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Democracy and Delegation in a Public Health Emergency: Statutory Interpretation and Separation of Powers

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Government orders restricting businesses and limiting individual liberty to mitigate widespread community transmission of a novel, serious, and highly infectious disease raise complex legal questions for which pre-pandemic judicial precedents provide few answers. Legal challenges to state and local orders have raised questions about who has the authority to adopt pandemic mitigation measures, by what criteria, and for how long. Protections for individual rights are balanced against government interests and separation of powers doctrines are loosely defined and rarely deployed as absolute limits. Consequently, the courts have had considerable discretion to shape their own role in pandemic response.[1]

The results of legal challenges to compulsory social distancing and face covering orders have been mixed, but the vast majority have been unsuccessful. Most judges have granted wide leeway to state and local executive-branch officials on questions of statutory interpretation and separation of powers. As the pandemic continues to wear on, however, the courts may be losing patience, particularly as legislatures begin to assert their authority to shape the pandemic response—albeit through unconventional means.

Resolution of the statutory interpretation and separation of powers issues raised by state and local coronavirus orders depends on state-level constitutional doctrines and precedents. The aim of this Issue Brief is to offer a roadmap with illustrative examples, not to definitively assess the merits of any given state or local order. It begins by surveying the historical context that has shaped federal and state public health, emergency, and disaster management statutory

[1] Significant portions of this Issue Brief are reproduced with permission from Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 20 YALE J. HEALTH POL'Y, L. & ETHICS (forthcoming December 2020). *See also* LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY RESTRAINT 432 (3d. ed. 2016); *see also* Lawrence O. Gostin & Lindsay F. Wiley, *Governmental Public Health Powers During the COVID-19 Pandemic: Stay-at-Home Orders, Business Closures, and Travel Restrictions*, 323 JAMA 2137 (2020).

authorities available to executive-branch officials. It then summarizes several recent court decisions adjudicating statutory interpretation and separation of powers challenges to coronavirus mitigation measures. It concludes with reflections on the roles of the judicial and legislative branches in public health emergency response and a call for legislative reforms to put pandemic response measures on firmer statutory footing and guide executive responses during the coming stages of this crisis and the next one

I. Historical Context

In the decades prior to the 2020 coronavirus pandemic, state and local authorities exercised broad powers to address public health threats ranging from cholera, smallpox, and polio to HIV, SARS, and Ebola. At the turn of the twenty-first century, modernization reforms in many states specifically authorized health officials to order individually-targeted measures such as compulsory medical examination, treatment, vaccination, isolation, and quarantine, via statutes that offer guardrails to guide executive action and protect individual rights and interests. In contrast, social distancing and face covering had not been widely required for the general public since the 1918 influenza pandemic and mid-century outbreaks of polio. These measures were largely sidelined by modernization reformers, leaving executive-branch officials to rely on older, broader grants of authority to control communicable diseases and respond to emergencies and disasters during the 2020 coronavirus pandemic.

A. Early Foundations

In the first half of the twentieth century, health officials frequently exercised broad powers to respond to communicable disease threats. Rarely, state supreme courts found that specific measures, such as vaccination, required specific authorization from the legislature.[2] More typically, early-twentieth century courts found broad delegations of public health power constitutionally proper and sufficient to encompass measures that were not authorized in specific terms.[3] During the 1918 flu pandemic, in the absence of effective tests, treatments, or

[2] *See, e.g.*, State v. Burdge, 70 N.W. 347 (Wis. 1897) (finding the state board of health lacked properly delegated power to adopt a compulsory vaccination rule absent a specific legislative authorization); *cf.* Mathews v. Kalamazoo Bd. of Educ., 86 N.W. 1036 (Mich. 1901) (finding that local school boards did not have statutory authority to require vaccination absent a specific legislative authorization).

[3] *See, e.g.*, People ex rel. Lieberman v. Van De Carr, 67 N.E. 913, 914 (N.Y. 1903) *aff'd sub nom*. People of State of New York v. Van De Carr, 199 U.S. 552 (1905) (finding that "[t]he vesting of powers more or less arbitrary in various officials and boards is necessary, if the work of prevention and regulation is to ward off fevers, pestilence, and the many other ills that constantly menace great centers of population"); Kirk v. Wyman, 65 S.E. 387, 389 (S.C. 1909) (finding that a state statute authorizing local health boards to make rules and regulations "as they deem necessary for the preservation of the public health" was not an unconstitutional delegation of legislative power); McCandless v. Campbell, 20 Haw. 411, 417 (1911) (describing delegation of "the power to enact regulations concerning the public health" to municipal corporations or local boards of health as an "exception" to the "established doctrine of constitutional law

vaccines, many U.S. cities and states issued orders to mitigate the spread of infection among the general population.[4] Many jurisdictions ordered bars, saloons, theaters, churches, and schools to close and prohibited gatherings. Many also ordered the general public to wear face coverings. Some went further and closed retail stores. Many of these measures were adopted as orders from executive-branch officials or boards, who didn't always point to a specific or appropriate source of statutory authority.[5] Legal challenges were largely rejected by the courts on the grounds that flu pandemic orders were "reasonable measures to slow the spread of disease."[6]

A "nuanced and Delphic opinion"[7] from 1905, *Jacobson v. Massachusetts*[8] remains the Supreme Court's most recent decision on the merits addressing a public health emergency measure. In *Jacobson*, the Court upheld a Massachusetts statute empowering municipal boards of health to "require and enforce the vaccination and revaccination of all . . . inhabitants" whenever a board found "in its opinion, it is necessary for the public health or safety."[9] The Court endorsed judicial deference to the scientific findings of experts exercising authority delegated by the legislature. Concluding that "[t]he authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body," the Court approved the legislature's choice "to refer that question, in the first instance, to a board of health composed of persons . . . appointed . . . because of their fitness to determine such questions."[10] The Court

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that the power conferred upon the legislature to make laws cannot be delegated to any other body or authority").

[4] In October 1918, the U.S. Surgeon General issued a bulletin advising state and local public health boards to prohibit public gatherings and order churches, theaters, saloons, and similar gathering places to close. Jason Marisam, *Local Governance and Pandemics: Lessons from the 1918 Flu*, 85 U. DET. MERCY L. REV. 347 (2008).

