

SYMPOSIUM: PANDEMICS AND THE CONSTITUTION

**CALLING THEIR OWN SHOTS: GOVERNORS’
EMERGENCY DECLARATIONS DURING THE
COVID-19 PANDEMIC**

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In April 2020, thousands of protesters assembled in front of state capital buildings and governors’ homes, often in violation of state stay-at-home orders, calling for the end of state emergency orders put in place to combat the spread of COVID-19.¹ Much of the messaging at these protests centered on the devastating economic impact of the COVID-19 pandemic and the widespread use of non-essential business closures and stay-at-home orders to curtail disease transmission. In a reversal of the traditional call for states’ rights, some of the protestors called into question the constitutional authority of governors enacting emergency orders in response to COVID-19, calling the action overreaching and violative of federal and state constitutions.²

State powers to quarantine, isolate, and take other measures to protect the public health and welfare, however, are well-established. The police powers, reserved for states in the Tenth Amendment³ and upheld by the U.S. Supreme Court in *Jacobson v. Massachusetts*,⁴ give states and their governors extremely broad powers to enact “reasonable regulations”

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1. *Coronavirus: US Faced With Protests Amid Pressure to Reopen*, BBC NEWS (Apr. 20, 2020), <https://www.bbc.com/news/world-us-canada-52348288>

2. Stephen Sorace, *Protesters Rally Against Washington’s Coronavirus Stay-at-home Order: “Give Me Liberty or Give Me Covid 19,”* FOX NEWS (Apr. 20, 2020), <https://www.foxnews.com/us/washington-coronavirus-protest-inslee-stay-at-home>

3. The text of the Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

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

to protect public health and safety.⁵ Additionally, most states constitutions and statutes specifically grant governors authority to take a variety of protective measures during emergencies. While large-scale quarantine and isolation orders have not been implemented in the United States, these powers rest comfortably within states' public health authority to address public health emergencies. Public health emergencies such as disease outbreaks and pandemics necessitate a complex response by federal, state, and local authorities, requiring swift and effective action to slow disease spread, provide treatment to infected populations, and mitigate further community harm.⁶

Unlike other recent disease outbreaks with limited transmission capability and risk, such as the Zika virus, which spread largely through infected mosquitos in population dense geographies,⁷ COVID-19 spreads more effectively.⁸ As a respiratory infection, COVID-19's primary modes of transmission are through respiratory droplets in the air and from touching surfaces.⁹ These comparatively easy transmission modes necessitate drastic measures to reach one of the key goals of a public health response: curbing the transmission of disease. Without extensive testing and treatment options available for COVID-19, the most effective mechanism for limiting transmission within a community is to strongly promote social distancing.¹⁰ In light of these factors, many states adopted novel orders designed to promote appropriate health measures while taking into account unique state cultural, geographic, or population attributes. While the effectiveness of many of these novel orders has yet to be evaluated, the state-by-state approach is more tailored to each state's special circumstances than a blanket federal order would be, possibly lessening resistance to them.

5. *Id.*

6. CENTER FOR LAW AND THE PUBLIC'S HEALTH, THE MODEL STATE EMERGENCY HEALTH POWERS ACT (2001), available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA.pdf> (last visited Apr. 20, 2020).

7. CENTERS FOR DISEASE CONTROL AND PREVENTION, ZIKA TRANSMISSION, <https://www.cdc.gov/zika/prevention/transmission-methods.html> (last visited Apr 20, 2020).

8. WORLD HEALTH ORGANIZATION, MODES OF TRANSMISSION OF VIRUS CAUSING COVID-19: IMPLICATIONS FOR IPC PRECAUTION RECOMMENDATIONS (2020), <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (last visited Apr 20, 2020).

9. Neeltje Van Doremalen et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, 382 NEW ENG. J. MED. 1564, 1564–67 (2020) (describing the nature of COVID-19 as stable on various surfaces and able to be transmitted through the air).

10. CENTERS FOR DISEASE CONTROL AND PREVENTION, SOCIAL DISTANCING, QUARANTINE, AND ISOLATION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited Apr 20, 2020).

