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Hortatory Mandates

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Hortatory Mandates

Nathan Cortez & Lindsay F. Wiley*

ABSTRACT

This Article is the first to describe “hortatory mandates” and articulate principles for judicial review. Hortatory mandates are laws whose form and function collide. Either they speak in mandatory terms but lack penalties or enforcement mechanisms, or they speak in hortatory, precatory terms that belie the legal obligations they create. Our analysis of important examples—the Affordable Care Act, the Clean Air Act, federal dietary guidelines, and COVID-19 mitigation orders—indicates that policymakers regularly deploy hortatory mandates for instrumental reasons rather than purely symbolic or precatory reasons. In matters of public health, environmental protection, and beyond, so-called “soft law” is now a preferred tool of government. Hortatory mandates are not a quirk of legislative contortions to pass health reform or the exigencies of our current pandemic; they are probably here to stay.

This Article offers a framework for evaluating which hortatory mandates should be reviewable by courts and which ones are best left to the other branches. We argue that the essential inquiry for courts is whether a hortatory mandate establishes a binding, enforceable norm. This can be demonstrated by pointing to the government’s use of coercive means to enforce the norm or credible signals that the norm will in fact be enforced. After all, government actions that are binding and enforceable are not really hortatory; they are mandatory, regardless of language to the contrary. Likewise, government actions that create no binding legal obligations are merely hortatory and should not invoke the power of the courts—again, regardless of language to the contrary. In such cases, judicial determinations clarifying the hortatory nature of an order, and thus excluding it from review, may facilitate political checks and balances on any hortatory mandates that overreach. If the government is trying to regulate behavior on the sly, litigation can force the question early, fostering more robust political debate and—potentially—nonjudicial intervention to redirect the government’s approach. We also caution that abuse of hortatory mandates can degrade the rule of law and undermine public trust and compliance.

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INTRODUCTION

To slow the spread of COVID-19, government officials issued hundreds of provisions that took the form of a mandate but whose function was merely hortatory in the absence of penalties or enforcement mechanisms.¹ The vast majority of the U.S. population was told to stay home, avoid gatherings, limit travel, quarantine, isolate, wear masks, and physically distance from others at various points during the pandemic.² In some jurisdictions, officials threatened criminal or civil penalties³ and in rare instances actually imposed them.⁴ We began to hear a common refrain from officials: “This is not a request. It’s an order.”⁵ Yet, while officials declared that their orders had “the power of a rule”⁶ and were “not optional,”⁷ they also signaled that there

1 Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 YALE J. HEALTH POL’Y L. & ETHICS 50, 69–80 (2020) (detailing COVID-19 mitigation orders).

2 *Id.* at 74–75.

3 *See, e.g.*, S.F. POLICE DEP’T, NOTICE 20-045, ENFORCEMENT OF PUBLIC HEALTH ORDERS (2020), <https://www.sanfranciscopolice.org/sites/default/files/2020-03/SFPDNotice20.045.20200323.pdf> [<https://perma.cc/A4Y3-3DBQ>] (advising that police may educate, admonish, seek voluntary compliance, and use enforcement for violations of the shelter-in-place order against businesses and individuals).

4 *See infra* Section II.A.2.

5 Jade Esteban Estrada, *Easter Camping in Parks Will Be Prohibited; COVID-19 Case Count Shoots to 140*, SAN ANTONIO SENTINEL (Mar. 29, 2020), <https://www.sasentinel.com/easter-camping-in-parks-will-be-prohibited-covid-19-case-count-shoots-to-140> [<https://perma.cc/A282-US9E>] (“Though no citations have been given, the San Antonio Police Department has thus far received 557 complaint calls and has observed 417 violations against the order. ‘This is not a drill,’ Nirenberg said firmly. ‘This is not a request. It’s an order. So if necessary, enforcement will continue in severity in order to gain compliance and to save lives.’”) (quoting San Antonio Mayor Ron Nirenberg).

6 Jane Lindholm (@JaneLindholm), TWITTER (Nov. 13, 2020, 11:42 AM), <https://twitter.com/JaneLindholm/status/1327290722291212289> [<https://perma.cc/9GB5-LPJF>] (describing a response from Vermont Governor Phil Scott to a question about enforcement of his order prohibiting multi-household social gatherings in private homes).

7 *Whitmer: Coronavirus Orders Are ‘Not Suggestions, Not Optional’*, ABC12 NEWS (May 11, 2020), <https://www.abc12.com/content/news/Whitmer-Coronavirus-orders-are-not-suggestions-not-optional-570380331.html> [<https://web.archive.org/web/20210117121956/https://www.abc12.com/content/news/Whitmer-Coronavirus-orders-are-not-s>] (quoting Michigan Governor Gretchen Whitmer that “the orders have the force of law, so they are ‘not suggestions, not optional or helpful hints. . . . I expect all Michiganders to follow the law unless and until a court decides otherwise’”).

would be little or no enforcement.⁸ Many officials treated these orders as a muscular recommendation. Compliance became, essentially, a matter of personal choice. Many people and businesses reflexively believed these orders would be enforced. But it did not take long to realize that enforcement was sporadic, unlikely, or even unheard of.⁹

We call these hortatory mandates. They are government policies that are either hortatory in form but mandatory in function, or mandatory in form but hortatory in function. The term, of course, is an oxymoron. A hortatory law is an exhortation or plea that we should or should not do something. A mandate, in contrast, is a legal command or prohibition that we shall or shall not do something. How, then, can a law be simultaneously hortatory and mandatory? “Hortatory mandates” are laws whose form and function are inconsistent, contradictory, or even incompatible. A law may be written as a mere exhortation or plea but is treated as binding and enforceable. Or the inverse may be true—a law is written as binding and enforceable but is treated in practice as a mere exhortation or plea or is simply ignored.

Inevitably, courts began receiving requests to enjoin hortatory COVID-19 mitigation orders, raising fundamental questions about the proper role for courts during a pandemic.¹⁰ But hortatory mandates also raise difficult questions about the role of government. What is an “order” without any penalties or threat of enforcement? What is the “power of a rule”? Should hortatory mandates be subject to the typical checks and balances that apply to traditional, binding laws? And as a threshold matter, to what extent (and to what ends) should they be subject to judicial review?

Coincidentally, one of the most controversial hortatory mandates arose before the COVID-19 pandemic but reached the Supreme Court in the midst of the pandemic. On November 10, 2020, the Court heard oral arguments in *California v. Texas*,¹¹ a challenge to the Af-

⁸ See, e.g., *Transcript: Governor Phil Scott Addresses Record COVID-19 Case Growth*, VT. OFF. OF GOVERNOR PHILL SCOTT: GOVERNOR SCOTT’S BLOG (Nov. 17, 2020), <https://governor.vermont.gov/governor-scotts-blog/transcript-governor-phil-scott-addresses-record-covid-19-case-growth> [<https://perma.cc/9WLY-GPQP>] (describing an executive order as “ban[ning] multi-household gatherings” and stating, “I understand that if you want to ignore the science or choose not to believe it for one reason or another, there’s not much we can do to stop you”).

⁹ See discussion *infra* Section II.A.2.

¹⁰ See Wiley, *supra* note 1, at 81–101 (reviewing litigation challenging COVID-19 mitigation orders from March through November 2020).

¹¹ 141 S. Ct. 2104 (2021).

fordable Care Act's ("ACA")¹² "individual mandate," a provision directing most individuals to maintain health insurance coverage.¹³ At the time, officials at every level of government were grappling with whether and how to convince individuals to stay home, cancel gatherings, and wear masks in response to the first winter wave of COVID-19.¹⁴ The Court released its decision in the ACA case on June 17, 2021, holding that the plaintiffs lacked standing to challenge the individual mandate because they could not demonstrate any "injury fairly traceable" to the law.¹⁵ The timing of the decision coincided with a summer respite from exponential spread of COVID-19 and a resulting wave of government decisions lifting mitigation measures that much of the public had already been disregarding for quite some time.¹⁶

By 2020, the "mandate" in *California v. Texas* was completely unenforceable. The original version of the ACA passed in 2010 provided that most individuals who failed to maintain "minimum essential coverage" would pay a tax penalty scaled to their income, and the government collected such taxes between 2014 and 2018.¹⁷ Beginning in 2019, Congress reduced the tax to zero.¹⁸ Yet challengers persisted with claims that the provision was unconstitutional. States claimed injuries in the form of increased administrative costs and increased enrollment in state-funded programs.¹⁹ Two individual plaintiffs argued

12 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended at 42 U.S.C. §§ 18091, 18092, 26 U.S.C. § 5000A).

13 Transcript of Oral Argument at 32, *California v. Texas*, 141 S. Ct. 2104 (No. 19-840).

14 See, e.g., Melissa Alonso & Jennifer Selva, *U.S. States Continue to See Alarming Rise in Coronavirus Cases*, CNN (Nov. 8, 2020, 10:12 PM), https://www.cnn.com/world/live-news/coronavirus-pandemic-11-09-20-intl/h_f7fc22cac0da6359c93ce8e8bafbe55b [<https://perma.cc/2D6F-RQB8>].

15 *California v. Texas*, 141 S. Ct. at 2120.

16 See, e.g., Amanda Watts, *Ohio Will End Its Covid-19 Emergency Declaration Tomorrow*, CNN (June 17, 2021, 2:46 PM), <https://www.cnn.com/us/live-news/coronavirus-pandemic-vaccine-updates-06-17-21/index.html> [<https://perma.cc/MY6W-NP7D>]; Press Release, Gretchen Whitmer, Governor of Mich., Gov. Whitmer Announces State Will Open to Full Capacity on June 22 (June 17, 2021), <https://www.michigan.gov/whitmer/news/press-releases/2021/06/17/gov-whitmer-announces-state-will-open-to-full-capacity-on-june-22> [<https://perma.cc/6BJA-YQ67>].

17 *Individual Shared Responsibility Provision—Reporting and Calculating the Payment*, INTERNAL REVENUE SERV., <https://www.irs.gov/affordable-care-act/individuals-and-families/aca-individual-shared-responsibility-provision-calculating-the-payment> [<https://perma.cc/VMU8-Z54M>]. For a comprehensive history of the individual mandate, see John E. McDonough, *The Tortured Saga of America's Least-Loved Policy Idea*, POLITICO MAG. (May 22, 2021), <https://www.politico.com/news/magazine/2021/05/22/health-care-individual-mandate-policy-conservative-idea-history-489956> [<https://perma.cc/7YZ5-DT4U>].

18 See 26 U.S.C. § 5000A(c)(2)(B)(iii), (c)(3)(A).

19 See *California v. Texas*, 141 S. Ct. at 2116–17.

that even though the mandate was unenforceable, “they ‘value[d] compliance with [their] legal obligations’”²⁰ and “fe[lt] compelled” to buy insurance²¹ because it was “the right thing to do.”²² At oral argument, Justice Kavanaugh spoke of “hortatory” language in statutes, which Justice Breyer described as “precatory.”²³ Both Justices questioned whether courts should review hortatory or precatory commands.²⁴ Their questions echoed the quandary confronting lower courts asked to review COVID-19 emergency orders.²⁵ Ultimately, the Supreme Court found the plaintiffs lacked standing because they could not point to any injury.²⁶

Hortatory mandates are having a moment. Why have they become such a popular intervention? In matters of public health, environmental protection, and beyond, so-called “soft law” and “nudges” are now preferred tools of government.²⁷ Hortatory mandates fit nicely within the soft governance ecosystem. They are not a quirk of legislative contortions to pass health reform or pandemic exigencies; they are probably here to stay.

This Article argues that hortatory mandates can (as a descriptive doctrinal matter) and should (as a normative matter) be subject to legislative and executive checks and balances, but the role for judicial review should be circumspect. As we demonstrate, government officials often deploy hortatory mandates for instrumental reasons rather than purely symbolic or precatory reasons. If the government uses coercive means to enforce the mandate or gives credible signals that it will be enforced, the action should not evade judicial review simply because it is styled as a mere plea or exhortation. At the same time, hortatory mandates not backed by actual or threatened enforcement give rise to no case or controversy and are thus not justiciable in the courts. In these instances, judicial determinations clarifying that a law

²⁰ Opening Brief for Petitioners at 18, *California v. Texas*, 141 S. Ct. 2104 (No. 19-840) (second alternation in original).

²¹ *Id.*

²² *Texas v. United States*, 945 F.3d 355, 380 (5th Cir. 2019).

²³ Transcript of Oral Argument, *supra* note 13, at 28, 97–98.

²⁴ *Id.* at 28, 68, 83–84.

²⁵ See *infra* Section II.B.

²⁶ *California v. Texas*, 141 S. Ct. 2104, 2120 (2021).

²⁷ See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 348, 388 (2004) (discussing “Flexibility and Noncoerciveness (or Softness-in-Law)” as a characteristic of new governance techniques); Cass R. Sunstein, *Nudges vs. Shoves: The Benefits of Preserving Choice*, 127 HARV. L. REV. F. 210, 217 (2014) (describing the advantages of nudges as “choice-preserving alternatives” to mandates).

cannot or will not be enforced may facilitate political checks and balances on any hortatory mandates that overreach. If the government is trying to regulate behavior on the sly, litigation can force the question early, fostering more robust political debate and, potentially, nonjudicial intervention to redirect the government's approach. Hortatory mandates have become an important tool for government and, like other tools, need guardrails.

We begin in Part I by explaining what qualifies as a hortatory mandate and describing when and why the government uses them. In Part II, we consider how recent experience during the COVID-19 pandemic highlights various problems with hortatory mandates—for courts and for anyone asked to interpret or comply with them. In Part III, we articulate principles to guide judicial review, including when review should and should not be available as a threshold matter. Given the recent proliferation of hortatory mandates and resulting confusion among courts, we offer a framework for evaluating which hortatory mandates should be reviewable and which ones are best left to the other branches. The essential inquiry, we argue, is whether the hortatory mandate establishes a binding, enforceable norm. This can be established by pointing to the government's use of coercive means to enforce the norm or credible signals that the norm will be enforced. After all, government actions that are binding and enforceable are not hortatory; they are mandatory. Likewise, government actions that create no binding legal obligations are merely hortatory and should not invoke the power of the courts. This inquiry is a tool for reducing any "hortatory mandate" to its essential nature as either hortatory or mandatory.

I. THE LOGICS OF HORTATORY MANDATES

We begin by addressing three core questions. What qualifies as a "hortatory mandate"? What different species of hortatory mandates does the government adopt? And when and why does the government deploy these variations? Answering these questions can help determine which hortatory mandates should be reviewable by courts and which are best left to political or administrative processes.

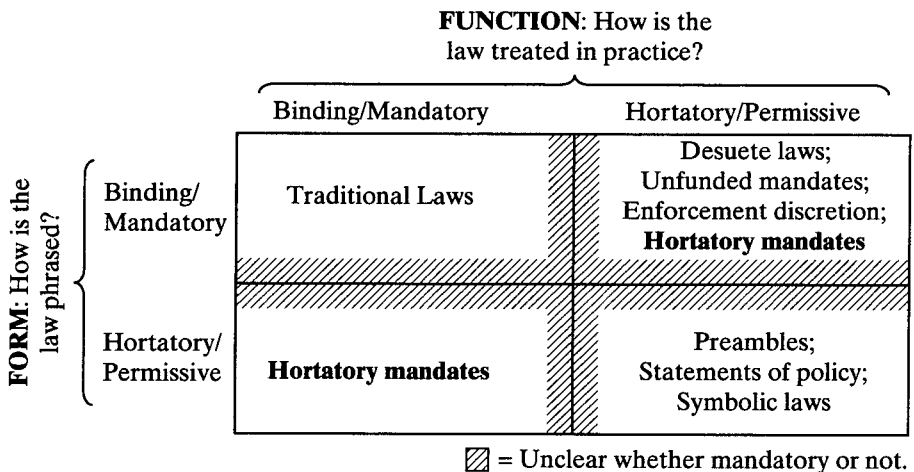
A. *What Qualifies as a Hortatory Mandate?*

A "hortatory mandate" is a government policy that is either hortatory in form but mandatory in function, or mandatory in form but hortatory in function. The term, on its face, is an oxymoron. A hortatory law is one that says we should or should not do something. It is an

exhortation, a plea, or an aspiration. The term "hortatory" is not defined in Black's Law Dictionary, perhaps because "the word, in a legal sense, is almost meaningless."²⁸ A mandate, in contrast, is a law that says we shall or shall not do something. It is a legal command or prohibition. How, then, can a law be simultaneously hortatory and mandatory?

"Hortatory mandates" are laws whose form and function are inconsistent, contradictory, or even incompatible. The law may be written as a mere exhortation or plea but is treated as binding and enforceable. Or the inverse may be true: the law is written as binding and enforceable but is treated in practice as a mere exhortation or plea or is simply ignored. In the figure, we situate hortatory mandates among more traditional types of laws based on the language they use (their form) and how they operate in practice (their function).