[5] *See, e.g.*, Marisam, *supra* note 4, at 363 (describing a "fairly standard order" (for the time) by a local health board in Globe, Arizona "banning the congregation of two or more people at schools, theaters, and other public gathering places," "purportedly" issued "under their powers to regulate public nuisances"); and *see* In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div., No. 161492, 2020 WL 5877599, at *29 (Mich. Oct. 2, 2020) (Viviano J., concurring in part and dissenting in part) (noting that the Michigan governor's 1918 order banning public meetings "did not cite any authority allowing the Governor to take such action, but the closures lasted only a few weeks").

[6] *See, e.g.*, Alden v. State, 20 Ariz. 235, 179 P. 646 (1919) (rejecting a habeas corpus petition by a movie theater owner arrested for violating a local health board order); *see also Globe Sch. Dist.*, 179 P. 55 (denying an injunction of a local health board order closing schools); *but see* Bd. of Health of City of Paterson v. Clayton, 93 N.J.L. 64, 106 A. 813 (1919) (upholding a lower court order setting aside a conviction of the defendant saloon owner for "invit[ing] people to congregate in his saloon . . . such an action being dangerous to human life and health, there being an epidemic of influenza in Paterson . . . .").

[7] Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 119 (2020).

[8] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[9] *Id.* at 12 (quoting the applicable state statute at the time).

[10] *Jacobson*, 197 U.S. at 27; *see also* People of State of New York v. Van De Carr, 199 U.S. 552, 561 (1905) (describing *Jacobson* as having "sustained a compulsory vaccination law which delegated to the board of

repeatedly noted the presence of a statutory standard authorizing local officials to make vaccination compulsory "only when, in the opinion of the board of health, that was necessary for the public health or the public safety."[11]

B. Mid-Century Expansion of Executive Emergency and Disaster Powers

Many jurisdictions adopted sweeping civil defense, emergency, and disaster statutes during the mid-century period marked by World War II, the Civil Rights movement, and Vietnam War protests.[12] These statutes typically include provisions aimed at quelling civil unrest through curfews and restricted zones. Legislatures do not appear to have had communicable disease threats foremost in mind when they authorized these measures, but emergency and disaster statutes were drafted broadly enough to encompass disease outbreaks as "naturally occurring" disasters or emergencies. Civil defense statutes adopted to secure "public safety" could similarly be interpreted to encompass public health emergencies. These statutes provide an additional layer of statutory authorization that typically empowers the governor, following a proper declaration, to adopt measures that are reasonable and necessary to "protect life and property or to bring the emergency situation within the affected area under control."[13] Many state statutes specifically authorize governors to control movement into, out of, and within a disaster or emergency-affected area, and to control occupation of premises.[14] Legislatures adopting civil defense, emergency, and disaster statutes generally left older public health statutes—and the communicable disease control powers they granted—in place, ensuring that executive-branch officials were equipped with extensive and overlapping authorities to respond to a pandemic. Plaintiffs challenging 2020 coronavirus orders have called on state supreme courts to narrow the scope of these authorities, but so far only the Michigan Supreme Court has been receptive to this argument.[15]

C. Public Health Law Modernization at the Turn of the Century

In the late twentieth and early twenty-first centuries, public health law experienced a renaissance. A series of novel threats, including the HIV/AIDS epidemic, the anthrax attacks of

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health of cities or towns the determination of the necessity of requiring the inhabitants to submit to compulsory vaccination").

[11] *Id.* at 27.

[12] PATRICK S. ROBERTS, DISASTERS AND THE AMERICAN STATE (2013) 127-145.

[13] *See, e.g.*, MICH. COMP. LAWS § 10.31(1). When Governor Whitmer relied on this provision to extend her authority to issue coronavirus emergency orders in 2020, the state supreme court determined that the statute violated the nondelegation doctrine enshrined in the state constitution. In re Certified Questions from United States Dist. Court, W. Dist. of Michigan, S. Div., No. 161492, 2020 WL 5877599, at *24 (Mich. Oct. 2, 2020). *See* Part III.B, *infra*.

[14] *Id.*

[15] *Id.*

2001, SARS outbreaks in 2003, and warnings that an influenza pandemic could be imminent prompted legislatures to reform public health statutes and align them with modern scientific principles and constitutional doctrines. These efforts focused predominantly on authorizing the deployment of modern medical countermeasures (e.g., tests, therapeutic treatments that reduce infectiousness, and vaccines) and isolation and quarantine of individuals reasonably believed to be infected or exposed, through compulsory means if necessary, subject to specific procedural protections and substantive standards.

The term *social distancing* first appeared in the mid-2000s in federal plans to guide state and local responses to SARS-1 and flu pandemics,[16] but public health law modernization reformers paid little attention to gathering bans, closure of gathering places, or face coverings, which had not been made compulsory in decades. Prior to the 2020 coronavirus pandemic, social distancing guidelines and preparedness plans typically focused on limiting the size of very large gatherings, closing schools and other gathering places, and voluntary recommendations for people to stay home if they were ill or had been in contact with someone who was.[17] The few reports that discussed sheltering in place for the general population broached it as a voluntary measure, and one on which experts disagreed.[18] Several empirical and policy evaluations of social distancing and other community mitigation measures were published in the academic literature, but few seriously contemplated long-term orders to shelter in place and cease all non-essential on-site business operations.[19]

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[16] CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), PUBLIC HEALTH GUIDANCE FOR COMMUNITY-LEVEL PREPAREDNESS AND RESPONSE TO SEVERE ACUTE RESPIRATORY SYNDROME (SARS) VERSION 2 app. D1 at 7 (2004); HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN 108 (2006).

[17] *See, e.g.*, CDC (2004), *supra* note 16 (discussing closure of schools and work sites, suspension of public markets, cancellation of events, scaling back of public transportation, and travel restrictions); *see also* NOREEN QUALLS ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, COMMUNITY MITIGATION GUIDELINES TO PREVENT PANDEMIC INFLUENZA — UNITED STATES, 2017, at 12-18 (2017) (recommending "voluntary home isolation of ill persons," "voluntary quarantine of exposed household members," "temporary closures and dismissals of child care facilities, K–12 schools, and institutions of higher education," and suggesting "[s]ocial distancing measures can be implemented in a range of community settings, including educational facilities, workplaces, and public places where people gather (e.g., parks, religious institutions, theaters, and sports arenas)" for influenza pandemic mitigation).