This paper first outlines state powers to combat emergencies and public health emergencies, and then analyzes specific measures taken by the states.

I. PRIMER OF STATE POWERS DURING EMERGENCIES

A state's broad powers to protect its citizens is well-established in the police powers,¹¹ and the locus of this power is typically the governor. The U.S. Supreme Court famously upheld the right of states to protect the health, welfare, and safety of its citizens in *Jacobson v. Massachusetts*, a case in which a Massachusetts resident contested the right of the state to statutorily compel smallpox vaccination. There, the Supreme Court wrote that:

Although this court has refrained from any attempt to define the limits of that [Tenth Amendment] power, it has distinctly recognized the authority of a state to enact quarantine laws and "health laws of every description. . . ." According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.¹²

Even prior to *Jacobson*, the Supreme Court upheld a state board of health's right to quarantine during an unspecified epidemic,¹³ finding that "from an early day the power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress."¹⁴ More than 100 years after *Jacobson*, challenges to a state's authority to protect the public health are typically decided in favor of the state, based on the reasoning in *Jacobson*.¹⁵

Additionally, most states grant governors specific powers through their state constitutions or statutes. These laws outline more explicitly the powers and procedures for governors to act to protect public health safety. State constitutions establish the governor as the state's Commander-In-Chief, with an affirmative duty to protect citizens. Statutorily, states may provide a framework, such as a Governor's Emergency Powers Act or Public Health Emergencies Act¹⁶ that lays out specific powers.

11. U.S. CONST. amend. X.

12. *Jacobson*, 197 U.S. at 25.

13. *Campagne Francaise de Navigation A Vapeur v. Louisiana State Bd. of Health*, 186 U.S. 380, 396-98 (1902).

14. *Id.* at 25.

15. See, e.g., *Phillips v. City of New York*, 755 F.3d 538, 542 (2d Cir. 2015).

16. Many of these frameworks are based in part on The Model State Emergency Health Powers Act, which was drafted in 2001 to provide states with a model to address modern public health

A. *Governors' Powers Generally*

All states grant their governors the power to declare a state of emergency for either man-made or natural disasters. Extraordinary powers accompany this declaration, and typically allow a governor to deploy resources, expend funds for response efforts and resources, order quarantine and isolation, order evacuations and control the movement of people, seize property, and in many cases, suspend the effect of statutes as necessary to respond to the emergency.¹⁷ In addition to enumerating specific emergency powers, most states include a broad grant of power to the governor to “[u]tilize all available resources of the state government and of each political subdivision of the state, as reasonably necessary to cope with the emergency.”¹⁸ Additionally, governors may often “[t]ransfer the direction, personnel, or functions of state departments and agencies or units thereof for the purpose of performing or facilitating emergency services.”¹⁹ Governors may quarantine vessels entering state waters in many states, if the “Governor has strong grounds to believe that there is a danger of a malignant and contagious disease being introduced into the State.”²⁰ They may also “[p]rohibit or restrict contact between the State and the place affected by the disease.”²¹

B. *Public Health Emergency Declarations and Powers*

Many states distinguish between emergency declarations and public health emergency (PHE) declarations, such as in Maryland, New Jersey, and New Mexico.²² PHE declarations may include a suite of powers that focus on public health measures, such as quarantine, isolation, testing, vaccination, and other measures. Most states that allow governor-declared public health emergencies specify that a governor should make such a declaration with the counsel and advice of the state health official.²³

emergencies. Many governors' public health emergencies powers are taken in part from the Model Act; however, state-to-state variation occurs in the nearly 40 states that have adopted part of the Act. See MODEL ACT, *supra* note 6.

