size of in-person gatherings, placing a temporary ban on elective surgeries, issuing long-term stay-at-home orders, and placing a moratorium on evictions among other orders, both individuals and groups began to challenge these orders as a violation of their constitutional rights.<sup>154</sup> A few state legislatures unsuccessfully attempted to use their powers under state emergency disaster statutes to terminate their governor's emergency declaration for COVID-19.<sup>155</sup> The respective governors challenged these actions.<sup>156</sup> There were also several challenges to governors' statutory authority to declare a state of emergency.<sup>157</sup> Subpart A looks at challenges to certain executive orders in the civil right context and subpart B looks at challenges to the state legislature's or governor's authority under their emergency disaster statute on either statutory or constitutional grounds.

##### A. Civil Rights Challenges to Specific Executive Orders

During the earliest parts of the pandemic, most federal district court judges addressed civil rights challenges to executive orders through the framework of the United States Supreme Court case *Jacobson v.*

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<https://townhall.virginia.gov/L/comments.cfm?GeneralNoticeid=1118>  
[<https://perma.cc/PN9B-SLMG>] (last visited May 20, 2021).

<sup>153</sup> Reynolds, *supra* note 152.

<sup>154</sup> See, e.g., Lesley Gool, *Executive Orders and Their Challenges During COVID-19*, ILL. STATE BAR ASSOC. (Dec. 2020), <https://www.isba.org/sections/localgovt/newsletter/2020/12/executiveordersandtheirchallengesdu> [<https://perma.cc/2C5F-UKRY>]. It should come as no surprise that a number of recent legal scholars have thoroughly recounted and analyzed some of the same cases I set out to describe in Part III. See generally Lindsay Wiley & Stephen Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 179-80 (2020); Wiley, *supra* note 70; Wendy Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117 (2020); Farber, *supra* note 87.

<sup>155</sup> See, e.g., Stephen Montemayor, *As Legislature Battles Over Gov. Tim Walz's Powers, Courts Refuse to Reject his Authority*, STARTRIBUNE (Mar. 28, 2021, 5:56 AM), <https://www.startribune.com/as-legislature-battles-over-gov-tim-walz-s-powers-courts-refuse-to-reject-his-authority/600039458/> [<https://perma.cc/3Z6C-DWCR>].

<sup>156</sup> See *infra* Part III.B.

<sup>157</sup> See *infra* Part III.B.2.

*Massachusetts*.<sup>158</sup> Decided more than one hundred years ago, the United States Supreme Court in *Jacobson* first defined the standard for evaluating emergency measures though not executive orders per se.<sup>159</sup> In *Jacobson*, the Massachusetts state legislature granted the State Board of Health the authority to issue a regulation requiring all adults to get a smallpox vaccine.<sup>160</sup> Defendant refused to be vaccinated and was found guilty for violating the health regulation.<sup>161</sup> The Supreme Court affirmed the guilty verdict and in doing so found that the Court should not infringe on the legislature's power to decide how best to protect the public.<sup>162</sup> In fact, the *Jacobson* Court found that the Court's power to review such legislative action is limited to only those statutes that have "no real or substantial relation to those objects, or is beyond all question, a plain, palpable invasion of rights secured by fundamental law . . . ."<sup>163</sup> Some scholars have raised serious concerns that courts will simply defer to the governor's emergency orders using the language of *Jacobson* as a two-part test to evaluate the executive order at issue.<sup>164</sup> In that sense, applying *Jacobson* in the absence of any meaningful review of the order in the civil rights context will eliminate a vital check on the governor's power.<sup>165</sup> Those fears may have come to rest.<sup>166</sup> While the standard of review may not be entirely settled, the Supreme Court's November 2020 decision in *Roman Catholic Diocese of Brooklyn v. Cuomo* where it applied traditional constitutional analysis and not the *Jacobson* framework to a challenge

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<sup>158</sup> 197 U.S. 11 (1905).

<sup>159</sup> *Id.* at 25.

<sup>160</sup> *Id.* at 12.

<sup>161</sup> *Id.* at 13–14.

<sup>162</sup> *Id.* at 37–38.

<sup>163</sup> *Id.* at 31.

<sup>164</sup> See Wiley & Vladeck, *supra* note 154, at 182; Parmet, *supra* note 154, at 31–33; Farber, *supra* note 87, at 18–20. As discussed more in *infra* Part V, Wiley, Vladeck, Parmet and Farber raised key early concerns about the level of deference the courts would afford to state government during the COVID-19 emergency and essentially rubber-stamp many of these emergency orders. And perhaps, their early warning signals helped shape some of the judges' analysis later on. Even prior to the COVID-19 pandemic, at least one scholar raised similar concerns about the suspension of civil liberties during the hurricane Katrina emergency and has argued that judges should use strict scrutiny when government officials violate civil liberties during an emergency. Michael F. Crusto, *State of Emergency: An Emergency Constitution Revisited*, 61 LOY. L. REV. 471, 475–76 (2015).

<sup>165</sup> See generally *Jacobson*, 197 U.S. 11 (1905).

<sup>166</sup> As discussed more fully in *infra* Part V while the recent Supreme Court decision may abate concerns that Courts are suspending judicial review, the decision raises new concerns about whether the judiciary may be usurping the executive's role in making decisions concerning the public health of its citizens.

under the Free Exercise Clause at a minimum diminishes *Jacobson's* relevance in these pandemic cases.<sup>167</sup>

To understand how the federal courts considered various constitutional challenges to executive orders from the onset of the pandemic through the end of 2020, this article reviewed the most typical executive orders involving: (1) limits or bans on non-essential gatherings; (2) limit or bans on elective surgeries; (3) stay-at-home orders and business closures; (4) moratoriums on evictions; and (5) limits on travel.

### 1. Ban or Limits on Non-Essential Gatherings

A significant number of federal district courts used the *Jacobson* framework to uphold executive orders limiting in-person gatherings during the COVID-19 pandemic.<sup>168</sup> For example, in *Antietam Battlefield KOA v. Hogan*, the federal district court denied plaintiffs' motion for a temporary restraining order enjoining enforcement of their Governor's executive order limiting gatherings to no more than ten persons.<sup>169</sup> Applying *Jacobson*, the district court concluded that the executive order had a real and substantial relation to the COVID-19 health crisis citing significant evidence in the record.<sup>170</sup> Second, the district found that the executive orders were not "plain, palpable invasion of rights secured by the fundamental law" employing traditional constitutional analysis to the second element that the orders were neutral and generally applicable.<sup>171</sup>

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<sup>167</sup> See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (hereinafter *Roman Catholic Diocese*).

<sup>168</sup> See Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 DUKE L.J. ONLINE 1, 4–6 (2020). Professor Corbin explains that the typical standard of review under the free exercise doctrine requires a two-part examination. *Id.* at 4. First, a court should determine whether the challenged law is both neutral and generally applicable. *Id.* A law is neutral if it does not specifically target religion and that law is generally applicable "if it applies broadly to the relevant population." *Id.* at 9. If the law satisfies both criteria, then it is constitutional and the analysis ends. *Id.* at 6. If the challenged law is not both neutral and generally applicable, the law is subject to strict scrutiny. *Id.* at 4. Under strict scrutiny, the law "must be justified by a compelling government interest and must be narrowly advanced to address that interest." *Id.* at 6 n. 25 (citing *Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993)).

<sup>169</sup> *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 223 (D. Md. 2020).

<sup>170</sup> *Id.* at 229. Some of the evidence included that COVID-19 spread easily in large groups, outbreaks have been linked to large gatherings and that the Governor issued the order with the assistance of a public health advisory committee. *Id.*

<sup>171</sup> *Id.* at 223. The court found that the order was neutral because it proscribes general conduct and did not target conduct due to religious affiliation. *Id.* at 231. The court also found that the order was generally applicable in that analogous secular activities such as grocery shopping, going to the movies and sporting events are also banned by the order. *Id.* at 231–32.

Likewise, in *Calvary Chapel of Bangor v. Mills*, the federal district court denied plaintiff's motion for a temporary restraining order as the plaintiff Church was unlikely to succeed on its free exercise claim.<sup>172</sup> Plaintiff challenged the Governor's executive order, which outlined Maine's phased reopening and included a provision that "continued [a] prohibition on gatherings of more than ten people."<sup>173</sup> In applying *Jacobson* to the case at hand, the district court concluded it would reach the same result if *Jacobson* was inapplicable, as the executive order likely survives plaintiff's challenge under the Free Exercise Clause.<sup>174</sup>

Reaching a different result, in *Roberts v. Neace*, the Sixth Circuit found the Kentucky Governor's executive order prohibiting all mass gatherings in April and May 2020 likely violated the Free Exercise Clause of the First Amendment.<sup>175</sup> The executive order included a number of exceptions such as airports, train and bus stations and shopping centers and malls.<sup>176</sup> However, the Sixth Circuit did not apply *Jacobson* to the facts at hand, but instead applied strict scrutiny to the orders finding that the "exception-ridden" order is not neutral.<sup>177</sup> In making this finding, the Sixth Circuit concluded that it could not distinguish those operations exempted from the mass gathering ban such as grocery stores, laundromats, airlines and landscaping businesses.<sup>178</sup> Nor was the order the least restrictive means as this order simply banned gatherings altogether.<sup>179</sup> In a few other instances where plaintiffs were granted relief from a governor's executive orders on free exercise grounds, those orders either specifically targeted religious groups or the order was subject to interpretation by law enforcement.<sup>180</sup>

In late May 2020, the U.S. Supreme Court in *South Bay Pentecostal Church v. Newsom* ("South Bay") denied the plaintiff church's emergency motion to enjoin Governor Newsom's stay-at-home order on free exercise

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<sup>172</sup> 459 F. Supp. 3d 273, 286–87 (D. Me. 2020).

<sup>173</sup> *Id.* at 279.

<sup>174</sup> *Id.* at 284. The court also found that the executive order did not likely violate the Free Exercise Clause as it was neutral and generally applicable. *Id.* at 285–86. *See also* Cassell v. Snyders, 458 F.Supp.3d 981, 993–98 (N.D. Ill. 2020) (finding plethora of evidence that executive order was issued to curb spread of COVID-19 under *Jacobson* and alternatively that it would withstand scrutiny under the Free Exercise Clause); Gish v. Newsom, No. EDCV 20-755 JGB (KKx), 2020 WL 1979970, at \*5 (C.D. Cal. April 23, 2020) (finding executive order met the two-part *Jacobson* test, and alternatively that the executive order did not violate free exercise clause).

<sup>175</sup> *Roberts v. Neace*, 958 F.3d 409, 413–14 (6th Cir. 2020).

<sup>176</sup> *Id.* at 411.

<sup>177</sup> *Id.* at 413–15. The Sixth Circuit simply cites to *Jacobson* once. *Id.* at 414. It does not incorporate any of that case's analysis in its decision. *Id.* at 411–16.

<sup>178</sup> *Id.* at 411–12, 16.

<sup>179</sup> *Id.* at 416.

<sup>180</sup> 140 S. Ct. 1613 (2020).

grounds.<sup>181</sup> The Supreme Court issued its decision without a majority opinion, but with Chief Justice Roberts concurring, and Justice Kavanaugh issuing a dissent joined by Justices Thomas and Gorsuch.<sup>182</sup> While Justice Roberts cited to *Jacobson*, he did not apply the framework, but rather concluded that the specific restrictions on religious organizations in Newsom’s executive order appeared consistent with the Free Exercise Clause as similar restrictions applied to “comparable secular gatherings.”<sup>183</sup> Justice Roberts found that other similar activities such as movie theaters, concerts, and sporting events where large groups of people gather for extended periods of time faced similar restrictions.<sup>184</sup> And in July 2020, the Supreme Court in *Calvary Chapel Dayton Valley v. Sisolak* denied the plaintiff church’s request for relief without a majority opinion.<sup>185</sup> This time no justices concurred, but three dissented.<sup>186</sup> The plaintiff Church challenged the Nevada Governor’s emergency directive limiting indoor religious gatherings and some other businesses to no more than fifty persons.<sup>187</sup> The dissenting justices voiced concern with the comparison group.<sup>188</sup> Rather than focusing on lectures, concerts and museums, the dissents all argued that bars, restaurants and even casinos should be the focus of the comparison.<sup>189</sup>

On November 25, 2020, with the addition of Justice Barrett on the Court, the U.S. Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo* in a per curiam opinion enjoined then-Governor’s Cuomo executive order which limited gathering capacity of religious organizations in certain zones to ten or twenty-five people.<sup>190</sup> The case also contained two separate lone concurrences by Justices Gorsuch and Kavanaugh and three separate dissents.<sup>191</sup> Plaintiffs, a Church and a

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1613–14.

<sup>183</sup> *Id.* at 1613 (Roberts, C. J., concurring).

<sup>184</sup> *Id.* (Roberts, C.J., concurring).

<sup>185</sup> See *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

<sup>186</sup> *Id.* at 2603–09. Justice Alito filed a dissent which was joined by Justices Thomas and Kavanaugh. *Id.* at 2603 (Alito, J., dissenting). Justice Gorsuch and Justice Kavanaugh both filed separate dissents. *Id.* at 2609 (Gorsuch, J., dissenting) (Kavanaugh, J., dissenting).

<sup>187</sup> *Id.* at 2604 (Alito, J., dissenting).

<sup>188</sup> See, e.g., *id.* at 2607.

<sup>189</sup> See *id.* at 2604; *Id.* at 2609 (Gorsuch, J., dissenting); *Id.* at 2609–10 (Kavanaugh, J., dissenting).

<sup>190</sup> *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68–69 (2020). The Justices fell along similar lines as in the decisions of *South Bay* and *Calvary Chapel Dayton* with the new Justice, Amy Coney Barrett, aligning with Justices Thomas, Alito, Gorsuch and Kavanaugh to make the new majority. See *supra* notes 181–82, 185–86.

<sup>191</sup> See *Roman Catholic Diocese*, 141 S. Ct. at 75 (Roberts, C.J., dissenting). Justice Breyer’s dissent was joined by Justices Sotomayor and Kagan. *Id.* at 76

synagogue, argued that the executive order violated their constitutional rights under the Free Exercise Clause.<sup>192</sup> The Court found that since the executive order explicitly targets “houses of worship for especially harsh treatment” the order is subject to strict scrutiny.<sup>193</sup> Specifically, it found that the order allowed certain businesses such as acupuncture facilities, campgrounds and garages to function without capacity restrictions while places of worship had ten or twenty-five person capacity restrictions.<sup>194</sup> The Court also noted that these restrictions were more severe than other restrictions that had come before it. Nor was the executive order likely “narrowly tailored to serve a compelling state interest.”<sup>195</sup> While the Court acknowledged that reducing the spread of COVID-19 is “unquestionably” a compelling interest, it found that plaintiffs offered evidence that they followed strict COVID-19 safety protocols and defendant did not provide evidence of an outbreak in either institution.<sup>196</sup> The Court also took issue with the fact that the order limited capacity to only ten or twenty-five persons when many places of worship seat hundreds or thousands of individuals.<sup>197</sup> Noticeably absent in the per curium opinion is any direct reference to the Supreme Court’s two most recent decisions in *South Bay* and *Calvary Chapel Dayton*, or the older *Jacobson* precedent.<sup>198</sup>

The Supreme Court’s decision in *Roman Catholic Diocese* may have raised more questions than it answered. While the per curium opinion did not apply the *Jacobson* framework (much less even cite to it), the Court

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(Breyer, J., joined by Sotomayor & Kagan, JJ., dissenting). Justice Sotomayor’s separate dissent was also joined by Justice Kagan. *Id.* at 78 (Sotomayor, J., joined by Kagan, J., dissenting).

<sup>192</sup> *Id.* at 66.

<sup>193</sup> *Id.* at 66–67.

<sup>194</sup> *Id.* at 66.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *S. Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020). Justice Gorsuch’s concurrence in *Roman Catholic Diocese* criticizes Justice Roberts’ concurrence in *South Bay* arguing that Roberts’ reliance on *Jacobson* is misplaced. *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). Justice Gorsuch is the only non-dissenting justice to even mention *Jacobson*, and he does so at length. *Id.* at 70–72 (Gorsuch, J., concurring). In his dissent, Chief Justice Roberts only mentions *Jacobson* in response to Justice Gorsuch’s concurrence. *Id.* at 75–76 (Roberts, C.J., dissenting). He argues that Gorsuch overreacted to Roberts’ one-sentence quotation to *Jacobson* in *South Bay*. *Id.* at 75–76 (Roberts, C.J., dissenting). That same quote was cited positively by Justice Kavanaugh in his concurrence as well as in Justice Breyer’s dissent. *Id.* at 73, 78. Justice Sotomayor in her dissent took aim at Justice Gorsuch’s non-secular comparisons, arguing that they were not square with the medical examples. *Id.* at 79 (Sotomayor, J., dissenting)

did not overrule the 115-year precedent or even attempt to limit its application going forward.<sup>199</sup> These unresolved issues are evident in the cases coming on the heels of this decision.

These recent cases are a reflection of the Court's striking omission. About a week after *Roman Catholic Diocese*, the Sixth Circuit in *Commonwealth v. Beshear* denied a preliminary injunction to private religious schools who challenged the Kentucky Governor's executive order closing all private and public elementary and secondary schools.<sup>200</sup> Unlike *Roman Catholic Diocese*, the Sixth Circuit found Governor Beshear's executive order to be neutral and of general applicability as the order did not single out religious institutions.<sup>201</sup> But where the executive order specifically mentions houses of worship in its restrictions, other courts post-*Roman Catholic Diocese* applied strict scrutiny.<sup>202</sup> The plaintiffs in both *Calvary Chapel Dayton Valley* and in *Roman Catholic Diocese* succeeded in their motions to enjoin enforcement of their Governor's executive order imposing capacity restrictions on houses of worship.<sup>203</sup> In December, the Ninth Circuit in *Calvary Chapel Dayton Valley* said that *Roman Catholic Diocese* requires it to apply strict scrutiny to the Governor's executive order which capped religious services at fifty persons while casinos, gyms and bowling alleys, among other secular activities, were only restricted to 50% of fire code capacity.<sup>204</sup> The Ninth Circuit concluded that the order is not narrowly tailored as there were less restrictive alternatives to the fifty-person cap such as a 50% capacity restriction.<sup>205</sup> Likewise, the Second Circuit applied strict scrutiny to then-Governor Cuomo's executive order which also imposed a percentage capacity restriction of 25% or 33% for places of worship in red or orange zones.<sup>206</sup>

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<sup>199</sup> *Roman Catholic Diocese*, 141 S. Ct. at 70–71 (Gorsuch, J., concurring).