[18] *See, e.g.*, Julia E. Aledort, et al., *Non-Pharmaceutical Public Health Interventions for Pandemic Influenza: An Evaluation of the Evidence Base*, 7 BMC PUB. HEALTH 208, Table 3, Figure 1 (2008) (assessing "voluntary sheltering" at home—defined as "sequestration of healthy persons to avoid exposure"—in consultation with an expert panel, which was in disagreement as to its advisability).

[19] *See, e.g.*, World Health Organization Writing Group, *Nonpharmaceutical Interventions for Pandemic Influenza, National and Community Measures*, 12 EMERGING INFECTIOUS DISEASES 81 (2006) (describing social distancing as involving cancellation of mass gatherings and closure of schools, colleges, theaters, and other public gathering places).

Specific statutory authorizations to issue quarantine and isolation orders or to make testing, treatment, or vaccination compulsory have—thus far—not played a significant role in the 2020 coronavirus pandemic. Resources for testing and contact tracing have generally fallen far short of what's needed to meet demand. The number of infected individuals has outstripped the capacity of local health departments to order and enforce compulsory quarantine and isolation orders. Social distancing plans were developed for precisely this situation—where community transmission is so widespread that individually targeted measures are inadequate to control the spread of a novel, serious, and highly transmissible communicable disease. But social distancing plans were developed for pathogens with characteristics that are different from SARS-CoV-2, the virus that causes COVID-19.[20] Face covering was generally believed to be effective only when masks are worn by those who are infectious. For an anticipated novel influenza pandemic or SARS-CoV (the virus that caused the 2003 SARS outbreak), pre-symptomatic or asymptomatic transmission was not a significant concern, so measures targeting those known or reasonably believed to be infectious were thought to be adequate. For these and other reasons, statutory reforms to authorize compulsory social distancing and face covering among the general population were not included in modernization reform efforts, leaving executive-branch officials to rely on older, broader grants of authority to respond to the 2020 coronavirus pandemic.

II. Public Health, Emergency, and Disaster Management Statutes

Governors and other executive-branch officials have relied on many different statutory authorities to respond to the coronavirus pandemic. It is helpful to distinguish them along two main lines. First, the extent to which the statutory authority is contingent on a formal declaration or informal finding of an emergency or disaster. Second, the extent to which the statutory authority is specific or general.

The extent to which an executive action depends on a formal declaration matters because the declarations themselves may be subject to statutory time limits, substantive standards, or procedural requirements. Some statutory authorities, including broadly defined powers to respond to an emergency or disaster, must be triggered by a formal declaration that satisfies substantive and procedural requirements. Statutory time limits for emergency and disaster declarations vary, but 30 days is common. Many state statutes are ambiguous on the question of whether unlimited renewals of the declaration are permitted, a matter that has been litigated in several states in 2020. Other authorities, including broadly defined powers to control

[20] SARS-1 (the coronavirus strain that caused outbreaks in 2003) and posited pandemic influenza strains on which these plans were based were more lethal than SARS-2 (the novel coronavirus strain that causes COVID-19), but easier to control through narrowly targeted measures—in part because they were less transmissible and were not commonly spread by asymptomatic, pre-symptomatic, or mildly symptomatic carriers. SARS-1 had a case-fatality rate of about 10-15%. *See* World Health Org., *Update 49: SARS Case Fatality Ratio, Incubation Period* (May 7, 2003).

the spread of communicable disease, vest power in the executive branch and do not rely on a formal disaster or emergency declaration. In some cases, state statutes provide for waiver of administrative procedural requirements that would normally apply to rulemaking under emergency circumstances. But unlike formal emergency declarations, these modified procedures may be waived following informal findings that specific statutory conditions are satisfied.

In addition to considering the extent to which a statutory authority relies on a formal declaration or informal finding of an emergency or disaster, it is also worth considering the extent to which a statutory authority is framed in specific or general terms. State public health, emergency, and disaster management statutes typically grant executive officials specific authorities to order medical examination, testing, isolation, and quarantine of individuals and (more rarely) to prohibit public gatherings, close gathering places, and control movement into, out of, and within areas affected by a declared disaster or emergency. These specific authorities are typically supplemented by more general grants of authority to adopt measures officials deem necessary to control the spread of communicable disease or to respond to an emergency or disaster.

A. Specific Authorities to Ban Gatherings and Close Gathering Places

Some states have statutory provisions specifically authorizing bans on gatherings or assemblages and closure of gathering places, but these provisions do not encompass all conceivable compulsory social distancing measures. For example, Colorado's public health statute includes one of the most specific provisions related to social distancing. A provision added in 2008 authorizes local public health agencies "[t]o close schools and public places and to prohibit gatherings of people when necessary to protect public health."[21] This authority does not rely on an emergency declaration, but it also does not clearly encompass closures of private businesses.[22] Wisconsin's statute includes similar language empowering the state health department to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics."[23] This authority is not triggered by a formal emergency or disaster declaration, but the text of the statute does require a finding of an "outbreak" or "epidemic"—terms the chapter does not define. To the dismay of public health officials seeking to limit house parties and family gatherings, the Wisconsin provision may not encompass

[21] COLO. REV. STAT. § 25-1-506(3)(b)(VII).

[22] *See* Larimer Cty. Pub. Health v. Maniacs Gym, 2020 WL 1943829 (Apr. 1, 2020) (relying on the local public health agency's quarantine power, and not it's power to close "public places" or "prohibit gatherings" to issue a preliminary injunction against the owner of a gym which remained open to members in defiance of a local order prohibiting nonessential on-site business operations).

[23] WIS. STAT. § 252.02(3) (emphasis added).

prohibitions on gatherings, however large, that take place in people's homes or other premises not open to the general public.