17. See, e.g., MONT. CODE ANN. § 10-3-104(2) (West 2016); OR. REV. STAT. § 433.441 (West 2016).

18. FL. STAT. ANN. § 252.36(5)(b-c) (2016).

19. *Id.*

20. MD. CODE ANN., HEALTH—GEN. § 18-212.1 (2016).

21. *Id.*

22. See N.J. REV. STAT. § 26:13-3 (2016); N.M. STAT. ANN. § 12-10A-5 (2016).

23. E.g., N.M. STAT. ANN. § 12-10A-5 (2016) (“Prior to a declaration of a state of public health emergency, the governor shall consult with the secretary of health.”); S.C. CODE ANN. § 25-1-440 (2016) (stating that “prior to the declaration of a public health emergency, the Governor must consult with the Public Health Planning Committee and may consult with any public health agency and other

Additionally, although the ability to declare a public health emergency may rest with the governor, most actions typically taken under that declaration are specified as the duties of the state health official,²⁴ and states often specify that governors should delegate these actions to the state health official. In general, states do not specify a *governor's* right to quarantine and isolate; however, many statutes include language that the governor may direct the health secretary or state health agency to implement quarantine and isolation orders. In Georgia, for example, “[t]he Governor may direct the Department of Public Health to coordinate all matters pertaining to the response of the . . . public health emergency” which may include quarantine and isolation.²⁵

It is important to note for this article that while most state and local health officials are vested with the power to issue quarantine and isolation orders to protect public health, many states tie the ability to implement widespread quarantine and isolation with a declared state of emergency, declared catastrophic health emergency, or declared health emergency—a power that in almost all states rests solely with the governor.²⁶ For example, Virginia states that “[n]o affected area shall be the subject to an order of quarantine issued by the State Health Commissioner unless the Governor . . . has declared a state of emergency for such affected area.”²⁷

C. *Limits on Emergency Powers*

Whether a declared general or public health emergency, it is important to note that these broad grants of power are not unlimited; almost all states limit emergency declarations to a specified period—usually thirty days,²⁸ although some may go longer, such as sixty days in

experts as necessary. Nothing herein shall be construed to limit the Governor’s authority to act without such consultation when the situation calls for prompt and timely action”).

24. See, e.g., N.M. STAT. § 12-10A-6 (2016) (listing special powers of the state secretary of health during a declared public health emergency).

25. GA. CODE ANN. § 38-3-51(i) (2016).

26. See, e.g., VA. CODE ANN. § 32.1-48.09 (2016); CONN. GEN. STAT. § 19a-131b (2016) (“if the Governor has declared a public health emergency, the commissioner, if so authorized by the Governor pursuant to section 19a-131a, may order into quarantine or isolation, as appropriate, any individual, group of individuals or individuals present within a geographic area”); MD. CODE ANN., PUB. SAFETY § 14-3A-02 & § 14-3A-03 (2016) (“If the Governor determines that a catastrophic health emergency exists, the Governor may issue a proclamation” that authorizes the Secretary of Health to “require individuals to go to and remain in places of isolation or quarantine”).

27. VA. CODE ANN. § 32.1-48.09 (2016).

28. See, e.g., N.J. STAT ANN. § 26:13-3(b) (2016) (“Any public health emergency declared pursuant to this act shall be terminated automatically after 30 days unless renewed by the Governor”); TEX. HEALTH & SAFETY CODE ANN. § 81.082(d) (West 2016) (“A declaration of a public health

Florida, or shorter, such as fifteen days in the case of South Carolina.²⁹ All states provide mechanisms for governors to renew emergency declarations for additional periods as necessitated by the emergency. Finally, while these extensions are usually left to the governor's discretion, many states specify protections to avoid abuse. In Maryland, for example, a joint resolution issued from the General Assembly can terminate a state of emergency.³⁰ In South Carolina, the state's General Assembly must consent to extend the declaration beyond the fifteen days.³¹