FIGURE. WHERE DO WE ENCOUNTER HORTATORY MANDATES?



Most traditional laws are binding both in form and function; that is, they are written to be binding and enforceable and are in fact binding and enforced. These are the operative provisions in statutes, regulations, or orders, including explicit commands and prohibitions, implementation provisions, specific repeals and amendments, preemption provisions, savings clauses, effective dates, expiration dates, and even definitions.²⁹ The figure places these in the upper left quadrant, where their form and function align.

²⁸ Elmer Gertz, *Hortatory Language in the Preamble and Bill of Rights of the 1970 Constitution*, 6 J. MARSHALL J. PRAC. & PROC. 217, 217 (1973).

²⁹ See REED DICKERSON, *LEGISLATIVE DRAFTING* 53-60 (1954).

Of course, not all statutory language binds. Statutes often include provisions such as preambles, statements of purpose, findings, and other introductory clauses that are generally nonbinding and inoperative—often obviously so.³⁰ For example, when Congress declares in Title 22 of the U.S. Code that “[i]t is the sense of Congress that United States businesses should be encouraged to provide assistance to sub-Saharan African countries to prevent and reduce the incidence of HIV/AIDS in sub-Saharan Africa,”³¹ we know that this is only “the sense of Congress.”³² It is mere encouragement, not a requirement. Similarly, when Congress declares in Title 36 that “[a]ll private citizens, organizations, and Federal, State, and local governmental and legislative entities are encouraged to recognize Parents’ Day,”³³ most understand immediately and intuitively that there are no penalties for letting Parents’ Day pass uncelebrated. These laws sit in the lower right quadrant of the figure, where their form and function also align.

Importantly, the separation between these quadrants is not always well delineated. Sometimes it is not entirely clear whether the language of the statute is binding or not, and determining whether a law is treated as binding in practice is an even more layered inquiry. For example, federal law declares flatly that “[n]o disrespect should be shown to the flag of the United States of America The flag should never be used for advertising purposes in any manner whatsoever.”³⁴ The language may seem straightforward, even unequivocal. There is no express reference to encouragement, as in the other examples above. But *should* is not *shall*. And, of course, we encounter the U.S. flag in all kinds of advertisements with no evident enforcement. Thus, we acknowledge that the lines between these categories can be indistinct, as shown by the gray borders in the figure.

Our primary interest is the two quadrants of the figure where form and function collide. In the upper right quadrant are laws phrased as mandatory but treated in practice as permissive or voluntary, or simply ignored. For example, desuete statutes are those that are written as mandatory and enforceable but nevertheless go unenforced, sometimes for decades or more.³⁵ Frequently cited examples are antisodomy laws that are virtually never enforced, particularly

³⁰ A leading treatise on legislative drafting explains the different components typically found in statutes. *See id.*

³¹ 22 U.S.C. § 7674.

³² *Id.*

³³ 36 U.S.C. § 135.

³⁴ 4 U.S.C. § 8.

³⁵ *Desuetude*, BLACK’S LAW DICTIONARY (11th ed. 2019).

against consenting adults acting in private.³⁶ In the rare instance where a long-dormant law *is* enforced, defendants often invoke “desuetude,” asking the court to invalidate the law precisely because it is dormant, obsolete, or unenforced.³⁷ This same quadrant also includes unfunded mandates³⁸ and laws and regulations that are subject to notices of enforcement discretion by agencies. For example, at the beginning of the COVID-19 pandemic, the U.S. Department of Health and Human Services (“HHS”) announced that it would not penalize violations of the HIPAA Privacy Rule by certain parties that used or disclosed protected health information for public health reasons.³⁹ In fact, HHS has maintained a list of “Notifications of Enforcement Discretion” in effect during the pandemic.⁴⁰ Both desuete laws and laws subject to enforcement discretion are relatively easy cases, at least for definitional purposes. Desuete laws typically are very old and lay dormant for decades or more,⁴¹ while laws subject to enforcement discretion are identified in formal announcements as such. Both types of laws qualify as “hortatory mandates” because they blend a hortatory function with a mandatory form.

But other types of hortatory mandates in this quadrant are not so clearly identifiable, usually because mixed messaging confuses their legal status. For example, in late 2020, Rhode Island Governor Gina Raimondo announced that she was prohibiting social gatherings in private homes but also said there would be no enforcement.⁴² Similarly, an Illinois statute declares that “[t]he official language of the State of Illinois is English” but includes no enforcement mecha-

³⁶ *Lawrence v. Texas*, 539 U.S. 558, 569 (2003). Although the Supreme Court in *Lawrence v. Texas* did not invalidate the Texas antisodomy law on desuetude grounds—relying instead on substantive due process grounds—commentators nonetheless suggested desuetude played a background role. See Note, *Desuetude*, 119 HARV. L. REV. 2209, 2212–13, 2219 (2006); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 30 (2003).

³⁷ See *Desuetude*, *supra* note 35, at 2209–10.

³⁸ For a discussion of unfunded mandates, see generally Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137 (1997).

³⁹ Enforcement Discretion under HIPAA to Allow Uses and Disclosures of Protected Health Information by Business Associates for Public Health and Health Oversight Activities in Response to COVID-19, 85 Fed. Reg. 19,392 (Apr. 7, 2020) (to be codified at 45 C.F.R. pts. 160, 164).

⁴⁰ *HIPAA and COVID-19*, HHS, <https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html> [<https://perma.cc/3BK8-S743>].

⁴¹ Of course, several courts are now being asked to consider decades-old state statutes that banned abortion pre-*Roe* which some argue should become operational again after *Dobbs*. See *infra* Section I.B.6.

⁴² See *infra* Section II.A.3.

nisms.⁴³ Likewise, section 5000A(a) of the Affordable Care Act declares that individuals “shall” maintain minimum health coverage but does not clarify that the tax penalty for failing to do so is zero until much later in the statute, after several complex provisions take pains to establish how penalties will be calculated.⁴⁴ The ACA sends mixed signals, telling us on the one hand that we “shall” maintain coverage but noting on the other hand that there are zero repercussions for not doing so.

Another frequently discussed example is section 112 of the Clean Air Act,⁴⁵ which directs the Environmental Protection Agency (“EPA”) to set emission standards for hazardous air pollutants at levels that “protect public health” with “an ample margin of safety,” without regard for costs or feasibility.⁴⁶ Experience with section 112 quickly demonstrated that its directive was not realistic and could not be interpreted literally.⁴⁷ The EPA responded by adopting a cumbersome process to delay making decisions under section 112 and then effectively rewrote the criteria to allow consideration of economic and technological factors.⁴⁸ The language of section 112 only makes sense as aspirational or symbolic—a signal that Congress was “taking an uncompromising stance toward hazardous airborne chemicals.”⁴⁹ It cannot be read as creating a workable regulatory program.⁵⁰

Laws in the lower left quadrant are also “hortatory mandates” but in reverse. They masquerade as hortatory or permissive but are in practice treated as operative or binding. Like the hortatory mandates in the upper right quadrant, their form and function are not in agreement. These types of laws are often dismissed as merely hortatory, precatory, nugatory, inoperative, or symbolic because the language seems to speak in those terms. Like laws in the lower right quadrant,

43 5 ILL. COMP. STAT. 460/20 (2022).

44 See 26 U.S.C. § 5000A.

45 42 U.S.C. § 7412.

46 *Id.* § 7412(f). This section does not expressly bar the EPA from considering costs or feasibility, but because Congress directed the EPA to consider costs and feasibility in neighboring section 111 when setting limits on new sources of *nonhazardous* pollutants, section 112 was construed as deliberately excluding costs and feasibility from the EPA’s considerations when setting limits on hazardous pollutants. See *id.* § 7411.

47 See John P. Dwyer, *The Pathology of Symbolic Legislation*, *ECOLOGY L.Q.* 233, 239–40, 250 (1990).

48 *Id.* at 251–52.

49 *Id.* at 282–83.

50 *Id.* at 234–35; see also James A. Henderson, Jr., & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 *COLUM. L. REV.* 1429, 1430 (1978).

which are hortatory both in form and function, they may exhort, encourage, or even call for specific behavior. In the language of H.L.A. Hart, these provisions may express an “imperative mood.”⁵¹ Yet such entreaties, pleas, or supplications can transform into hortatory mandates when presented or implemented as binding and enforceable. For example, nutritional guidelines for foods marketed to children were styled as hortatory but quickly became viewed as new de facto requirements, even triggering a threat of review by the Office of Information and Regulatory Affairs (“OIRA”), which is usually reserved for legislative rules.⁵² The transition from hortatory to mandatory can happen either during the legislative process, when lawmakers draft language that they know cannot be implemented or enforced, or after a law is passed, when enforcement authorities signal that the law is more than merely precatory or symbolic.⁵³ Entreaties are treated as commands in practice. *Shoulds* are treated as *shalls*.

Thus, the simplest formulation of a “hortatory mandate” is any law whose form and function are not in agreement—laws written as mandatory but treated as hortatory or written as hortatory but treated as mandatory. When does the government resort to such nontraditional formulations? Do they even qualify as *law*? What do they seek to accomplish?

B. *When and Why Do Lawmakers Use Hortatory Mandates?*

The best lawmaking occurs when the government says what it means and means what it says. As Reed Dickerson’s classic book *Legislative Drafting* observes, “Sound government depends upon legislation that says the right thing in the right way.”⁵⁴ Of course, even statutory language in the hands of the most able draftsman, working under the most favorable conditions, may be rendered by the lawmaking process “a thing of shreds and patches hardly recognizable by its author.”⁵⁵ There are often compelling reasons why a law cannot simply say what it means and mean what it says: politics, optics, and tactical considerations may dictate language that is obscure or even contradictory.⁵⁶

⁵¹ H.L.A. HART, *THE CONCEPT OF LAW* 18 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

⁵² See *infra* Section I.C.3.

⁵³ See *infra* Sections I.B.1–2.

⁵⁴ DICKERSON, *supra* note 29, at 3.

⁵⁵ *Id.* at 49 (quoting SIR FREDERICK POLLOCK, *JURISPRUDENCE AND ETHICS* 78–80 (1882), quoted in COURTNEY ILBERT, *THE MECHANICS OF LAW MAKING* 14 (1914)).

⁵⁶ See *id.* at 48 (quoting ILBERT, *supra* note 55, at 18, 22).

We argue that many of the same dynamics that influence drafting considerations for federal legislation also apply to other government actors that generate hortatory mandates, including federal, state, and local authorities. Although the term *lawmakers* is typically understood to be synonymous with *legislators*, here we use the term more broadly to refer to elected and appointed government actors who make law—whether through legislation, executive order, or agency action. All these parties have looked to hortatory mandates during the pandemic.⁵⁷

This section considers the circumstances and rationales that generate hortatory mandates, again with the goal of delineating which laws warrant judicial review. What do different types of hortatory mandates achieve—whether intentionally or accidentally? Which ones are used to coerce? And which ones are inert?

1. *Laws That Are Designed to Be Hortatory Mandates Ex Ante*

Some laws use mandatory-sounding language even though lawmakers know the law cannot be implemented, enforced, or taken literally.⁵⁸ It is not unusual for Congress to declare “noble and lofty goals” knowing they cannot be achieved, at least in the near term.⁵⁹ Often lawmakers are fully aware that a statute is largely precatory, symbolic, or aspirational—without real chance of implementation—but enact the law anyway to gesture to the importance of an issue.⁶⁰ Such laws can be “symbolic gratifications for demands [that] may achieve little of substance . . . but constitute nonetheless a positive reinforcement for the demands themselves and the legitimation of a governmental role in dealing with these demands.”⁶¹ These laws are not necessarily designed to change behavior—at least not directly or in the near term.

This type of hortatory mandate is useful for signaling government priorities, public values, and even an elevated claim on government resources or attention.⁶² One oft-cited example is section 112 of the Clean Air Act, which promised to achieve “health-based” emission

⁵⁷ See *infra* Part II.

⁵⁸ See, e.g., Dwyer, *supra* note 47, at 250 (discussing the symbolic nature of section 112 of the Clean Air Act).

⁵⁹ Christopher T. Giovinazzo, *Defending Overstatement: The Symbolic Clean Air Act and Carbon Dioxide*, 30 HARV. ENV'T L. REV. 99, 102 (2006).

⁶⁰ See, e.g., Dwyer, *supra* note 47, at 283.

⁶¹ James Q. Wilson, *The Politics of Regulation*, in SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT, 135, 166 (James W. McKie ed., 1974).

⁶² See Dwyer, *supra* note 47, at 248–49.

limits on hazardous air pollutants, regardless of cost or feasibility.⁶³ Congress used section 112 to signal that it was taking an uncompromising stance toward regulating airborne chemicals without confronting the problem in a realistic way.⁶⁴ Despite the Act's failure to realistically address the problem, Congress preserved section 112 for almost two decades "because of the political benefits of supporting legislation purporting to protect [public] health regardless of costs, and because of the great political costs of appearing to sacrifice health benefits to lower regulatory costs."⁶⁵ Behavior would have to change slowly through persuasion rather than coercion.

Another example is the Illinois law proclaiming that "[t]he official language of the State of Illinois is English,"⁶⁶ which has no legal force or effect.⁶⁷ In contrast, Iowa law also proclaims that English is the state's official language but provides direct enforcement mechanisms.⁶⁸ The result in Iowa is that "[a]ll official documents" and other official actions in Iowa "shall be in the English language."⁶⁹ Although the Iowa law reportedly had little practical effect after passage in 2002, it served as the basis for a 2006 legal challenge when the Iowa secretary of state decided to print ballot request forms in multiple languages, including English.⁷⁰ An Iowa court invalidated that effort as

⁶³ 42 U.S.C. § 7412. The version of section 112 first enacted required the EPA to set emissions standards for "hazardous air pollutants" that provide "an ample margin of safety to protect the public health." *Id.* § 7412(b)(1)(B). Notably, section 112 implicitly precluded the EPA from considering economic costs or technological feasibility as Congress had directed the EPA to consider in other sections of the Clean Air Act, such as section 111. *See* Dwyer, *supra* note 47, at 239.

⁶⁴ *See* Dwyer, *supra* note 47, at 234–35.

⁶⁵ *Id.* at 235. Note that Congress amended section 112 in the Clean Air Act Amendments of 1990. Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. § 7412).

⁶⁶ 5 ILL. COMP. STAT. 460/20 (2022).

⁶⁷ The small number of cases discussing this provision reject the notion that it is binding. *See, e.g.,* Puerto Rican Org. for Pol. Action v. Kusper, 490 F.2d 575, 577 (7th Cir. 1973) (discussing the law previously codified at Ill. Rev. Stat. ch. 127 § 177 and comparing it to provisions in the same section naming the official state bird and state song of Illinois).

⁶⁸ IOWA CODE § 1.18(3) (2022). On the distinction between the Illinois and Iowa laws, see Evan L. Seite, Note, *Language Legislation in Iowa: Lessons Learned from the Enactment and Application of the Iowa English Language Reaffirmation Act*, 95 IOWA L. REV. 1369, 1390 (2010). Originally, the Iowa law was both justified and critiqued as being merely symbolic. Years after its enactment, an Iowa court found it to be binding and enforceable. *See* King v. Mauro, No. CV6739, slip op. at 29 (Iowa Dist. Ct. Mar. 31, 2008). Seite's analysis of the Iowa law discusses how political posturing during passage of the bill, including previous iterations that failed to pass, generated a law that was far more than symbolic. Seite, *supra*, at 1371–75.

⁶⁹ § 1.18(3).

⁷⁰ Seite, *supra* note 68, at 1377–78; Jane Norman, *Iowa's King Sues over English Law*, DES MOINES REG., Jan. 11, 2007, at 1.

incompatible with Iowa's English language law,⁷¹ making clear that a law once viewed as symbolic was indeed enforceable. In Illinois, by contrast, where the English language law has never been used to prevent the publication of non-English material, the legislature could have made the law more than a mere declaration of public values but chose not to do so.⁷²

2. *Laws That Are Rendered Hortatory Ex Post*

In contrast, some laws are designed to be implemented and enforced but turn out to be unenforceable or inoperative after the fact. Sometimes “the infeasibility of the statute becomes evident only with experience.”⁷³ Often, these are cases of statutory interpretation that require courts to ascertain what Congress intended.⁷⁴ For example, the National Environmental Policy Act of 1969 (“NEPA”)⁷⁵ provides “a national policy” of preventing or eliminating damage to the environment.⁷⁶ Shortly after Congress passed NEPA, the Supreme Court held that only the procedural requirements of NEPA were enforceable, which left agencies “free to disregard, or to view as cynically symbolic, NEPA’s declarations of national policy.”⁷⁷ Likewise, it took a decision by the Supreme Court to clarify that section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act⁷⁸ merely encouraged, rather than mandated, spending on services for the developmentally disabled, despite language in the statute declaring that both states and the federal government were obligated not to spend government funds on institutions that do not meet standards of care for the disabled.⁷⁹ The Court in that case said that the provision “does no more than express a congressional preference for certain kinds of treat-

⁷¹ See *King*, slip op. at 31.