Many state statutes include provisions that specifically authorize health officials to exert control over private property and persons, but these are not always drafted broadly enough to encompass business closures for social distancing purposes. For example, Colorado's statute authorizes county public health agencies to "establish, maintain, and enforce isolation and quarantine, and in pursuance thereof, and for this purpose only, to exercise physical control over property and over the persons of the people within the jurisdiction of the agency as the agency may find necessary for the protection of the public health[.]"[24] In *Larimer County Public Health v. Maniacs Gym*, the court described this quarantine authority as "relevant" to its decision issuing a preliminary injunction ordering the defendant business to cease operations pursuant to a coronavirus emergency order closing gymnasiums.[25] This authority is drafted to permit control over private property when it is for the purpose of implementing isolation and quarantine, but those terms are typically defined as interventions targeting specific individuals, groups, or facilities suspected of infection, exposure, or contamination and are therefore distinct from social distancing among the general population. Massachusetts's civil defense statute gives the governor authority "relative to . . . [r]egulating the sale of articles of food and household articles."[26] This authority is primarily used to address price gouging, but has been re-purposed during the 2020 coronavirus pandemic to order business closures.[27]

B. General Authorities for Communicable Disease Control and Emergency Response

State and federal statutes also typically include more broadly drafted catch-all provisions authorizing actions to control communicable diseases. For example, Section 361(a) of the federal Public Health Service Act authorizes the U.S. Secretary of Health and Human Services "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."[28] The statute lists several activities the director may undertake to carry out and enforce the applicable regulations, including "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, *and other measures*, as in his judgment may be

[24] COLO. REV. STAT. § 25-1-506(3)(b)(VI).
[25] Larimer Cty. Pub. Health v. Maniacs Gym, 2020 WL 1943829 (Apr. 1, 2020).
[26] MASS. GEN. LAWS ch. 639 § 7(g).
[27] Governor Baker's March 23, 2020 Executive Order closing non-essential businesses specifically referenced this provision, among others. *See* Mass. COVID-19 Order No. 13 (Mar. 23, 2020).
[28] 42 U.S.C. § 264(a). The text of the statute refers to the Surgeon General, but these functions were reassigned to the Secretary of Health and Human Services in a subsequent departmental reorganization.

necessary."[29] A Centers for Disease Control (CDC) order halting evictions through the end of 2020 relies on this authority and is currently being challenged in the courts. Depending on the outcome of this litigation and the preferences of the federal administration, the same statutory authority could provide the basis for a nationwide mask mandate or generally applicable restrictions on businesses or travel. This authority is not dependent on an emergency declaration.

Many states have similar provisions granting broadly defined communicable disease control authorities to health officials. For example, alongside specific authorities for isolation and quarantine and to close public places and prohibit gatherings, Colorado's public health statute also authorizes local public health agencies "[t]o investigate *and control* the causes of epidemic or communicable diseases and conditions affecting public health[.]"[30] Ohio's statute does not specifically reference closing gathering places or prohibiting gatherings, but it does authorize the state health department to "make special or standing orders or rules . . . *for preventing the spread of contagious or infectious diseases* . . . and for such other sanitary matters as are best controlled by a general rule."[31] Similarly, Wisconsin's statute authorizes the state health department to "authorize and implement *all emergency measures necessary* to control communicable diseases."[32] These general communicable disease control authorities are not contingent on any formal declaration or informal finding of an emergency.

Many state statutes include similarly broad authorizations to respond to emergencies or disasters. A sweeping provision in California's Emergency Services Act (adopted in 1970) grants the governor "complete authority over all agencies of the state government and the right to exercise within the area designated *all police power vested in the state* by the Constitution and laws of the State of California in order to effectuate the purposes of [emergency mitigation and protection of health and safety]."[33] In addition, California's public health statute authorizes local health officers to "take *any preventive measure* that may be necessary to protect and preserve the public health from any public health hazard during any 'state of war emergency,' 'state of emergency,' or 'local emergency.' . . . within his or her jurisdiction."[34] Oregon's laws are similar, with an emergency management statute granting the governor authority to exercise "all police powers vested in the state by the Oregon Constitution in order to effectuate the purposes of [the statute]."[35] In addition, a public health statute provides more specific authorities to close facilities, regulate goods and services, and control "entry into, exit from, movement within, and

[29] 42 U.S.C. § 264(a) (emphasis added).
[30] COLO. REV. STAT. § 25-1-506(3)(b)(V).
[31] OHIO REV. CODE § 3701.13 (2013).
[32] WISC. STAT. § 252.02(6) (2015).
[33] CAL. GOV. CODE § 8627 (emphasis added)
[34] CAL. HEALTH & SAF. C. § 101040 (local health officers); § 101475 (city health officers) (emphasis added).
[35] OR. REV. STAT. § 401.168(1).

occupancy of premises in any public area subject to or threatened by a public health emergency," subject to a 28-day limit on the governor's authority.[36]

Broadly defined state disaster and emergency authorities empower officials to control personal movement within an affected area during a declared disaster or emergency. These provisions have frequently been used to impose temporary curfews surrounding a natural disaster.[37] Pennsylvania's disaster management statute, adopted in 1978, authorizes the governor to "[c]ontrol ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein,"[38] a provision drafted broadly enough to encompass all movements, whether in public areas or privately owned premises. These powers are typically triggered by the governor's declaration of a disaster, which may or may not be defined by statute to specifically include a pandemic or other communicable disease emergency. Pennsylvania's statute defines natural disaster to include weather related events, as well as earthquakes, tidal waves, fires, explosions "or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life."[39] This final, catch-all category is the locus of the governor's authority to respond to a pandemic.

III. The 2020 Coronavirus Pandemic in the Courts

In addition to raising individual rights claims, plaintiffs challenging coronavirus mitigation orders have asserted structural arguments. Some challengers have argued that coronavirus mitigation orders exceed the scope of the government's statutory authority. Questions of statutory authority are decided first and foremost based on what the courts perceive to have been the legislature's intent. Some challengers have relied on the nondelegation doctrine, which holds that federal and state constitutional provisions vesting all legislative powers in the legislature prohibit the legislature from delegating those powers to executive-branch officials. Federal and state court precedents typically hold that the legislature may properly delegate authority to the executive if its statutes provide an "intelligible principle" to guide executive action.[40] The court's role is "to figure out what task [the statute] delegates and what instructions it provides."[41] Conservative judges, including at least three current Supreme Court Justices, have indicated a desire to strengthen the nondelegation

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[36] OR. REV. STAT. § 433.441(4). In *Elkhorn Baptist v. Brown*, 366 Or. 506 (2020), the Oregon Supreme Court held that the specific powers authorized by § 433 may also be exercised by the governor under a § 410 emergency declaration without being subject to § 433's time limit.

[37] *See, e.g.*, Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996).

[38] 35 PA. CONS. STAT., § 7301(f)(7) (2014); *see also* ALASKA STAT. § 26.23.020(g)(7) (2004) (accord); GA. CODE ANN. § 38-3-51(d)(7) (2010) (accord); LA. REV. STAT. § 29-72 (C)(3) (accord).