D. Challenges to Governors' Powers

In addition to the state constitutional and statutory limits placed on governors' powers, as the current pandemic has progressed, residents in many states have begun to protest governor-issued stay-at-home orders, both civilly and legally. While many of the civil protests are rooted in the belief that such orders are inherently against the individual liberties guaranteed by the Constitution (an argument largely foreclosed by *Jacobson*), it's important to note that some legal challenges to particular aspects of stay-at-home orders have met with success. The Wisconsin Supreme Court made national headlines in May, when it declared that an extension of a stay-at-home order issued by the Secretary of Health, at the direction of the Governor, was "unenforceable."³² However, the Court took pains to make clear the case was "not about Governor Tony Evers' Emergency Order or the powers of the Governor."³³ Rather, the case focused on the order issued solely by the Secretary of Health, Emergency Order 28, which the Court found had failed to follow required emergency rulemaking procedures.³⁴

Nonetheless, the duration of the COVID-19 pandemic makes future challenges to prolonged stay-at-home orders likely. The success of such challenges will likely hinge on the balancing test articulated in *Jacobson* of the state's interest in protecting its residents versus the intrusion on civil liberties; as cases decline in a state, governors may need to recalibrate

disaster may continue for not more than 30 days" without renewal, but the "governor may terminate a declaration of a public health disaster at any time.").

29. S.C. CODE ANN. § 25-1-440(a)(2) (2016).

30. MD. CODE ANN., PUB. SAFETY § 14-107(a)(4) (West 2016).

31. S.C. CODE ANN. § 25-1-440(a)(2) (2016). Conversely, in Florida, a declaration may last 60 days before automatically terminating, unless renewed by the Governor. FLA. STAT. ANN. § 252.36(2) (2016). The state legislature may terminate a declaration by concurrent resolution. *Id.*

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

33. *Id.*

34. *Id.*

orders. In fact, this is already happening, as governors alter stay-at-home orders gradually to allow for a return to a “new normal.”³⁵

II. STATE EMERGENCY MEASURES ENACTED IN RESPONSE TO COVID-19

For the first time in history, every state in the United States and the District of Columbia officially declared a state of emergency in response to the same emergency.³⁶ In addition to emergency declarations, states enacted a wide variety of emergency orders, from stay-at-home mandates to consumer protections.³⁷ This unprecedented response to the COVID-19 pandemic provides a unique opportunity to assess the different ways each state government utilizes its emergency powers to fight this pandemic. Learning from responses in other nations and jurisdictions, most states exercised emergency powers with an intention to:

1. Limit the spread of the virus within the population;
2. Enhance and protect the supply of personal protective equipment;
3. Increase hospital capacity to support patients; and/or
4. Buffer the economic costs of the disaster.

The general outlines of these efforts are described in turn.

A. *Limiting the Spread*

As per guidance from public health officials, the most effective way to limit transmission of COVID-19 is to make it more difficult for a contagious individual, who may be asymptomatic, to infect another.³⁸ Because COVID-19 can be transmitted through the air and on surfaces by asymptomatic individuals, the most effective method for limiting the spread is to limit individuals’ ability congregate in groups. Initial state

35. *See infra*, Sec. III.

36. Jason Hoffman, *For the First Time in US History, Every State is Under a Disaster Declaration Simultaneously*, CNN, https://edition.cnn.com/world/live-news/coronavirus-pandemic-04-11-20/h_a72269d9659294b60f09c1eb6acec702 (last accessed Apr. 11, 2020).

37. Ben Yelin, UNIVERSITY OF MARYLAND CENTER FOR HEALTH AND HOMELAND SECURITY, 50 STATE SUMMARY OF COVID-19 ACTIONS (2020), <https://www.mdchhs.com/2020/03/30/infographic-50-state-summary-of-covid-19-actions> (last visited Apr. 20, 2020).