⁷² For an (older) list of English language statutes, see José Roberto Juárez, Jr., *The American Tradition of Language Rights: The Forgotten Right to Government in a “Known Tongue,”* 13 *LAW & INEQ.* 443, 450 n.22 (1995).

⁷³ Dwyer, *supra* note 47, at 283.

⁷⁴ *Id.* at 298–301.

⁷⁵ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified in scattered sections of 42 U.S.C.).

⁷⁶ 42 U.S.C. § 4321 (“Congressional declaration of purpose”).

⁷⁷ Holly Doremus, *Constitutive Law and Environmental Policy*, 22 *STAN. ENV’T L.J.* 295, 356 (2003); see also *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980) (per curiam).

⁷⁸ 42 U.S.C. § 6010 (current version at 42 U.S.C. § 15009).

⁷⁹ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19–20 (1981); see 42 U.S.C. § 6010 (1982) (current version at 42 U.S.C. § 15009).

ment,” as it was styled as “simply a general statement of ‘findings.’”⁸⁰ Similarly, in *Rosado v. Wyman*,⁸¹ the Supreme Court observed that “Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred directions.”⁸² Finally, the ACA’s individual mandate was rendered largely symbolic—not by the Supreme Court, but by Congress itself via later amendment.⁸³ In these cases, the hortatory language of the statute have survived *in situ* despite declarations of unenforceability, perhaps signaling their instrumental value and ongoing congressional commitment to certain principles.⁸⁴

Both types of hortatory mandates—*ex ante* and *ex post*—can burden the courts, bureaucrats, and others who have to “work out what the statutes mean.”⁸⁵ Hortatory mandates are thus problematic when they try to “address real social conflicts in unrealistic ways.”⁸⁶ The root may be a well-meaning lawmaker that is naïve, has a weak understanding of how a complex law might operate in practice, or wants to avoid difficult questions regarding implementation and enforcement.⁸⁷ Or, again, it might be purposeful obfuscation. This latter approach was evident in section 112 of the Clean Air Act, where “legislators deliberately drafted and supported provisions they knew had little chance of being implemented.”⁸⁸ Although section 112 is written as a directive to the EPA, it makes more sense if viewed as a signal to interest groups and the public at large.⁸⁹ This approach, of course, puts the agency in a difficult spot, shifting hard questions of implementation and enforcement from Congress to the EPA.⁹⁰ For these laws, the

⁸⁰ *Halderman*, 451 U.S. at 19–20 (“Congress intended to encourage, rather than mandate, the provision of better services to the developmentally disabled.”).

⁸¹ 397 U.S. 397 (1970).

⁸² *Id.* at 413; *see also id.* at 401, 420 (concluding that “New York’s Program was incompatible with § 402(a)(23)” of the Social Security Act of 1935 and “that petitioners [were] entitled to declaratory relief and an appropriate injunction by the District Court against the payment of federal monies according to the new schedules, should the State not develop a conforming plan within a reasonable period of time”).

⁸³ Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).

⁸⁴ *See Doremus*, *supra* note 77, at 356; *see also Dwyer*, *supra* note 47, at 248–49.

⁸⁵ Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 *DUKE L.J.* 1, 2–3 (1997).

⁸⁶ *Dwyer*, *supra* note 47, at 283.

⁸⁷ *See id.* at 249.

⁸⁸ *Id.* at 249–50.

⁸⁹ *See id.* at 250.

⁹⁰ *Id.*

timing of judicial review is everything—early review while the law appears to be binding seems appropriate, while later review of merely hortatory laws serves no useful function.

3. *Laws with Expressive Rationales but Real-World Effects*

Laws can serve an expressive function by conveying certain messages to the public. But what does the public *do* with these messages? Theorists of expressive law focus on public perceptions of, and reactions to, the messages embodied in laws—although public reception inevitably varies, and “public meaning” can be deeply contested.⁹¹ Although traditional laws try to “directly encourage or discourage behavior through subsidies, taxes, rewards, or sanctions,”⁹² hortatory mandates “can also encourage beliefs or attitudes that then lead or contribute to desired behavior.”⁹³ As Holly Doremus explains, because people generally comply with the law, “the mere enactment of a law can change behavior without much enforcement effort, at least if the change requires little time, effort, or money to implement.”⁹⁴ Perhaps this is the “power of a rule” that governors were trying to channel when issuing COVID-19 mitigation orders?⁹⁵ Tom Tyler explains widespread compliance with the law by pointing both to normative, internal motivations (“I will comply with this law because it is just and legitimate”) and to instrumental, extrinsic motivations (“I will comply with this law because it is in my self-interest”).⁹⁶ For example, compulsory voting laws “increase voter turnout, even though the imposition of formal penalties is rare.”⁹⁷ At some point, a suffi-

⁹¹ See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022–23 (1996); Doremus, *supra* note 77, at 310–11.

⁹² Doremus, *supra* note 77, at 312. The well-known literature on behavioral economics explains how law can influence behavior by “publicizing a little-noticed social consensus” and by “nudge[ing]” people toward desired behavior through choice architecture and manipulating available options. *Id.* at 312–13 (discussing Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 400–03 (1997)); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 13–14 (2008). In fact, these nudges became popular precisely because they withheld the compulsory power of the state and relied, at least ostensibly, on individual choices. See, e.g., George F. Will, *Nudge Against the Fudge*, NEWSWEEK (June 21, 2008, 9:47 AM), <https://www.newsweek.com/george-f-will-nudge-against-fudge-90735> [<https://perma.cc/LX5A-FF3E>] (“[N]udges have the additional virtue of annoying those busybody, nanny-state liberals who, as the saying goes, do not care what people do as long as it is compulsory.”).

⁹³ Doremus, *supra* note 77, at 312.

⁹⁴ *Id.* at 312–13; see also TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 40–56 (1990).

⁹⁵ See, e.g., Lindholm, *supra* note 6.

⁹⁶ TYLER, *supra* note 94, at 34, 56.

⁹⁷ Doremus, *supra* note 77, at 313; Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L.

cient percentage of the public either acts on or at least internalizes the norm embodied in the law.⁹⁸ Moreover, even without formal sanctions or enforcement, informal sanctions in the form of disapproval, shaming, gossip, and ostracism are cheap for the state, as they are enforced by private actors.⁹⁹ Thus, even a hortatory mandate enacted for expressive purposes may try—and succeed—in changing behavior.¹⁰⁰ Yet, judicial review seems unwise and unnecessary when these laws do not invoke the coercive power of the state.

4. *Laws with Precommitment Rationales*

Some argue that symbolic or aspirational language in laws can be understood as a precommitment device, designed to drive long-term changes and signal a serious commitment to a problem.¹⁰¹ Such laws are not to be taken literally but should be taken seriously.¹⁰² Thus, when the Clean Air Act promises cleaner air without regard to costs or feasibility in section 112, it should not be read literally but should be viewed as a serious commitment that elevates cleaner air above other concerns that might compete, such as cost, scientific uncertainty, or technological limitations—not unlike Ulysses tying himself to the mast.¹⁰³ This type of language can be useful because it may resist being diluted by regulated parties and others who oppose the program.¹⁰⁴ Yet, again, without the state invoking its coercive powers, judicial review seems unwise and unnecessary.

5. *Laws That Target Values Rather than Conduct*

In the 1960s, Lon Fuller distinguished between legal “duties” and “aspirations,” noting that although duties can be legally compelled,

REV. 2135, 2170–72 (1996) (“The evidence of high voter turnout in the absence of much [compulsory voting law] enforcement suggests that compulsory voting laws serve much the same function as a social norm of voting.”).

⁹⁸ Doremus, *supra* note 77, at 313.

⁹⁹ *Id.*; Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1668 (1996). Of course, once the state gets involved in shaming, another set of problems emerges. *See, e.g.*, Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371, 1373–74; Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1381, 1419–21 (1973).

¹⁰⁰ *See* Doremus, *supra* note 77, at 313–14.

¹⁰¹ Giovinazzo, *supra* note 59, at 119.

¹⁰² *Id.* at 120.

¹⁰³ *Id.*; Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195, 196 (Jon Elster & Rune Slagstad eds., 1988).

¹⁰⁴ Giovinazzo, *supra* note 59, at 123.

aspirations cannot be.¹⁰⁵ Similarly, three decades later, Mark Tushnet and Larry Yackle sought to understand how “symbolic” statutes fit into the legal landscape, describing three types of statutes.¹⁰⁶ First there are symbolic statutes that “simply make a statement” or attempt to “define for the public what its *own* values and preferences are,” such as a ban on flag burning that signals social disapproval but is rarely, if ever, enforced.¹⁰⁷ Second there are “instrumental” statutes that “take their targets’ preferences and values as given” but alter the costs and benefits of acting on those preferences, such as a statute that doubles the penalty for something already declared a crime, like embezzlement.¹⁰⁸ Finally, they describe “expressive” statutes that combine the two, not only altering the costs and benefits of acting on one’s preferences but also “simultaneously attempting to change their targets’ values and preferences,” such as a statute prohibiting race-based denials of housing in order to signal social disapproval for discrimination.¹⁰⁹ Under our framework, Tushnet’s and Yackle’s “symbolic” statutes would be both hortatory in form and function, although their “instrumental” and “expressive” statutes would be both mandatory in form and function.

However, Tushnet and Yackle acknowledge that a symbolic statute can be problematic “when it is implemented as a real law.”¹¹⁰ We would call such laws “hortatory mandates” because they are presented as hortatory in form but are treated as mandatory in practice. To Tushnet and Yackle, laws are symbolic when they target *values* or *attitudes* rather than *behavior*.¹¹¹ Symbolic laws declare public values or attitudes and thus implicitly try to encourage conformity with those values—perhaps “signalling appropriate behavior” but not threatening official sanctions.¹¹² They simply “tell us who we are.”¹¹³ But symbolic laws, they explain, also “can have undesirable effects” when parties have to reconcile symbolic statutes with other instrumental laws in effect.¹¹⁴ Some judges will endeavor to square the two; others will not.¹¹⁵ Some symbolic statutes will indeed influence how laws are

105 LON L. FULLER, *THE MORALITY OF THE LAW* 9 (1969).

106 Tushnet & Yackle, *supra* note 85, at 2–3.

107 *Id.* at 75–76.

108 *Id.* at 74–75.

109 *Id.*

110 *Id.* at 76.

111 *Id.* at 77.

112 Sunstein, *supra* note 91, at 2032.

113 Tushnet & Yackle, *supra* note 85, at 84.

114 *Id.*

115 *Id.* at 84–85.

interpreted and applied even though they are symbolic on their face.¹¹⁶ Tushnet and Yackle therefore argue that symbolic laws “do have real consequences,” but those consequences can be random and unintended, often “serving no discernible public purpose.”¹¹⁷ Unless such a law threatens official sanctions of some kind, we argue, judicial review should not be available.

6. *Laws That Are Enforced Only Conditionally or Intermittently*

Some laws are enforced only intermittently, temporarily, or conditionally. Above we noted rules subject to agency enforcement discretion, which remain on the books but are identified in official announcements as inert—at least for the time being.¹¹⁸ In a similar vein, it is not at all unusual for Congress to adopt new taxes but delay their start dates or suspend collection temporarily. For example, under the ACA, the tax penalty for not maintaining health coverage was \$695 per adult in 2018, before Congress reduced the amount to zero in 2019.¹¹⁹ The Tax Cuts and Jobs Act did not repeal the individual mandate in section 5000A but instead reduced to zero the dollar amount and percentage of income imposed as penalties.¹²⁰ A future Congress could, of course, amend section 5000A again to impose a nonzero tax penalty. Thus, the ACA’s individual mandate may be hortatory now, but it was not hortatory in the past and may not be in the future. Similarly, a current administration’s nonenforcement policy may turn into a future administration’s enforcement priority. Judicial review would thus be available intermittently, depending on enforcement.

The best current examples of this are state “trigger laws” that sprung into effect after the Supreme Court overturned *Roe v. Wade*¹²¹ in June 2022. Before the Court’s decision in *Dobbs v. Jackson Women’s Health*,¹²² which overturned *Roe*, thirteen states had trigger laws that would ban abortion shortly after the Court overturned *Roe* and *Casey*,¹²³ eight of which became effective the day of the ruling.¹²⁴ As

¹¹⁶ *Id.* at 85.

¹¹⁷ *Id.*

¹¹⁸ See *infra* Section I.A.

¹¹⁹ Congress passed the bill that reduced the “Shared Responsibility Payment” to zero in 2017, but the reduction did not take effect until the 2019 tax year. See *No Health Insurance? See If You’ll Owe a Fee*, HEALTHCARE.GOV, <https://www.healthcare.gov/fees/fee-for-not-being-covered/> [<https://perma.cc/JT4U-JDC6>].

¹²⁰ Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).

¹²¹ 410 U.S. 113 (1973).

¹²² 142 S. Ct. 2228, 2284 (2022).

¹²³ 505 U.S. 833 (1992).

¹²⁴ See Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamarina & Lauren

early as 2005, some states passed laws that would become operative if the Supreme Court ever overturned *Roe* and *Casey*.¹²⁵ Similarly, some state laws banned abortion before *Roe* in 1973, and pro-life advocates have sought to reactivate these dormant laws. For example, West Virginia never repealed its abortion ban after *Roe*.¹²⁶ In Arizona, the state attorney general claims that the 1901 ban will now be enforceable after *Dobbs*.¹²⁷ In Texas, the state attorney general claims a 1925 ban will again be enforceable,¹²⁸ but plaintiffs challenging the law argue that it was impliedly repealed after *Roe*.¹²⁹ Courts are thus struggling to determine the applicability of these laws in the wake of *Dobbs*.¹³⁰ Intermittently enforced laws present their own unique problems that are largely beyond the scope of this Article.

C. Exemplars

To better appreciate the different forms and logics of hortatory mandates—and how they emerge through interaction among the legislative, executive, and judicial branches—we offer a deeper dive into several exemplars. These case studies demonstrate some of the reasons that hortatory mandates are becoming more common. Some hortatory mandates are intentionally designed as such; others become hortatory (or mandatory) only through judicial or executive branch

Tierney, *Abortion Is Now Banned in These States*. See *Where Laws Have Changed*, WASH. POST (June 24, 2022, 10:23 AM), <https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/> [<https://perma.cc/659R-SW7X>].

¹²⁵ See Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here's What Happens When Roe Is Overturned*, GUTTMACHER INSTITUTE (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [<https://perma.cc/EB43-LPLF>] (reporting that South Dakota enacted a trigger law in 2005).

¹²⁶ See W. VA. CODE § 61-2-8 (2022); *West Virginia's 150-year-old Abortion Ban Blocked by Judge*, CBS NEWS (July 19, 2022, 9:32 AM), <https://www.cbsnews.com/news/abortion-law-west-virginia-blocked-tera-salango/> [<https://perma.cc/H7HD-FGRD>].

¹²⁷ See ARIZ. REV. STAT. ANN. § 13-3603; *Arizona's Attorney General Says a Pre-1901 Abortion Ban Is Enforceable*, NPR (June 30, 2022, 8:13 AM), <https://www.npr.org/2022/06/30/1108871251/arizonas-attorney-general-says-pre-1901-abortion-ban-is-enforceable> [<https://perma.cc/PVY4-FMAB>].

¹²⁸ See TEX. OFF. OF ATT'Y GEN., UPDATED ADVISORY ON TEXAS LAW UPON REVERSAL OF *ROE V. WADE* 2 (July 27, 2022), [https://texasattorneygeneral.gov/sites/default/files/images/executive-management/Updated%20Post-Roe%20Advisory%20Upon%20Issuance%20of%20Dobbs%20Judgment%20\(07.27.2022\).pdf](https://texasattorneygeneral.gov/sites/default/files/images/executive-management/Updated%20Post-Roe%20Advisory%20Upon%20Issuance%20of%20Dobbs%20Judgment%20(07.27.2022).pdf) [<https://perma.cc/4LTL-BNE9>].

¹²⁹ See Adela Suliman, *Texas Supreme Court Blocks Order that Allowed Abortions to Resume*, WASH. POST (July 2, 2022, 2:02 PM), <https://www.washingtonpost.com/nation/2022/07/02/texas-supreme-court-order-abortion/> [<https://perma.cc/52RK-BPX4>].

¹³⁰ For a useful state-by-state summary of abortion laws and the litigation challenging these laws, see Kitchener et al., *supra* note 124.

reactions. Ex post hortatory mandates may result when checks and balances are applied in response to stakeholder challenges. As these challenges become more frequent, so do ex post hortatory mandates. Policymakers' ex ante, intentional use of directives that are formally mandatory but functionally hortatory suggests that they have a useful purpose, which we tie to the new governance movement. Fulfilling that purpose depends on the perception that the directives have the power of rules. In turn, the perceived legitimacy of a hortatory mandate is shaped by stakeholder challenges that invoke available checks and balances.