<sup>200</sup> 981 F.3d 505, 507 (6th Cir. 2020).

<sup>201</sup> *Commonwealth*, 981 F.3d at 509. The Sixth Circuit makes it a point to say that it has no need to rely upon either *South Bay* or *Jacobson* in reaching its decision. *Id.* at 510.

<sup>202</sup> See *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1234 (9th Cir. 2020); *Agudath Israel v. Cuomo*, 983 F.3d 620, 632–33 (2d Cir. 2020).

<sup>203</sup> *Calvary Chapel Dayton Valley*, 982 F.3d at 1234; *Agudath Israel*, 983 F.3d at 632–33.

<sup>204</sup> This is the same directive plaintiff sought to enjoin back in May 2020 but was unsuccessful *Calvary Chapel Dayton Valley*, 982 F.3d at 1230, 1233.

<sup>205</sup> *Id.* at 1234.

<sup>206</sup> *Agudath Israel*, 983 F.3d at 632–33. This is the same executive order at issue in the Supreme Court's decision in *Roman Catholic Diocese*. *Id.* at 631–32. The executive order imposed either a person limit or percentage capacity restriction on places of worship in certain zones. *Id.* at 625–26. The Supreme Court only looked at the fixed capacity limits, not the percentage capacity limits. *Id.* at 636–37. The Second Circuit granted *Agudath Israel*'s motion to enjoin enforcement of the order but

In contrast, the plaintiffs in *South Bay Pentecostal Church* did not succeed in their motion to enjoin Governor Newsom's executive order limiting worship services in certain regions to outdoor gatherings.<sup>207</sup> The federal district court also applied strict scrutiny to the Governor's executive order, but found that the order was narrowly tailored to achieve a compelling state interest.<sup>208</sup> The district court distinguished the Ninth Circuit's decision in *Calvary Chapel Dayton Valley* in that Governor Newsom's executive order does not treat similar secular activities like restaurants, bars and gyms more favorably.<sup>209</sup> In fact, the court concluded that many of these activities with "heightened risk profiles are entirely closed."<sup>210</sup>

It seemed as if the *Jacobson* framework had been abandoned with these three previous decisions. In *Calvary Chapel Dayton Valley*, the Ninth Circuit did not address whether *Jacobson* should be considered in its analysis even though the Governor argued that the *Jacobson* framework applies during this public health crisis.<sup>211</sup> The Second Circuit found that any reliance on *Jacobson* is misplaced.<sup>212</sup> Further, the federal district court in *South Bay* does not even mention *Jacobson*.<sup>213</sup> However, *Jacobson* is alive and well at least according to two recent federal district court opinions each denying plaintiffs' motion for emergency relief.<sup>214</sup> Neither decision concerns a free exercise challenge and both decisions applied rational basis review and alternatively the *Jacobson* framework.<sup>215</sup> But their reasons for doing so are clear. Both district courts found that "*Jacobson* is controlling precedent until the Supreme Court . . . tells us otherwise."<sup>216</sup>

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remanded to the district court to determine whether the fixed capacity limits survive strict scrutiny. *Id.*

<sup>207</sup> *S. Bay Pentecostal Church v. Newsom*, No. 20-cv-00865-BAS-AHG, 2020 WL 7488974, at \*13 (S.D. Cal. Dec. 21, 2020), *aff'd*, 985 F.3d 1128 (9th Cir. 2021).

<sup>208</sup> *Id.* at \*8.

<sup>209</sup> *Id.* at \*11.

<sup>210</sup> *Id.*

<sup>211</sup> *Calvary Chapel Dayton Valley*, 982 F.3d at 1231.

<sup>212</sup> *Agudath Israel v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020).

<sup>213</sup> 2020 WL 7488974, at \*1–13.

<sup>214</sup> *Delaney v. Baker*, No. 20-11154-WGY, 2021 WL 42340, at \*13–14 (D. Mass. Jan. 6, 2021) (concerning challenge to executive order mandating wearing of face masks in public); *M. Rae, Inc. v. Wolf*, No. 1:20-CV-2366, 2020 WL 7642596, at \*5–6 (M.D. Pa. Dec. 23, 2020) (concerning challenge to executive order banning indoor dining).

<sup>215</sup> See *Delaney*, No. 20-11154-WGY, 2021 WL 42340, at 13–14; *M. Rae, Inc. v. Wolf*, No. 1:20-CV-2366, 2020 WL 7642596, at \*6.

<sup>216</sup> *M. Rae, Inc.*, 2020 WL 7642596, at \*6; *Delaney*, 2021 WL 42340, at \*11 (finding that "until the Supreme Court overrules *Jacobson*, this Court is bound by stare decisis to apply *Jacobson* harmoniously with the precedent developed under the tiers of scrutiny.").



## 2. Ban or Limits on Elective Surgical Procedures

Even more complicated are evaluating executive orders that impact a woman's right to abortion, though all of these decisions predate the Supreme Court decisions in *South Bay, Calvary Chapel Dayton and Roman Catholic Diocese*. Within the *Jacobson* framework, the Fifth, Sixth, Eighth and Eleventh Circuits considered whether an executive order prohibiting and/or limiting elective medical procedures for a period of time violates a woman's right to an abortion with differing outcomes.<sup>217</sup> Divided circuit panels in the Fifth and Eighth Circuit vacated their respective district court's temporary restraining order ("TRO") allowing the executive orders to continue.<sup>218</sup> Those TROs had essentially exempted abortions from the respective Governor's executive order postponing non-essential surgeries for a period of time due to COVID-19. The Fifth Circuit in *In re Abbott* based its holding on three considerations emphasizing that the district court failed to apply the *Jacobson* standard for evaluating emergency orders to this case.<sup>219</sup> It found the executive order easily met both *Jacobson* elements. As to the first *Jacobson* element, the court found that the order helped curb transmission of COVID-19 since restricting the number of medical procedures both reduced hospital capacity and conserved personal protective equipment (PPE).<sup>220</sup> As to the second *Jacobson* element, the court found that the executive order did not place an "undue burden" on getting an abortion as set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>221</sup>

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<sup>217</sup> See *Robinson v. Att'y. Gen.*, 957 F.3d 1171, 1182–84 (11th Cir. 2020) (applying *Jacobson* to deny stay of district court's preliminary injunction on state health officer's order postponing all non-emergency medical procedures during COVID-19.); *In re Rutledge*, 956 F.3d 1018, 1023 (8th Cir. 2020) (ordering district court to dissolve its TRO enjoining Arkansas "from enforcing a health directive against a provider of surgical abortions."); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 916–17 (6th Cir. 2020) (upholding in part and modifying in part district court's preliminary injunction on against executive order), *vacated and remanded*, 141 S. Ct. 1262 (2021); *In re Abbott*, 954 F.3d 772, 777–78 (5th Cir. 2020) (granting writ of mandamus directing vacatur of district court's TRO against executive order), *vacated and remanded by Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021).

<sup>218</sup> *Abbott*, 954 F.3d at 778; *Rutledge*, 956 F.3d at 1023.

<sup>219</sup> *Abbott*, 954 F.3d at 778–79. The Fifth Circuit also found the district court's decision patently wrong for declaring that the executive order was an outright ban on abortion instead of applying the *Casey* undue burdens test. *Id.* at 778. And that "the district court usurped the state's authority to craft emergency health measures." *Id.*

<sup>220</sup> *Id.* at 787.

<sup>221</sup> *Id.* at 786, 791. *Casey* holds that a state may regulate, not ban abortion and in regulating abortion it may not place a "substantial obstacle in the path of a woman seeking an abortion before the fetus retains viability." *Planned Parenthood of Se.*

In finding that the order met the *Casey* test, the court emphasized that this was a three week emergency order and not an outright ban on abortion.<sup>222</sup> Similarly, the Eighth Circuit in *In re Rutledge* found that the district court “failed to meaningfully apply” the *Jacobson* framework as the standard of review.<sup>223</sup>

The Eleventh Circuit in *Robinson v. Attorney General* reached a different result. Even though the court applied *Jacobson*, it concluded that the state’s public health order, which mandated postponement of all “dental, medical or surgical procedures” was likely in violation of the right to an abortion.<sup>224</sup> In affirming the district court’s decision, the Eleventh Circuit reading *Jacobson* and *Casey* together found that the state was unlikely to succeed on the merits and recounted significant evidence in the record in support of this conclusion.<sup>225</sup> The state argued the order was issued to conserve PPE, free up hospital capacity, and reduce social interactions.<sup>226</sup> However, the clinics still needed PPE to treat these women for ongoing pre-natal visits and pre-abortion examinations and these additional examinations may actually require more PPE.<sup>227</sup> The evidence also indicated that the number of abortions requiring hospitalizations are quite low.<sup>228</sup> And finally, there was evidence that banning abortions, even temporarily, would increase, not decrease, social interactions as even an uncomplicated pregnancy involves ten to thirteen prenatal visits.<sup>229</sup> Decided a day later, the Sixth Circuit in *Adams & Boyle v. Slatery* similarly concluded that plaintiff health providers would likely succeed on the merits in showing that the state’s emergency executive order banning elective surgical procedures for a period of time violated the Fourteenth Amendment right to an abortion.<sup>230</sup> As with *Robinson*, the Sixth Circuit had a significant factual record which met both *Casey*’s undue burden test and the *Jacobson* test.<sup>231</sup> Even though *Jacobson* may no longer be the

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Pennsylvania v. Casey, 505 U.S. 833, 878 (1992). This is known as the undue burdens test. *Id.* at 942 (Blackmun, J., concurring).

<sup>222</sup> *Abbott*, 954 F.3d at 790–91.

<sup>223</sup> *Rutledge*, 956 F.3d at 1028.

<sup>224</sup> *Robinson*, 957 F.3d at 1182.

<sup>225</sup> *Id.* at 1182. For example, there was evidence in the record that postponing an abortion would amount to a prohibition as most abortions in Alabama must be performed before the fetus reaches twenty weeks. *Id.* at 1180. There was also evidence that the order would create logistical challenges for women as well as causing serious harm to a woman’s health. *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 1182.

<sup>228</sup> *Id.* at 1181.

<sup>229</sup> *Id.* at 1182.

<sup>230</sup> 956 F.3d at 925.

<sup>231</sup> *Id.* at 920–22, 924–27. The Sixth Circuit employed the *Jacobson* test in the alternative saying that “even if *Jacobson*’s more state friendly standard of review is

standard of review here, these decisions would still likely stand.<sup>232</sup> Plaintiffs in both *Robinson* and *Adams & Boyle* were able to show a likelihood of success on the merits notwithstanding the federal appellate courts using a standard of review allowing for greater deference to the state.<sup>233</sup>

### 3. Stay-at-Home Orders and Restrictions on Businesses

Unlike challenges under the Free Exercise Clause and the right to abortion which often requires the order to be subject to heightened scrutiny, most challenges to stay-at-home orders had to pass the rational basis test or in some cases intermediate scrutiny.<sup>234</sup> For example, in *McGhee v. City of Flagstaff*, the district court applying the *Jacobson* framework found that the stay-at-home order did not likely violate plaintiff's substantive due process rights.<sup>235</sup> The court said that the stay-at-home order provided for some exceptions as citizens were able to leave home to exercise, care for family members or friends, work or buy essential goods.<sup>236</sup> While couched within the *Jacobson* framework, the court made clear that the Governor had significant evidence to support the conclusion that COVID-19 was a public health emergency necessitating the stay-at-home order.<sup>237</sup>

Like *McGhee* – but without applying the *Jacobson* framework – the Pennsylvania Supreme Court in *Friends of Danny Devito v. Wolf* held that Governor Wolf's stay-at-home order did not violate plaintiffs' constitutional rights.<sup>238</sup> In reviewing each of plaintiffs' constitutional claims, the Pennsylvania Supreme Court used traditional constitutional

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the test we should be applying here – rather than the usual *Roe* and *Casey* standard – we still think that Plaintiffs are likely to succeed on their constitutional claim.” *Id.* at 925.

<sup>232</sup> *Id.*

<sup>233</sup> *Robinson*, 957 F.3d at 1182; *Adams & Boyle*; 956 F.3d at 920–22, 924–27.

<sup>234</sup> *Henry*, 461 F. Supp. 3d at 1254–55 (applying rational basis review); *McGhee*, 2020 WL 2308479, at \*5 (applying heightened level of scrutiny). The most significant challenge to a stay-at-home order came early on in *Wisconsin Legis. v. Palm*, 942 N.W.2d 900 (2020) discussed at length in *infra* Part III.B.

<sup>235</sup> *McGhee*, 2020 WL 2308479, at \*5–6. In a similar vein, the plaintiff in *Henry v. DeSantis* alleged constitutional violations including violations under the 14<sup>th</sup> due process and equal protection clauses. 461 F. Supp. 3d at 1254. That court applying the rational basis test found that the petitioner's claims failed as the Governor's stay at home order was issued to slow the spread of COVID-19 which is a legitimate government interest. *Id.* at 1255.

<sup>236</sup> *McGhee*, 2020 WL 2308479, at \*5.

<sup>237</sup> *Id.* at \*3–5.

<sup>238</sup> *Friends of Danny Devito v. Wolf*, 227 A.3d 872, 903 (Pa. 2020).

analysis and did not apply the *Jacobson* framework or cite to *Jacobson* anywhere in its opinion.<sup>239</sup>

However, the district court in *Open Our Oregon v. Brown* used the *Jacobson* framework to find that the Oregon Governor's executive order which closed plaintiffs' businesses had not violated their constitutional rights.<sup>240</sup> And, in the Sixth Circuit case *League of Independent Fitness Facilities and Trainers, Inc. v. Whitmer*, the federal appellate court granted a stay of the district court's entry of a preliminary injunction prohibiting enforcement of the Governor's executive order closing fitness facilities for a period of time.<sup>241</sup> The Sixth Circuit cited to *Jacobson*, recognizing that the state's police power to address pandemics should proceed largely without interference from the courts.<sup>242</sup> Yet, the federal appellate court applied the traditional constitutional analysis—finding that the executive order met the rational basis test.<sup>243</sup>

And at least one stay-at-home order survived intermediate scrutiny.<sup>244</sup> In *Altman v. County of Santa Clara*, firearms dealers challenged the California County's shelter in place order as violating its Second Amendment Right to Bear Arms.<sup>245</sup> In *Altman*, the district court found that "it need not decide whether *Jacobson* or the Ninth Circuit's Second

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<sup>239</sup> *Id.* at 896–903. For example, in analyzing Plaintiff, Devito Committee's claim under the equal protection clause, the Pennsylvania Supreme Court recognized that "while the equal protection clause assures that all similarly situated persons are treated alike, it does not obligate the government to treat all persons identically." *Id.* at 901 (quoting *Commonwealth v. Bullock*, 913 A.2d 207, 215 (Pa. 2006)).

<sup>240</sup> *Open Our Oregon v. Brown*, No. 6:20-cv-773-MC, 2020 WL 2542861, at \*2 (D. Or. May 19, 2020). In almost complete deference to the state's interest in combating COVID-19, the district court concluded that it "is inclined to side with the chorus of federal courts in pointing to *Jacobson* and rejecting similar constitutional claims . . ." *Id.*

<sup>241</sup> *League of Indep. Fitness Facility & Trainers, Inc. v. Whitmer*, 814 Fed. Appx. 125, 129–30 (6th Cir. 2020).

<sup>242</sup> *Id.* at 127.

<sup>243</sup> *Id.* at 128–29. The Governor in its brief to the district court provided information citing to the CDC on how indoor facilities are more susceptible to spread of the virus. *Id.* at 128. The Sixth Circuit found this information as a "paradigmatic example of 'rational speculation' that fairly support the Governor's treatment of indoor fitness facilities." *Id.* at 129.

<sup>244</sup> *See, e.g., Altman v. Cnty. of Santa Clara*, 464 F. Supp. 3d 1106, 1111, 1132 (N.D. Cal. 2020).

<sup>245</sup> *Id.* at 1111; *but cf. Conn. Citizens Def. League, Inc. v. Lamont*, 465 F. Supp. 3d 56, 72–73 (D. Conn. 2020) (applying intermediate scrutiny in finding that the Governor's order which had the effect of suspending fingerprinting indefinitely – a necessary requirement for obtaining a gun in Connecticut – likely violated Second Amendment).

Amendment framework applies here because . . . the Court concludes that the order survives under either test.<sup>246</sup>

In a marked departure from the above cases, the federal district court in *County of Butler v. Wolf* declared that Governor Wolf's stay-at-home order, which was no longer in effect, violated plaintiffs' Fourteenth Amendment rights. Foreshadowing Justice Gorsuch's concurring opinion in *Roman Catholic Diocese*, Judge Stickman found the *Jacobson* framework to be inappropriate for the standard of review saying he would apply "regular" constitutional scrutiny.<sup>247</sup> He struck down this order on the assumption that Governor Wolf would reinstate it and that the state's compelling interest in curbing the spread of COVID-19 had waned due to the ongoing length of the pandemic.<sup>248</sup> Judge Stickman all but ignored the scientific evidence behind the pandemic including COVID-19's high transmissibility necessitating the stay-at-home order not just in the Commonwealth but throughout the globe.<sup>249</sup> And he made the leap on his own accord to apply strict scrutiny to plaintiffs' substantive due process claims even though longstanding precedent applied intermediate scrutiny.<sup>250</sup>

#### 4. Moratorium on Evictions

While a significant number of Americans appreciated their governor's executive order placing a moratorium on evictions, several dissatisfied landlords challenged these orders.<sup>251</sup> For example, in *Elmsford Apartment. Assoc., LLC v. Cuomo*, three residential landlords, challenged then-Governor Cuomo's executive order temporarily permitting tenants to use their security deposit for rent and placing a moratorium on evictions as violating their rights under the Takings Clause

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<sup>246</sup> *Altman*, 464 F. Supp. 3d at 1125. The district court found that the executive order met the two element *Jacobson* test. *Id.* at 1124. The Court then determined intermediate, not strict scrutiny applied as the order merely regulated the manner of possession as opposed to an outright ban of firearms. *Id.* at 1126, 1128.