38. Interim Guidance, Infection Prevention and Control During Health Care When Coronavirus Disease (COVID-19) is Suspected or Confirmed, WORLD HEALTH ORGANIZATION, at 3-4, June 29, 2020, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/infection-prevention-and-control> (last visited July 2, 2020).

measures taken to limit large gatherings prohibited gatherings of 250 people or more.³⁹ Within weeks, states recognized the need for stricter measures to promote social distancing with many states then closing schools,⁴⁰ fitness centers,⁴¹ close-contact businesses such as salons and tattoo parlors,⁴² and closing on-premises dining establishments.⁴³ Needing even more social distancing within communities, states began ordering the closure of non-essential businesses⁴⁴ and issuing “stay at home” orders for their residents.⁴⁵ Eventually, many states adopted the Center for Disease Control’s guidance and prohibited gatherings of ten people or more—though several states prohibited gatherings of five people or more or any non-household gatherings.⁴⁶

Outside of the relatively standard orders to promote social distancing, some states also took unique approaches to limit the possibility of the virus spreading. For example, New Hampshire temporarily required all grocery stores to use single use paper or plastic bags to prevent disease transmission from reusable cloth grocery bags.⁴⁷

B. *Protecting the Supply Chain*

States also passed numerous emergency orders to protect and enhance medical supplies, primarily personal protective equipment (PPE). These efforts included ways to limit the use of personal protective equipment for activities other than treating COVID-19 patients, as well as promoting the transportation of these supplies. Some of these efforts to preserve the use of personal protective equipment for COVID-19 cases

39. See, e.g., MD. Exec. Order No. 20-03-30-01 (Mar. 12, 2020) (prohibiting large gatherings and events and closing senior centers); Or. Exec. Order No. 20-05 (Mar. 12, 2020) (prohibiting large gatherings due to coronavirus (COVID-19)); Mich. Exec. Order No. 2020-5 (Mar. 13, 2020) (temporary prohibition on large assemblages and events, temporary school closures).

40. See *Map: Coronavirus and School Closures*, ED. WEEK (2020), available at, <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html> (last visited April 18, 2020).

41. See, e.g., W. Va. Exec. Order 3-20 (Mar. 18, 2020).

42. Close contact businesses are generally those that require a service provider to physically touch the patron, such as hair salons, nail salons, massage parlors, and tattoo parlors. See, e.g., Tenn. Exec. Order No. 21 (Mar. 30, 2020); Iowa Proclamation of Disaster Emergency (Mar. 22, 2020); Vt. Exec. Order No. 01-20 (Mar. 20, 2020).

43. See, e.g., S.C. Exec. Order No. 2020-10 (Mar. 17, 2020)

44. See, e.g., S.C. Exec. Order No. 2020-17 (Mar. 31, 2020)

45. See, e.g., Wisc. Emergency Order #12: Safer at Home Order (Mar. 24, 2020); Alabama Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 (amend. Apr. 3, 2020); Cal. Exec. Order No. 33-20 (Mar. 19, 2020).

46. Yelin, *supra* note 37.

47. New Hampshire Emergency Order 10 Pursuant to N.H. Exec. Order No. 2020-04 (Mar. 21, 2020)

included limiting the private sale of PPE,⁴⁸ stopping non-essential medical and dental procedures that would require the equipment,⁴⁹ and allowing donations of PPE from healthcare providers.⁵⁰

In addition to personal protective equipment, many states worked to increase the supplies of hand sanitizer. This included granting pharmacies permission to compound hand sanitizer on premises that would not traditionally sell compounded over the counter hand sanitizer.⁵¹ Some states also authorized non-traditional producers of hand sanitizer,⁵² such as distilleries and breweries.⁵³ To promote the transportation of critical supplies, most states have waived road weight requirements and driver time limitations for truckers.⁵⁴

C. *Increase Hospital Capacity*

Even with the strong social distancing measures and limitations on non-essential medical procedures, the pandemic created a surge of medical need, requiring facilities to increase their capacity to care for patients. To do so, some states enacted orders directing facilities to bring in more patient beds and waiving licensing requirements for those beds in order to provide more beds for patients.⁵⁵ Many states also took measures to increase its medical workforce by waiving licensure requirements from providers with licenses held in other states,⁵⁶ permitting certain students to begin practicing in their field as if they were licensed,⁵⁷ and temporarily increasing the scope of practice for some medical professions.⁵⁸ Many states also eased restrictions on telemedicine services, promoting greater

48. *See, e.g.*, New Mexico Public Health Order Temporarily Regulating the Sale and Distribution of Personal Protective Equipment Due to Shortages Caused by COVID-19 (Mar. 24, 2020).