1. *The Clean Air Act's Emission Standards*

When Congress passed the Clean Air Act Amendments of 1977,¹³¹ directing the EPA to set emissions standards for hazardous air pollutants, it stressed the Act's "precautionary or preventive purpose[s]" and emphasized that protecting public health was "the predominant value."¹³² Section 112 gave the EPA very short deadlines both to publish a list of hazardous air pollutants—just ninety days after the statute took effect—and propose emission standards, just 180 days later.¹³³ But more than that, section 112 imposed strict substantive criteria for setting those standards. The EPA was to set standards at levels that "protect public health" with "an ample margin of safety."¹³⁴

In promising to achieve health-based emission limits on hazardous air pollutants, regardless of the costs or feasibility of doing so,¹³⁵ and in such a quick timeframe, section 112 came to be viewed more as an aspirational or symbolic statute than one creating a workable regulatory program.¹³⁶ The language of section 112 signaled that Congress was taking an uncompromising stance toward regulating airborne chemicals, although it quickly became apparent that Congress had incorrectly "assumed the existence of adequate and reliable scientific

131 Pub. L. No. 95-95, 91 Stat. 685 (1977).

132 H.R. REP. NO. 95-294, at 49, 51 (1977).

133 42 U.S.C. § 7412.

134 *Id.* § 7412(f)(2).

135 *Id.* § 7412. The version of section 112 first enacted required the EPA to set emissions standards for "hazardous air pollutants" that were "adequate to protect public health with an ample margin of safety." *Id.* § 7412(c)(9)(B)(ii). Notably, section 112 implicitly precluded the EPA from considering economic costs or technological feasibility as Congress had directed the EPA to consider in other sections of the Clean Air Act, such as section 111. See Dwyer, *supra* note 47, at 239.

136 Dwyer, *supra* note 47, at 234–35; Henderson & Pearson, *supra* note 50, at 1430.

data” readily available for EPA to make these decisions.¹³⁷ As John Dwyer explained, the process of gathering and evaluating data that correlates air pollutant exposure to health risks “can last as long as seven years” “for a single chemical.”¹³⁸

Despite the unrealistic statutory language in section 112, Congress preserved the language for decades “because of the political benefits of supporting legislation purporting to protect health regardless of costs, and because of the great political costs of appearing to sacrifice health benefits to lower regulatory costs.”¹³⁹ Section 112 was symbolic in the worst sense, directing the EPA to set “unrealistically stringent” standards that “most industrial facilities could not meet . . . without closing their doors.”¹⁴⁰ Section 112, then, was “useful in “sending a signal to interest groups,”¹⁴¹ and perhaps in “precommit[ting] EPA and industry to” taking more aggressive actions against air pollutants,¹⁴² but was not useful in establishing a “functional and effective” program for regulating “hazardous air pollutants.”¹⁴³ At the same time, section 112 sent a valuable signal that public health should be elevated over industrial or economic costs, and section 112 might have been “technology-forcing” by contemplating stringent standards that the industry would never achieve without provocation.¹⁴⁴

Nevertheless, the EPA was tasked with achieving the impossible. As a result, the EPA purposefully delayed implementing section 112, avoided identifying hazardous air pollutants that would trigger the regulatory process, purposefully misconstrued the statute’s language into something workable, and blew through statutory deadlines until courts ordered the EPA to act, including a threatened contempt citation against the EPA administrator.¹⁴⁵ Section 112 could only be understood in hindsight as more a message to constituents than a workable instruction to the EPA.¹⁴⁶ Ironically, it was “the threat of judicial review [that] caused EPA to delay” implementing section 112, knowing the agency could not meet the literal criteria of the statute

¹³⁷ Dwyer, *supra* note 47, at 238.

¹³⁸ *Id.*

¹³⁹ *Id.* at 235. Note that Congress amended section 112 in the Clean Air Act Amendments of 1990. *Id.* at 266.

¹⁴⁰ *Id.* at 235.

¹⁴¹ *Id.* at 247.

¹⁴² Giovinazzo, *supra* note 59, at 100.

¹⁴³ Dwyer, *supra* note 47, at 247.

¹⁴⁴ *See id.* at 247–48; *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 490–92 (2001) (Breyer, J., concurring).

¹⁴⁵ *See Dwyer, supra* note 47, at 235, 281–82.

¹⁴⁶ *See id.* at 236.

and could not reformulate the statute into a workable program without being overturned by reviewing courts.¹⁴⁷ Moreover, the unworkable language forced EPA “to misrepresent its position to Congress, the courts, and the public,” disguising the bases of its decision-making, suppressing debate, and thwarting judicial review by driving decision-making underground.¹⁴⁸

Experience with section 112 led some to argue that courts should recognize symbolic legislation as such and thus be especially deferential to agency implementation of such language.¹⁴⁹ John Dwyer urges courts not to interpret symbolic or aspirational statutes literally, lest they undermine reasonable attempts by agencies to render the statute workable and indulge in an idealized view of the legislative process that invites nondelegation arguments that attack the very constitutional legitimacy of the statute.¹⁵⁰ Invalidating symbolic statutes because they make promises that cannot be kept could deter legislative compromises.¹⁵¹

Section 112 is thus a cautionary tale of the challenges that hortatory mandates can impose on agencies and courts alike. The EPA was forced to respond to unworkable statutory standards,¹⁵² and courts were forced to reconcile statutory language styled as a mandate but best understood as merely symbolic or aspirational in substance.¹⁵³ Confusion abounds when form and function collide.

2. *The Affordable Care Act's Individual Mandate*

The most prominent recent example of a hortatory mandate began as a simple, enforceable mandate. When Congress passed the ACA in 2010, it included an “individual mandate” that required most Americans to obtain health insurance or pay a penalty scaled to their income.¹⁵⁴ The ACA phased in the penalty—called a “shared responsibility payment”—over a three-year period beginning in 2014.¹⁵⁵ In

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 282; see Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENV'T L. REV. 297, 301–03 (1999).

¹⁴⁹ Dwyer, *supra* note 47, at 236, 311–15.

¹⁵⁰ *Id.* at 286, 303–05; see also Julian Davis Mortenson & Nicholas Bagley, *Nondelegation at the Founding*, 121 COLUM. L. REV. 277, 315 (2021). Some scholars argue for invalidating or nullifying hopelessly ambiguous or obsolete statutes. See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 170–71 (1982).

¹⁵¹ Dwyer, *supra* note 47, at 305.

¹⁵² *Id.* at 286, 292.

¹⁵³ *Id.* at 302–16.

¹⁵⁴ 42 U.S.C. §§ 18091, 18092; 26 U.S.C. § 5000A; McDonough, *supra* note 17.

¹⁵⁵ INTERNAL REVENUE SERV., *supra* note 17.

2014, the penalty for going uninsured was either 1% of income above the filing threshold or a fixed amount (\$95 per adult or \$47.50 per child), whichever was greater.¹⁵⁶ In 2015, the ACA raised the amounts to 2% of income above the filing threshold or \$325 per adult and \$162.50 per child.¹⁵⁷ And from 2016 to 2018, the amounts were raised to 2.5% of income above the filing threshold or \$695 per adult and \$347.50 per child.¹⁵⁸

Predictably, people responded by procuring the “minimum essential coverage” required by the ACA. A study measuring the mandate’s effect on nonelderly persons with family incomes above 400% of the federal poverty level found that between 2013 and 2016, the share of those that went without health insurance at some point during that period fell between 24% and 39%.¹⁵⁹ To isolate the effect of the individual mandate, the study authors excluded people eligible for Medicare, Medicaid, or insurance subsidies, although the authors acknowledge that other confounding factors, such as insurance market reforms, could have influenced these decisions too.¹⁶⁰

In 2017, however, after repeated attempts in Congress to repeal the ACA whole cloth, opponents were able to pass only a limited bill that zeroed out the mandate penalty, beginning in 2019.¹⁶¹ Thus, the Tax Cuts and Jobs Act of 2017 did not repeal the individual mandate itself in section 5000A but instead reduced to zero the dollar amount and percentage of income imposed as penalties.¹⁶² Experts at the time estimated that eliminating the penalty would increase the number of uninsured by 2.8 to 13 million.¹⁶³ In the end, repealing the mandate

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Matthew Fiedler, *How Did the ACA’s Individual Mandate Affect Insurance Coverage? Evidence from Coverage Decisions by Higher-Income People*, U.S.C.-BROOKINGS SCHAEFFER INITIATIVE FOR HEALTH POL’Y 1 (May 2018) <https://www.brookings.edu/wp-content/uploads/2018/05/coverageeffectsofmandate2018.pdf> [<https://perma.cc/B7VE-E38M>].

¹⁶⁰ See *id.* at 2, 19–21.

¹⁶¹ Congress passed the bill that reduced the “Shared Responsibility Payment” to zero in 2017, but the reduction did not take effect until the 2019 tax year. See HEALTHCARE.GOV, *supra* note 119; Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).

¹⁶² See § 11081, 131 Stat. at 2092.

¹⁶³ See CONG. BUDGET OFF., REPEALING THE INDIVIDUAL INSURANCE MANDATE: AN UPDATED ESTIMATE 1 (2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53300-individualmandate.pdf> [<https://perma.cc/84EC-SDW8>]; CHRISTINE EIBNER & SARAH NOWAK, THE EFFECT OF ELIMINATING THE INDIVIDUAL MANDATE PENALTY AND THE ROLE OF BEHAVIORAL FACTORS (2018), <https://www.commonwealthfund.org/publications/fund-reports/2018/jul/eliminating-individual-mandate-penalty-behavioral-factors> [<https://perma.cc/72BK-TKXC>].

did not have as great an impact as feared—participation in the state insurance exchanges decreased only from 12.2 million in 2017 to 11.4 million in 2020.¹⁶⁴

Still, at least some portion of the population responded to the enforceable mandate by *purchasing* health insurance, and at least some responded to the unenforceable mandate by *dropping* or failing to procure health insurance. This, of course, did not deter opponents of the ACA from challenging the unenforceable mandate and the entire law yet again. Texas and seventeen other states sued to challenge the zero-penalty mandate, which they argued violated the Constitution in light of the holding in *NFIB v. Sebelius*¹⁶⁵ that the mandate was valid only as a tax.¹⁶⁶ With the tax penalty reduced to zero, they argued, the mandate could no longer be justified as a tax.¹⁶⁷ The states were joined by two individual plaintiffs, Neill Hurley and John Nantz, who claimed that the mandate could not be severed from the rest of the ACA and thus urged that the entire Act be invalidated.¹⁶⁸

Although the plaintiffs found sympathetic—and credulous—judges at both the district court and court of appeals,¹⁶⁹ the Supreme Court was not sympathetic to their claims. By a 7–2 majority, the Court found that neither the states nor the individual plaintiffs had standing to challenge the law, as neither could demonstrate that they had suffered a concrete, particularized injury that was fairly traceable to the federal government’s conduct.¹⁷⁰ The two individual plaintiffs argued that, despite the lack of legal consequences for not buying insurance, “they ‘value[d] compliance with [their] legal obligations’”¹⁷¹ and “fe[lt] compelled to buy insurance” because it was “the right thing to do.”¹⁷² The state plaintiffs claimed that the unenforceable mandate would still increase enrollment in, and thus the cost of operating, state

¹⁶⁴ *Marketplace Enrollment, 2014–2023*, KAISER FAM. FOUND., <https://www.kff.org/53b4840/> [<https://perma.cc/VJ7L-RKCU>]; Sarah Kliff, *Republicans Killed the Obamacare Mandate. New Data Shows It Didn't Really Matter.*, N.Y. TIMES (Sept. 21, 2020), <https://www.nytimes.com/2020/09/18/upshot/obamacare-mandate-republicans.html> [<https://perma.cc/7UMC-NREE>].

¹⁶⁵ 567 U.S. 519 (2012).

¹⁶⁶ *See id.*; *Texas v. United States*, 340 F. Supp. 3d 579, 591 (N.D. Tex. 2018).

¹⁶⁷ *See Texas v. United States*, 340 F. Supp. 3d at 591.

¹⁶⁸ *See id.*

¹⁶⁹ *See id.* at 593; *Texas v. United States*, 945 F.3d 355, 369 (5th Cir. 2019).

¹⁷⁰ *See California v. Texas*, 141 S. Ct. 2104, 2120 (2021).

¹⁷¹ Opening Brief for Petitioners, *supra* note 20, at 18.

¹⁷² *Id.*; *Texas v. United States*, 945 F.3d at 380.

public insurance programs, along with related administrative expenses.¹⁷³

The Court rejected these claims.¹⁷⁴ Although the ACA tells plaintiffs to maintain coverage, the government “has no means of enforcement” and “the IRS can no longer seek a penalty from those who fail to comply.”¹⁷⁵ Writing for the majority, Justice Breyer emphasized that the Court’s “cases have consistently spoken of the need to assert an injury that is the result of a statute’s actual or threatened *enforcement*, whether today or in the future,” and that “[i]n the absence of contemporary enforcement . . . a plaintiff claiming standing must show that the likelihood of future enforcement is ‘substantial.’”¹⁷⁶ However, the Court found that, in this case, “there is no action—actual or threatened—whatsoever.”¹⁷⁷ An injunction would not make sense, the majority observes, because “[t]here is no one, and nothing, to enjoin.”¹⁷⁸ Likewise, the state plaintiffs failed to establish standing because they could not show, at the very least, that individual consumers would “likely react [to the unenforceable mandate] in predictable ways.”¹⁷⁹ As the majority observed, “[a] penalty might have led some inertia-bound individuals to enroll,” but questioned, “without a penalty, what incentive could the provision provide?”¹⁸⁰ Even though the Congressional Budget Office predicted that, absent a tax penalty, a “small number of people” would continue to enroll in health insurance due to a “willingness to comply with the law,”¹⁸¹ the plaintiffs could not explain “*why* they might do so.”¹⁸² Such a “highly attenuated chain of possibilities” did not satisfy the requirement that any injuries be fairly traceable to the defendants’ conduct.¹⁸³

The ACA mandate thus demonstrates how *timing* should influence judicial review. At one point, the insurance mandate was binding and enforceable—and thus presumably reviewable. Today it is none of those things.

173 *California v. Texas*, 141 S. Ct. at 2116–17.

174 *Id.* at 2117–18.

175 *Id.* at 2114.

176 *Id.* (emphasis added) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014)).

177 *Id.* at 2115.

178 *Id.* at 2116.

179 *See id.* at 2117 (quoting *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019)).

180 *Id.* at 2118.

181 CONG. BUDGET OFF., *supra* note 163, at 1.

182 *California v. Texas*, 141 S. Ct. at 2118.

183 *See id.* at 2119 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410–11 (2013)).

3. Dietary Guidelines

Hortatory mandates also include the flipside: guidelines that are formally hortatory but functionally mandatory. These are harder to come by, as they are less well classified in the literature than formally mandatory, functionally hortatory laws. Dietary guidelines offer an example through an informative case study.

As a formal matter, government-issued dietary guidelines are typically hortatory. Functionally, however, they are often incorporated into binding requirements. For instance, every five years, the U.S. Department of Agriculture (“USDA”) collaborates with HHS to update the Dietary Guidelines for Americans (“DGAs”).¹⁸⁴ In a parallel process, the U.S. Food and Drug Administration (“FDA”) promulgates Daily Reference Values (“DRVs”) for specific food components such as fat, sodium, and added sugars.¹⁸⁵ Although the DGAs and DRVs themselves are formally hortatory, they are incorporated into various binding requirements, including federal nutrition programs for low-income households and schools,¹⁸⁶ federal nutrition labeling requirements for packaged foods,¹⁸⁷ and local labeling requirements for food service establishment menus.¹⁸⁸

Health and animal rights groups have frequently sued USDA and HHS to enforce procedural requirements related to the DGAs and had some modest success in increasing transparency.¹⁸⁹ They have

¹⁸⁴ National Nutrition Monitoring and Related Research Act of 1990 § 301, 7 U.S.C. § 5341 (requiring USDA and HHS secretaries to publish nutritional guidelines at least once every five years); USDA & HHS, 2020–2025 DIETARY GUIDELINES FOR AMERICANS (2020), https://www.dietaryguidelines.gov/sites/default/files/2020-12/Dietary_Guidelines_for_Americans_2020-2025.pdf [<https://perma.cc/E7GT-JA44>].

¹⁸⁵ Food Labeling: Revision of the Nutrition and Supplement Facts Labels, 81 Fed. Reg. 33,742 (May 27, 2016) (setting forth DRVs).

¹⁸⁶ See Lindsay F. Wiley, *The U.S. Department of Agriculture as a Public Health Agency? A “Health in All Policies” Case Study*, 9 J. FOOD L. & POL’Y 61, 82–96 (2013) (detailing the incorporation of nutrition guidelines into federal nutrition assistance programs).