<sup>247</sup> *Id.* at 899. Judge Stickman detailed at length his reasons for declining to adopt *Jacobson* to this case which included the ongoing nature of the pandemic and the need for an independent judiciary citing Wiley and Vladeck's article on the suspension doctrine. *Id.* at 899–901 (citing Wiley & Vladeck, *supra* note 154).

<sup>248</sup> *See id.* at 899.

<sup>249</sup> *Id.* at 916–18.

<sup>250</sup> *Id.* at 916–17; *see also* Wiley, *supra* note 70, at 93. Wiley argues that Judge Stickman erroneously applied the incorrect standard of review to plaintiffs' substantive due process claim as "[e]conomic rights to use one's property and earn one's livelihood as one sees fit have been overwhelmingly rejected as a basis for applying strict scrutiny under the U.S. Constitution in the modern era." *Id.*

<sup>251</sup> *See, e.g., Elmsford Apartment Assocs., L.L.C. v. Cuomo*, 469 F. Supp. 3d 148, 155–56 (S.D.N.Y. 2020).

and Contracts Clause of the Constitution.<sup>252</sup> Employing traditional constitutional analysis, the federal district court denied plaintiffs' claims.<sup>253</sup> Similar challenges by landlords in other states where there was an executive order placing a moratorium on evictions likewise failed.<sup>254</sup>

### 5. Travel Restrictions – Mandatory Self Quarantining

The few challenges to executive orders requiring those entering the state to quarantine have largely been unsuccessful though the courts in these cases often applied different standards of review.<sup>255</sup> For example, in *Bailey Campground Inc. v. Mills*, in-state business owners and out of state individuals challenged the Maine Governor's executive orders, which prohibited out of state residents from entering the state unless they owned or could rent property as violating their right to travel.<sup>256</sup> While the district court, applying strict scrutiny, found that the Governor's executive orders burdened Plaintiffs' right to travel, it found that plaintiffs had not proved that the "measure is not the least burdensome way to serve a compelling interest."<sup>257</sup> The district court emphasized that the standard of review in this case was governed by the jurisprudence concerning the right to travel, and not the judicial framework in *Jacobson*.<sup>258</sup>

About a month later in *Carmichael v. Ige*, the district court in Hawaii similarly held that plaintiffs were not likely to succeed on their challenge to the Governor's fourteen-day travel quarantine.<sup>259</sup> Unlike the Court in

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 156. The district court did not use the *Jacobson* framework in its analysis. *See id.* at 165. Instead, the district court applied the three-factor test in *Penn Central Trans. Co. v. New York City* to determine if the interference with plaintiff's property constituted a taking. *Id.* (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987)).

<sup>254</sup> *See, e.g.,* *Heights Apartments, L.L.C. v. Walz*, No. 20-CV-2051, 2020 WL 7828818, at \*12, \*14, \*16 (D. Minn. Dec. 31, 2020) (finding that executive order placing moratorium on evictions did not violate plaintiffs' constitutional rights under Contracts Clause, Takings Clause and First Amendment of United States Constitution); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 382 (D. Mass. 2020) (finding that landlords were unlikely to succeed on the merits that the moratorium constituted a taking under the Contract Clause); *Auracle Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199, 207 (D. Conn. 2020) (denying plaintiff's motion for preliminary injunction to enjoin enforcement of executive order allowing tenants to use security deposit for rent and placing moratorium on evictions).

<sup>255</sup> *Compare* *Bayley's Campground, Inc. v. Mills*, 463 F. Supp. 3d 22, 32 (D. Maine 2020), *aff'd*, 985 F.3d 153 (1st Cir. 2021), *with* *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1143 (D. Haw. 2020).

<sup>256</sup> *Bayley's Campground*, 463 F. Supp. 3d at 24.

<sup>257</sup> *Id.* at 33–34

<sup>258</sup> *Id.* at 32.

<sup>259</sup> *Carmichael*, 470 F. Supp. 3d at 1146–47.

*Bailey Campground*, Judge Otake in *Carmichael* emphasized that the *Jacobson* framework applied though she applied traditional constitutional analysis to the second element.<sup>260</sup> And in *Page v. Cuomo*, the district court held that then-Governor Cuomo's executive order requiring those entering New York to submit to a fourteen-day quarantine did not likely violate plaintiff's right to travel.<sup>261</sup> However, and more surprisingly, the *Page* court's August decision fully embraced the *Jacobson* framework.<sup>262</sup>

### *B. Challenges to the Emergency Declaration/Executive Order Process*

Not surprisingly, some state governors and legislatures have disagreed on how to best manage the COVID-19 pandemic particularly where the legislature and executive branches were from different political parties.<sup>263</sup> In some hotly contested litigation between state legislatures and governors, the states' highest courts weighed in on the current process and procedure for declaring, extending and terminating a state declaration of emergency.<sup>264</sup>

#### 1. State Legislative Authority to Terminate or Extend Governor's Emergency Declaration or Order

The Pennsylvania Supreme Court in *Wolf v. Scarnati* stepped in during a dispute between the Pennsylvania legislature and the Governor concerning whether the state legislature could through concurrent resolution unilaterally end the state of the emergency without going through the formal process of presenting any such resolution to the governor for signature or veto.<sup>265</sup> The Emergency Management Services Code provides in pertinent part: “[n]o state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. *The General Assembly by concurrent resolution may terminate a state of*

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<sup>260</sup> *Id.* at 1142–47. Judge Otake applied the *Jacobson* two-element test to the facts of the case. *Id.* at 1143. First, she easily concluded that the 14-day quarantine had a real and substantial relation to public health. *Id.* at 1143. She cited from the record that the incubation period for COVID–19 can be up to 14 days. *Id.* Second, she found that the fourteen-day quarantine is not a travel ban, but rather a restriction for which one must comply. *Id.* at 1145. And even assuming the quarantine imposed a burden on travel and applying strict scrutiny, plaintiffs still are not likely to succeed. *Id.* at 1146.

<sup>261</sup> *Page v. Cuomo*, 478 F. Supp. 3d 355, 359, 369 (N.D.N.Y. 2020).

<sup>262</sup> *Id.* at 366–67.

<sup>263</sup> *See, e.g., Wolf v. Scarnati*, 233 A.3d 679, 686 (Pa. 2020).

<sup>264</sup> *Id.* at 684.

<sup>265</sup> *Id.*

*disaster emergency at any time.*<sup>266</sup> On June 9, 2020, the Pennsylvania Senate and General Assembly passed a concurrent resolution which ordered the Governor to end the current state of emergency which had been in effect since early March.<sup>267</sup> The concurrent resolution was not presented to the Governor for his signature or veto.<sup>268</sup> The Pennsylvania Supreme Court held that the State Assembly's concurrent resolution required presentment to the Governor for his signature or veto and without presentment, the resolution was null and void.<sup>269</sup> If the legislative intent behind the Emergency Management Code was to bypass the Governor's role here, the Code would not have the additional requirement that the Governor terminate the emergency declaration once a resolution had been issued.<sup>270</sup>

Likewise, in *Kelly v. Legislative Coordinating Council*, the Kansas State Legislature through its appointed council attempted to revoke the Governor's executive order limiting mass gatherings.<sup>271</sup> Within fifteen days of Governor Kelly declaring an emergency due to COVID-19, the legislature, by concurrent resolution, extended the emergency declaration until May 1, 2020 and, among other things, provided for a contingency if the legislature was not in session.<sup>272</sup> A day after Governor Kelly issued an executive order which no longer exempted religious gatherings from the ten-person limit, the legislative coordinating council ("LCC") voted to revoke it.<sup>273</sup> The Kansas Supreme Court held that the LCC did not have the authority to revoke the order since the concurrent resolution explicitly stated it only had authority to act "*following such state finance council action.*"<sup>274</sup> The court found that "the step involving the state finance council must occur before the LCC's challenged authority is triggered."<sup>275</sup>

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<sup>266</sup> *Id.* at 685 (emphasis in original) (quoting PA. CONS. STAT. § 7301(c) (2016)); see PA. CONS. STAT. § 7301(c) (2016).

<sup>267</sup> *Scarnati*, 233 A.3d at 685–86.

<sup>268</sup> See *id.* at 687.

<sup>269</sup> *Id.* at 707.

<sup>270</sup> *Id.*

<sup>271</sup> *Kelly v. Legis. Coordinating Council*, 460 P.3d 832, 837 (Kan. 2020).

<sup>272</sup> *Id.* at 836. First, upon application by the Governor, the State Finance Council could authorize a one-time extension of the emergency declaration. *Id.* And second, "*following such state finance action*", the Legislative Coordinating Council may terminate a declaration of emergency or revoke an executive order. *Id.* at 836–37.

<sup>273</sup> *Id.* at 837.

<sup>274</sup> *Id.* at 839.

<sup>275</sup> *Id.*



## 2. Governor or State Health Official's Statutory Authority to Issue Emergency Declaration or Executive Order

On April 21, 2020, when most of the country was still on lockdown, the Republican controlled Wisconsin State Legislature brought suit against the state's Secretary of Health for issuing a second stay-at-home order in *Wisconsin Legislature v. Palm* ("*Palm*").<sup>276</sup> In *Palm*, a divided Wisconsin Supreme Court held that the second emergency stay-at-home order issued by the top state health official was unenforceable.<sup>277</sup> To be clear, the Wisconsin Supreme Court majority emphasized that its decision in *Palm* was about the "assertion of power of one unelected official" and not about the Wisconsin Governor's "[e]mergency order or the powers of the Governor."<sup>278</sup> Indeed, the emergency order before the court, Order 28, issued by the top state health official, was not issued pursuant to the Governor's public health emergency declaration but rather by Wis. Stat. § 252.02(3).<sup>279</sup> The majority found that Emergency Order 28 was unenforceable for two reasons.<sup>280</sup> First, Order 28 was a rule and as such *Palm* needed to follow the rule-making procedures for promulgating such a rule, which she did not do.<sup>281</sup> Second, *Palm* exceeded her authority under Wis. Stat. § 252.02 when she confined people to their homes, restricted travel, and ordered businesses be closed.<sup>282</sup>

In June 2020, the Oregon Supreme Court in *Elkhorn Baptist Church v. Brown* held that the Oregon Governor's declaration of emergency concerning COVID-19 was proper.<sup>283</sup> The Oregon Supreme Court found that the declaration did not expire under Or. Rev. Stat. Ann. § 401.165 and that the Governor was not required to specifically declare a public health emergency under Or. Rev. Stat. Ann. § 433.441(1) which had a twenty-

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<sup>276</sup> Wis. Legislature. v. Palm, 942 N.W.2d 900, 906–07 (Wis. 2020).

<sup>277</sup> *Id.* at 918.

<sup>278</sup> *Id.* at 904–05.

<sup>279</sup> *Id.* at 906. Emergency Order 28 was issued on April 16, 2020 and superseded Emergency Order 12. *Id.* Emergency Order 12 was issued on March 24, 2020 pursuant to "Wis. Stat. § 252.02(3) and (6) and all of the powers invested in [her] through *Executive Order #72, and at the direction of Governor Tony Evers[.]*" *Id.* at 906 (alterations in the original) (emphasis added).

<sup>280</sup> *Id.* at 918.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* While *Palm* argued that she was provided broad powers under Chapter 252 of the Wisconsin Statutes to respond to COVID-19 as a communicable disease, the Wisconsin Supreme Court majority was unpersuaded. *Id.* at 915–16. First, the majority found that since *Palm* did not follow rule making procedures, there can be no criminal penalties for violation of the order. *Id.* at 918. Second, her orders went beyond the statutory powers. *Id.* For example, while *Palm* had authority to quarantine those infected or suspected to be infected, her order requiring all citizens to stay home exceeded her authority under statute. *Id.* at 916.

<sup>283</sup> *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 35–36 (Or. 2020).

eight day statutory time limit.<sup>284</sup> Plaintiffs' argued that all of the Governor's executive orders are no longer enforceable as the situation was really a "public health emergency" and any such declaration would have expired after twenty-eight days.<sup>285</sup> The court explained that the Governor had several avenues for addressing the COVID-19 pandemic under Oregon law.<sup>286</sup> The Oregon Supreme Court found that the Governor had the discretion when faced with a public health emergency to use either statute.<sup>287</sup> It also saw no conflict in the Governor doing so.<sup>288</sup> The court reasoned that "[o]ne of the reasons the ORS chapter 433 emergency statutes were enacted was to give the Governor *an option* for responding to a public health emergency by *taking a step short of declaring a state of emergency* under chapter 401."<sup>289</sup> The Court also found that the two statutes were intended to work together.<sup>290</sup> In fact, Chapter 433 specifically states that nothing in that statute limits the Governor's ability to declare a state of emergency under Chapter 401.<sup>291</sup>

A few months later, the Michigan Supreme Court was confronted with a similar situation in *In re Certified Questions* where the Michigan Governor based her declaration of emergency concerning COVID-19 on

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<sup>284</sup> *Id.* at 38, 45, 52.

<sup>285</sup> *Id.* at 38–39. Plaintiffs were a number of churches and churchgoers and later a number of individuals, local officials and businesses owners intervened and filed their own complaint. *Id.* at 35, 39. Plaintiffs also made an alternative argument that the emergency declaration should have expired after 30 days under Article X-A of the Oregon Constitution. *Id.* at 39. The court held that the Governor did not invoke the extraordinary powers provided to her under the state constitution in response to a catastrophic disaster. *Id.* at 51.

<sup>286</sup> *Id.* at 38. The first way is via OR. REV. STAT. § 401.165 which is Oregon's general emergency disaster statute. *Id.* at 36. That statute authorizes the Governor to declare a state of emergency and with that declaration the Governor is vested with broad authority including the right to exercise police powers. *Id.* OR. REV. STAT. § 401.165 does not have any durational limits, but the Governor is to terminate the state of emergency when it no longer exists. *Id.* And the legislature may terminate the state of emergency at any time through a joint resolution. *Id.* A second more limited avenue would be for the Governor to declare a public health emergency under OR. REV. STAT. § 433.441(1). *Id.* at 38. As with § 401.165, the public health emergency declaration under § 433.441(1) gives the Governor certain emergency powers but is more limited. *Id.* at 45. OR. REV. STAT. § 433.441(1), however, has a statutory durational limitation of twenty-eight days. *Id.* at 38.

<sup>287</sup> *Id.* at 45.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 46 (emphasis added).

<sup>290</sup> *See id.* at 48.

<sup>291</sup> *Id.* ORE. REV. STAT. § 433.441(4) provides that the Governor who declares a state of emergency under Chapter 401 is authorized to implement any action provided under Chapter 433. *Id.*

two separate emergency statutes.<sup>292</sup> The Michigan Supreme Court examined the Governor's authority under both of these statutes: the Emergency Management Act of 1976 (the "EMA") and the Emergency Powers of the Governor's Act of 1945 (the "EPGA").<sup>293</sup>

The context was key in the court's analysis and decision. On March 10, 2020, Michigan Governor Whitmer declared a state of emergency due to the COVID-19 pandemic under both the EMA and EPGA. And on March 23, 2020, she issued a stay-at-home order.<sup>294</sup> On April 1, 2020, the Governor again issued a state of emergency under the EMA and EPGA and asked the State Legislature in accordance with the EMA to extend the emergency for an additional seventy days.<sup>295</sup> The Legislature extended the state of emergency but only until April 30, 2020.<sup>296</sup> On April 30, 2020, the Governor terminated the state of emergency under the EMA but issued another order stating that the state of emergency was still in effect under the EPGA.<sup>297</sup> She then issued an executive order "redeclaring" the state of emergency under the EMA.<sup>298</sup>

For the first question, the Michigan Supreme Court provided a unified and clear holding that the Governor lacked authority to issue any further executive orders after April 30 under the EMA.<sup>299</sup> The Michigan EMA gives the Governor the authority to declare a state of emergency and also provides that "[a]fter 28 days, the Governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of disaster for a specified number of days has been approved by both houses of the legislature..."<sup>300</sup> The Michigan high court found that the Governor redeclared an identical emergency to bypass the legislature's limitation on her authority.<sup>301</sup> The court reasoned that, to give effect to the Governor's actions here would be tantamount to ignoring the plain statutory language of the EMA in providing the legislature power to limit the Governor's authority.<sup>302</sup>

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<sup>292</sup> *In re Certified Questions from the U.S. Dist. Ct., W.D. Mich., S. Div.*, 958 N.W.2d 1, 6 (Mich. 2020) [hereinafter *In re Certified Questions*].

<sup>293</sup> *Id.* at 7.

<sup>294</sup> *Id.* at 6.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 6–7.

<sup>297</sup> *Id.* at 7.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 6.

<sup>300</sup> *Id.* at 9 (emphasis added).

<sup>301</sup> *Id.* at 10.