49. *See, e.g.*, Utah Public Health Order dated March 23, 2020.

50. *See, e.g.*, N.C. Exec. Order No. 122 (Mar. 30, 2020).

51. *See* New Hampshire Emergency Order 13 Pursuant to Executive Order 2020-04.

52. *See* Conn. Exec. Order No. 7B (Mar. 14, 2020).

53. *Dogfish Head Scratch-Made Hand Sanitizer*, DOGFISH HEAD CRAFT BREWED ALES, <https://www.dogfish.com/blog/dogfish-head-scratch-made-hand-sanitizer> (last visited Apr. 20, 2020).

54. . Emergency Declarations, Waivers, Exemptions and Permits, FED. MOTOR CARRIER SAFETY ADMIN., <https://www.fmcsa.dot.gov/emergency-declarations> (last visited Apr. 20, 2020).

55. *See, e.g.*, Va. Exec. Order No. 52 (Mar. 20, 2020) (ordering increases in hospital bed capacity for COVID-19).

56. *See, e.g.*, Connecticut Public Health Order (Mar. 23, 2020).

57. *See, e.g.*, Indiana Executive Order 20-13, Directives to Manage Indiana's Health Care Response for Hoosiers with COVID-19 During the Public Health Emergency (Mar. 30, 2020).

58. *See, e.g.*, Massachusetts Order Extending the Registrations of Certain Licensed Professionals (Mar. 18, 2020).

healthcare capacity overall for residents without risking their exposure to the virus.⁵⁹

D. *Buffering Economic Costs*

The measures taken to limit the spread of COVID-19 inevitably result in economic damage to the economy as businesses reduce hours, temporarily cease operations, or close due to the social distancing requirements. Some industries were able to shift to virtual work settings, allowing many workers to complete their duties from home. This move has been seen as largely beneficial by some employers, with large employers like Twitter now announcing that some employees will be able to continue remote work after the pandemic social distancing measures end.⁶⁰ This will likely have downstream effects to the broader economy, with industries that rely on office workers—such as restaurants located in business districts—may see a reduction in customer volume to a point that may endanger those businesses survival.

To buffer against a complete economic collapse following the necessary social distancing measures to address the pandemic, the federal government enacted three laws to mitigate the economic losses resulting from the pandemic: Coronavirus Preparedness and Response Supplemental Appropriations Act;⁶¹ the Families First Coronavirus Response Act (FFCRA);⁶² and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).⁶³ States also have taken measures to support businesses and protect consumers from catastrophic hardships, such as the California Infrastructure and Economic Development Bank, which was allocated \$50 million in funding to provide guaranteed loans to small businesses of up to \$50,000.⁶⁴ Additionally, many states have suspended evictions and foreclosure proceedings⁶⁵ and placed

59. See, e.g., Ariz. Exec. Order No. 2020-29 (Apr. 12, 2020) (increased telemedicine access for workers' compensation).

60. Brian Fung, *Twitter Will Let Some Employees Work From Home "Forever,"* CNN (2020), <https://www.cnn.com/2020/05/12/tech/twitter-work-from-home-forever/index.html> (last visited May 22, 2020).

61. H.R. 6074, 116th Cong. (Mar. 6, 2020).

62. H.R. 6201, 116th Cong. (Mar. 18, 2020).

63. Public Law 116-136 (Mar. 27, 2020); see Kelsey Snell, *What's Inside The Senate's \$2 Trillion Coronavirus Aid Package*, NPR (Mar. 26, 2020), <https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package>

64. Office of Governor, Governor Newsom Announces New Help for Small Businesses & Workers Displaced by COVID-19 (Apr. 2, 2020), <https://www.gov.ca.gov/2020/04/02/governor-newsom-announces-new-help-for-small-businesses-workers-displaced-by-covid-19>.