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., *Nat’l Rest. Ass’n v. N.Y.C. Dep’t of Health & Mental Hygiene*, 49 N.Y.S.3d 18, 20 (App. Div. 2017) (upholding New York City mandate to include sodium warnings on food service establishment menus based in part on DGA recommendation for maximum sodium consumption). Similarly, FDA regulations governing medical devices incorporate hundreds of “voluntary consensus standards” issued by international standard-setting organizations such as the International Electrotechnical Commission and the International Organization for Standardization (abbreviated as “ISO” as derived from the Greek word *isos*, or “equal”). See FDA, *Recognized Consensus Standards*, <https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfStandards/search.cfm> [<https://perma.cc/S7Q8-DPFG>]; FDA, *Standards and Conformity Assessment Program*, <https://www.fda.gov/medical-devices/premarket-submissions-selecting-and-preparing-correct-submission/standards-and-conformity-assessment-program> [<https://perma.cc/Z8CU-M655>].

¹⁸⁹ See, e.g., *Physicians Comm. For Responsible Med. v. Glickman*, 117 F. Supp. 2d 1, 3–6

tried, but failed, to obtain court rulings reviewing the dietary guidelines themselves.¹⁹⁰ Nor have they been able to hold the agencies accountable for securing the DGA process against improper influence from the food and agriculture industries. In 2016, for example, a federal district judge held that the Federal Advisory Committee Act's¹⁹¹ mandate that executive departments "shall" follow guidelines requiring "appropriate provisions to assure that the advice and recommendations of [an] advisory committee [governed by the Act] will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment" did not provide a meaningful standard for review.¹⁹²

Nongovernmental organizations have also sought to hold the USDA accountable for weakening regulations incorporating voluntary nutrition guidelines into mandatory nutrition standards for school meals. In 2020, for example, public health advocacy groups successfully obtained a district court order holding that USDA violated the Administrative Procedure Act ("APA")¹⁹³ by failing to give adequate notice regarding changes to sodium and whole grain requirements for the federal school meal program.¹⁹⁴ Their efforts to enforce statutory directives to ensure school meals "are consistent with the goals of the most recent" DGAs were unsuccessful; however, the court found the directives were ambiguous and the agency's interpretations were reasonable.¹⁹⁵ The court reasoned that "'goals' could refer to the specific quantitative recommendations to which Plaintiffs point, or it could refer to the more general goals of increasing whole grain consumption and reducing sodium consumption to which USDA points."¹⁹⁶ Although this particular mandate was formally mandatory, "Congress

(D.D.C. 2000) (holding that the identity of a corporation that paid a member of the DGA Committee was not protected from disclosure under the Freedom of Information Act); *see also* Wiley, *supra* note 186, at 72–73 (describing the influence of litigation on the DGAs).

¹⁹⁰ *See, e.g.*, *Physicians Comm. For Responsible Med. v. Vilsack*, 867 F. Supp. 2d 24, 26–30 (D.D.C. 2011) (finding the plaintiffs lacked standing and dietary guidelines were not "agency action" subject to judicial review under the Administrative Procedure Act).

¹⁹¹ 5 U.S.C. app. 2. §§ 1–16.

¹⁹² *Physicians Comm. For Responsible Med. v. Vilsack*, No. 16-cv-00069, 2016 WL 5930585, *2–3, *8 (N.D. Cal. Oct. 12, 2016) (original alteration omitted).

¹⁹³ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).

¹⁹⁴ *Ctr. For Sci. in the Pub. Int. v. Perdue*, 438 F. Supp. 3d 546, 546–47 (D. Md. 2020).

¹⁹⁵ *Id.* at 562 (quoting 42 U.S.C. § 1758(f)(1)(A)).

¹⁹⁶ *Id.* at 562–63.

did not clearly indicate which ‘goals’ it was referring to in crafting its directive,”¹⁹⁷ rendering it functionally hortatory.

In addition to seeking redress in the courts, nutrition and public health advocates have advocated for public-private partnerships to enhance industry self-governance, particularly for foods marketed to children.¹⁹⁸ Prompted by concerns that industry self-regulation would result in lax guidelines,¹⁹⁹ in 2009, Congress created the Interagency Working Group on Food Marketed to Children, made up of representatives from the Center for Disease Control (“CDC”), FDA, USDA, and the Federal Trade Commission (“FTC”) and directed it to recommend voluntary nutritional guidelines.²⁰⁰ The guidelines the working group proposed²⁰¹ took heavy flak from both sides; public health and nutrition advocates deemed them too lax while industry groups said they were far too limiting.²⁰² Thus, even an effort using only “soft” law²⁰³ to guide industry self-regulation was seen as too threatening to marketers. After an intense industry lobbying campaign, Congress added language to the Consolidated Appropriations Act of 2012²⁰⁴ stating that appropriations for the year may not be used by the FTC to finalize the working group’s report unless it survived OIRA review,²⁰⁵ an apparently unprecedented step for guidelines that were formally voluntary.

Why did the food and beverage industry find it worthwhile to expend tens of millions of lobbying dollars to ensure that voluntary guidelines were never finalized?²⁰⁶ Apparently, companies perceived

¹⁹⁷ *Id.* at 563.

¹⁹⁸ See LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 213–14 (3d ed. 2016).

¹⁹⁹ See *id.* at 215 (describing the industry standards the working group was seeking to influence).

²⁰⁰ Interagency Working Grp. on Food Marketed to Child., *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts: Request for Comments 1–2* (2011), https://www.ftc.gov/sites/default/files/documents/public_events/food-marketed-children-forum-inter-agency-working-group-proposal/110428foodmarketproposedguide.pdf [<https://perma.cc/3VB2-68MY>].

²⁰¹ *Id.*

²⁰² See Marion Nestle, *House Holds Hearings on Nutrition Standards for Food Marketing to Kids*, *FOOD POL.* (Oct. 12, 2011), <https://www.foodpolitics.com/2011/10/house-holds-hearings-on-nutrition-standards-for-food-marketing-to-kids/> [<https://perma.cc/DE9X-HSLF>].

²⁰³ *Soft Law*, *BLACK’S LAW DICTIONARY* (11th ed. 2019) (defining soft law as “rules that are neither strictly binding nor completely lacking in legal significance”).

²⁰⁴ Pub. L. No. 112-74, 125 Stat. 786 (2011).

²⁰⁵ *Id.* § 626.

²⁰⁶ See Marion Nestle, *Congress Caves in Again. Delays IWG Recommendations.*, *FOOD POL.* (Dec. 17, 2011), <https://www.foodpolitics.com/2011/12/congress-caves-in-again-delays-iwg-recommendations/> [<https://perma.cc/8UXE-ZTAQ>].

that, although hortatory in form, the guidelines would be treated as mandatory in function—setting de facto industry standards. Their effort to nip the initiative in the bud was successful. FTC abandoned the effort altogether.²⁰⁷ This hortatory mandate was checked not by judicial review, which may have faced justiciability barriers, but by the *political* branches. The legislative process (congressional appropriations) and the threat of executive review (OIRA) were enough to deter the four agencies from finalizing and implementing standards. This demonstrates that judicial review is not the only check or balance for hortatory mandates.

II. WHAT HAS THE COVID-19 PANDEMIC TAUGHT US ABOUT HORTATORY MANDATES?

In response to the COVID-19 pandemic, governments at all levels turned to hortatory mandates. First, CDC and other agencies issued hundreds of guidelines that were hortatory in form but became mandatory in function when both public and private entities adopted them as binding requirements.²⁰⁸ Second, many (but not all) state and local orders that limited gatherings, restricted movement, and mandated masks or vaccinations were hortatory in function despite being mandatory in form.²⁰⁹ What do these efforts tell us about when and why lawmakers use hortatory mandates? And why were some COVID-19 orders treated by judges as hortatory?

A. Which COVID-19 Mandates Were Hortatory and Why?

Formally mandatory but functionally hortatory public health orders may have existed before COVID-19, but they were not the norm. Before the pandemic, it was far more common to see simple hortatory advisories, such as CDC's 2016 advisory warning pregnant people to avoid a neighborhood in Miami-Dade County where there was an active transmission of the Zika virus,²¹⁰ and traditional mandates such as state laws requiring people to wear seat belts in motor vehicles, en-

²⁰⁷ See *Fact Sheet: Unhealthy and Unregulated: Food Advertising and Marketing to Children*, AM. HEART ASS'N (Apr. 9, 2019), <https://www.heart.org/-/media/files/about-us/policy-research/fact-sheets/healthy-schools-and-childhood-obesity/food-marketing-and-advertising-to-children-fact-sheet.pdf> [<https://perma.cc/F53E-TXUL>].

²⁰⁸ See *infra* Section II.A.1.

²⁰⁹ See *infra* Section II.A.2.

²¹⁰ Press Release, CDC, CDC Issues Travel Guidance Related to Miami Neighborhood with Active Zika Spread (Aug. 1, 2016), <https://www.cdc.gov/media/releases/2016/p0801-zika-travel-guidance.html> [<https://perma.cc/S5NL-G2XN>].

forceable as a primary or secondary traffic offense.²¹¹ But, during the pandemic, officials turned to hortatory mandates to an unprecedented degree, particularly for measures directed at individuals, rather than businesses and organizations.²¹²

1. *Formally Hortatory COVID-19 Guidelines That Were Functionally Mandatory*

Voluntary guidelines from CDC and state and local health departments serve important purposes: they help coordinate responses by other government agencies and private entities, and they also offer legal and political cover for controversial policies. Prior to COVID-19, judges often treated concordance with CDC and other health agency guidelines as a strong indication that binding legal requirements have a sound scientific basis.²¹³

Throughout the COVID-19 pandemic, voluntary guidelines have been directly incorporated into enforceable directives: for example, CDC issues guidelines recommending specific time periods for isolation (for people known or suspected of being infected) and quarantine (for people known or suspected of having been exposed). These guidelines then become mandates when state and local officials warn that “[i]ndividuals who fail to comply [with CDC’s isolation and quarantine guidelines] may be subject to involuntary detention.”²¹⁴ CDC guidelines were also incorporated into federal sick leave requirements,²¹⁵ as well as various mitigation policies adopted by schools and employers—many of which required individuals to attest to following public health “guidance.”²¹⁶ CDC also has issued a series of recom-

211 *Traffic Safety State Bill Tracking*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 15, 2023), <https://www.ncsl.org/transportation/traffic-safety-state-bill-tracking> [<https://perma.cc/NCE2-ZKH5>] (select “Seatbelts and Occupant Protection” in the “Topics” search; then select the “Search” button).

212 Lindsay F. Wiley, Essay, *Public Health Law and Science in the Community Mitigation Strategy for Covid-19*, J.L. & BIOSIS., Jan.–June 2020, at 4–8.

213 *Id.* at 19.

214 *COVID-19 Resource Guide*, KING CNTY. 9 (Apr. 23, 2022), <https://kingcounty.gov/~media/vonReichbauer/documents/2020/ResourceGuide4-23.ashx> [<https://perma.cc/QSF3-X655>]; see also Wiley, *supra* note 212, at 19.

215 See, e.g., Families First Coronavirus Response Act, Pub. L. No. 116-127, § 5102(a), 134 Stat. 178, 195–96 (2020) (mandating paid leave for isolation and quarantine through 2020 under some circumstances); D.C. CODE § 32-502.01 (2021) (expired) (extending unpaid leave for isolation and quarantine).

216 For example, many businesses and institutions required individuals to attest that they had not recently tested positive for COVID-19. Some, but not all, updated these required attestations (from fourteen days to ten days to five days) in response to the CDC’s changes to its isolation guidance. See, e.g., United Airlines, *What Does the “Ready-to-Fly Checklist” Entail?*,

recommendations for when to use face coverings, which many state and local governments then referenced as the basis for imposing—and lifting and reimposing—mandatory face covering orders.²¹⁷ Similarly, specific vaccination schedules recommended by CDC have been incorporated into mandates issued by state and local governments, universities, schools, daycares, and workplaces.²¹⁸ Recommendations by CDC’s Advisory Committee on Immunization Practices are incorporated by reference into the contracts that give health care providers access to COVID-19 vaccine doses²¹⁹ and health insurance regulations that prohibit out-of-pocket payments for the cost of administering vaccines.²²⁰

When “guidelines” morph into requirements, they face heightened procedural and substantive expectations. For example, the lack of transparency in the CDC’s process for developing and modifying COVID-19 guidelines—and politicization of public health interventions—eroded trust in the CDC.²²¹ Ironically, the power of voluntary

<https://www.united.com/ual/en/us/fly/travel/what-to-expect.html> [<https://web.archive.org/web/20220103231826/https://www.united.com/ual/en/us/fly/travel/what-to-expect.html>] (describing a requirement that passengers must attest that they have not tested positive in the last five days).

²¹⁷ See, e.g., Press Release, Brandon M. Scott, Mayor of Balt., Mayor Scott Reinstates Indoor Mask Requirement in Baltimore City (Aug. 5, 2021), <https://mayor.baltimorecity.gov/news/press-releases/2021-08-05-mayor-scott-reinstates-indoor-mask-requirement-baltimore-city> [<https://perma.cc/MX76-UXC3>] (“This Health Order, issued by Health Commissioner Dr. Letitia Dzirasa, aligns Baltimore City with the new Centers for Disease Control and Prevention guidance regarding jurisdictions seeing substantial case transmission.”).

²¹⁸ See, e.g., Kelly Gooch, *Thirteen States or Cities Requiring COVID-19 Vaccinations for Healthcare Workers*, BECKER’S HOSP. REV. (Oct. 4, 2021), <https://www.beckershospitalreview.com/workforce/8-states-cities-requiring-covid-19-vaccination-for-healthcare-workers.html> [<https://perma.cc/PH5T-BBTS>]; *Where Teachers Are Required to Get Vaccinated Against COVID-19*, EDUC. WK. (May 4, 2022), <https://www.edweek.org/policy-politics/where-teachers-are-required-to-get-vaccinated-against-covid-19/2021/08> [<https://perma.cc/QB78-FA8C>]; Chris Burt, *State-by-State Colleges Requiring COVID-19 Vaccines, Boosters*, UNIV. BUS. (Jan. 2, 2022), <https://universitybusiness.com/state-by-state-look-at-colleges-requiring-vaccines/> [<https://web.archive.org/web/20220105200933/https://universitybusiness.com/state-by-state-look-at-colleges-requiring-vaccines/>]; Carlie Porterfield, *Here Are the U.S. Cities Where You Need a Covid Vaccine to Dine in a Restaurant*, FORBES (Dec. 22, 2021, 12:49 PM), <https://www.forbes.com/sites/carlieporterfield/2021/12/22/here-are-the-us-cities-where-you-need-a-covid-vaccine-to-dine-in-a-restaurant/?sh=62414b048821> [<https://perma.cc/5ZEY-R8YX>].

²¹⁹ CDC, COVID-19 VACCINATION PROGRAM PROVIDER AGREEMENT (Sept. 14, 2020), https://scdhec.gov/sites/default/files/media/document/COVID19-Vaccination_Provider_Agreement_and_Profile_Form.pdf [<https://perma.cc/SQU4-JPP7>].

²²⁰ See Sidney Lupkin & Pien Huang, *CDC Warns Against Off-Label Use Of COVID Vaccine*, NPR (Sept. 2, 2021, 5:00AM), <https://www.npr.org/sections/health-shots/2021/09/02/1033299418/cdc-warns-against-off-label-use-of-covid-vaccine> [<https://perma.cc/7JMH-8Y8K>].

²²¹ See Dylan Scott, *The Most Consistently Botched Part of the U.S. Pandemic Response*, VOX (Jan 14, 2022, 6:00 AM), <https://www.vox.com/coronavirus-covid19/22870268/cdc-covid-19-guidelines-isolation-boosters-masks> [<https://perma.cc/CEN5-9QHZ>]; Carl Latkin, Lauren Day-

guidelines to coordinate and provide cover for mandatory interventions may be diminished as a result. Guidelines that have practically mandatory impact are not subject to stringent procedural requirements on the front end to ensure transparency, legitimacy, and trust,²²² nor are they directly reviewable by the courts.²²³

2. *Formally Mandatory COVID-19 Orders Rendered Functionally Hortatory*

In March 2020, local public health officials in the San Francisco Bay Area turned to the all-hazards approach to emergency preparedness that became popular in the early 2000s,²²⁴ deploying tools developed for pandemics, severe weather events, civil unrest, and acts of terrorism.²²⁵ Relying on broad authority provided by disaster and emergency management statutes, San Francisco's shelter-in-place orders—the first in the United States used in response to COVID-19—included substantial penalties.²²⁶ Local police followed up with guidance clarifying that officers could issue misdemeanor citations for violating the orders but would aim for an “education first” approach.²²⁷

ton, Justin C. Strickland, Brian Colon, Rajiv Rimal & Basmattee Boodram, *An Assessment of the Rapid Decline of Trust in US Sources of Public Information About COVID-19*, 25 J. HEALTH COMM'N 764, 765 (2020).