[39] 35 PA. CONS. STAT. § 7102.

[40] At the federal level, the intelligible principle test is traced to *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

[41] Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (opinion by Kagan, J.).

doctrine as a limit on legislative and agency authority by adopting new, more stringent criteria for delegations.[42]

Both of these arguments—statutory construction and nondelegation—are derived from the separation of powers enshrined in federal and state constitutions. Challengers and judges sometimes combine the two, arguing that the statutory authority must not be as broad as the defending officials claim because, if it were, the statute would violate the nondelegation doctrine. Invoking the avoidance canon, this controversial argument essentially converts the nondelegation doctrine into a canon of statutory construction.[43]

Some, but not all, of the suits alleging that coronavirus mitigation orders violate structural constraints on executive action have been brought by legislatures or individual legislators. By going to the courts, legislatures and legislators have sought to override executive orders rather than adopt new statutes. Courts have taken widely divergent approaches to resolving the questions raised by these challenges

A. A Lack of Statutory Authority for Executive Action

One of the most important effects of emergency and disaster declarations is that they trigger *ex ante* delegations of authority from the legislature. By passing an emergency powers statute, the legislature pre-commits to a delegation of some—or in the case of states like California, all—of the state's power to regulate for the general welfare to executive-branch officials. These delegations equip the executive branch to respond swiftly in a crisis. In addition, health officials may rely on public health statutes that do not require an emergency declaration. Very few state statutes authorize officials to order compulsory social distancing and face covering in specific terms. Orders relying on more broadly defined authorities have been challenged as *ultra vires.*

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[42] In *Gundy v. United States*, 139 S. Ct. 2116 (2019), "Justice Neil Gorsuch, joined by Justice Clarence Thomas and Chief Justice John Roberts, dissented and proposed a new test for approaching nondelegation challenges. Justice Gorsuch averred that the legislature could only give power under three circumstances: (1) to "fill up the details"; (2) to make the application of a rule dependent on certain executive fact-finding; or (3) to assign nonlegislative responsibilities to either the judicial or executive branch. The three prongs of his analysis formed the new 'Gorsuch test.'" Johnathan Hall, *The Gorsuch Test*: Gundy v. United States, *Limiting the Administrative State, and the Future of Nondelegation* (Note), 70 DUKE L.J. 175 (2020).

[43] In *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), the Supreme Court "rejected the District of Columbia Circuit's practice of ordering administrative agencies to narrowly construe statutes to avoid possible violations of the nondelegation doctrine. Since the Court did not examine the question of whether its rationale for rejecting administrative saving constructions should likewise apply to courts, this question remains open, and of great interest to scholars, judges, and litigants." David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 2 (2002).

In Pennsylvania, for example, the plaintiffs in one of the earliest coronavirus challenges pointed out that public health emergency statutes did not equip the governor with the "power or authority to shutter businesses."[44] But Governor Tom Wolf relied on a curfew provision in an older disaster management statute, which empowered him to control "movement of persons" and "occupancy of premises" within a declared disaster area.[45] On March 22, in a *per curiam* decision in *Civil Rights Defense Firm, P.C., v. Wolf*, the Pennsylvania Supreme Court denied the plaintiffs' request that the court review its challenge to the governor's order closing "all businesses that are not life sustaining" without discussing the merits.[46] A few weeks later in *Friends of Danny DeVito v. Wolf,* (no, not *that* Danny DeVito[47]), the court described the governor's "broad authority" derived from the state constitution and the disaster management statute as "firmly grounded in the state's police power."[48] After a lengthy discussion of the statutory interpretation cannon of *ejusdem generis*, which counsels against "the expansion of a list of specific items to include other items not 'of the same kind' as those expressly listed,"[49] the court determined "[t]he COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions."[50] Thus, it fell within the disaster management statute's provision for any "other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life."[51] Any other determination could have resulted in invalidation of Pennsylvania's social distancing orders. The state's subsequent face covering order, in contrast to the stay-at-home orders challenged in *Friends of Danny DeVito*, was issued by the state secretary of health pursuant to the health department's authority "to determine and employ the most efficient and practical means for the prevention and suppression of disease"[52] and other public health powers.[53] It's unclear why Governor Wolf declined to rely on the health department's authority to issue the state's stay-at-home order, though it is possible doing so would have opened up the order to an administrative law challenge for failure to follow the appropriate rulemaking process.

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[44] Petitioner's Emergency, Ex Parte Application for Extraordinary Relief at 14, Civil Rights Def. Firm, P.C., v. Wolf, 226 A.3d 569 (Pa. 2020).

[45] Order of the Governor of the Commonwealth of Pennsylvania regarding the Closure of All Businesses that are Not Life Sustaining (Mar. 19, 2020) (citing 35 PA. CONS. STAT. § 7301(f)).

[46] Civil Rights Def. Firm, P.C. v. Wolf, 226 A.3d 569 (Pa. 2020).

[47] Friends of Danny DeVito v. Wolf, 227 A.3d 872, 881 (Pa., 2020). ("Petitioner Friends of Danny DeVito . . . is a Pennsylvania candidate committee . . . formed to operate and administer the candidacy of Danny DeVito, a candidate for the 45th District of the Pennsylvania State House of Representatives.")

[48] *Id.* at 885-86.

[49] *Id.* at 888.

[50] *Id.* at 889.

[51] *Id.*

[52] 71 PA. STAT. § 532(a).

[53] The health secretary's mask orders also refer to several other provisions, but they appear to be less on-point than 71 PA. STAT. § 532(a). Pa. Dep't of Health, Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings (July 1, 2020).