65. See, e.g., N.J. Exec. Order No. 106 (Mar. 19, 2020).

moratoriums on utility shut offs as a way to protect consumers who have lost work or income due to the pandemic.⁶⁶

E. State Variances in COVID-19 Emergency Orders

While many states enacted similar emergency measures, some states also addressed issues specific to their state under their COVID-19 emergency declaration. For example, the State of Maine has enacted numerous emergency orders to expand and protect fishing industries in the state.⁶⁷ In Florida, which relies heavily on a tourism industry, the governor attempted to limit large gatherings by suspending vacation rentals⁶⁸ before issuing a stay-at-home order.⁶⁹ Other states attempted to limit visitors to the state by limiting activities of out of state visitors. For example, Nebraska issued an executive order limiting non-resident spring turkey hunting permits to limit the number of turkey hunters in the state.⁷⁰

III. TRANSITIONING TOWARD A NEW NORMAL

Like the decisions to issue stay-at-home orders, while each state is developing their own plan for re-opening there are similar elements across state plans. For example, most states are conducting their re-opening efforts in phases, with certain industries that are better able to promote social distancing at a workplace opening before close-contact businesses. Many re-opening plans are also contingent on states having a declining rate of COVID-19 cases and a certain level of COVID-19 testing available.

Unsurprisingly, the effects of the COVID-19 pandemic have been intensely felt across many sectors of society. For example, consumer spending in states that enacted stricter stay at home orders fell significantly versus states with less restrictive measures.⁷¹ Additionally, the pandemic has resulted in a national unemployment spike nearing the

66. See, e.g., State of Connecticut Emergency Petition of William Tong, Attorney General for the State of Connecticut for a Proceeding to Establish a State of Emergency Utility Shut-Off Moratorium (Mar. 12, 2020).

67. See Me. Exec. Order No. 17 FY 19/20 (Mar. 20, 2020), (starting fishing season two weeks early); Me. Exec. Order No. 33 FY 19/20 (Apr. 1, 2020) (regarding expiration of certain licenses and permits issued by Department of Marine Resources); Me. Exec. Order No. 21 FY 19/20 (Mar. 25, 2020) (regarding fishing laws).

68. Fla. Exec. Order No. 20-87 (Mar. 27, 2020).

69. Fla. Exec. Order No. 20-91 (Apr. 1, 2020).

70. Neb. Exec. Order No. 20-11 (Mar. 30, 2020).

71. *How the Covid-19 Pandemic is Changing Americans' Spending Habits*, THE ECONOMIST, <https://www.economist.com/graphic-detail/2020/04/09/how-the-covid-19-pandemic-is-changing-americans-spending-habits> (last visited May 22, 2020).

levels of the Great Depression with a great amount of uncertainty remaining as to whether and how quickly the economy will recover from the industry restrictions.⁷²

The experience of the COVID-19 social distancing measures effects virtually every aspect of American life, with many of the measures likely to continue even as states begin relaxing public health and emergency restrictions. For example, consumers may continue to purchase certain items online versus in brick and mortar retail stores and video conferencing may be used more often than physical meetings.

IV. CONCLUSION

Without a vaccine, COVID-19 disease models⁷³ project continued transmission surges across the United States that will require states to implement balanced, long-term strategies. To ensure compliance, states must tailor their approach to the unique needs of their citizens. Fortunately, states and their governors derive significant powers from several sources—police powers, state constitutions, and statutes—to create these flexible approaches to quarantine, isolate, and otherwise protect the public health and welfare. Indeed, in the absence of coherent federal action, many states have already taken important steps to limit transmission spread, enhance medical response systems, prepare for hospital surge, and provide economic and consumer protections to citizens.

72. Greg Iacurci, *Unemployment is Nearing Great Depression Levels. Here's How the Eras are Similar and Different*, CNBC, <https://www.cnbc.com/2020/05/19/unemployment-today-vs-the-great-depression-how-do-the-eras-compare.html> (last visited May 22, 2020).

73. COVID-19 Forecasts for the United States, CENTERS FOR DISEASE CONTROL AND PREVENTION (2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html> (last visited Apr. 21, 2020).