²²² Robert Gatter, *Ebola, Quarantine, and Flawed CDC Policy*, 23 U. MIA. BUS. L. REV. 375, 396 (2015).

²²³ JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., R44468, GENERAL POLICY STATEMENTS: LEGAL OVERVIEW 6–8, 15 (2016).

²²⁴ See, e.g., EDWARD P. RICHARDS, KATHERINE C. RATHBUN, CORINA SOLÉ BRITO, & ANDREA LUNA, U.S. DEP'T OF JUST., THE ROLE OF LAW ENFORCEMENT IN PUBLIC HEALTH EMERGENCIES: SPECIAL CONSIDERATIONS FOR AN ALL-HAZARDS APPROACH 3 (2006), <https://www.ojp.gov/pdffiles1/bja/214333.pdf> [<https://perma.cc/6KYB-RQQB>].

²²⁵ Julia Prodis Sulek, *Meet the Doctor Who Ordered the Bay Area's Coronavirus Lockdown, the First in the U.S.*, MERCURY NEWS (Jan. 24, 2021, 6:46 PM), <https://www.mercurynews.com/2020/03/29/she-shut-down-the-bay-area-to-slow-the-deadly-coronavirus-none-of-us-really-believed-we-would-do-it> [<https://perma.cc/5BVH-YG7U>] (describing the events that led public health officers in seven local jurisdictions to simultaneously issue shelter-in-place orders and the models they relied on).

²²⁶ See, e.g., CITY & CNTY. OF S.F. DEP'T OF PUB. HEALTH, ADMIN. ORDER NO. C19-07, SHELTER IN PLACE ORDER (2020), <https://sfgsa.org/sites/default/files/Document/OrderC19-07ShelterinPlace.pdf> [<https://perma.cc/TF6W-JGW5>].

²²⁷ See, e.g., S.F. POLICE DEP'T, NOTICE 20-045, ENFORCEMENT OF PUBLIC HEALTH ORDERS (2020), <https://www.sanfranciscopolice.org/sites/default/files/2020-03/SFPDNotice20.045.20200323.pdf> [<https://perma.cc/6SH3-8CAY>] (“Members may directly enforce health orders under state law, and the [Shelter in Place] Order is such an order . . . Members may educate, admonish, seek voluntary compliance, and use enforcement for violations of the SIP (‘progressive enforcement’). Members issuing citations for violating the SIP should cite SF Admin 7.17(b) [misdemeanor for violating a lawful order, the SIP] Cal Penal Code § 148 [misdemeanor for willful resisting, delaying, or obstructing the SIP order, if appropriate.]” (original emphasis omitted)).

In the months that followed, enforcement of COVID-19 mitigation orders was sporadic and then largely tapered off.²²⁸ In several jurisdictions, journalists and nongovernmental organizations documented predictably discriminatory enforcement by police against Black and Brown people²²⁹ and the use of social distancing violations to increase penalties for minor offenses, known as “charge stacking.”²³⁰ Some of these reports came shortly before a national movement to end racist policing and defund the police sparked by the murder of George Floyd.²³¹

Officials also quickly ran up against logistical constraints, opposition from civil liberty and public health groups, and overt resistance by local police. It was simply not feasible in many settings to enforce orders restricting travel or movement or requiring physical distancing. Governors and other state executive officials have few enforcement resources at their direct disposal. State police forces are typically far smaller than the combined local police forces within the state.²³² And

²²⁸ See, e.g., Brief of Appellants at 7 n.5, *County of Butler v. Governor of Pa.*, 8 F.4th 226 (3d Cir. 2021) (No. 20-2936), (“[T]hough there was some confusion at the outset, the policy with respect to the stay-at-home orders was that there were not to be any citations. With respect to the Business Closure Orders, certain enforcement actions were taken.”).

²²⁹ See, e.g., Ashley Southall, *Scrutiny of Social-Distance Policing as Thirty-Five of Forty Arrested Are Black*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/05/07/nyregion/nypd-social-distancing-race-coronavirus.html> [<https://perma.cc/63UJ-Q9HD>]; Joshua Kaplan & Benjamin Hardy, *Early Data Shows Black People Are Being Disproportionately Arrested for Social Distancing Violations*, PROPUBLICA (May 8, 2020, 6:22 PM), <https://www.propublica.org/article/in-some-of-ohios-most-populous-areas-black-people-were-at-least-4-times-as-likely-to-be-charged-with-stay-at-home-violations-as-whites> [<https://perma.cc/6M3Y-9YT9>]; Jake Offenhardt, “*Déjà Vu*”: Attorneys Say De Blasio’s Social Distancing Enforcement Is Stop-and-Frisk All Over Again, GOTHAMIST (May 26, 2020), <https://gothamist.com/news/d%C3%A9j%C3%A0-vu-attorneys-say-de-blasios-social-distancing-enforcement-is-stop-and-frisk-all-over-again> [<https://perma.cc/JJB7-HX6E>]. When face covering orders were issued, reports indicated that Black men were being disproportionately stopped by police—both for wearing masks and for not wearing masks. See, e.g., Damon Young, Perspective, *Masking While Black: A Coronavirus Story*, WASH. POST (Apr. 10, 2020, 12:20 PM), <https://www.washingtonpost.com/outlook/2020/04/10/coronavirus-masks-black-america/> [<https://perma.cc/T5PE-6Y98>]; Fabiola Cineas, *Senators Are Demanding a Solution to Police Stopping Black Men for Wearing—and Not Wearing—Masks*, VOX (Apr. 22, 2020, 2:10 PM), <https://www.vox.com/2020/4/22/21230999/black-men-wearing-masks-police-bias-harris-booker-senate> [<https://perma.cc/M8UG-A4PQ>].

²³⁰ Betsy Pearl, Lea Hunter, Kenny Lo & Ed Chung, *The Enforcement of COVID-19 Stay-at-Home Orders*, CTR. FOR AM. PROGRESS (Apr. 2, 2020), <https://www.americanprogress.org/article/enforcement-covid-19-stay-home-orders/> [<https://perma.cc/Z5KE-UAWK>].

²³¹ George Floyd was murdered on May 25, 2020. Protests began the following day and continued for months. See Jessica M. Eaglin, *To “Defund” the Police*, 73 STAN. L. REV. ONLINE 120, 122 (2021).

²³² *Occupational Employment and Wage Statistics: Occupational Employment and Wages, May 2021: 33-3051 Police and Sheriff’s Patrol Officers*, U.S. BUREAU OF LAB. STAT. (May 2021), <https://www.bls.gov/oes/current/oes333051.htm#> [<https://perma.cc/W6AB-6HV3>].

they tend to focus on functions that are outside the jurisdiction of local police, such as traffic enforcement on state and interstate highways and securing state-run facilities.²³³ In many states, emergency management statutes authorize state officials to declare that violating their emergency orders is a misdemeanor under a preexisting state emergency management law.²³⁴ In others, there is no such mechanism.²³⁵ In either case, widespread, on-the-ground enforcement against individuals requires the cooperation of local law enforcement.

Enforcement against businesses was easier than enforcement against individuals. In many states, licensing authorities have resources to conduct inspections and issue warnings and citations, and governors directed them to take the lead in lieu of police.²³⁶ For example, in response to surging COVID-19 cases in June 2020, Texas Governor Greg Abbott issued a new round of orders limiting capacity in bars and restaurants while asserting they could safely stay open if they abided by his requirements.²³⁷ The Texas Alcoholic Beverage Commission, which administers permits for serving alcohol, began enforcing these requirements, using site checks, warnings, citations, and permit suspensions.²³⁸ The next year, in August 2021, the same state commission warned businesses that compliance with a Texas statute *prohibiting* businesses from requiring customers to show proof of vaccination may be required “as a condition of holding a license, permit,

²³³ Paul Musgrave, *Bringing the State Police In: The Diffusion of U.S. Statewide Policing Agencies, 1905–1941*, 34 *STUD. AM. POL. DEV.* 3, 3 (2020).

²³⁴ See, e.g., California Emergency Services Act, CAL. GOV'T CODE § 8665 (West 2023) (making refusal or willful neglect to obey a lawful emergency management order a misdemeanor punishable by a fine of no more than \$1,000, imprisonment for no more than six months, or both).

²³⁵ See, e.g., Emergency Management Act, UTAH CODE ANN. § 53-2a (West 2022).

²³⁶ See Doug Johnson, *ABC Lists Dozens of Local Bars, Restaurants Facing Citations for Violating COVID-19 Rules*, Fox40 (Feb. 5, 2021, 4:50 PM), <https://fox40.com/news/local-news/abc-lists-dozens-of-local-bars-restaurants-facing-citations-for-violating-covid-19-rules/> [<https://perma.cc/JZZ2-FHL5>] (describing citations issued by the California Department of Alcoholic Beverage Control for violation of Covid-19 restrictions).

²³⁷ Tex. Exec. Order No. GA-26 (June 3, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-26_expanded_opening_COVID-19.pdf [<https://perma.cc/RDJ9-RNDW>].

²³⁸ See, e.g., Jack Highberger, Claire Cardona & Chris Blake, *TABC Suspends Alcohol Permits for Four North Texas Bars After Check for COVID-19 Protocols*, NBCDFW (June 22, 2020, 4:52 PM), <https://www.nbcdfw.com/news/coronavirus/tabc-suspends-alcohol-permit-for-dallas-bar-after-covid-19-protocol-inspection/2392495/> [<https://perma.cc/F6Y5-PXLW>].

certificate, or other authorization” from the commission²³⁹ and issued warnings to at least some establishments.²⁴⁰

In many parts of the country, police resisted enforcing public health orders, particularly in the late spring and summer of 2020, when face covering mandates were widely adopted by governors, heavily politicized by their opponents, and rarely enforced on the ground.²⁴¹ Initially, police opposition may have been expressed in closed meetings, but as the pandemic wore on, consensus broke down completely, and some law enforcement officials spoke directly to the public about their refusal to play a role in COVID-19 mitigation.²⁴²

In some cases, law enforcement opposition was overtly politicized and appeared intended to provoke a harsh response from the state. For example, at the New Hope Revival Church in New Mexico, a local sheriff “deputized church members, labeled them an essential business, and facilitated in holding a religious service.”²⁴³ The incident prompted the state health department to send a cease and desist letter to the church, which was served by a state police officer.²⁴⁴ The pastor recorded his attempt to debate constitutional law with the state deputy, and the resulting video went viral.²⁴⁵ But this instance of enforcement was the exception rather than the norm, as noted by a federal district judge in *Legacy Church, Inc. v. Kunkel*.²⁴⁶ A different church in New Mexico challenged the state order restricting worship services, arguing that officials were targeting religious groups for unequal enforcement while simultaneously encouraging racial justice protests in

²³⁹ *Reminder: Businesses Prohibited from Requiring Customers to Show Proof of COVID-19 Vaccination*, TEX. ALCO. BEV. COMM’N (Aug. 12, 2021), <https://www.tabc.texas.gov/news/announcements/reminder-businesses-prohibited-from-requiring-customers-to-show-proof-of-covid-19-vaccination-2021/> [<https://perma.cc/K4SS-5HQJ>].

²⁴⁰ *See, e.g.,* Nina Rangel, *TABC Threatens to Pull Licenses from Texas Eateries Requiring Proof of Vaccination for Entry*, SAN ANTONIO CURRENT (Aug. 16, 2021, 10:50 AM), <https://www.sacurrent.com/sanantonio/tabc-threatens-to-pull-licenses-from-texas-eateries-requiring-proof-of-vaccination-for-entry/Content?oid=26925916> [<https://perma.cc/7C3V-KQ94>].

²⁴¹ *See* Kristine Phillips, *Many Face Mask Mandates Go Unenforced as Police Feel Political, Economic Pressure*, USA TODAY (Sept. 16, 2020, 1:17 PM), <https://www.usatoday.com/story/news/politics/2020/09/16/covid-19-face-mask-mandates-go-unenforced-police-under-pressure/5714736002/> [<https://perma.cc/3EMK-E2Y6>].

²⁴² *See id.*

²⁴³ *Legacy Church, Inc. v. Kunkel*, 472 F. Supp. 3d 926, 1040 (D.N.M. 2020).

²⁴⁴ *See id.*; *Sierra County Church Issued Cease-and-Desist Order After Violating Public Health Order*, KOAT (May 13, 2020, 12:18 PM), <https://www.koat.com/article/sierra-county-church-issued-cease-desist-order-after-holding-service/32463707> [<https://perma.cc/LBY8-6MUE>].

²⁴⁵ *See* KOAT, *supra* note 244.

²⁴⁶ 472 F. Supp. 3d 926.

violation of gathering bans.²⁴⁷ But the district court noted that the plaintiff could cite no other instances of enforcement against houses of worship beyond the highly publicized incident with New Hope Revival.²⁴⁸ Ultimately, the plaintiff's request for preliminary injunction was rejected by a district judge who deemed the order neutral and generally applicable, based on an interpretation of Free Exercise doctrine that the Supreme Court later called into question, as discussed below.²⁴⁹

Notably, the case in which the Supreme Court first blocked a pandemic mitigation order involved highly publicized and politicized threats of enforcement from state officials. On the evening before Thanksgiving, in a shadow-docket case, the Supreme Court departed from earlier decisions declining to intervene in ongoing challenges to restrictions on religious services.²⁵⁰ In *Roman Catholic Diocese of Brooklyn v. Cuomo*,²⁵¹ the Court enjoined the governor of New York from enforcing occupancy limits against the plaintiffs, including Agudath Israel of America, which had filed a separate emergency application.²⁵²

The order challenged in *Roman Catholic Diocese* was neither formally nor functionally hortatory. Although the Court did not specifically document the threat of enforcement activities,²⁵³ a judge dissenting from the case when it was at the Second Circuit noted that Governor Cuomo threatened “that if the ‘ultra-Orthodox [Jewish] community’ would not agree to enforce the rules, ‘then we’ll close the institutions down.’”²⁵⁴ In a press conference the day before he announced his new order, Governor Cuomo specified his plans for enforcement: “I say [to a health officer,] you’re going to be stationed in

²⁴⁷ *Id.* at 1040.

²⁴⁸ *Id.* (describing the incident as “the only enforcement action that the parties have identified”).

²⁴⁹ *Id.* at 1022 (finding the challenged order restricting religious services was “neutral and generally applicable” based on findings that it imposed similar limits on secular activities). *But see* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (“[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly or even less favorably than the religious exercise at issue.” (citations omitted)).

²⁵⁰ *See* *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 64 (2020).

²⁵¹ 141 S. Ct. 63 (2020).

²⁵² *See id.* at 65.

²⁵³ *Id.* at 67 (asserting “[t]here can be no question that the challenged restrictions, if enforced, will cause irreparable harm”) (emphasis added).

²⁵⁴ *Agudath Israel of Am. v. Cuomo*, 980 F.3d 222, 229 (2d Cir. 2020) (Park, C.J., dissenting) (alteration in original).

front of Saint Peter's Church. The capacity is 150. You stand at the front door. When they go over you close the door and call me and if you have any problem this state police officer is down the block and he'll come help you."²⁵⁵ Cuomo's comments suggest that the few resources governors had at their disposal were directed toward high-profile targets who were perceived to be flagrantly breaking the rules. There were other high-profile instances of businesses whose owners vocally defied public health orders triggering high-visibility enforcement efforts.²⁵⁶

In addition to logistical constraints, the threat of lawsuits may have prompted some officials to dial back enforcement. Travel quarantines are instructive. In March 2020, when the New York metro area emerged as a pandemic hotspot, many jurisdictions across the country issued orders requiring travelers from New York to quarantine for fourteen days upon arrival.²⁵⁷ Although the targets of travel quarantines shifted throughout 2020 and 2021, they proved difficult to enforce and prompted legal challenges.²⁵⁸ For example, in late March

²⁵⁵ Josh Blackman, *New York Governor Cuomo: "I'm Going to Say to the Orthodox Community Tomorrow if You Don't Agree then We Will Have to Close Down Your Religious Institutions."*, VOLOKH CONSPIRACY (Oct. 6, 2020, 12:27 AM), <https://reason.com/volokh/2020/10/06/new-york-governor-cuomo-im-going-to-say-to-the-orthodox-community-tomorrow-if-you-dont-agree-then-we-will-have-to-close-down-your-religious-institutions/> [https://perma.cc/5PME-G6L7] (alterations in original).