<sup>302</sup> *Id.* On March 31, 2021, the Wisconsin Supreme Court similarly held that Governor Evers exceeded his statutory authority under that state's emergency disaster statute when he continually reissued emergency declarations notwithstanding the statute's clear language that the emergency declaration expires after sixty days unless

The second question concerned whether the EPGA was constitutional.<sup>303</sup> In a divided decision, the Michigan Supreme Court held that the EPGA violated the Michigan Constitution because the statute “constitutes an unlawful delegation of legislative power to the executive . . . .”<sup>304</sup> In doing so, the majority took issue with the broad powers provided to the Governor under the EPGA to “promulgate reasonable orders, rules and regulations that he or she considers necessary to protect life and property.”<sup>305</sup> Having delegated such broad powers to the Governor, the majority looked to see if the EPGA provided sufficient checks on this power.<sup>306</sup> First, the majority found the legislature did not have any check on the duration of the Governor’s emergency declaration under the EPGA.<sup>307</sup> Second, the majority found that the EPGA provided no legislative standard or direction guiding the Governor in exercising these broad powers.<sup>308</sup> Finding no reasonable check on the Governor’s broad powers under the EPGA, the Michigan Supreme Court concluded the statute was unconstitutional.<sup>309</sup> And with the Michigan Supreme Court’s decision, Governor Whitmer went from having two avenues of emergency powers to none.

Hoping to ride the coattails of the Michigan decision, several Kentucky business owners along with the Kentucky Attorney General challenged Kentucky Governor Beshear’s declaration of emergency in *Beshear v. Acree*.<sup>310</sup> In the November 2020 decision, the Kentucky Supreme Court in a lengthy opinion held that Governor Beshear properly declared a state of emergency and that his authority to issue executive

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renewed by the state legislature. *See Fabick v. Evers*, 956 N.W.2d 856, 860 (Wis. 2021).

<sup>303</sup> *In re Certified Questions*, 958 N.W.2d at 7.

<sup>304</sup> *Id.* at 24.

<sup>305</sup> *Id.* (citations omitted). The court also listed many of Governor Whitmer’s executive orders issued under the EPGA emergency powers including face covering mandates, social distancing orders, business capacity restrictions to name a few. *Id.* at 20–21.

<sup>306</sup> *Id.* at 17.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 20. In doing so, the majority found the term “reasonableness” to be merely an “illusory limitation upon the Governor’s discretion because the legislature is presumed not to delegate the authority to be unreasonable.” *Id.* at 22. Likewise, it found the other alleged guiding term “necessary” to be too overbroad to put any reasonable constraints on the governor’s actions. *Id.*

<sup>309</sup> *Id.* at 22. The dissent argues that there are a number of reasonable checks on the Governor’s emergency powers under the EPGA such as repealing or amending the statute. *Id.* at 50–51 (McCormick, J., dissenting).

<sup>310</sup> *Beshear v. Acree*, 615 S.W.3d 780, 786 (Ky. 2020). In February 2021, the Kentucky legislature in an attempt to bypass the Kentucky Supreme Court decision passed four bills aimed at vastly limiting the governor’s emergency powers. *See Gabriel, supra* note 146.

orders did not raise issues of separation of powers or violate the nondelegation doctrine.<sup>311</sup> The court found that Governor Beshear had broad executive powers during times of emergency and even if he did not, the Legislature properly delegated that authority under the state's emergency disaster statute.<sup>312</sup> First, those executive powers come in part from the state constitution itself which vests the Governor with "supreme executive power of the commonwealth" and providing only the Governor with discretion to call a special legislative session for "extraordinary occasions."<sup>313</sup> That tilt toward the executive is also underscored by a state legislature that meets only part-time.<sup>314</sup> Indeed, the Kentucky Supreme Court noted that the state legislature meets only sixty days per year in even numbered years and only thirty days in odd numbered years with sessions not extending beyond April 15 and March 30 respectively.<sup>315</sup> In closing the door on the separation of powers argument, the court found that "the structure of Kentucky government as discussed renders it impractical, if not impossible, for the legislature, in session for only a short period of time each year to have a primary role in steering the Commonwealth through an emergency."<sup>316</sup>

Nor do the emergency powers granted to the Governor by Ky. Rev. Stat. § 39A.010 violate the nondelegation doctrine.<sup>317</sup> The Court distinguished *Acree* from the Michigan Supreme Court case *In re Certified Questions* finding that the Kentucky Governor does not have emergency powers of unlimited duration nor is the Kentucky legislature continuously in session ready to accept responsibility for the emergency.<sup>318</sup>

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<sup>311</sup> *Beshear*, 615 S.W.3d at 786.

<sup>312</sup> *Id.* The Kentucky Supreme Court found that Governor Beshear properly declared a state of emergency under KRS 39A.010 which includes biological and etiological hazards such as the COVID-19 pandemic. *Id.*

<sup>313</sup> *Id.* at 790.

<sup>314</sup> *Id.* at 807.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 808–09.

<sup>317</sup> *Id.* at 809.

<sup>318</sup> *Id.* at 812. The Kentucky legislature in late March 2020 through S.B. 150 placed a durational limitation, albeit a weak one, on Governor Beshear's state of emergency. *Id.* S.B. 150 § 3 provided that the Legislative Assembly may declare that the emergency no longer exists on the first day of the next session if the Governor has not already done so. *Id.* at 812–13. Kentucky's emergency disaster statute, KY. REV. STAT. § 39A.100 does not have any durational limitation. KY. REV. STAT. § 39A.100. Additionally, the Court also held that the Governor was authorized to issue emergency executive orders under KY. REV. STAT. § 39A and need not promulgate emergency regulations under KY. REV. STAT. § 13A. *Beshear*, 615 S.W.3d at 787.

## V. SAMPLING OF INDIVIDUAL STATE RESPONSES TO COVID-19 PANDEMIC

State responses to the pandemic have varied significantly. Some states such as New York have actively approached the pandemic on all fronts with the Governor, state legislature and state agencies all taking on a role in the process.<sup>319</sup> Other states such as Florida have taken a more hands-off approach especially toward the latter part of 2020.<sup>320</sup> And in both Michigan and Wisconsin, the Governors and state legislatures have largely been at odds with one another requiring the judiciary to step in on multiple occasions to settle the disputes.<sup>321</sup> Section IV is divided into four subparts where I explain how New York, Florida, Michigan and Wisconsin responded during the COVID-19 pandemic in 2020.

### A. New York

As one of the primary hot spots early on in the pandemic, then-New York Governor Andrew Cuomo quickly declared a state of emergency due to COVID-19.<sup>322</sup> On March 20, 2020, Governor Cuomo signed the “New York State on Pause” executive order which, among other things, required all non-essential businesses to close in-office personnel functions, banned non-essential social gatherings of any size and included a ninety-day moratorium on evictions.<sup>323</sup> The Governor stopped short of instituting a state-wide stay-at-home order saying that doing so evoked images of “shooter situations” or “nuclear war.”<sup>324</sup> On April 17, 2020, New York was also one of the first states to order a mask mandate.<sup>325</sup> On April 26, 2020, Governor Cuomo announced a phased approach to reopening New

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<sup>319</sup> See Gabriel, *supra* note 146.

<sup>320</sup> *Plan for Florida’s Recovery*, FLORIDA HEALTH, <https://floridahealthcovid19.gov/plan-for-floridas-recovery/> [<https://perma.cc/X8KU-V6Q3>] (last updated May 28, 2021).

<sup>321</sup> See Gabriel, *supra* note 146.

<sup>322</sup> N.Y. Exec. Order No. 202, N.Y. Comp. Codes R. & Regs. tit. 9, § 8.202 (2020).

<sup>323</sup> *Id.* See also See N.Y. EXEC. LAW § 29-a (McKinney 2020) (providing governor with authority to temporarily suspend laws and issue directives “necessary to cope with the disaster”).

<sup>324</sup> Kwame Opam, *It’s Not ‘Shelter in Place’: What the New Coronavirus Restrictions Mean*, N.Y. TIMES (March 24, 2020), <https://www.nytimes.com/article/what-is-shelter-in-place-coronavirus.html> [<https://perma.cc/YU5G-HEQU>].

<sup>325</sup> N.Y. Exec. Order 202.17, N.Y. Comp. Codes R. & Regs. tit. 9, § 8.202.17 (April 17, 2020) (ordering that any individual “over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance”).

York industries and businesses.<sup>326</sup> The reopening was slow lagging behind most of the country though arguably better suited to contain the spread of the virus.<sup>327</sup> In the fall of 2020, as with most states, New York experienced a surge in cases.<sup>328</sup> Rather than issuing state-wide closures or lockdowns, Governor Cuomo established mitigation measures for “clusters” of COVID-19 cases.<sup>329</sup> This executive order came about because of certain “hot spots” of COVID-19 infection in Kings, Queens, Broome, Orange and Rockland counties.<sup>330</sup> As discussed in *supra* Part III, Subpart A:1., the United States Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo* found that the executive order, which among other things limited the size of indoor gatherings in certain geographical zones, likely violated plaintiffs’ rights under the Free Exercise Clause.<sup>331</sup>

In July 2020, in an effort to formalize some of Governor Cuomo’s executive orders, the New York State Department of Health issued a series of COVID-19 temporary emergency regulations concerning face-coverings, non-essential gatherings and business operations which lasted through the state of disaster emergency.<sup>332</sup>

As of mid-November 2020, the New York State legislature had introduced nearly 500 COVID-19 related bills.<sup>333</sup> Among those bills enacted, the legislature provided for a moratorium on utility termination of services and a COVID-19 public employee death benefit.<sup>334</sup> In a most

<sup>326</sup> *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Outlines Phased Plan to Re-open New York Starting With Construction and Manufacturing*, <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-phased-plan-re-open-new-york-starting> [https://perma.cc/2PNY-KR4F] (Apr. 26, 2020).

<sup>327</sup> Lazaro Gamio, *How Coronavirus Cases Have Risen Since States Have Reopened*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/interactive/2020/07/09/us/coronavirus-cases-reopening-trends.html> [https://perma.cc/F5WW-T5RE].

<sup>328</sup> *Id.*

<sup>329</sup> N.Y. Exec. Order No. 202.68, N.Y. Comp. Codes R. & Regs. tit. 9 § 8.202.68 (Oct. 6, 2020).

<sup>330</sup> *Agudath Isreal of Am. V. Cuomo*, 983 F.3d 620 (2d Cir. 2020).

<sup>331</sup> *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam).

<sup>332</sup> *See* N.Y. COMP. CODES R. & REGS. tit. 10 § 66-3.1-3.5. (2020). For example, section 66-3.3 provides that there shall be no non-essential gatherings greater than ten individuals for any reason “unless modified by any Executive Order . . . [for] implementing the phased reopening of New York businesses and the relaxation of social distancing rules by region. *Id.* § 66-3.3 (emphasis added). These emergency regulations expired on October 6, 2020 and the same emergency regulations were reissued on October 7, 2020. *Id.*

<sup>333</sup> *See State Laws in Response to the Coronavirus (COVID-19) Pandemic*, *supra* note 145.

<sup>334</sup> *See, e.g.*, S.B. 08113A, 2019-2020 Gen. Assemb., Reg. Sess. (N.Y. June 20, 2020) (concerning a moratorium on utility termination services during the pandemic);

unusual move, the New York legislature convened a special session between Christmas and the New Year to provide critical economic relief to many of its citizens by passing “one of the most comprehensive anti-eviction laws in the nation.”<sup>335</sup> The ban halted current evictions for sixty days and prohibited landlords from initiating most new evictions until May 1, 2021.<sup>336</sup>

As of December 31, 2020 New York reported a staggering 978,000 positive COVID-19 cases and 38,000 deaths.<sup>337</sup> However, approximately 31,000 of those deaths came in the first three months of the pandemic.<sup>338</sup>

On March 4, 2021 both the New York Times and Wall Street Journal reported that some Cuomo administration staff rewrote a report produced by the state Department of Health to “conceal the pandemic’s true death toll at long-term care facilities.”<sup>339</sup> This scandal coupled with recent sexual misconduct allegations against Governor Cuomo concerning several former female staff members prompted the New York Legislature to limit some of the governor’s emergency powers.<sup>340</sup> The bill which was signed by Governor Cuomo repealed special emergency powers given to the governor by the Legislature about a year earlier to respond to the pandemic.<sup>341</sup> However, the Legislature left in place those emergency powers the Governor had prior to the pandemic as well as current emergency orders that are still in effect.<sup>342</sup>

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S.B. S8427, 2019-2020, Gen. Assemb., Reg. Sess. (N.Y. May 30, 2020) (providing for employee death benefit for those contracting COVID-19 in the workplace).

<sup>335</sup> Dana Rubinstein, *New York Bans Most Evictions as Tenants Struggle to Pay Rent*, N.Y. TIMES (Dec. 28, 2020), <https://www.nytimes.com/2020/12/28/nyregion/new-york-eviction-ban.html> [https://perma.cc/WWU9-PUHX].

<sup>336</sup> *Id.*

<sup>337</sup> See Ctr. For Sys. Sci. and Eng’g, *COVID-19 Dashboard*, JOHNS HOPKINS SCH. OF MED. (as of April 28, 2021), <https://gisanddata.maps.arcgis.com/apps/dashboards/bda7594740fd40299423467b48e9ecf6> [https://perma.cc/BUA6-3UFB]. New York has the third highest numbers of cases and the most deaths from COVID-19 in the United States. *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> J. David Goodman & Danny Hakim, *Cuomo Aides Rewrote Nursing Home Report to Hide Higher Death Toll*, N.Y. TIMES, <https://www.nytimes.com/2021/03/04/nyregion/cuomo-nursing-home-deaths.html> [https://perma.cc/G29X-GRSK] (last updated April 22, 2021); Joe Palazzolo et. al, *Cuomo Advisers Altered Report on COVID-19 Nursing Home Deaths*, WALL ST J., <https://www.wsj.com/articles/cuomo-advisers-altered-report-on-covid-19-nursing-home-deaths-11614910855> [https://perma.cc/GF2L-UMCX] (Mar. 4, 2021).

<sup>340</sup> Jesse Mckinley & Luis Ferre-Sadurni, *Cuomo Faces Revolt as Legislators Move to Strip Him of Pandemic Powers*, N.Y. TIMES, <https://www.nytimes.com/2021/02/17/nyregion/cuomo-nursing-homes-deaths.html> [https://perma.cc/2RRA-RX7J] (last updated Mar. 5, 2021).

<sup>341</sup> See S.B. S5357, 2021-2022 Gen. Assemb., Reg. Sess. (Mar. 7, 2021).

<sup>342</sup> *See id.*



New Yorkers overwhelmingly supported Governor Cuomo's management of the COVID-19 pandemic.<sup>343</sup> Governor Cuomo had a 70% approval in April 2020 compared to a national average of 64%, and an approval rating of 53% in February 2021 with a national average of 46%.<sup>344</sup> Even after Governor Cuomo was plagued by a sexual assault scandal and the New York State Legislature repealed some of his emergency powers, 64% of New York democrats said that Cuomo has done a good job providing information during the pandemic.<sup>345</sup>

### B. Florida

Florida's Governor similarly declared a state of emergency concerning COVID-19 early in March, 2020.<sup>346</sup> Taking a different approach than New York, on March 15, 2021, Governor DeSantis barred visitation to nursing homes and set up "Covid-dedicated" health wards for seniors testing positive for COVID and who could not be properly isolated in their current facility.<sup>347</sup> Between March 17<sup>th</sup> and March 31<sup>st</sup>, the Governor issued a number of executive orders designed to curb the spread of COVID-19 including, among others, limiting restaurant capacity and banning non-emergency medical procedures.<sup>348</sup> And on April 1, 2020, the

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<sup>343</sup> David Lazer et al., *The State of the Nation: a 50-State COVID-19 Survey, Report #22 Executive Approval Update*, THE COVID-19 CONSORTIUM FOR UNDERSTANDING THE PUB.'S POL.'Y PREFERENCES ACROSS STATES (March 2021).

<sup>344</sup> *Id.*

<sup>345</sup> Nate Cohn, *Governor's Approval Rating Has Fallen. He Could Still Win Re-Election*, N.Y. TIMES, (April 24, 2021), <https://www.nytimes.com/2021/04/24/upshot/andrew-cuomo-polls-governor.html> [<https://perma.cc/XB5W-WJZC>].

<sup>346</sup> Both a public health emergency and a state of emergency was declared in Florida. See Fla. Exec. Order No. 20-51 (March 1, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-51.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-51.pdf) [<https://perma.cc/L7HM-RVER>] (ordering state health officer to declare public health emergency); FLA. DEP'T OF HEALTH, *Declaration of Public Health Emergency*, (March 1, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-51.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-51.pdf) [<https://perma.cc/L7HM-RVER>] (declaring public health emergency due to COVID-19); Fla. Exec. Order No. 20-52 (March 9, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-52.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-52.pdf) (declaring a state of emergency under Chapter 252 of the Florida Statutes) [<https://perma.cc/6ZQF-F9AL>].

<sup>347</sup> Allysia Finley, *Vindication for Ron DeSantis*, WALL. ST. J., (Mar. 2, 2021), <https://www.wsj.com/articles/vindication-for-ron-desantis-11614986751> [<https://perma.cc/97L4-HDWC>].

<sup>348</sup> See Fla. Exec. Order No. 20-68 (March 17, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-68.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-68.pdf) [<https://perma.cc/8H3N-8GCB>] (limiting capacity at restaurants and beaches); Fla. Exec. Order No. 20-72 (March 20, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-72.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-72.pdf) [<https://perma.cc/NS3V-5KTL>] (prohibiting "medically unnecessary, non-urgent or non-emergency procedures or

Governor issued a stay-at-home order and said all persons in Florida should limit their activities to obtaining or providing essential services.<sup>349</sup>

Governor Desantis' efforts to curb COVID-19 transmission were short-lived.<sup>350</sup> He lifted the stay-at-home order only four weeks later on April 29, 2020, but with limitations as most of Florida entered phase one of Florida's reopening plan.<sup>351</sup> Florida was not an initial hot spot, but it opened up its economy more quickly than other states. In July 2020, just after the Governor allowed retail establishments, museums and gyms among other businesses to operate at full capacity, Florida experienced a surge in COVID-19 cases and reported the country's highest single-day record at the time for positive tests at 15,299.<sup>352</sup> While still in the midst of the summer surge, Governor DeSantis issued Executive Order 20-244 providing that all of Florida enter phase three of its reopening plan.<sup>353</sup> In an unusual move, the Governor removed all capacity and other restrictions

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surgery; Fla. Exec. Order No. 20-82 (March 24, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-82.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-82.pdf) [https://perma.cc/DBK7-BXNG] (directing “[a]ll persons who enter Florida from an area with substantial community spread... to isolate and quarantine for a period of 14 days...”); Fla. Exec. Order No. 20-87 (March 27, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-87.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-87.pdf) [https://perma.cc/6TAF-4KXB] (prohibiting short-term vacation rentals); Fla. Exec. Order 20-90 (March 31, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-90.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-90.pdf) [https://perma.cc/8NH2-HX6D] (closing beaches in Broward and Palm Beach County).