Other courts have been less generous in their statutory interpretation of executive emergency powers. In *Rock House Fitness v. Acton*,[54] an Ohio trial court ruled that Department of Health Director Amy Acton's April 30 order maintaining limits on high-risk settings like fitness centers while lifting other restrictions was *ultra vires*. The court largely ignored Acton's assertion that the order was authorized by a general grant of authority to "make special orders . . . for preventing the spread of contagious or infectious diseases."[55] The judge instead characterized Acton's order as having "quarantined the entire people of the state of Ohio, for much more than 14 days" in violation of the statutory guardrails applicable to individual quarantine orders.[56] He went on to hold that "[t]he director has no statutory authority to close all businesses, including the plaintiffs' gyms, which she deems non-essential[,] for a period of two months. She has acted in an impermissibly arbitrary, unreasonable, and oppressive manner and without any procedural safeguards."[57]

In *Wisconsin Legislature v. Palm*—probably the most notorious court decision in the early months of the pandemic[58]—the Wisconsin Supreme Court lifted the state health department's extended stay-at-home order. [59] The court described Secretary-Designee Andrea Palm[60] as having "quarantine[d] '[a]ll individuals present within the State of Wisconsin by ordering them 'to stay at home or at their place of residence' with exceptions she deems appropriate."[61] The court described this as exceeding the scope of the state quarantine statute because it was "not based on persons infected or suspected of being infected."[62]

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[54] Rock House Fitness, Inc., v. Acton, 2020 WL 3105522 (Ohio Com.Pl. May 20, 2020).

[55] Ohio Dep't of Health, Director's Stay Safe Ohio Order (Apr. 30, 2020).

[56] *Rock House Fitness*, 2020 WL 3105522, at *4.

[57] *Id.*

[58] The Wisconsin Supreme Court's other big coronavirus decision—blocking the governor's order suspending in-person voting in the state's April 7 primary election—would be a close runner up. Wisconsin Legislature v. Evers, Civ. No. 2020AP608-OA (Wis. April 6, 2020); *see also* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (staying district court order granting a preliminary injunction which would have required the state to count absentee ballots postmarked after election day).

[59] Wisconsin Legislature v. Palm, 942 N.W.2d 900 (Wis. 2020). The order invalidated by *Wisconsin Legislature v. Palm* was Wisconsin Dep't of Health Servs. Emergency Order 28 (Apr. 16, 2020). The April 16 order extended restrictions which had previously been imposed by the secretary in a March 24 health department order.

[60] The state senate has refused to hold a vote on Palm's confirmation since her nomination in 2019. See Anthony Dabruzzi, *Wisconsin Health Secretary Still Awaits Confirmation from Senate* (Apr. 28, 2020), SPECTRUM NEWS 1.

[61] *Wisconsin Legislature*, 942 N.W.2d at 916 (Wis. 2020); *see also* Rock House Fitness, Inc., v. Acton, 2020 WL 3105522 (Ohio Com.Pl. May 20, 2020) (applying statutory guardrails for quarantine and isolation of individuals to Ohio's order closing businesses, restricting travel, and ordering the general public to stay at home); *see also* Lindsay F. Wiley, *Wisconsin's "Safer at Home" Order Isn't a Quarantine—But that Doesn't Mean it Isn't Necessary to Control the Spread of Coronavirus*, ACS BLOGS (May 7, 2020).

[62] *Wisconsin Legislature*, 942 N.W.2d at 916 (Wis. 2020).

Moreover, the *Palm* court found the order was not a permissible exercise of the health department's broad authorities to "implement all emergency measures necessary to control communicable diseases" or "to act to control and suppress communicable disease and to guard against introduction of communicable disease into [a] state" under other provisions of the state's public health statute.[63] In the words of Justice Patience Roggensack's opinion for the majority, the court "cannot expansively read statutes with imprecise terminology that purport to delegate lawmaking authority to an administrative agency."[64] This result, according to Roggensack, was dictated by a 2011 amendment to the state's Administrative Procedure Act (APA), part of then-governor Scott Walker's efforts to roll back business regulation.[65] The court held that agencies were prohibited from "circumventing [the 2011 amendment's] new 'explicit authority' requirement by simply utilizing broad statutes describing the agency's general duties or legislative purpose as a blank check for regulatory authority."[66] The court's narrow interpretation of broad grants of authority to control communicable disease was entwined with its expansive interpretation of a separate provision directing that "unless a rule has been promulgated [via an emergency rulemaking process subject to legislative veto] or the [agency] action is 'explicitly required or explicitly permitted by statute' [the agency] has no power to implement or enforce its directives."[67] Public health advocates condemned the court's decision as "reckless,"[68] while champions of pro-business regulatory reform welcomed it as a sign that the court was "reining in" the administrative state.[69] Because the broad power to control communicable disease did not "explicitly permit" imposing compulsory social distancing limits on business operations, gatherings, and travel, Wisconsin's extended "safer at home" order was invalidated.

B. Nondelegation

The nondelegation doctrine is a more prominent limit on administrative discretion in some states than it has been at the federal level. Routine public health regulations have been struck down in recent decades on separation of powers grounds in states with rigid limits on

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[63] *Id.* at 914-18.

[64] *Id.* at 917.

[65] *Id.* The court relied on WISC. STAT. § 227.10(2m), which provides: "No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with [proscribed rulemaking processes]." *See* MacIver Institute, *Reining in the Administrative State:* Wisconsin Legislature v. Palm *and the Explicit Authority Requirement* (May 27, 2020).

[66] *Wisconsin Legislature*, 942 N.W.2d at 917.

[67] *Id.*

[68] Press Release, State Representative Lisa Subeck, Representative Lisa Subeck Condemns Supreme Court rule in Wisconsin Legislature v. Palm (May 14, 2020).

[69] *See, e.g.*, MacIver Institute, *supra* note 65.

agency discretion, including during the current coronavirus pandemic.[70] Courts rigorously reviewing statutory delegations typically look for adequate statutory guardrails to guide executive action to determine whether the legislature's authorization of decisionmaking power crosses the line from executive implementation into improper exercise of legislative power by executive-branch officials.[71]

As discussed above, in *Wisconsin Legislature v. Palm*, the Wisconsin Supreme Court did not strike down Palm's order on nondelegation grounds, but invoked nondelegation doctrine indirectly to call Palm's actions into question, noting that "[a] delegation of legislative power to a subordinate agency will be upheld if the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose."[72] The court reasoned that procedural safeguards provided by rulemaking—which Secretary Palm had not followed—secured structural, as well as individual-rights constraints on administrative action.[73] Filing suit and asking the courts to intervene allowed the legislature to shape the pandemic response without passing a new statute, and risking a gubernatorial veto, to constrain the administration's authority.