²⁵⁶ See, e.g., Sophie Lewis, *Salon Owner Gets Week in Jail for Refusing to Close Business During Stay-at-Home Orders*, CBS NEWS (May 6, 2020, 2:40 PM), <https://www.cbsnews.com/news/salon-owner-shelley-luther-dallas-jail-coronavirus-stay-at-home/> [https://perma.cc/QFK5-44YU] (describing sentencing of a Dallas, Texas, salon owner whom the judge described as defying pandemic mitigation orders in a "flagrant and intentional" way); *Dallas Salon Owner Who Defied Lockdown Makes Texas Senate Runoff*, NBCDFW (Sept. 30, 2020, 7:27 AM), <https://www.nbcdfw.com/news/politics/drew-springer-shelley-luther-advance-to-runoff-for-state-senate-special-election/2452463/> [https://perma.cc/AMF5-FBHX] (describing the Dallas salon owner's political campaign and receipt of five hundred thousand dollars in donations with the help of conservative activists in response to her refusal to comply with the orders to close her business); Bill Hutchinson & Aaron Katersky, *Protest over Shutdown of New York's 'Autonomous Zone' Bar for COVID Rule Violations Draws Large Crowd*, ABC NEWS (Dec. 3, 2020, 10:56 AM), <https://abcnews.go.com/US/york-autonomous-zone-bar-shut-owner-arrested-violating/story?id=74501929> [https://perma.cc/8CJ9-EZTT] (describing protests following the arrest of a bar owner who refused to comply with pandemic mitigation orders and declared the establishment an "autonomous zone," papering it with signs opposing pandemic mitigation measures).

²⁵⁷ *Travel Restrictions Issued by States in Response to the Coronavirus (COVID-19) Pandemic, 2020–2022*, BALLOTPEDIA (2022), [https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2022](https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2022) [https://perma.cc/5ANA-JWE4].

²⁵⁸ Ross D. Silverman, *Contact Tracing, Intrastate and Interstate Quarantine, and Isolation*, in 11 COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE 28, 28 (Scott Burris et al., eds., 2021).

2020, Rhode Island Governor Gina Raimondo directed state police to pull over vehicles with New York plates and directed the Rhode Island National Guard to start door-to-door checks in coastal communities popular with visitors.²⁵⁹ Governor Raimondo backed off only after Governor Cuomo publicly threatened a lawsuit and then gloated when Cuomo instituted a travel quarantine of his own a few months later.²⁶⁰ In Maine, the strict requirements for businesses offering temporary lodgings, which were enforced through criminal penalties, were replaced by looser requirements for businesses to collect self-attestations that guests had tested negative for COVID-19.²⁶¹ The change came shortly after a federal district court cautioned that the stricter quarantine order may not withstand judicial scrutiny for much longer.²⁶² Other jurisdictions—including New York beginning in July 2020—mandated that travelers from specified states fill out forms, including contact information and travel history, but it was unclear what degree of follow-up was involved to ensure that travelers actually quarantined upon arrival.²⁶³ Ultimately, only the island jurisdictions of Hawaii and Puerto Rico put substantial effort into enforcing restrictions on travelers on a long-term basis—eventually offering exemptions to quarantine requirements based on testing and vaccination.²⁶⁴

²⁵⁹ *Rhode Island Cracks Down on Visitors from New York*, ASSOCIATED PRESS (Mar. 27, 2020), <https://apnews.com/article/f4dcbd469550da169fa06f366f6e64ed> [<https://perma.cc/8SMS-9HNT>].

²⁶⁰ See Patrick Anderson, *Raimondo Says R.I. Likely to Order Quarantine for Visitors from Areas Hit Hard by Coronavirus*, THE PROVIDENCE J. (June 24, 2020, 12:02 PM), <https://www.providencejournal.com/story/news/coronavirus/2020/06/24/raimondo-says-ri-likely-to-order-quarantine-for-visitors-from-areas-hit-hard-by-coronavirus/113737706/> [<https://perma.cc/NZQ5-Z53Z>].

²⁶¹ See *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 155–57 (1st Cir. 2021) (describing the state's travel quarantine orders and affirming district court denial of preliminary injunction).

²⁶² See *id.* at 156.

²⁶³ New York's form was distributed at certain airport arrival gates. Hansi Lo Wang, *New York to Require Contact Info from Air Travelers from Restricted States*, NPR (July 14, 2020, 11:17 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/13/890572067/new-york-to-require-contact-info-from-air-travelers-from-states-that-must-quaran> [<https://perma.cc/43Y6-EUPR>]. The form was also used by New York City as the basis for a requirement that businesses offering temporary lodgings must collect the form from all guests. See N.Y.C. Emergency Exec. Order No. 141 (Aug. 19, 2020), https://a860-gpp.nyc.gov/concern/parent/m613n042b/file_sets/8049g706f [<https://perma.cc/S7SZ-NCSB>].

²⁶⁴ See Silverman, *supra* note 258, at 30; Alison Fox, *A Guide to All Fifty States' COVID-19 Travel Restrictions*, TRAVEL + LEISURE (Feb 18, 2021), <https://www.travelandleisure.com/travel-news/what-to-know-about-each-state-during-the-coronavirus> [<https://perma.cc/U4SP-W656>]; Nicole Acevedo, *Puerto Rico Enacted Strict Covid Measures. It Paid Off, and It's a Lesson for the Mainland.*, NBC NEWS (Mar. 15, 2021, 8:09 AM), <https://www.nbcnews.com/news/latino/puerto-rico-enacted-strict-covid-measures-it-paid-it-s-n1260998> [<https://perma.cc/TM2X-7XZX>]; Katherine Fan, *Everything You Need to Know About Visiting Puerto Rico Right Now*, THE POINTS

The government's ability to control individuals and organizations during a public health emergency varies depending on how widely diffused the targeted conduct is and whether there are existing mechanisms for government leverage. It is far more feasible for state or local governments to close businesses—especially those that are already subject to inspections by licensing authorities—than it is for police to patrol the streets statewide and keep people from leaving their homes. Federal enforcement capacity for CDC's transit mask order is greater in airports—due to the presence of Transportation Security Administration officers—than on city buses, and even in airports, enforcement is minimal.²⁶⁵ The reality is that when officials impose pandemic mitigation restrictions on the entire population, mandatory orders depend on widespread *voluntary* compliance.²⁶⁶ And voluntary compliance depends on maintaining the public's trust and cooperation.²⁶⁷ But confusing guidance, imposing mandates that are not really mandates, and threats of enforcement that ring hollow can undermine that trust.

Logistical challenges and concerns about maintaining public trust were openly acknowledged in prepandemic preparedness plans. For example, a 2004 CDC plan for the possible resurgence of SARS advised judicious use of restrictions on movement for the general population for brief periods to blunt peak impacts during widespread community transmission.²⁶⁸ The plan warned that it “[m]ay be difficult to solicit cooperation for extended periods, particularly if the rationale is not readily apparent or was not clearly explained.”²⁶⁹ A 2006 report published by the Department of Justice on the role of law enforcement officers in an influenza pandemic cautioned that “[s]ocial distancing relies heavily on voluntary compliance . . . it may be difficult to enforce social distancing unless the public has been educated about how social distancing protects their health and safety The

GUY (JAN. 7, 2021), <https://thepointsguy.com/news/puerto-rico-reopening-july-15/> [<https://perma.cc/46ZW-TXY7>].

²⁶⁵ Suzanne Rowan Kelleher, *TSA Fined Less than One Percent of Travelers who Blew Off Federal Mask Mandate in Airports*, FORBES (Oct. 26, 2021, 11:14 AM), <https://www.forbes.com/sites/suzannerowankelleher/2021/10/26/tsa-fine-less-than-1-percent-travelers-refused-mask-airport/?sh=5c70c6fc52f3> [<https://perma.cc/3JM3-UHLW>].

²⁶⁶ RICHARDS ET AL., *supra* note 224, at 19.

²⁶⁷ *Id.* at 25.

²⁶⁸ DEPT'T HEALTH AND HUM. SERVS., CDC, PUBLIC HEALTH GUIDANCE FOR COMMUNITY-LEVEL PREPAREDNESS AND RESPONSE TO SEVERE ACUTE RESPIRATORY SYNDROME (SARS) VERSION 2 app. D1 (Supp. D Jan. 8, 2004), <https://www.cdc.gov/sars/guidance/d-quarantine/app1.pdf> [<https://perma.cc/F2VV-C877>].

²⁶⁹ *Id.* at 9.

most realistic way to restrict large numbers of persons is to persuade them to stay home.”²⁷⁰

When officials issued sweeping COVID-19 orders, some of them may have expected to enforce them—and the public may have expected them to be enforced—but enforcement was rarely implemented at scale.²⁷¹ Self-attestations became ubiquitous. Employers, schools, childcare facilities, airlines, hotels, plumbers, doctor’s offices, and more required people to check the right boxes with no questions asked.²⁷² When focus shifted from mobility restrictions to vaccination requirements, the attestations multiplied.²⁷³ But enforcement continued to be the exception, not the norm.

3. *Mandatory COVID-19 Orders Designed to Be Functionally Hortatory Ex Ante*

Some governors who were slow to adopt sweeping restrictions early in the pandemic expressly disclaimed that they were ordering the public to stay home. In New York, Governor Cuomo “shied away from the language of a shelter-in-place order, which he said evoked images of shooter situations or nuclear war. ‘Words matter,’ the governor said, instead describing [his order] as putting all of New York on pause.”²⁷⁴ Similarly, Texas Governor Greg Abbott stated in a press briefing that he was *not* issuing a stay-at-home order, “arguing such labels leave the wrong impression.”²⁷⁵ The order he signed that day directed that “every person in Texas shall, except where necessary to provide or obtain essential services, minimize social gatherings and minimize in-person contact with people who are not in the same household.”²⁷⁶ The following day, Abbott clarified that his order “re-

²⁷⁰ RICHARDS ET AL., *supra* note 224, at 19–21.

²⁷¹ See, e.g., Steve Brown, *State Rarely Enforced Mask and Travel Orders*, *WBUR Review Finds*, WBUR (Apr. 30, 2021), <https://www.wbur.org/news/2021/04/30/massachusetts-mask-travel-fines-quarantine> [<https://perma.cc/8KEE-2PFV>].

²⁷² See, e.g., Jane C. Hu, *The Dawn of the COVID Self-Attestation*, SLATE (May 21, 2020, 12:36 PM), <https://slate.com/technology/2020/05/self-attestation-covid19-symptoms-lyft.html> [<https://perma.cc/5Z3B-4MTV>].

²⁷³ See, e.g., Lauren Wingo, *Requiring Employee Vaccine Status Self-Attestation? Here’s How to Do It Right*, CO— (Sept. 10, 2021), <https://www.uschamber.com/co/run/human-resources/employee-vaccine-self-attestation-policies> [<https://perma.cc/SP55-E8WB>].

²⁷⁴ Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [<https://perma.cc/3HWM-FLHA>].

²⁷⁵ Patrick Svitek, *Gov. Greg Abbott Tells Texans to Stay Home Except for Essential Activity in April*, TEX. TRIB. (Mar. 31, 2020, 10:00 PM), <https://www.texastribune.org/2020/03/31/greg-abbott-texas-executive-order-closures/> [<https://perma.cc/ZL4N-MRC3>].

²⁷⁶ Tex. Exec. Order No. GA-14 (Mar. 31, 2020).

quires all Texans to stay at home.”²⁷⁷ The order threatened civil and criminal penalties, but several weeks later Abbott specifically prohibited cities from arresting individuals who violated his (loosened) orders.²⁷⁸ He also prohibited them from adopting more stringent requirements of their own.

From the outset, some civil liberties and public health advocates were wary of harsh enforcement, even if police were willing to cooperate. In the early weeks of COVID-19 restrictions, the American Civil Liberties Union noted the enforcement measures taken in New York City and Puerto Rico and warned against more aggressive enforcement of COVID-19 public health violations against people of color.²⁷⁹ Some civil libertarians have also expressed concern that police involvement through arrests could increase the risk of transmission in jails and escalate public backlash against COVID-19 mitigation measures.²⁸⁰

In response to these concerns (and practical limitations on enforcement), many state and local officials issued formally mandatory orders while simultaneously providing explicit assurances that enforcement would be minimal, a last resort, nonexistent, or even expressly disavowed.²⁸¹ Even as they cautioned residents not to “break[]

²⁷⁷ Jeremy Wallace & Austin Bureau, *Gov. Abbott Clarifies Order, Saying It “Requires All Texans to Stay at Home”*, HOUS. CHRONICLE (Apr. 1, 2020, 8:02 PM), <https://www.houstonchronicle.com/news/article/Gov-Abbott-clarifies-order-saying-it-15172996.php> [<https://perma.cc/VG9P-JXVF>].

²⁷⁸ Tex. Exec. Order No. GA-23 (May 18, 2020), <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-23.pdf> [<https://perma.cc/29T8-4MH6>]; see also Sally Beauvais, Lexi Churchill, Kiah Collier, Vianna Davila & Ren Larson, *Gov. Greg Abbott Is Limiting Enforcement of COVID-19 Orders, but Many Cities Already Took a Lax Approach*, PROPUBLICA (May 14, 2020, 1:30 PM), <https://www.propublica.org/article/texas-gov-greg-abbott-is-cracking-down-on-cities-enforcement-of-covid-19-orders-but-many-already-took-a-lax-approach> [<https://perma.cc/UDJ9-NUCZ>].

²⁷⁹ Carl Takei & Paige Fernandez, *Police Are Enforcing Public Health Orders, but That Doesn’t Make Them Public Health Experts*, ACLU (Apr. 7, 2020), <https://www.aclu.org/news/criminal-law-reform/police-are-enforcing-public-health-orders-but-that-doesnt-make-them-public-health-experts/> [<https://perma.cc/EK8P-6QNG>].

²⁸⁰ [M]ore often than not, police are trying to avoid arrests for violations of stay-at-home orders. And that’s reassuring for some civil libertarians who have argued that while stay-at-home orders might be necessary for public health, sending people to jail could present a risk because of how infectious diseases can rapidly spread in confined spaces.

Martin Austermulhe, *D.C. Police Officers Will Only Arrest People Who Violate Stay-at-Home Orders as a Last Resort*, DCIST (Apr. 1, 2020, 4:49 PM), <https://dcist.com/story/20/04/01/d-c-police-officers-will-only-arrest-people-who-violate-stay-at-home-orders-as-a-last-resort/> [<https://perma.cc/W6MY-7F3J>]

²⁸¹ ‘Our goal is always educate first,’ [said Rhode Island Governor Gina Raimondo] . . . ‘If you don’t have a mask, you know, we’re not fining you for not

the rules,” they acknowledged that “there would be nothing the state would do to prohibit people from” doing so.²⁸² This approach was particularly common during the winter of 2020–2021, when some governors left business establishments open—including bars and restaurants where people gathered—even as they announced they were banning all social gatherings in private homes.²⁸³

Signals and assurances about lack of enforcement thus turned traditional laws into hortatory mandates, breeding confusion and eroding trust in government during the pandemic. Officials could have issued formally voluntary guidance, which could have been reinforced by supportive measures to make it more feasible for everyone to comply. But instead, they chose to use formally mandatory, functionally hortatory mandates as a kind of muscular recommendation with the power of a rule.²⁸⁴

A highly publicized dispute between Georgia Governor Brian Kemp and Atlanta Mayor Keisha Bottoms illustrates the value some officials placed on being able to use mandatory language even in the absence of enforcement. After Governor Kemp issued an executive order preempting local authorities from mandating pandemic mitigation measures,²⁸⁵ Mayor Bottoms announced that the city was returning to “Phase 1” status and directed nonessential businesses to close and the public to shelter in place.²⁸⁶ Although Mayor Bottoms

having a mask. We’re giving you a mask.’ ‘We want to make it easy and deescalate the situation,’ she said. ‘Having said that, I want to remind you the fine for violating a social gathering limit is up to \$500.’

See, e.g., Evan Simko-Bednarski, *If You See People Gathered in Large Numbers, Rhode Island Wants You to Call It In*, CNN (Aug. 6, 2020, 5:36 PM), <https://www.cnn.com/2020/08/06/us/rhode-island-social-gathering-hotline-trnd/index.html> [<https://perma.cc/YH2Z-2U3F>].

²⁸² Raimondo said that social gatherings are now limited to ‘single households’—but at the same time, said there would be nothing the state would do to prohibit people from traveling for Thanksgiving. ‘If you have your plans made to go out to restaurants [for Thanksgiving], we’re not going to get in way of that—use extreme caution and wear a mask,’ she said. ‘You should stay at home with the people you live with and celebrate Thanksgiving,’ said Raimondo. ‘If you insist on travelling over Thanksgiving—I’m asking you not to do it. But if you’re going to do it and that means you’re breaking the rules—get tested before you go.’

Raimondo Restricts Social Gatherings to Single Households, K-8 Schools to Stay Open, GoLOCALPROV (Nov. 19, 2020), <https://www.golocalprov.com/news/raimondo-2-week-shutdown-social-gatherings-limited-to-1-household-k-8-schoo> [<https://perma.cc/76PA-7Y3X>]

²⁸³ See *id.*

²⁸⁴ See Lindholm, *supra* note 6.

²⁸⁵ See Ga. Exec. Order No. 06.29.20.02, *Providing Additional Guidance for Empowering a Healthy Georgia in Response to COVID-19* (June 29, 2020), <https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders> [<https://perma.cc/E54W-YVJM>].