<sup>349</sup> Fla. Exec. Order No. 20-91 (April 1, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-91-compressed.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-91-compressed.pdf) [https://perma.cc/9W8C-VDHD].

<sup>350</sup> See Fla. Exec. Order No. 20-112 (April 29, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-112.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-112.pdf) [https://perma.cc/UF6X-DJ3V].

<sup>351</sup> *Id.* Broward, West-Palm and Miami-Dade Counties did not enter phase one on this date. *Governor says phase 1 of reopening can begin May 4: What that means for Central Florida*, WFTV NEWS 9, (April 29, 2020) <https://www.wftv.com/news/local/florida-governor-says-phase-1-reopening-can-begin-may-4-except-3-south-florida-counties/OECBRFOQI5CK3BMNREC2UVZGEM/> [https://perma.cc/T8C4-MSZM]. Governor Desantis' reopening plan titled “Safe. Smart. Step-by-Step” is a three phased plan. Re-open Florida Task Force, *Safe. Smart. Step-by-Step. Plan for Florida's Recovery*, FL. GOV., <https://www.flgov.com/wp-content/uploads/covid19/Taskforce%20Report.pdf> [https://perma.cc/8N53-M7PL].

<sup>352</sup> See Fla. Exec. Order No. 20-139 (June 3, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-139.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-139.pdf) [https://perma.cc/BDW7-X25H]; Tamara Lush & Terry Spencer, *Florida Reports Largest Single-Day Increase in COVID Cases*, ASSOCIATED PRESS (July 12, 2020), <https://apnews.com/article/virus-outbreak-health-statistics-health-us-news-ap-top-news-798f9aab3bb2e5fbf733413a99476d7c> [https://perma.cc/JD9D-7C59].

<sup>353</sup> Fla. Exec. Order No. 20-244 (Sept. 25, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-244.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-244.pdf) [https://perma.cc/5QEE-VVT9].

on businesses and suspended all fines concerning COVID-19.<sup>354</sup> In other words, individuals and businesses could not be penalized if they violated any COVID-19 restrictions in the state. While some city and local governments may have had certain restrictions in place such as capacity restrictions or a local mask mandate, they were powerless to enforce them. Some Florida counties were not even permitted to maintain some of their local COVID-19 orders. For example, restaurant and bar owners brought suit against Broward County for ordering that these establishments could not serve between midnight and 5 a.m.<sup>355</sup> The federal district court held that Broward County's order was preempted by Governor DeSantis' recent order effectively reopening all Florida businesses.<sup>356</sup> The Florida Governor has not issued nor has plans to issue a state-wide mask mandate though a few local counties have mandates.<sup>357</sup> However, since Executive Order 20-244 suspends the collection of fines associated with COVID-19, any local mask mandate is essentially unenforceable.<sup>358</sup>

By the end of 2020, the Florida state legislature had not passed any legislation designed to either curb the transmission of COVID-19 or to provide economic relief to its citizens due to the pandemic.<sup>359</sup> As of December 31, 2020, Florida reported approximately 1.3 million positive COVID-19 cases and 21,700 deaths.<sup>360</sup> Florida had the third highest number of reported positive cases and the fourth highest number of COVID-19 fatalities.<sup>361</sup>

During 2020, Florida citizens have largely disapproved of Governor DeSantis' handling of the pandemic. His approval rating was just 46% in April 2020, which was significantly below the 64% average for approval for Governors at that time. It further declined to 40% in October 2020 which is 8% below the average for other Governors in October.<sup>362</sup> Even

<sup>354</sup> *Id.*

<sup>355</sup> 828 Management LLC v. Broward Cty, No. 20-62166-CIV-SINGHAL, 2020 WL 7635169, at \*1, 2 (S.D. Fla. Dec. 21, 2020).

<sup>356</sup> *Id.* at \*7.

<sup>357</sup> Greg Allen, *Florida's Governor: Officials Can Require Face Masks, But Can't Enforce It*, NAT'L PUB. RADIO (Oct. 7, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/10/07/921216724/floridas-governor-officials-can-require-face-masks-but-can-t-enforce-it> [https://perma.cc/3RXC-6LJQ].

<sup>358</sup> *Id.*

<sup>359</sup> As of mid-November 2020, the Florida state legislature passed one bill which declared the Florida State Seminoles the NCAA champions upon default as the NCAA tournament was canceled due to COVID-19 concerns. S.R. 1934, 2020 Reg. Sess. (Fla. 2020).

<sup>360</sup> See *COVID-19 Dashboard*, *supra* note 337.

<sup>361</sup> *Id.* California and Texas reported higher positive cases and only New York, California and Texas recorded higher total fatalities. *Id.*

<sup>362</sup> See Lazer, *supra* note 343.

as recently as February 2021, DeSantis' approval hit a pandemic low of 35%, more than 11% below the national average.<sup>363</sup> However, in March 2021, Governor DeSantis was praised by some for his handling of the pandemic, particularly his approach in managing long term care facilities during the early part of the crisis.<sup>364</sup> He has also been commended for reopening the Florida economy more quickly than other states.<sup>365</sup> Still, others argue that Governor DeSantis did not necessarily manage the pandemic well but rather Florida's weather and less densely populated areas may have reduced the spread of the virus.<sup>366</sup>

### C. Michigan

As discussed in *supra* Part III, on March 10, 2020, Michigan Governor Gretchen Whitmer declared a state of emergency under two separate emergency statutes – the Emergency Management Act of 1976 (“EMA”) and the Emergency Powers of the Governor’s Act of 1945 (“EPGA”).<sup>367</sup> The Governor shortly thereafter ordered that gatherings greater than 250 persons were prohibited and schools were to close on March 16.<sup>368</sup> Five days later, Governor Whitmer ordered Michigan residents to stay at home.<sup>369</sup> Within three weeks of the Governor’s initial emergency declaration, there were nearly 10,000 COVID-19 cases and 337 deaths in the state.<sup>370</sup> On April 1, 2020, Governor Whitmer issued Executive order 2020-33 which expanded her initial emergency declaration.<sup>371</sup> The Michigan Legislature through Concurrent Senate Resolution 24 approved and extended Governor Whitmer’s emergency

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<sup>363</sup> *Id.*

<sup>364</sup> Finley, *supra* note 347.

<sup>365</sup> *Id.*

<sup>366</sup> Souma Karlamangla & Rong-Gong Lin II, *California vs. Florida: Who Handled COVID-19 Better*, L.A. TIMES, (Mar. 9, 2021), <https://www.latimes.com/california/story/2021-03-09/florida-vs-california-who-had-better-covid-response> [<https://perma.cc/85VP-24GJ>].

<sup>367</sup> Mich. Exec. Order No. 2020-04, (Mar. 10, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-521576--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html) [<https://perma.cc/79MU-JXGP>].

<sup>368</sup> Mich. Exec. Order No. 2020-05, (Mar. 10, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-521595--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html) [<https://perma.cc/XH45-7NU4>].

<sup>369</sup> Mich. Exec. Order No. 2020-21, (Mar. 21, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-522626--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html) [<https://perma.cc/EU4K-AZ4R>].

<sup>370</sup> Mich. Exec. Order No. 2020-33 (Mar. 10, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-524025--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-524025--,00.html) [<https://perma.cc/LW5B-N4A4>].

<sup>371</sup> *Id.*

declaration until April 30, 2020.<sup>372</sup> On April 30, Governor Whitmer issued Executive Order 2020-66 which terminated her previous declarations of emergency and then issued Executive Orders 2020-67 and 2020-68 where she redeclared a state of emergency concerning COVID-19 under both the EPGA and EMA respectively.<sup>373</sup> She did so without legislative approval. The Michigan Legislature instead sought to proceed without renewing the state of emergency by passing Senate Bill 858, which sought to limit the Governor's initial emergency declaration to fourteen days before needing legislative approval to extend.<sup>374</sup> Senate Bill 858 also sought to lift the stay-at-home order while introducing social distancing measures and cleaning protocols for opened businesses.<sup>375</sup>

On May 4, 2020, the Governor introduced the state's reopening plan but did not lift the stay-at-home order until June.<sup>376</sup> On May 6, the Michigan state legislature leadership brought suit against Whitmer for exceeding her authority under both the EPGA and EMA and the next day Governor Whitmer vetoed Senate Bill 858.<sup>377</sup> On May 22, 2020, Governor Whitmer rescinded her previous declarations of emergencies under both the EPGA and EMA and reissued those emergency declarations to reflect the ongoing nature of litigation concerning her authority to issue them.<sup>378</sup> In the summer of 2020, most Michigan regions entered phase four of the Michigan Safe Start Plan which allowed for some small non-essential

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<sup>372</sup> S. Con. Res. 24, 2020 Reg. Sess. (Mich. Apr. 7, 2020), <http://legislature.mi.gov/documents/2019-2020/concurrentresolutionintroduced/Senate/htm/2020-SICR-0024.htm> [<https://perma.cc/7C3R-NPHQ>].

<sup>373</sup> Mich. Exec. Order No. 2020-67 (Apr. 30, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-527717--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-527717--,00.html) [<https://perma.cc/86BP-23RY>].

<sup>374</sup> S.B. 858, 100th Leg., Reg. Sess. (Mich. enrolled Apr. 30, 2020), <https://www.legislature.mi.gov/documents/2019-2020/billenrolled/Senate/pdf/2020-SNB-0858.pdf> [<https://perma.cc/7E9M-2B6G>].

<sup>375</sup> *Id.*

<sup>376</sup> See MI Safe Start, MICHIGAN.GOV (May 7, 2020), [https://www.michigan.gov/documents/whitmer/MI\\_SAFE\\_START\\_PLAN\\_689875\\_7.pdf](https://www.michigan.gov/documents/whitmer/MI_SAFE_START_PLAN_689875_7.pdf) [<https://perma.cc/F8JX-LNA3>]; Mich. Exec. Order No. 2020-110, (June 1, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-530620--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-530620--,00.html) [<https://perma.cc/3KLA-QPZD>].

<sup>377</sup> *Whitmer Vetoes Bill that Would Have Reopened Some Businesses Sooner*, MLIVE (May 5, 2020), <https://www.mlive.com/public-interest/2020/05/whitmer-vetoes-bill-that-would-have-reopened-some-businesses-sooner.html> [<https://perma.cc/R8YU-7R3A>].

<sup>378</sup> See Mich. Exec. Order No. 20-99 (May 22, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-530039--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-530039--,00.html) [<https://perma.cc/92L4-899K>].

gatherings and lower risk businesses to reopen.<sup>379</sup> On July 13, 2020, the Governor issued an order requiring all individuals who leave their home to wear a mask.<sup>380</sup>

As discussed more fully in *supra* Part III.B, the Michigan Supreme Court in *In re Certified Questions* found that neither the emergency declaration under the EMA nor the one under the EPGA were valid and enforceable.<sup>381</sup> And on October 12, 2020, the Michigan Supreme Court held that Governor Whitmer's emergency orders had no effect and urged the Governor and state legislature to work together.<sup>382</sup>

With all of the Governor's emergency executive orders rescinded, both Michigan state agencies and the state legislature engaged in a flurry of activity to provide some of the basic protections for its citizens that were no longer covered. On October 5, 2020, the director of the Michigan Department of Health and Human Services issued an "Emergency Order Under MCL 333.2252 – Gathering Prohibition and Mask Order."<sup>383</sup> This public health order was to replace the Governor's most recent executive order on face coverings and gatherings.<sup>384</sup> On October 15, 2020, the Michigan Department of Labor and Economic Opportunity promulgated emergency rules that clarified that Workers' Compensation coverage for first responders who test positive for COVID-19 is presumed, replacing previous coverage provided under executive order 2020-128.<sup>385</sup> The state

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<sup>379</sup> *Id.* Phase Five allows for larger gathering sizes and for most businesses to reopen. *Id.*

<sup>380</sup> See Mich. Exec. Order No. 2020-147, (July 13, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-534169--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-534169--,00.html) [<https://perma.cc/XP2J-2KDC>]. A face mask bill was introduced in Michigan House on August 6, 2020 and as of the date of this article remains in the Committee on Health Policy. See H.B. 6099, 100th Leg., Reg. Sess. (Mich. 2020) (in committee Aug. 12, 2020).

<sup>381</sup> See *In re Certified Questions*, 958 N.W.2d 1, 31 (Mich. 2020).

<sup>382</sup> *In re Certified Questions*, 949 N.W.2d 274 (Mich. 2020) (denying motion to stay precedential effect of Oct. 2, 2020 decision).

<sup>383</sup> DEP'T OF HEALTH & HUMAN SERVS, *Emergency Order Under MCL 333.2253 – Gathering Prohibition and Mask Order*, STATE OF MICH. (October 5, 2020), [https://www.michigan.gov/documents/coronavirus/MDHHS\\_epidemic\\_order\\_-\\_Gatherings\\_masks\\_bars\\_sports\\_-\\_FINAL\\_704287\\_7.pdf](https://www.michigan.gov/documents/coronavirus/MDHHS_epidemic_order_-_Gatherings_masks_bars_sports_-_FINAL_704287_7.pdf) [<https://perma.cc/7WZR-Q5MM>].

<sup>384</sup> *Id.* This order replaces three of the Governor's executive orders: 2020-153, 2020-160 and 2020-161. *Id.*

<sup>385</sup> MICH. DEP'T OF LABOR & ECON. OPPORTUNITY, *Worker's Disability Compensation Agency, Emergency Rules* (Oct. 16, 2020), [https://www.michigan.gov/documents/lara/Workers\\_Disability\\_Compensation\\_Agency\\_COVID-19\\_First\\_Responder\\_ER\\_684245\\_7.pdf](https://www.michigan.gov/documents/lara/Workers_Disability_Compensation_Agency_COVID-19_First_Responder_ER_684245_7.pdf) [<https://perma.cc/WX3C-GEBN>].

legislature stepped in with several bills to codify previous executive orders with the Governor, signing six of them as of early November, 2020.<sup>386</sup>

The Michigan State Legislature introduced nearly 200 COVID-19 related bills and resolutions.<sup>387</sup> Most of the legislative action occurred after the Michigan Supreme Court confirmed that Michigan was no longer under a state of emergency.<sup>388</sup>

As of December 31, 2020, Michigan had reported 528,600 positive COVID-19 cases and 13,000 deaths.<sup>389</sup> Governor Whitmer has received high approval ratings for her handling of the pandemic with a 62% approval rating in April, a 56% approval rating in October 2020 and a 52% rating in February 2021, all exceeding the national average.<sup>390</sup>

In early April 2021, as most of the United States saw a decrease in COVID-19 cases, Michigan experienced a significant surge where it was reporting over 7,000 infections per day – a seven fold increase from February 2021.<sup>391</sup> Going against health official recommendations, Governor Whitmer did not issue any stay-at-home orders or close down any businesses.<sup>392</sup> Recognizing that Michigan citizens suffered from pandemic fatigue, she asked that citizens take a two-week pause from in-person dining, high school and sports.<sup>393</sup> As of May 1, 2021, Michigan's two week positive case average decreased by 46% to about 4600 new cases per day.<sup>394</sup>

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<sup>386</sup> These new laws include adding requirements for nursing home with COVID-19 residents, allowing certain licensed health professionals to administer COVID-19 testing and amending the probate law to allow for some electronic records and signatures. H.B. 6137, 100th Leg., Reg. Sess. (Mich. 2020), H.B. 6293, 100th Leg., Reg. Sess. (Mich. 2020); H.B. 2694, 100th Leg., Reg. Sess. (Mich. 2020).

<sup>387</sup> See *State Laws in Response to the Coronavirus (COVID-19) Pandemic*, *supra* note 145.

<sup>388</sup> See, e.g., H.B. 5911, 100th Leg., Reg. Sess. (Mich. 2020), <http://www.legislature.mi.gov/documents/2019-2020/publicact/pdf/2020-PA-0147.pdf> [<https://perma.cc/96LJ-F67P>]; see also *In re Certified Questions of the United States District Court*, 949 N.W.2d 274 (Mich. 2020).

<sup>389</sup> See *COVID-19 Dashboard*, *supra* note 337.

<sup>390</sup> See Lazer, *supra* note 343.

<sup>391</sup> Julie Bosman & Mitch Smith, *Michigan's Virus Cases are out of Control, Putting Gov. Gretchen Whitmer in a Bind*, N.Y. TIMES, <https://www.nytimes.com/2021/04/10/us/coronavirus-michigan-gretchen-whitmer.html> [<https://perma.cc/GY89-W3FL>] (April 10, 2021). The surge is likely a result of a more contagious variant spreading throughout the state coupled with a significant increase in in-person gatherings. *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Tracking Coronavirus in Michigan: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/michigan-covid-cases.html> [<https://perma.cc/XXU3-T9DU>] (as of May 1, 2021).