Legislative efforts to constrain executive action played an important role in other states as well. Although the Pennsylvania Supreme Court blessed the governor's exercise of sweeping powers to respond to the pandemic, it also noted in *Friends of Danny DeVito* that "[a]s a counterbalance to the exercise of the broad powers granted to the Governor, the Emergency Code provides that the General Assembly by concurrent resolution may terminate a state of disaster emergency at any time."[74] Several weeks later, in *Wolf v. Scarnati*, the Pennsylvania Supreme Court rejected the validity of the legislature's attempt to do exactly that.[75] In a case similar to *Wolf v. Scarnati*, Kansas Governor Laura Kelly brought suit seeking clarification as to whether the

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[70] *See, e.g.*, New York Statewide Coal. of Hispanic Chambers of Commerce v. New York City Dep't of Health & Mental Hygiene, 23 N.Y.3d 681, 16 N.E.3d 538, 541 (2014) ("[T]he New York City Board of Health, in adopting the "Sugary Drinks Portion Cap Rule", exceeded the scope of its regulatory authority. By choosing among competing policy goals, without any legislative delegation or guidance, the Board engaged in law-making and thus infringed upon the legislative jurisdiction of the City Council of New York."); *see also* Boreali v. Axelrod, 71 N.Y.2d 1, 517 N.E.2d 1350 (1987) (holding that the New York State Public Health Council overstepped its regulatory authority when it adopted regulations prohibiting smoking in a wide variety of indoor areas open to the public that had previously been considered, but not adopted, by the state legislature).

[71] *See, e.g.*, Blue Cross & Blue Shield v. Milliken, 367 N.W.2d. 1, 52-53 (1985) ("Challenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power.").

[72] *Id.* (internal quotation marks and citations omitted)

[73] *Id.* at 913 (internal citations omitted).

[74] *Id.* at 886.

[75] Wolf v. Scarnati, 2020 WL 3567269 (Penn. July 1, 2020).

legislature's attempted revocation of her emergency order was valid.[76] In *Kelly v. Legislative Coordinating Council*, the Kansas Supreme Court held that the legislative coordinating council lacked statutory authority to revoke the order under the procedure it adopted, rendering its purported revocation a legal nullity.[77]

In October the Michigan Supreme Court ruled that the state's 1945 civil defense statute—which the governor relied on to extend her emergency declarations—was unconstitutional under the nondelegation doctrine.[78] The majority of the court interpreted the language of the 1945 statute broadly. Typical for a mid-century civil defense statute, it empowered the governor to declare an emergency "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state . . . when public safety is imperiled."[79] Upon such a declaration, the governor was authorized to "promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control."[80] The statute also included specific authorities to control occupancy, ingress, and egress, and "places of amusement and assembly" within the area affected by the emergency.[81] The court rejected the legislature's argument that the 1945 statute was inapplicable to epidemics. The majority also found a dissenting justice's argument that "public safety" emergencies are distinct from and exclude "public health" emergencies unpersuasive.[82] Instead, the court declared the 1945 statute's delegation of the entirety of the state's police powers to the governor during a properly declared emergency unconstitutional.

The Michigan Supreme Court's nondelegation analysis relied on a state precedent tying the specificity of the statutory guardrails required to survive a nondelegation challenge to the specificity of the power the statute authorizes. "Challenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power. The preciseness required of the standards will depend on the complexity of the subject."[83] Ultimately, "the standards prescribed for guidance must be as reasonably precise as the subject-matter

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[76] Kelly v. Legislative Coordinating Council, 460 P.3d 832 (Kan. 2020).

[77] *Id.*

[78] In re Certified Questions from United States Dist. Court, W. Dist. of Michigan, S. Div., No. 161492, 2020 WL 5877599 (Mich. Oct. 2, 2020). The question was resolved by the court on certification from a federal court. The Michigan Supreme Court later granted immediate reconsideration and partial reversal of the lower court decision in a state-court case, *House of Representatives v. Governor*, consistent with its decision in *In re Certified Questions*.

[79] MICH. COMP. LAWS § 10.31(1).

[80] *Id.*

[81] *Id.*

[82] In re Certified Questions from United States Dist. Court, W. Dist. of Michigan, S. Div., No. 161492, 2020 WL 5877599, at *29 (Mich. Oct. 2, 2020) (Viviano J., concurring in part and dissenting in part).

[83] *Id.* at 13 (quoting Blue Cross & Blue Shield of Mich. v. Milliken, 367 N.W.2d 1 (1985)).

requires or permits."[84] "In other words, it is one thing if a statute confers a great degree of discretion over a narrow subject; it is quite another if that power can be brought to bear on something as 'immense' as an entire economy."[85] The court also pointed to the challenged order's invocation of criminal sanctions, its impact on fundamental rights, and its lack of hard time limits as reasons to require more specific statutory limits than the 1945 statute's procedures for emergency declaration and its reasonableness and necessity standards provided.

In *Elkhorn Baptist Church v. Brown*, the Oregon Supreme Court took a very different tack. The court reversed a trial court ruling that would have lifted the state's compulsory social distancing provisions.[86] The Oregon Supreme Court held that neither a 28-day statutory time limit on public health emergencies[87] nor a 30-day limit on a constitutional provision governing catastrophic disasters[88] constrained the governor's coronavirus response measures because they were independently authorized by a broader emergency management statute that does not include time limits.[89] Moreover, the court found that delegation of all police powers to the governor without statutory time limits did not violate the state's nondelegation doctrine. The court found the governor's emergency powers are limited by statutory provisions requiring them "to be exercised in a manner consistent with . . . address[ing] the declared emergency" and permitting the legislature to terminate the governor's emergency declaration.[90] The court also noted the powers were subject to civil liberties constraints under the federal and state constitutions.[91]

In a similar case, *Beshear v. Acree*, the Supreme Court of Kentucky rejected a nondelegation challenge by the state's attorney general (an independently elected official who is a political rival of the governor) and business owners.[92] The court reasoned that the state constitution "which provides for a part-time legislature incapable of convening itself, tilts toward emergency powers in the executive branch."[93] The governor's orders have relied on a 1998 emergency management statute authorizing him to declare curfews and establish their limits, prohibit or limit the sale or consumption of goods, and "to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population."[94] The state supreme court held that "to the extent [the governor's emergency powers] are perceived as