*D. Wisconsin*

On March 12, 2020, Wisconsin Governor Tony Evers declared a public health emergency which was due to expire in sixty days unless extended by the legislature.<sup>395</sup> On March 24, 2020, the Secretary of Health ordered residents to stay at home in accordance with the Governor's public health emergency declaration and Wis. Stat. section 252.02(3), also known as the Safer at Home Order.<sup>396</sup> About two weeks before the public health emergency was set to expire, the Secretary of Health reissued the Safer at Home Order but solely under Wis. Stat. section 252.02(3) and not under the Governor's emergency declaration.<sup>397</sup> This new order had the effect of bypassing the need for a legislative resolution to extend the public health emergency.<sup>398</sup> As described more fully in *supra* Part III.B, the Safer at Home Order was declared unenforceable by the Wisconsin Supreme Court on May 13, 2020, effectively reopening the entire Wisconsin economy.<sup>399</sup> Notwithstanding the Wisconsin Supreme Court's rulings, Governor Evers continued renewing the state of emergency and both Evers and Secretary Palm continued to issue orders in an effort to curb transmission of the virus.<sup>400</sup> For example, on August 1, 2020, Governor Evers ordered that face coverings required in indoor spaces rather than in a private residence.<sup>401</sup> Secretary Palm was not as successful when she

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<sup>395</sup> Wis. Exec. Order No. 72 (Mar. 12, 2020), <https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf> [<https://perma.cc/4ETM-RL9C>].

<sup>396</sup> Wis. Exec. Order No. 12 (Mar. 24, 2020), <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf> [<https://perma.cc/HL3W-RKH9>].

<sup>397</sup> Wis. Exec. Order No. 28 (Apr. 16, 2020), <https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf> [<https://perma.cc/XKA7-E3TA>].

<sup>398</sup> *Id.* On April 27 and May 11, the Wisconsin Secretary of Health issued two additional orders slowly reopening the economy which allowed among other things retail and drive-in theaters to open with restrictions. *See* Wis. Exec. Order No. 34 (Apr. 27, 2020), <https://evers.wi.gov/Documents/COVID19/EMO34-SAHDIalTurn.pdf> [<https://perma.cc/SW9N-BHB>]; Wis. Exec. Order No. 36 (May 11, 2020), <https://evers.wi.gov/Documents/COVID19/EMO36-SAHDIalTurn2.pdf> [<https://perma.cc/5M5E-5JLH>].

<sup>398</sup> *Id.* On April 20, the Secretary of Health through emergency order 31 announced the three-phased approach toward opening Wisconsin's economy. *Palm*, 942 N.W.2d at 918.

<sup>399</sup> *Id.*

<sup>400</sup> *See, e.g., infra* notes 401-03.

<sup>401</sup> Wis. Gov. Emergency Order No. 1 (Aug. 1, 2020), <https://evers.wi.gov/Documents/COVID19/EmO01-FaceCoverings.pdf> [<https://perma.cc/3DT8-ALSL>]. The mask mandate initially withstood legal challenge. *See Lindoo v. Evers*, No. 20 CV 219 (Wis. Ct. App. Oct. 12, 2020).



issued Emergency Order #3 limiting public gatherings in early October, as a Wisconsin appellate court enjoined enforcement of the order.<sup>402</sup> On November 10, 2020, Governor Evers – not the Secretary of Health – issued Executive Order #94 titled “Relating to Actions Every Wisconsinite Should Take to Protect their Family, Friends, and Neighbors from COVID-19.”<sup>403</sup> This advisory recommends that all Wisconsinites should stay home as much as possible due to the surge of COVID-19 positive cases in the state. There is no penalty for failing to comply with this advisory.<sup>404</sup>

In late January 2021, Governor Evers had only a few COVID-19 restrictions in place including the state-wide mask mandate.<sup>405</sup> Looking to repeal the mask mandate, the Wisconsin Legislature passed Concurrent Resolution No. 3 which stated that Governor Evers had no authority to renew the state of emergency due to COVID-19 and that even if he did, the Legislature was using its authority to terminate the emergency declaration by concurrent resolution.<sup>406</sup> This had the effect of ending all of the Governor’s executive orders including the mask-mandate order.<sup>407</sup> Notwithstanding the Legislature’s resolution terminating the emergency declaration, Governor Evers issued a new emergency declaration and a new mask mandate.<sup>408</sup> On March 31, 2021, the Wisconsin Supreme Court

<sup>402</sup> Wis. Gov. & Sec. Emergency Order No. 3 (Oct. 6, 2020), [https://www.wpr.org/sites/default/files/emo\\_3\\_limiting\\_public\\_gatherings\\_signed.pdf](https://www.wpr.org/sites/default/files/emo_3_limiting_public_gatherings_signed.pdf) [<https://perma.cc/7Y65-QL5K>]. The Secretary of Health stated that the emergency order was issued pursuant to Wis. Stat. § 252.02(3) and the Wisconsin Supreme Court decision in *Wis. Legislature v. Palm*, 942 N.W.2d 900 (Wis. 2020). Memorandum in Support of Emergency Motion for Temporary Injunction Pending Appeal, *Tavern League of Wis., Inc. v. Palm*, No. 2020CV128 (Wis. Ct. App. Nov. 6, 2020) (No. 2020CV128) (available at [https://greatlakeslegalfoundation.org/wwwcms/wp-content/uploads/2020/10/Tavern-League-of-WI-v-Palm\\_Memo-ISO-Injunction-Pending-Appeal.pdf](https://greatlakeslegalfoundation.org/wwwcms/wp-content/uploads/2020/10/Tavern-League-of-WI-v-Palm_Memo-ISO-Injunction-Pending-Appeal.pdf) [<https://perma.cc/7W9A-7GBM>]).

<sup>403</sup> Wis. Exec. Order No. 94 (Nov. 10, 2020), <https://evers.wi.gov/Documents/COVID19/EO094-COVIDRecommendations.pdf> [<https://perma.cc/DE5K-4LFX>].

<sup>404</sup> *Id.*

<sup>405</sup> Wis. Exec. Order No. 104 (Jan. 19, 2021), <https://evers.wi.gov/Documents/EO/EO104-DeclaringPublicHealthEmergencyJan2021.pdf> [<https://perma.cc/Q3HD-M8VK>]; Wis. Gov. Emergency Order No. 1 (Jan. 19, 2021), <https://evers.wi.gov/Documents/COVID19/EmO01-JanFaceCoverings.pdf> [<https://perma.cc/URF8-VCZ6>] (relating to the stopping of the spread of highly contagious variant by the requiring of face coverings).

<sup>406</sup> S. Con. Res. 3, 2021-2022, Reg. Sess. (Wis. 2021).

<sup>407</sup> *Id.*

<sup>408</sup> Wis. Exec. Order No. 105 (Feb. 4, 2021), <https://evers.wi.gov/Documents/EO/EO105-PHE.pdf> [<https://perma.cc/J8PE-3EG3>]; Wis. Gov. Emergency Order No. 1 (Feb. 4, 2021),

in *Fabick v. Evers* held that Governor Evers exceeded his authority under the state's emergency disaster statute for reissuing multiple states of emergency due to COVID-19 when the statutory duration for a state of emergency was sixty days unless extended by the Legislature.<sup>409</sup> Like Michigan, Wisconsin no longer has a state of emergency due to COVID-19.<sup>410</sup>

As of November 16, 2020, the Republican controlled state legislature had passed only one bill related to the COVID-19 pandemic.<sup>411</sup> Governor Evers and the Secretary of Health's lack of authority to issue community mitigation measures has taken a toll on the state. As the New York Times reported in early November 2020, COVID-19 cases have surged all across the country "but nowhere as quickly as Wisconsin."<sup>412</sup> In the first week of November, Wisconsin reported over 6,000 cases per day.<sup>413</sup> The fall surge was attributed in part to the party line division within the state on how to manage the pandemic.<sup>414</sup> As of December 31, 2020, Wisconsin reported 520,400 cases of COVID-19 and 5,200 deaths from the disease.<sup>415</sup> Governor Evers's approval rating steadily declined from a high of 56% in April to 41% in October, but jumped to a high of 54% in February 2021 as he fought to maintain the state of emergency and the state's mask mandate.<sup>416</sup>

## VI. ANALYSIS AND RECOMMENDATIONS

With a surge in cases at the time of this article's submission in March 2021, state governors continued to issue executive orders aimed at curbing the spread of COVID-19, as well as addressing the significant economic

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<https://evers.wi.gov/Documents/COVID19/EmO01-FebruaryFaceCoverings.pdf> [https://perma.cc/Q5TM-WSN7].

<sup>409</sup> 956 N.W.2d 856, 869–80 (Wis. 2021).

<sup>410</sup> As of May 1, 2021, only Alaska, Wisconsin and Michigan did not have a current COVID-19 state of emergency. See *COVID-19 Reopening and Reclosing Plans*, *supra* note 11.

<sup>411</sup> See 2019 WIS. ACT 185 (enacted Apr. 15, 2020), <https://docs.legis.wisconsin.gov/2019/related/acts/185.pdf> [https://perma.cc/JQM3-BV27].

<sup>412</sup> Mitch Smith et. al., *What Places are Hardest Hit by the Coronavirus? It Depends on the Measure*, N.Y. TIMES (Nov. 20, 2020), <https://www.nytimes.com/2020/11/12/us/coronavirus-crisis-united-states.html> [https://perma.cc/Y38T-M8UQ].

<sup>413</sup> *Id.*

<sup>414</sup> Robinson Meyer, *Wisconsin is on the Brink of a Major Outbreak*, THE ATLANTIC, (Sept. 26, 2020), <https://www.theatlantic.com/science/archive/2020/09/wisconsin-coronavirus-hotspot/616510/> [https://perma.cc/2GZG-VQM2].

<sup>415</sup> See *COVID-19 Dashboard*, *supra* note 337.

<sup>416</sup> See Lazer, *supra* note 343.

impacts this pandemic has had on their state's economy.<sup>417</sup> These orders have not been uniformly welcomed with open arms.<sup>418</sup> Individuals, businesses, and religious organizations have protested in the streets against some of the most restrictive social distancing orders and have challenged them in the courts.<sup>419</sup> Therefore, subpart A evaluates whether there are sufficient checks in place on the state executive or if some of those checks are too burdensome on governors. Next, subpart B examines how both governors and litigants can learn from prior cases to better craft executive orders that may avoid some of the constitutional pitfalls. And finally, subpart C looks at how the state legislature or various state agencies could undertake a more active role by enacting emergency statutes or regulations concerning COVID-19.

### A. Checks on Governor's Emergency Executive Order Authority

While the United States saw an unprecedented number of executive orders issued by state governors, its citizens can be reasonably assured that there are enough checks in place against a governor that may have overstepped her bounds. First, a majority of state legislatures can terminate their governor's declaration of emergency at any time through a concurrent resolution.<sup>420</sup> If the state legislature terminated the emergency declaration, it also terminates the governor's authority to issue executive orders in accordance with the emergency.<sup>421</sup> Second, the judiciary is providing meaningful review of challenges to executive orders particularly where the order concerns potential civil rights violations.<sup>422</sup>

#### 1. Legislative Oversight and Statutory Limits

Typically, state legislatures have some oversight or ability to limit a governor who oversteps her authority when issuing emergency orders.<sup>423</sup> However, some statutory guardrails are better than others. Perhaps the most balanced form of check on the governor's emergency powers is the state legislature's authority to terminate the state of emergency by concurrent resolution. Indeed, about thirty-three state legislatures can terminate a governor's declaration of emergency and all of the emergency

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<sup>417</sup> See *supra* Part II.

<sup>418</sup> *Id.*

<sup>419</sup> See *supra* Part III.

<sup>420</sup> See *infra* Appendix A.

<sup>421</sup> See *supra* Part III.

<sup>422</sup> *Id.*

<sup>423</sup> See *infra* Appendix A.

powers that come with it.<sup>424</sup> A joint resolution terminating an emergency would not be a power likely wielded often as a majority of the state legislature would be needed for its passage.<sup>425</sup> The joint resolution may need to be presented to the governor for her signature.<sup>426</sup> Only a few state legislatures such as the Kansas and Pennsylvania state legislatures have attempted to terminate their governor's emergency declaration through legislative resolution but failed either because the resolution was not presented for the governor's signature or because it failed to follow proper procedures.<sup>427</sup> And it may have been for the best as Kansas and Pennsylvania each have an active state of emergency.<sup>428</sup> In contrast, in January 2021, the Wisconsin legislature by concurrent resolution terminated Governor Evers current COVID-19 emergency declaration, only to have Governor Evers reissue a new emergency declaration.<sup>429</sup> While Governor Evers' intent was to bypass the statutory guardrail

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<sup>424</sup> *Id.* I use the term state legislature to refer to the fifty U.S. states as well as to the District of Columbia and the U.S. territories.

<sup>425</sup> *See infra* notes 427, 429 (explaining that only the Kansas, Pennsylvania and Wisconsin state legislatures passed a legislative resolution to end the state of emergency).

<sup>426</sup> *See, e.g.,* *Wolf v. Scarnati*, 233 A.3d at 707 (finding that the legislature must present the concurrent resolution terminating the state of emergency to the governor). An additional argument could be made that a state legislature cannot use a concurrent resolution to end the emergency without presenting it to the governor for signature or veto since executive orders have the full force of law. *See Gen. Assemb. of State of N.J. v. Byrne*, 448 A.2d 438 (N.J. 1982) (finding broad legislative veto provision in New Jersey Legislative Oversight Act violated separation of powers doctrine by usurping Governor's authority under the Presentment Clause of State Constitution).

<sup>427</sup> *See Titus Wu, Kansas Lawmakers Discuss Ending COVID-19 Emergency, Attempt Override on Last Day of Work*, TOPEKA CAPITAL-JOURNAL (May 26, 2021), <https://www.cjonline.com/story/news/politics/government/2021/05/26/kansas-lawmakers-end-covid-19-emergency-override-more-vetoes-sine-die-laura-kelly-ty-masterson/7447412002/> [<https://perma.cc/H325-Y6RE>]; *see also* Harri Leigh, *Pa. Legislature Moves to End the Governor's Emergency Disaster Declaration*, FOX43 (May 25, 2021), <https://www.fox43.com/article/news/politics/pa-legislature-end-governors-emergency-disaster-declaration/521-2cc00848-336e-43b3-b847-e07044196e7b> [<https://perma.cc/5R8E-53QG>]; *Kelly v. Legis. Coordinating Council*, 460 P.3d 832 (Kan. 2020). In March 2021, the Kansas state legislature amended the state's emergency disaster statute to provide greater powers to a legislative coordinating council. *See* S.B. 40, 2020-2021 Leg. Sess. (Ka. 2021). That council consisting of state legislative leadership will now be needed to approve any future emergency orders issued by the governor. *Id.*

<sup>428</sup> *COVID-19 Reopening and Reclosing Plans*, *supra* note 11.

<sup>429</sup> Wis. Exec. Order No. 105 (Feb. 4, 2021), <https://evers.wi.gov/Documents/EO/EO105-PHE.pdf> [<https://perma.cc/EY4X-CN3W>]; Wis. Gov. Emergency Order No. 1 (Feb. 4, 2021), <https://evers.wi.gov/Documents/COVID19/EmO01-FebruaryFaceCoverings.pdf> [<https://perma.cc/N4JM-JTHZ>].

provided by the state's emergency disaster statute, he was ultimately unsuccessful.<sup>430</sup> For the approximately twenty states or U.S. territories without this type of statutory guardrail, their respective emergency disaster statutes or state constitutions should be amended to include one.<sup>431</sup>

Most state emergency disaster statutes provide for an emergency declaration of a limited duration such as thirty, sixty, or ninety days.<sup>432</sup> Yet a number of these state statutes do not specify who may extend the state of emergency. Some states vest the power to renew with the governor.<sup>433</sup> Unlike an open-ended emergency declaration, these emergency disaster statutes with durational limits provide for some type of regular review of the need for the emergency but that review likely rests with the executive and would not be a check on her power.<sup>434</sup>

Instead of the power to terminate a declaration of emergency, about seven state legislatures are vested with the power to renew a governor's state of emergency after a certain period of time.<sup>435</sup> It seems as this is not so much a limit on the governor's power but rather requires active *participation* by the state legislature in the emergency power process and goes too far in times of emergency. Since state legislatures are known to be sluggish, this process can lead to inaction and the inability to come together resulting in an expired emergency declaration even though the need to continue the emergency is still pressing. Also, this provision can be used for political purposes to thwart activity of the governor from the opposing party. Michigan and Wisconsin are two cases in point. Governor Whitmer, a Democratic governor, sidestepped the state emergency statute's requirement that she request the legislature's approval to continue the state of emergency past twenty-eight days knowing she would be thwarted by a predominantly Republican legislature.<sup>436</sup> With the Michigan Supreme Court holding that she did not comply with the statute, her initial emergency declaration expired leaving her without any emergency powers amidst an ongoing crisis.<sup>437</sup> The Democratic Wisconsin Governor, Tony Evers, likewise had his Secretary of Health issue a stay-at-home order under a specific Wisconsin Statute rather than

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<sup>430</sup> *Fabick v. Evers*, 956 N.W.2d 856, 869–70 (Wis. 2021). The Wisconsin Supreme Court held that Evers did not have authority to reissue the COVID-19 emergency declarations as the statute only provides for a state of emergency to last for sixty days unless extended by the legislature. *Id.* at 868–70.

<sup>431</sup> *See infra* Appendix A.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *Id.* Those seven states are Alaska, Kansas, Michigan, Oklahoma, South Carolina, Washington, and Wisconsin. *Id.*

<sup>436</sup> *See generally supra* Part IV.C.

<sup>437</sup> *In re Certified Questions from U.S. Dist. Ct., W. Dist. of Mich., S. Div.*, 958 N.W.2d 1, 6–7 (Mich. 2020).

under his public health emergency declaration as that declaration was set to expire in May and he needed the concurrent resolution of the Republican led legislature to extend the emergency.<sup>438</sup> As with Michigan, the Wisconsin Supreme Court intervened in the dispute between the executive and legislative branches holding that the Secretary of Health exceeded her authority and declared the stay-at-home order invalid and unenforceable.<sup>439</sup> In March 2021, the Wisconsin Supreme Court held that Governor Evers did not have the authority to declare a state of emergency in response to COVID-19 once the sixty day durational limitation expired.<sup>440</sup> Like Michigan, Wisconsin was no longer in a state of emergency as the legislature did not seek to extend it.<sup>441</sup>

In contrast, during the worst of the pandemic in Pennsylvania, the state legislature did not have the authority to extend an emergency declaration.<sup>442</sup> The Legislature was limited to terminating a state of emergency by legislative concurrent resolution that also must be presented to the governor for signature or veto.<sup>443</sup> While the Pennsylvania state legislature adopted a concurrent resolution to end the COVID-19 state of emergency, Governor Wolf vetoed that resolution, and the state assembly did not have the two third majority votes necessary to override the veto.<sup>444</sup> This is the democratic process at work.<sup>445</sup>

However, some may argue that the state legislature's power in many of these emergency disaster statutes gives it little flexibility – it is an all or nothing approach. New York may have a better solution. In New York, the state legislature had both the authority to terminate a state of emergency *as well as* the authority to terminate a specific emergency executive order.<sup>446</sup> If the state legislature finds that the governor overstepped his authority in issuing a particular order, it may by concurrent resolution terminate that specific order rather than the entire state of emergency.<sup>447</sup>

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<sup>438</sup> See generally *supra* Part IV.D.

<sup>439</sup> See *Wis. Legislature. v. Palm*, 942 N.W.2d 900, 906–07 (Wis. 2020).

<sup>440</sup> *Fabick v. Evers*, 956 N.W.2d 856, 859 (Wis. 2021).

<sup>441</sup> *Id.*

<sup>442</sup> See *infra* Appendix A.

<sup>443</sup> *Id.*

<sup>444</sup> H.R. 836, Gen. Assemb., 2020 Sess. (Pa. 2020) (vetoed).

<sup>445</sup> Pennsylvania citizens voted in May to limit the Governor's declaration of emergency to twenty-one days unless renewed by legislature. Hannah Brandt, *PA Voters Limited the Governor's Emergency Declaration Powers. Now What?*, ABC27 (May 2020), <https://www.abc27.com/news/pennsylvania/pa-voters-limited-the-governors-emergency-declaration-powers-now-what/> [https://perma.cc/PYV6-753N].

<sup>446</sup> N.Y. EXEC. LAW § 20-A(4).

<sup>447</sup> *Id.*

In Kentucky, the state legislature went beyond giving itself the power to terminate a resolution or state of emergency: it passed legislation to strip certain emergency powers from its governor.<sup>448</sup> Rather than providing for a check on the governor's emergency powers with respect to closing certain businesses to curb transmission of COVID-19, it usurped those powers by allowing for businesses, schools and associations to remain open as long as their plan meets or exceeds CDC guidance.<sup>449</sup> It took away the Governor's ability to protect its citizens from the ongoing pandemic when closing businesses in response to a highly transmissible variant may be necessary notwithstanding compliance with CDC guidance. And, it is shocking that this part-time legislature that meets either thirty or sixty days per year is required to extend any emergency executive order concerning in-person meetings.<sup>450</sup> For a state legislature whose state constitution dictates that it is not to be in session beyond April in any given year, the general assembly cannot feasibly renew executive orders expiring in the summer or fall.<sup>451</sup> If a court does not declare this legislation unconstitutional, the Governor will be powerless to employ certain mitigation measures should the need arise, and the part-time state legislature may not be in session to take over for the executive.

Some state legislatures may need to do some statutory cleanup to better integrate their public health statutory scheme with their overall emergency disaster statutory framework. For a number of states, the governors declared both a public health emergency and a general state of emergency.<sup>452</sup> For those states, their public health emergency statute may not provide their governor with sufficient emergency powers to respond to the virus.<sup>453</sup> Instead of declaring both types of emergencies, governors should have an option to use their full range of emergency powers when confronting a public health emergency. That option should come with the same set of statutory guardrails as with the emergency disaster statute. For other states, such as Wisconsin, the governor was provided with little emergency powers but instead was ordered to direct the Secretary of

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<sup>448</sup> See H.B. 1, 2021 Reg. Sess. (Ky. 2021) (allowing businesses, schools and associations to remain open if their plan meets or exceeds current CDC guidance); H.B. 5, 2021 Reg. Sess. (Ky. 2021) (limiting the authority of governor to temporarily reorganize administrative agencies without legislative approval); S.B. 1, 2021 Reg. Sess. (Ky. 2021) (limiting executive orders concerning in-person meetings to thirty days unless extended by legislature); S.B. 2, 2021 Reg. Sess. (Ky. 2021) (requiring state agencies to submit documentation to legislative subcommittee before issuing emergency regulations).

<sup>449</sup> See Ky. H.B. 1.

<sup>450</sup> See Ky. S.B. 1.

<sup>451</sup> KY. CONST. § 42.

<sup>452</sup> See *infra* Appendix A.

<sup>453</sup> *Id.*

Health to respond to the emergency.<sup>454</sup> No doubt state legislatures will also need to contemplate long term reform of their public health emergency statutory framework. One legal scholar has proposed statutory reform to codify the law of social distancing.<sup>455</sup> As with recent public health emergency reform, this change may be necessary, but it will not come easy. In the meantime, for those few states that do not have a statutory check on their governor's emergency powers, it may be time for those state legislatures to put one in place.<sup>456</sup>

## 2. Sufficient Judicial Review

Early on in the pandemic, some legal scholars raised serious concerns about whether the courts would meaningfully review a constitutional challenge to a governor's executive order.<sup>457</sup> And these concerns were certainly justified at the time. As discussed in *supra* Part III, Subpart A, a number of federal district courts in Spring 2020 applied the century old case *Jacobson v. Massachusetts* finding that they must afford more deferential review to government restrictions concerning COVID-19.<sup>458</sup> In other words, a number of these courts swapped out traditional constitutional analysis for a more deferential standard during this time of emergency.<sup>459</sup> However, the majority opinion in the recent Supreme Court *Roman Catholic Diocese of Brooklyn v. Cuomo* does not even cite to *Jacobson*.<sup>460</sup> It appears likely the *Jacobson* framework is no longer the standard of review in pandemic cases.<sup>461</sup> The more difficult question is whether courts may still rely on *Jacobson* but to a lesser degree. Indeed, at least two federal district courts post-*Roman Catholic Diocese* confirmed

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<sup>454</sup> See Wis. Exec. Order No. 72, *supra* note 395.

<sup>455</sup> See Wiley, *supra* note 70, at 60–68. Professor Wiley argues that the legislature should begin to codify the law of social distancing and mask requirements. *Id.* Wiley broadly proposes state legislative reform concerning a governor's emergency powers should encompass four general principles: 1) the strategic and scientific purpose of the order; 2) a graded range of intervention and classification among businesses and activities, 3) Neutral laws of general applicability; and 4) supportive measures should be put in place. *Id.* at 59.

<sup>456</sup> Alabama, Delaware, District of Columbia, Illinois, Kentucky, Massachusetts, Mississippi, New Jersey, New Mexico, Ohio, Tennessee, Vermont, Virginia and Wyoming currently do not have any statutory limits on the Governor's authority to declare and/or extend a state of emergency. See *infra* Appendix A.

<sup>457</sup> Wiley & Vladeck, *supra* note 154, at 187 (finding that the “coronavirus pandemic serves to undermine defenses of the ‘suspension’ model grounded in the putatively transitory nature of emergencies.”).

<sup>458</sup> See generally *supra* Part III.A and accompanying cases.

<sup>459</sup> *Id.*

<sup>460</sup> *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 80 (2020).

<sup>461</sup> See, e.g., *Open Our Oregon v. Brown*, No. 6:20-cv-773-MC, 2020 WL 2542861, at \*2 (D. Or. May 19, 2020).



that *Jacobson* is binding precedent until the U.S. Supreme Court or federal appellate court tells them otherwise.<sup>462</sup> While the law remains far from settled, most decisions fall along a spectrum in how they integrate the *Jacobson* framework to the challenged orders. At one end of the spectrum, some courts applied *Jacobson* rigidly providing a highly deferential review of the governor's executive orders.<sup>463</sup> While some courts embraced this standard early on in the pandemic, fewer courts since May 2020 have applied so rigid a standard.<sup>464</sup> At the other end of the spectrum, a few courts – most notably the December 2020 Second Circuit decision in *Agudath Israel v. Cuomo* – specifically rejected *Jacobson* as the standard of review.<sup>465</sup> Other courts fell somewhere in between. For those judges more inclined to integrate *Jacobson* into their decision, they reviewed the executive order using the *Jacobson* two element test but apply traditional constitutional analysis to the second element.<sup>466</sup> For other judges, *Jacobson* is more of a lens by which to apply traditional constitutional analysis.<sup>467</sup> Even for those courts that lean more heavily on *Jacobson*, an executive order will not be enforced when the evidence clearly shows that it does not substantially support the government's interest.<sup>468</sup>

As the battle lines have been drawn between Democratic governors and Republican led state legislatures in Pennsylvania, Michigan, Wisconsin and Kansas over how best to manage the COVID-19 pandemic,

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<sup>462</sup> See *Delaney v. Baker*, No. 20-11154-WGY, 2021 WL 42340, at \*11 (D. Mass. Jan. 6, 2021) (concerning challenge to Executive Order mandating wearing of face masks in public); *M. Rae, Inc. v. Wolf*, No. 1:20-CV-2366, 2020 WL 7642596, at \*6, 11 (M.D. Pa. Dec. 23, 2020) (concerning challenge to executive order banning indoor dining).

<sup>463</sup> *M. Rae, Inc.*, 2020 WL 7642596, at \*6.

<sup>464</sup> See *Agudath Israel v. Cuomo*, No. 20-3572, 2020 WL 7691715, at \*9 (2d Cir. Dec. 28, 2020).

<sup>465</sup> *Id.*

<sup>466</sup> See, e.g., *In re Rutledge*, 956 F.3d 1018, 1029–30 (8th Cir. 2020) (applying *Casey* undue burdens test to *Jacobson* second element in finding executive order restricting abortions not likely a violation of right to abortion); *Carmichael v. Ige*, 470 F.Supp.3d 1133, 1146–47 (D. Haw. 2020) (applying traditional constitutional analysis in *Jacobson* second element in finding that executive order requiring 14-day quarantine did not violate right to travel.).

<sup>467</sup> See Farber, *supra* note 87, at 833, 851–52. Farber argues that the best approach for guidance on how courts should approach judicial review during an emergency may be found in national security cases concerning free speech. *Id.* In those cases, the government is afforded some deference, but the courts do not abandon “normal constitutional tests.” *Id.* at 835. Similarly, Parmet argues that “*Jacobson* helps to set the table. It provides a vital reminder of the context which courts should review public health measures, especially – but not only – during emergencies.” Parmet, *supra* note 154, at 132–33.

<sup>468</sup> See, e.g., *Robinson v. Att’y Gen.*, 957 F.3d 1171, 1176–78 (11th Cir. 2020) (applying the *Jacobson* framework but finding executive order postponing all non-emergency medical procedures including abortion likely violates right to abortion).

their respective state supreme courts have stepped in to make sure neither the executive nor legislative branches have bypassed the statutory mechanisms set forth in their respective emergency statutes.<sup>469</sup> The state supreme courts have universally abided by the process.<sup>470</sup>

Both the judiciary and legislature provide a check on the governor's power to issue executive orders.<sup>471</sup> After the Supreme Court's decision in *Roman Catholic Diocese*, one could easily say that the judiciary has ventured from a check on the executive's power to usurping some of that function. *Roman Catholic Diocese* does just that.<sup>472</sup> The Court, armed with less information than the governor, chose to compare houses of worship capacity restrictions with those of liquor stores and acupuncture facilities, whereas Governor Cuomo backed by scientific experts, grouped houses of worship with secular institutions such as movie theaters, concerts, and sports arenas where large groups of people gather for long periods of time.<sup>473</sup> By disregarding Governor Cuomo's basis for grouping the institutions and substituting its own, the Court went beyond providing a check on executive authority; it decided in lieu of the executive.<sup>474</sup> While there is no doubt that this is Madisonian checks and balances at play, I would argue that the judiciary should not interfere the way it did in *Roman Catholic Diocese* and defer to the governor more.<sup>475</sup> As some legal scholars have suggested, some degree of deference should be given to the executive during times of emergency, but traditional constitutional analysis should not be abandoned.<sup>476</sup>

In the United States, there is no judicial check on a governor's failure to act during a state of emergency.<sup>477</sup> A state's emergency disaster statute may provide the governor with broad powers to act during these times, but it cannot require him to use those powers in a specific manner.<sup>478</sup> Indeed,

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<sup>469</sup> See *supra* Part III.B.

<sup>470</sup> *Id.*

<sup>471</sup> *Id.*

<sup>472</sup> *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

<sup>473</sup> *Id.* at 80 (Sotomayor, J., dissenting).

<sup>474</sup> *Id.* at 79–80.

<sup>475</sup> While the New York state legislature repealed the statute that granted Governor Cuomo additional powers during the COVID-19 pandemic, he still maintains the emergency powers he already had under the New York Executive Law and all his current executive orders remain in effect for the next sixty days. See S.B. 5357, 2021-2022 Gen Assemb., Reg. Sess. (N.Y. 2021). Moreover, the basis for the repeal had more to do with allegations of sexual harassment against Governor Cuomo and accusations that Cuomo's aides manipulating the death count at nursing homes than with Cuomo's issuance of executive orders. See Goodman & Hakim, *supra* note 339.

<sup>476</sup> See Farber, *supra* note 87, at 834–35.

<sup>477</sup> See *Printz v. United States*, 521 U.S. 898 (1997) (establishing that neither Congress nor federal regulators have the authority to require state officials to act).

<sup>478</sup> *Id.*

the “choice to act or not to act lies with the [governor].”<sup>479</sup> While a religious group may challenge an executive order limiting indoor gatherings, senior citizens cannot ask a court to order the governor to impose a mask mandate or orders its citizens to shelter in place as a means to keep them safe and healthy.<sup>480</sup> The underlying premise for this dichotomy lies with the Constitution being a “charter of negative rather than positive liberties.”<sup>481</sup> New York and Florida are two examples where the governor has responded to the COVID-19 pandemic differently.<sup>482</sup> In New York, as discussed in *supra* Part IV.A, Governor Cuomo has taken an active approach toward curbing the virus issuing numerous executive orders including a recent one limiting indoor gatherings which was successfully challenged by religious groups before the United States Supreme Court.<sup>483</sup> In contrast, Florida Governor DeSantis has not issued a mask mandate nor any recent social distancing restrictions and in fact has an order prohibiting any enforcement of local COVID-19 restrictions.<sup>484</sup> Unlike New York religious groups challenging Governor Cuomo’s mass gathering order, no Florida citizen or group can challenge Governor DeSantis’ failure to issue either a mask mandate or an order limiting mass gatherings.<sup>485</sup> Certainly, the Florida Legislature can choose to enact legislation, but it cannot be required to do so.<sup>486</sup> In non-emergency times Florida citizens, displeased with their elected officials’ actions or lack thereof, can simply vote them out of office.<sup>487</sup> However, in times of emergency, citizens do not have the luxury to wait for an election. With Governor DeSantis’ approval rating at 40% in October 2020, 8% below

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<sup>479</sup> See Rossi, *supra* note 35, at 268; Eric Posner, *You Can Sue to Stop Lockdowns, But You Can’t Sue to Get Them. That is Dangerous*, WASH. POST (May 4, 2020), [https://www.washingtonpost.com/outlook/lockdown-legal-challenges-constitution/2020/05/03/389af052-8aff-11ea-9dfd-990f9dcc71fc\\_story.html](https://www.washingtonpost.com/outlook/lockdown-legal-challenges-constitution/2020/05/03/389af052-8aff-11ea-9dfd-990f9dcc71fc_story.html) [https://perma.cc/7LUU-67WA]. In this commentary, Posner argues that courts should largely stay out of emergency public health matters because the courts can only respond to challenges to enjoin enforcement of executive orders and not to challenges that government has failed to appropriately enact such orders. *Id.* He says the result is “one-sided pressure on governors . . .” *Id.*

<sup>480</sup> Posner, *supra* note 479. Unlike Posner, I do not advocate that the judiciary stay out of public health emergency matters. *Id.* Thus far, most courts have come down on the side of the state. *Id.* Those holdings which find the executive orders likely enforceable certainly balance out the ones finding that they are not. *Id.*

<sup>481</sup> See Stephen Heyman, *First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 509 (1991) (quoting *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983)).

<sup>482</sup> See Opam, *supra* note 324; see also Finley, *supra* note 347.

<sup>483</sup> See *supra* Part IV.A.

<sup>484</sup> See *supra* Part IV.B.

<sup>485</sup> See Heyman, *supra* note 481.

<sup>486</sup> *Id.*

<sup>487</sup> *Id.* at 530.

the national average for governors and about 17% below the approval rating for Governor Cuomo, he may very well be voted out of office come the next election.<sup>488</sup>

### *B. Lessons Learned Early On*

Governors can certainly learn from recent judicial decisions how best to craft an executive order to withstand a constitutional challenge. For executive orders that seek to limit or prohibit non-essential mass gatherings, it is imperative that the order be neutral and generally applicable to better survive a challenge based on the Free Exercise Clause.<sup>489</sup> If it is neutral and generally applicable, that order is subject to rational basis review. Otherwise, the order would be analyzed under strict scrutiny.<sup>490</sup> That means the executive order should not “single” out religious organizations as the Kansas Governor did in one of her executive orders or the New York Governor in the most recent case before the U.S. Supreme Court.<sup>491</sup> Nor should the executive order be so riddled with exceptions to a mass gathering ban that it is no longer generally applicable.<sup>492</sup> The executive order also must not leave it to the discretion of law enforcement to decide “whether a religious person or entity has met the ‘no-more-than-10-inside-unless-impossible’ requirement.”<sup>493</sup> And finally, the governor will want to craft the executive order keeping in mind how such restrictions compare to similar secular gatherings. Governors can also tailor their orders based on latest scientific advancements. Recent scientific data points to COVID-19 transmitting easily in cafes, restaurants, gyms and reducing capacity in those venues to somewhere between 20–30% would significantly reduce infections.<sup>494</sup> Indeed, the New Jersey and New York governors followed the science and capped

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<sup>488</sup> See Lazer, *supra* note 343, at 8–10.