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[84] *Id.* (quoting Osius v. St. Clair Shores, 75 N.W.2d 25 (1956) (alteration marks omitted).
[85] *Id.* at 14. Here, the court cited a Lochner-era precedent, *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935).
[86] Elkhorn Baptist Church v. Brown, 366 Or. 506 (2020).
[87] OR. REV. STAT. § 433.
[88] OR. CONST. ART. X-A.
[89] *Id.* (citing OR. REV. STAT. § 410).
[90] *Id.*
[91] *Id.*
[92] 2020 WL 6736090 (Ky. Nov. 12, 2020).
[93] *Id.* at *1.
[94] KY. REV. STAT. 39A.100.

legislative, [the statute] is a lawful delegation of that power with sufficient standards and procedural safeguards to pass constitutional muster."[95] The court noted the potential danger of overruling decades of precedent "recogniz[ing] the lawful delegation of legislative powers . . . especially in circumstances that would leave the Commonwealth without day-to-day leadership in the face of a pandemic affecting all parts of the state."[96]

Notably, the Oregon and Kentucky supreme courts' analysis mirrors that of the Arizona Supreme Court in a 1919 case upholding a local health board order to mitigate the spread of the 1918 influenza pandemic—one of very few pre-2020 precedents defining the scope of executive authority to order compulsory social distancing. In *Globe School Dist. No. 1 of Globe, Gila Cty. v. Board of Health of City of Globe*,[97] the Arizona Supreme Court upheld a local health board order closing schools as a valid exercise of statutory authority "to make and enforce all needful rules and regulations . . . to prevent the spread of any contagious, infectious, or malarial diseases among persons." In 1919, the Arizona Supreme Court took nondelegation limits seriously—holding that the order was *not* a valid exercise of the board's nuisance abatement authority as it had claimed because declaring schools, businesses, and other facilities nuisances in the absence of present infection or contamination would require the exercise of legislative power. But the Arizona court ultimately found that a state public health statute empowering health boards "to make and enforce all needful rules and regulations" to prevent the spread of contagious disease authorized the order closing schools and provided adequate safeguards by requiring an administrative finding of an emergency and setting forth standards of reasonableness and necessity to guide the board's use of its public health powers.[98]

IV. The Role of Courts and Legislatures in Pandemic Response

Most judges have been understandably reluctant to rely on constitutional protections for civil liberties to second guess a government's pandemic response. They may be more comfortable policing the separation of powers however as the crisis wears on and legislatures seek to shape the pandemic response. Broadly defined limits—such as those the Oregon Supreme Court deemed adequate—are likely to be enough to save public health measures from running afoul of loose nondelegation limits in most states. In states where the courts are dominated by far-right judges bent on reviving hard nondelegation limits,[99] however, new legislation to authorize compulsory social distancing and face covering in specific terms and provide more specific

[95] Beshear v. Acree, 2020 WL 6736090 at *1.
[96] *Id.*
[97] Globe School Dist. No. 1 of Globe, Gila Cty. v. Board of Health of City of Globe, 179 P. 55, 59-60 (Ariz. 1919).
[98] *Id.*
[99] *See* Nicholas Bagley, *A Warning from Michigan: The State Previews How Far Republican Judges Will Go to Obstruct Democrats in Office*, ATLANTIC (Oct. 7, 2020).

statutory guardrails mandating transparency and clear communication of public health goals may be needed to put pandemic response on firmer footing.

In the meantime, Wisconsin and Michigan officials have issued new orders relying on more specific statutory authorizations to restrict public gatherings.[100] Challenges to these October orders relying on statutory interpretation and nondelegation arguments are now making their way through state courts. The greater specificity of the statutory authorizations at issue may be a saving grace, but it may also open the door to narrow statutory constructions that exclude the Michigan order's requirement of face coverings in commercial establishments[101] or the Wisconsin order's application to "spontaneous gatherings" of people transiently passing through commercial establishments.[102] As of this writing, the Wisconsin order has been enjoined by an intermediate state court pending appeal.[103] The court did not discuss the rationale for its finding that the challengers were likely to succeed on the merits.

In some states, legislators are so offended by what they perceive to be executive overreach that they are seeking to strip executive officials of their emergency powers. Specific statutory authorizations subject to rigorous statutory guardrails offer an alternative approach to expressing a legislature's concerns about unbridled executive authority without tying the government to the mast by restricting executive power to respond swiftly in a crisis. Even those who feel stay-at-home orders went too far in the spring of 2020 must recognize that the current pandemic is an evolving situation with the potential to become more dangerous over time. Moreover, a future epidemic could pose threats that coronavirus-response critics might view as even more severe—with a higher case-fatality rate or a disproportionate impact on children, for example.

Pre-coronavirus pandemic plans—such as the CDC's 2004 plan for possible SARS resurgence—caution that the most extreme disease control measures "[m]ay be controversial because of infringement on personal liberties," and that it "[m]ay be difficult to solicit cooperation for extended periods, particularly if the rationale is not readily apparent or was not clearly

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[100] The Wisconsin order dated October 5, 2020 relies on WISC. STAT. § 252.02(3) ("The department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics."). The Michigan order dated October 9, 2020 relies on Mich. Comp. Laws § 333.2253 ("If the director determines that control of an
epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.")

[101] Mich. Emergency Order Under Mich. Comp. Laws § 333.2253 — Gathering Prohibition and Mask Order (Oct. 5, 2020).

[102] Wisc. Emergency Order 3 — Limiting Public Gatherings (Oct. 6, 2020).

[103] Tavern League of Wisconsin, Inc. v. Andrea Palm, No. 2020CV128 (Mich. Ct. App. Dist. 3, Oct. 23, 2020).

explained."[104] They advise that implementation "[r]equires excellent communication mechanisms to inform affected persons and to maintain public confidence in the appropriateness of the chosen course of action; [m]ay need to provide replacements for affected activities (e.g., school, essential service providers); and [m]ust address mental health and financial support for affected population[s]."[105] Elected and appointed officials would do well to keep this advice in mind as they navigate the challenges ahead. Clear communication of goals and supports to enable compliance and minimize secondary harms are critical. The public's trust is a scarce and precious resource in a pandemic and the worst of this crisis may yet be ahead of us. Stripping executive officials of authority to respond to the crisis—as some legislatures are seeking to do[106]—is an untenable solution that puts the lives and wellbeing of the populace at risk.

[104] CDC (2004), *supra* note 16, at 7.

[105] *Id.*

[106] *See, e.g.*, *Lawmakers Move to Limit a Governor's Disaster Powers*, AP (July 15, 2020).

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