<sup>489</sup> See *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 888 (1990).

<sup>490</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 (2014); *see also* Corbin, *supra* note 168, at 6.

<sup>491</sup> See *First Baptist Church v. Kelly*, 455 F.Supp.3d 1078, 1089–90 (D. Kan. 2020) (analyzing an executive order limiting indoor religious services to no more than 10 persons); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (analyzing an executive order limiting indoor religious services in certain zones to 10 or 25 persons).

<sup>492</sup> See *Roberts v. Neace*, 958 F.3d 409, 413–14 (6th Cir. 2020).

<sup>493</sup> See *Berean Baptist Church v. Cooper*, 460 F. Supp. 3d 651, 660–61 (E.D.N.C. 2020).

<sup>494</sup> David Cyranoski, *How to Stop Restaurants from Driving COVID Infections*, NATURE (Nov. 10, 2020), <https://www.nature.com/articles/d41586-020-03140-4> [<https://perma.cc/6CNA-BLZT>].

indoor dining and gyms at 25%.<sup>495</sup> This would allow governors to balance the economic interests of these businesses while also curbing transmission.

Litigants also play a role by providing courts with evidence that the executive order does not relate to the requisite level of government interest. Litigants provided such evidence to convince both the Eleventh and Sixth Circuits that their Governor's executive order restricting or prohibiting elective medical procedures likely violated the constitutional right to abortion.<sup>496</sup> In doing so, the litigants produced evidence that the state's goal of reducing social interaction, freeing up hospital resources and conserving PPE were contradictory since banning or delaying abortions would result in ongoing pre-natal care which would actually increase hospital resources, PPE and social interactions.<sup>497</sup> And in *Roman Catholic Diocese*, plaintiffs provided evidence that it had complied with all COVID-19 mitigation measures and that neither the church nor the synagogue has had an outbreak since reopening.<sup>498</sup>

### *C. Continued Need for Emergency Executive Orders and Greater Role for State Legislatures and State Agencies*

Most states have had active states of emergency for COVID-19 since March 2020 for more than a year.<sup>499</sup> COVID-19 is not like other infectious diseases of the past that can be more easily contained with isolation and quarantine of just those infected or exposed.<sup>500</sup> Asymptomatic infection contributes to spreading the disease unknowingly.<sup>501</sup> COVID-19 does not rest, and neither should the governors in response. As with most initial emergencies, most governors quickly responded to COVID-19 by issuing executive orders aimed at curbing transmission though the stay-at-home orders and limits on gatherings were unpopular and negatively impacted the economy.<sup>502</sup> But, fast forward eight months later to November 2020, and the United States' daily COVID-19 positivity rates, death rates and hospitalizations were at an all-time high.<sup>503</sup> The emergency had not

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<sup>495</sup> See N.J. Exec. Order No. 183, *supra* note 47; *Interim Guidance For New York City Indoor Food Services During the COVID-19 Public Health Emergency*, N.Y.S. DEP'T HEALTH (May 7, 2021), [https://www.governor.ny.gov/sites/default/files/atoms/files/NYC\\_Indoor\\_Food\\_Services\\_Detailed\\_Guidance.pdf](https://www.governor.ny.gov/sites/default/files/atoms/files/NYC_Indoor_Food_Services_Detailed_Guidance.pdf) [<https://perma.cc/FQB7-P6N8>].

<sup>496</sup> *Robinson v. Att'y Gen.*, 957 F.3d 1171, 1182 (11th Cir. 2020); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 917 (6th Cir. 2020).

<sup>497</sup> *Robinson*, 957 F.3d at 1182; *Slatery*, 956 F.3d at 920.

<sup>498</sup> *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020).

<sup>499</sup> *COVID-19 Reopening and Reclosing Plans*, *supra* note 11.

<sup>500</sup> See *Wiley*, *supra* note 70, at 68–70.

<sup>501</sup> *Slivka*, *supra* note 72.

<sup>502</sup> See *Cloud*, *supra* note 127.

<sup>503</sup> *Mzezewa & Calahan*, *supra* note 140.

subsided; it had worsened.<sup>504</sup> And governors began to respond albeit slowly to issuing more restrictive orders in order to slow down the spread of the virus. New Mexico's department of health issued a two-week stay at home order.<sup>505</sup> By January 2021, with three thousand U.S. citizens dying every day from COVID-19, response needed to be swift.<sup>506</sup> While opposition to these restrictions are significant, the majority of Americans supported many of their governor's restrictive measures.<sup>507</sup> Even more telling are the approval ratings, with hands-on approach governors (like New York and New Jersey) receiving much higher approval ratings than hands-off governors (like Florida).<sup>508</sup>

In less emergent areas, more state legislatures and state agencies should enact COVID-19 related statutes or regulations rather than the governor issuing executive orders. Unlike an executive order which is issued quickly, a bill goes through a formal process.<sup>509</sup> The time that it takes to pass a bill, even one that moves more quickly, allows for revision, reflection and amendment.<sup>510</sup> For these reasons, certain COVID-19 measures that will be necessary to implement for a longer period of time should be taken up by state legislatures, even those only in session for part of the year.

For example, a requirement for citizens to wear face coverings in public should come out of the legislature via statute or alternatively the state health department via a regulation. The science is clear that facial coverings protect both the wearer and those the wearer encounters.<sup>511</sup> New Jersey, Pennsylvania and Minnesota had face mask bills introduced but so far none have passed.<sup>512</sup> Passing these bills would essentially codify their respective Governor's executive order mandating mask wearing in public. But even more, it would likely alter citizens' perspective of the mask requirement since it would now come from the formal rule making body.

New York provides a model for states with a full-time or a significant part-time legislature to follow as the New York State Legislature has enacted significant COVID-19 related legislation and the state health

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<sup>504</sup> See Cloud, *supra* note 127.

<sup>505</sup> N.M. Pub. Health Order, *supra* note 142.

<sup>506</sup> *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> [https://perma.cc/8XEV-49FH] (last visited May 1, 2021).

<sup>507</sup> Daniller, *supra* note 125.

<sup>508</sup> See Lazer, *supra* note 343.

<sup>509</sup> See Wiley, *supra* note 70, at 59–60.

<sup>510</sup> *Id.* at 60.

<sup>511</sup> See *Scientific Brief*, *supra* note 130.

<sup>512</sup> Carl Smith, *Lawmakers Get Tough with Mask Requirements: Legislative Watch*, GOVERNING (Sept. 9, 2020), <https://www.governing.com/next/lawmakers-get-tough-with-mask-requirements-legislative-watch.html> [https://perma.cc/TF2P-G45A].

department has promulgated some emergency regulations concerning social distancing measures.<sup>513</sup> For example, while Governor Cuomo initially issued executive orders providing a moratorium on utilities and evictions, those measures were taken up and passed by the state legislature.<sup>514</sup> As bills, they were introduced, debated and passed by the Senate and Assembly.<sup>515</sup> They were then signed by the New York Governor.<sup>516</sup>

While under difficult circumstances, the Michigan legislature enacted bi-partisan legislation that had been previously covered by Governor Whitmer's executive orders.<sup>517</sup> And, it did so fairly quickly by passing six bills within three weeks after the Michigan Supreme Court said Governor Whitmer's executive orders concerning COVID-19 were no longer valid.<sup>518</sup>

Even state agencies can take a larger role by promulgating more formal regulations. The Virginia emergency standard for workplace safety provides a prime example.<sup>519</sup> That standard went through several iterations and provided for public comments.<sup>520</sup> While not expedient, these workplace regulations are less likely to be modified and more likely to have stronger buy-in from employers and citizens alike.

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<sup>513</sup> See, e.g., S.B. 08113, 2019-2020 Gen. Assemb., Reg. Sess. (N.Y. June 20, 2020); S.B. 08427, 2019-2020, Gen. Assemb., Reg. Sess. (N.Y. May 30, 2020).

<sup>514</sup> See, e.g., S.B. 08113A, 2019-2020 Gen. Assemb., Reg. Sess. (N.Y. June 20, 2020) (concerning a moratorium on utility termination services during the pandemic); S.B. 08427, 2019-2020, Gen. Assemb., Reg. Sess. (N.Y. May 30, 2020) (providing for employee death benefit for those contracting COVID-19 in the workplace).

<sup>515</sup> S.B. S8113A, 2019-2020 Gen. Assemb., Reg. Sess. (N.Y. 2020); S.B. S8427, 2019-2020 Gen. Assemb., Reg. Sess. (N.Y. 2020).

<sup>516</sup> See S.B. S8113A, *supra* note 515; S.B. S8427, *supra* note 515.

<sup>517</sup> See, e.g., S.B. 1094, 100th Leg., Reg. Sess. (Mich. 2020); H.B. 6137, 100th Leg., Reg. Sess. (Mich. 2020); S.B. 886, 100th Leg., Reg. Sess., (Mich. 2020).

<sup>518</sup> Derick Hutchinson, *Michigan Gov. Gretchen Whitmer Signs 6 COVID-19 Bills Into Law*, CLICK ON DETROIT (Nov. 5, 2020), <https://www.clickondetroit.com/health/2020/11/05/michigan-gov-gretchen-whitmer-signs-6-covid-19-bills-into-law/> [<https://perma.cc/GP6D-RPEH>].

<sup>519</sup> See VA. DEP'T OF LABOR, EMERGENCY TEMPORARY STANDARD, INFECTIOUS DISEASE PREVENTION: SARS-CoV-2 VIRUS THAT CAUSES COVID-19, 16VAC25-220 (July 27, 2020), <https://www.doli.virginia.gov/wp-content/uploads/2020/07/RIS-VR-FINAL-COVID-19-Emergency-Temporary-Standard-FOR-PUBLIC-DISTRIBUTION-final-July-23.2020.pdf> [<https://perma.cc/WHE5-D4SV>].

<sup>520</sup> *Virginia Safety and Health Codes Board Adoption of COVID-19 Emergency Temporary Standard/Emergency Regulation*, DEP'T OF LAB. AND INDUSTRY, <https://www.doli.virginia.gov/virginia-safety-and-health-codes-board-adoption-of-covid-19-emergency-temporary-standard-emergency-regulation/> [<https://perma.cc/L36S-B4BE>] (last visited May 20, 2021).

## VII. CONCLUSION

As we reflect on 2020, it is useful to consider how the majority of state governors used emergency executive orders during this ongoing crisis. Governors needed to act quickly in order to curb the spread of COVID-19. This often took the form of orders to limit gathering sizes, close certain non-essential businesses where there can be significant transmission such as bars and even close schools.<sup>521</sup> Battling a highly contagious virus, a governor could not simply wait for the state legislature to pass an emergency statute. It takes too long for a state health agency to go through the formal process of issuing an emergency regulation. Neither the legislature nor the judiciary should be involved in the executive order process unless the governor oversteps her bounds. Their role should be one of a “check” and not one of participation. That check is easily met if the legislature can terminate a state of emergency by concurrent resolution and, as of March 2021, about thirty-three states had that authority.<sup>522</sup> Likewise, the courts should be there to properly balance the urgent need for the governor to curb transmission of the virus with potential constitutional violations. It should not be there to substitute its decision for that of the governor.

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<sup>521</sup> See Wiley, *supra* note 70, at 69–70.

<sup>522</sup> See *infra* Appendix A.



## APPENDIX A

Appendix A contains a chart of some key components of each state's emergency disaster statute.<sup>523</sup> The first column lists each state/U.S. territory alphabetically. Column two lists the maximum duration of the emergency declaration if applicable. Column three looks at who may extend the declaration of emergency if applicable. Column four lists whether the state legislature has authority to terminate a declaration of emergency.<sup>524</sup>

STATE/U.S. TERRITORY	DURATION	WHO MAY EXTEND?	LEGISLATIVE AUTHORITY TO TERMINATE DECLARATION OF EMERGENCY
Alabama	60 Days	Governor or	N/A

<sup>523</sup> Included in this chart are the emergency disaster statutes for the District Columbia, Guam, Puerto Rico and the U.S. Virgin Islands.

<sup>524</sup> The information collected in Appendix A for columns two, three and four were gathered by looking at the following statutes which were in effect as of December 31, 2020: ALA. CODE § 31-9-8 (2020); ALASKA STAT. § 26.20.040 (2020); ARIZ. REV. STAT. ANN. § 26-303 (2020); ARK. CODE ANN. § 12-75-107 (2020); CAL. GOV'T CODE §§ 8624, 8629 (West 2020); COLO. REV. STAT. § 24-33.5-704 (2020); CONN. GEN. STAT. § 28-9 (2020); DEL. CODE ANN. tit. 20, § 3115 (2020); D.C. CODE § 7-2306 (2021); FLA. STAT. § 252.36 (2020); GA. CODE ANN. § 38-3-51 (2020); 10 GUAM CODE ANN. § 19405 (2019); HAW. REV. STAT. § 127A-14 (2020); IDAHO CODE § 46-1008 (2020); 20 ILL. COMP. STAT. 3305/7 (2020); IND. CODE § 10-14-3-12 (2020); IOWA CODE § 29C.6 (2020); KAN. STAT. ANN. § 48-924 (2020); KY. REV. STAT. ANN. § 39A.100 (West 2020); LA. STAT. ANN. § 29:724 (2020); ME. REV. STAT. tit. 37-B, § 743 (2019); MD. CODE ANN., PUB. SAFETY § 14-107 (West 2020); MICH. COMP. LAWS § 30.403 (2020); MINN. STAT. § 12.31 (2020); MISS. CODE ANN. § 33-15-11 (2021); MO. REV. STAT. § 44.100 (2020); MONT. CODE ANN. § 10-3-505 (2019); NEB. REV. STAT. § 81-829.40 (2020); NEV. REV. STAT. § 414.070 (2020); N.H. REV. STAT. ANN. § 4:45 (2020); N.J. STAT. ANN. § 26:13-3 (West 2020); N.M. STAT. ANN. § 12-10A-5 (2020); N.Y. EXEC. LAW § 29-a (McKinney 2020); N.C. GEN. STAT. § 166A-19.20 (2020); N.D. CENT. CODE § 37-17.1-05 (2019); OKLA. STAT. tit. 63, § 683.9 (2020); OR. REV. STAT. § 401.192 (2020); 35 PA. STAT. AND CONS. STAT. ANN. § 7301(C) (West 2020); P.R. LAWS ANN. tit. 3, § 1942 (2021); 30 R.I. GEN. LAWS § 30-15-9 (2020); S.C. CODE ANN. § 25-1-440 (2020); S.D. CODIFIED LAWS § 34-48A-5 (2020); TENN. CODE ANN. § 58-2-107 (2020); TEX. GOV'T CODE ANN. § 418.014 (West 2019); UTAH CODE ANN. § 53-2A-206 (West 2020); VT. STAT. ANN. tit. 20, § 9 (2020); VA. CODE ANN. § 44-146.17 (2020); V.I. CODE ANN. tit. 23, § 1005 (2020); WASH. REV. CODE § 43.06.220 (2020); W. VA. CODE § 15-5-6 (2020); WIS. STAT. § 323.10 (2019); WYO. STAT. ANN. § 19-13-104 (2020).

STATE/U.S. TERRITORY	DURATION	WHO MAY EXTEND?	LEGISLATIVE AUTHORITY TO TERMINATE DECLARATION OF EMERGENCY
		Legislature	
Alaska	30 Days	Legislature	Yes
Arizona	N/A	N/A	Yes
Arkansas	60 Days	N/A	Yes
California	N/A	N/A	Yes
Colorado	30 days	N/A	Yes
Connecticut	N/A	N/A	Yes
Delaware	30 Days	N/A	N/A
District of Columbia	90 days COVID-19	N/A	N/A
Florida	60 days	Governor	Yes
Georgia	30 days	N/A	Yes
Guam	30 days	N/A	Yes
Hawaii	60 days	N/A	N/A
Idaho	30 Days	N/A	Yes
Illinois	30 days	N/A	N/A
Indiana	30 days	N/A	Yes
Iowa	30 days	N/A	Yes
Kansas	15 days	Legislature	N/A
Kentucky	N/A	N/A	N/A
Louisiana	30 days	N/A	Yes
Maine	30 days	N/A	Yes
Maryland	30 days	N/A	Yes
Massachusetts	N/A	N/A	N/A
Michigan	28 days	Legislature	N/A
Minnesota	5 days	Executive Council may extend to 30 days.	Yes
Mississippi	30 days	Governor	N/A
Missouri	N/A	N/A	Yes
Montana	45 days	N/A	N/A
Nebraska	N/A	N/A	Yes
Nevada	N/A	N/A	Yes
New Hampshire	21 days	N/A	Yes
New Jersey	30 days	N/A	N/A
New Mexico	30 days	N/A	No, by governor
New York	6 Months	Governor	Yes

STATE/U.S. TERRITORY	DURATION	WHO MAY EXTEND?	LEGISLATIVE AUTHORITY TO TERMINATE DECLARATION OF EMERGENCY
North Carolina	N/A	N/A	Yes, if Legislature is the authority that declared emergency.
North Dakota	N/A	N/A	Yes
Ohio	N/A	N/A	N/A
Oklahoma	N/A	Public Health Emergency must be approved by State Legislature in special session.	Yes
Oregon	N/A	N/A	Yes
Pennsylvania	90 days	N/A	Yes
Puerto Rico	N/A	N/A	Legislature shall pass judgment on the content of emergency order.
Rhode Island	30 days	N/A	Yes
South Carolina	15 days	General Assembly	N/A
South Dakota	6 months	N/A	Yes
Tennessee	30 days	N/A	N/A
Texas	30 days	N/A	Yes
Utah	30 days	N/A	Yes
Vermont	N/A	N/A	N/A
Virginia	N/A	N/A	N/A
U.S. Virgin Islands	30 days	Gov. must submit legislation to extend.	N/A
Washington	30 days	Legislature	N/A
West Virginia	30 days	N/A	Yes
Wisconsin	60 Days	Legislature	Yes
Wyoming	N/A	N/A	N/A