²⁸⁶ Press Release, Keisha Bottoms, Mayor of Atlanta, Mayor Keisha Lance Bottoms Or-

used formally mandatory language, her order merely updated the status of voluntary guidelines.²⁸⁷ Governor Kemp asserted that the mayor's action "is merely guidance—both nonbinding and legally unenforceable."²⁸⁸ He also filed suit²⁸⁹ but later withdrew the complaint after the Mayor had made several statements clarifying that her announcement of a return to Phase 1 status was advisory and not an enforceable order.²⁹⁰

Hortatory mandates also complicated expert assessments of whether the restrictions on liberty they purported to impose required the same level of public health justification as orders that are mandatory in both form and function. Some may have downplayed concerns about orders to stay home—which appeared on the surface to be unprecedented infringements on personal liberty—based on the near-total lack of enforcement. Some may have felt these orders were not meaningfully different from voluntary advisories. Naturally, disputes about the legal and practical significance of these orders made their way to courts.

B. Which COVID-19 Mitigation Orders Did Judges Treat as Hortatory and Why?

Parties opposed to COVID-19 mitigation orders filed lawsuits on numerous grounds, arguing that officials violated the First and Fourteenth Amendments, exceeded officials' statutory authority, failed to follow required administrative procedures, and violated constitutional separation of powers principles. The courts struggled to determine whether and how to adjudicate the merits of these claims, given the lack of precedents, and (for some orders) the lack of any credible threat of enforcement. Plaintiffs asked judges to expedite their cases

ders City's Phased Reopening Plan to be Moved Back to Phase I (July 10, 2020, 6:43 PM), <https://www.atlantaga.gov/Home/Components/News/News/13408/672> [<https://perma.cc/TXN3-7Y4T>].

²⁸⁷ Henri Hollis, *Mayor Orders Rollback to Phase I Reopening Guidelines; Governor Calls It "Unenforceable,"* ATLANTA J.-CONST. (July 10, 2020), <https://www.ajc.com/news/breaking-news/mayor-plans-rollback-phase-reopening-guidelines-governor-calls-unenforceable/8OI8sIbuVy2D8DDvoBrzJ/> [<https://perma.cc/2V4A-DEQ5>].

²⁸⁸ *Id.* (quoting a Tweet from the governor); accord Press Release, Brian Kemp, Governor of Ga., Statement on Atlanta Reverting to "Phase One" (July 13, 2020), <https://gov.georgia.gov/press-releases/2020-07-13/statement-atlanta-reverting-phase-one> [<https://perma.cc/6Z4P-PYHB>].

²⁸⁹ Complaint for Declaratory and Injunctive Relief, *Kemp v. Bottoms*, No. 2020-CV-338387 (Ga. Super. Ct. July 16, 2020).

²⁹⁰ See Press Release, Brian Kemp, Governor of Ga., Kemp Issues Statement on Lawsuit Against Bottoms, Atlanta City Council (Aug. 13, 2020), <https://gov.georgia.gov/press-releases/2020-08-13/kemp-issues-statement-lawsuit-against-bottoms-atlanta-city-council> [<https://perma.cc/9W2C-AEYB>].

by filing requests for temporary restraining orders (“TROs”) and preliminary injunctions, which rest partly on the likelihood that the plaintiff will succeed on the merits and partly on the threat of irreparable harm while litigation is pending.²⁹¹

A few courts declined to reach the merits—including challenges to orders that we would not classify as hortatory—because they found enforcement was unlikely. For example, in *Faust v. Inslee*,²⁹² Judge Benjamin Settle denied a motion for a TRO to a plaintiff protesting Washington’s stay-at-home order on the grounds that she had “fail[ed] to establish a realistic threat of any criminal enforcement action as a result of her course of conduct.”²⁹³ In April 2020, a state agency denied Faust’s application for a permit to protest on the state capitol grounds, citing the cancellation of all permitted events in accordance with the governor’s public health directives.²⁹⁴ In pleadings, the plaintiff said that she planned to hold a rally at the state capitol in June, but she had not filed an application for a permit to do so given that the Governor’s gathering ban remained in effect.²⁹⁵ The restrictions that Faust challenged were included in the governor’s statewide stay-at-home order, styled as a proclamation “*prohibiting* all people in Washington State from leaving their homes or participating in social, spiritual and recreational gatherings of any kind regardless of the number of participants, and all nonessential businesses in Washington State from conducting business, within the limitations provided herein.”²⁹⁶

Despite formally mandatory language, the court treated this order as functionally hortatory.²⁹⁷ The court may have perceived that the proclamation itself was not in fact an order.²⁹⁸ But the court disre-

²⁹¹ A party requesting preliminary relief “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

²⁹² No. C20-5356, 2020 WL 2557329 (W.D. Wash. May 20, 2020).

²⁹³ *Id.* at *2.

²⁹⁴ *Id.* at *1.

²⁹⁵ *Id.*

²⁹⁶ Proclamation, Jay Inslee, Governor of Wash., Proclamation by the Governor Amending Proclamation 20-25, at 2 (Mar. 23, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-25%20Coronavirus%20Stay%20Safe-Stay%20Healthy%20%28tmp%29%20%28002%29.pdf> [<https://perma.cc/9EG3-FQEY>] (emphasis added).

²⁹⁷ *Faust*, 2020 WL 2557329, at *2.

²⁹⁸ Proclamations are described on the governor’s website as “formal public declarations from the governor.” *Proclamations*, OFFICE OF GOVERNOR JAY INSLEE, <https://www.governor.wa.gov/office-governor/official-actions/proclamations> [<https://perma.cc/CR8A-3UR4>]. As examples, the website notes that “[o]ften proclamations declare states of emergency or call the legislature into a special session.” *Id.*

garded the Governor's description of planned enforcement activities. Inslee's March 25th proclamation, which was in effect at the time of the plaintiff's challenge, included a reference to criminal enforcement, stating "[v]iolators of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5),"²⁹⁹ a provision that designates "willfully violating any provision of an order issued by the governor under [the governor's emergency powers as] a gross misdemeanor."³⁰⁰ In addition, Inslee held a press conference on March 30th to outline planned enforcement activities.³⁰¹ At the press conference, Inslee emphasized an education-first approach, but a local police chief joined him at the podium to specifically urge the public "to report violations where a large number of people may be at risk."³⁰² A social media post by the Governor's office describing the press conference noted: "If a business or individual fails to comply after law enforcement intervenes, the agencies responsible for public safety could take formal enforcement actions. Inslee said these include citations, suspension notices, revoking someone's business license, potential criminal charges, and even a Consumer Protection Act violation action."³⁰³ The press conference and social media post directed that "[r]esidents should contact their police departments directly and not call 911 to report gatherings."³⁰⁴ The fact that callers were being redirected from the 911 emergency line and guided to limit calls to situations where large numbers of people were present suggests the governor may have been trying to walk a fine line between appearing tough on violators while acknowledging the reality that police would not be able to respond to every violation as if it were an emergency.

Faust appeared before the court *pro se*, without legal representation. The defendant state officials argued that the plaintiff lacked standing, failed to exhaust administrative remedies, and that the claim was not ripe for review, and the court rejected the plaintiffs' request for a TRO on all three grounds.³⁰⁵ The court reasoned that because Faust had not submitted a second application for a permit to hold the

²⁹⁹ Proclamation, *supra* note 296, at 5.

³⁰⁰ WASH. REV. CODE § 43.06.220(5) (2019).

³⁰¹ Wash. Governor's Off., *Inslee, Law Enforcement Provide Guidance to Businesses, Individuals for Compliance with 'Stay Home, Stay Healthy' Order*, MEDIUM (Mar. 30, 2020), <https://medium.com/wagovernor/inslee-law-enforcement-provide-guidance-to-businesses-individuals-for-compliance-with-stay-home-d4bf2fdd0413> [<https://perma.cc/H3PC-QNY7>].

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Faust v. Inslee*, No. C20-5356, 2020 WL 2557329, at *1–2 (W.D. Wash. May 20, 2020).

rally she was planning for June 2020, there was no denial for it to review. In addition, the court noted that recreation on public property was permitted under the governor's order and that "[i]f Faust's idea of recreating on public lands involves protesting at the State Capital, then it seems like she could as long as the land is open to the public and she follows the physical distancing requirements"³⁰⁶—essentially instructing her on how to technically comply with the law while exercising her First Amendment rights. The court dismissed Faust's other arguments, finding her "alleged harms . . . 'amount[ed] to no more than a "generalized grievance" shared in substantially equal measure by . . . a large class of citizens, and thus do not warrant the exercise of jurisdiction."³⁰⁷ The court also found that Faust had "fail[ed] to 'demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement'" due to the lack of "a realistic threat of any criminal enforcement action as a result of her course of conduct."³⁰⁸

A somewhat analogous case focused on religious services, which some officials targeted through spotty, but sometimes high-profile enforcement efforts.³⁰⁹ In *Lighthouse Fellowship Church v. Northam*,³¹⁰ Judge Arenda Wright Allen denied the church's motion for injunction "[b]ecause there [was] no evidence that the Governor himself 'enforced, threatened to enforce, or advised other agencies to enforce' his Orders against Plaintiff or any other individual or entity."³¹¹ The court relied on *Ex parte Young*³¹² and other precedents allowing parties to evade a state government's sovereign immunity defense by bringing suit "against individuals, for the purpose of preventing them, as officers of a state, from *enforcing* an unconstitutional enactment, to the injury of the rights of the plaintiff."³¹³ The plaintiff church had previously been visited by a local law enforcement officer who "stopped by Plaintiff's building to inquire whether Plaintiff planned to host a religious service that day" and "informed a member of Plain-

³⁰⁶ *Id.* at *2.

³⁰⁷ *Id.* (quoting *San Diego Cnty. Gun Rights Comm'n. v. Reno*, 98 F.3d 1121, 1131–32 (9th Cir. 1996)).

³⁰⁸ *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

³⁰⁹ See *supra* notes 243–49 and accompanying text.

³¹⁰ 462 F. Supp. 3d 635 (E.D. Va. 2020).

³¹¹ *Id.* at 644 (quoting *McBurney v. Cuccinelli*, 616 F.3d 393, 402 (4th Cir. 2010)) (denying motion for preliminary injunction pending appeal), *appeal dismissed as moot*, No. 20-1515, 2020 WL 6074341, at *1 (4th Cir. Oct. 13, 2020).

³¹² 209 U.S. 123 (1908).

³¹³ *Lighthouse Fellowship Church*, 462 F. Supp. 3d at 642 (quoting *Ex parte Young*, 209 U.S. at 154).

tiff's Board of Directors that Plaintiff was not permitted to have more than ten people in attendance, and that all attendees must be spaced six feet apart."³¹⁴ After holding a service that exceeded the limits imposed by the state order,

[t]he Pastor of Lighthouse inquired whether he would be further criminally cited if Plaintiff held a religious worship service on Easter Sunday. . . . Officers informed him that should Lighthouse host any gathering with more than ten people in attendance, every person in attendance would be given a criminal citation for violating the Governor's Orders.³¹⁵

But because these enforcement threats were not initiated at the specific direction of the governor, Judge Wright Allen rejected the plaintiff's request for an injunction.³¹⁶ The plaintiff's appeal to the Fourth Circuit was dismissed as moot after the order expired.³¹⁷

Other courts adjudicated similar cases differently. Several courts upheld gathering bans against freedom of expression claims similar to the one the courts side-stepped in *Faust v. Inslee*. In *Geller v. de Blasio*,³¹⁸ for example, a plaintiff who planned to organize a protest against pandemic mitigation measures sought a preliminary injunction barring the mayor and city of New York from enforcing a ban on nonessential gatherings of any size.³¹⁹ A federal judge for the Southern District of New York applied intermediate scrutiny after finding the order was content neutral, then found it was reasonable and narrowly tailored.³²⁰ Thus, the court rejected the plaintiff's request because the challenge was unlikely to succeed on the merits.³²¹ In *Henry v. DeSantis*,³²² the Southern District of Florida upheld a stay-at-home order and rejected the First Amendment claims of a plaintiff who did not have specific plans to engage in political protests on the grounds that "[t]he Supreme Court has not found a 'generalized right of 'social association'" under the First Amendment's freedom of associa-

³¹⁴ *Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418, 426 (E.D. Va. 2020) (denying motion for TRO and preliminary injunction).

³¹⁵ *Id.* at 426–27 (citation omitted).

³¹⁶ *Id.* at 442.

³¹⁷ *Lighthouse Fellowship Church v. Northam*, No. 20-1515, 2020 WL 6074341, at *1 (4th Cir. Oct. 13, 2020).

³¹⁸ No. 20-cv-3566, 2020 WL 2520711 (S.D.N.Y. May 18, 2020).

³¹⁹ *Id.* at *3–4.

³²⁰ *Id.* at *4.

³²¹ *Id.* at *5.

³²² 461 F. Supp. 3d 1244 (S.D. Fla. 2020).

tion.”³²³ These cases did not address the penalties for or likelihood of enforcement action against violators.

A rare case enjoining enforcement of a gathering ban on freedom of expression grounds, *Ramsek v. Beshear*,³²⁴ was brought by protesters who alleged they were physically blocked by state police from protesting at the Kentucky state capitol building.³²⁵ On April 15, 2020, when approximately 100 protesters gathered during Governor Andy Beshear’s daily press conference, the state police prohibited them from accessing the side of the building where the briefing was being held, putting up a physical barrier and a sign threatening criminal penalties for breaching the restricted zone.³²⁶ The following day, the state health commissioner outlined a drive-through option for protesters to express themselves in the capitol building’s parking garage while remaining in their vehicles.³²⁷ On May 2, 2020, state police blocked certain entrances and exits to the state capitol to control the flow of traffic during a drive-through protest.³²⁸

Although the judge described these past enforcement activities in detail, the judge also noted enforcement activities appeared to be less likely going forward. By the time the court issued its preliminary injunction in the case, the judge noted that Black Lives Matter protests had become a daily occurrence across the state: “Although public demonstrations have been occurring almost daily throughout Kentucky, there have been no reports of any enforcement actions taken against participants for violating the Mass Gathering Order. In fact, Governor Beshear attended and spoke at a Black Lives Matter rally on June 5, 2020.”³²⁹ In spite of what the judge suggested was a lack of any ongoing threat of enforcement, the court granted an injunction prohibiting the governor from enforcing the gathering ban against political protesters, finding that the Governor’s order failed the intermediate scrutiny test because, although it was content neutral—the plaintiff’s protests were held in response to the ban, not the other way around—there were less restrictive alternatives available to accomplish the governor’s purposes and thus the gathering limit was not narrowly tailored.³³⁰

³²³ *Id.* at 1254 (citing *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)).

³²⁴ 468 F. Supp. 3d 904 (E.D. Ky. 2020).

³²⁵ *Id.* at 908.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 916.

³³⁰ *Id.* at 918–19.

In a few cases, courts appeared eager to reach the merits of challenges to stay-at-home orders so they could enjoin them—and depart from settled precedent in the process. In *County of Butler v. Wolf*,³³¹ for example, a federal court in the Western District of Pennsylvania held that stay-at-home orders violated both the First and Fourteenth Amendments.³³² To reach this holding, Judge William Stickman praised *Lochner v. New York*,³³³ a notorious case widely perceived as part of the constitutional “anticanon,”³³⁴ and sought to revive its long-rejected economic due process doctrine.³³⁵ At the time of the decision, the stay at home order was no longer in effect, but Judge Stickman reached the merits anyway, reasoning that “while not currently being enforced, Pennsylvania citizens remain subject to the re-imposition of the most severe provisions at any time.”³³⁶ Judge Stickman also noted “[w]hile the Governor’s representative testified that ‘our approach throughout the pandemic has not been to take an aggressive enforcement approach,’ the fact remains that Pennsylvanians were cited for violating the stay-at-home and business closure orders.”³³⁷ The district court’s decision was stayed by the Third Circuit,³³⁸ which eventually dismissed an appeal as moot.³³⁹ In their appellate brief, the Governor and State Health Secretary addressed the enforcement question by clarifying that “[c]itizens and businesses were expected to comply voluntarily and largely did so; though there was some confusion at the outset, the policy with respect to the stay-at-home orders was that there were not to be any citations. With respect to the Business Closure Orders, certain enforcement actions were taken.”³⁴⁰

About a week before Judge Wright Allen declined to enjoin restrictions on worship services in *Lighthouse Fellowship* based on the lack of enforcement,³⁴¹ a federal district court judge in Kentucky issued a TRO prohibiting the mayor and city of Louisville “from en-

331 486 F. Supp. 3d 883 (M.D. Pa. 2020).

332 *Id.* at 891.

333 198 U.S. 45 (1905).

334 Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (describing *Lochner* as one of four cases “consistently cited in Supreme Court opinions, in constitutional law casebooks, and at confirmation hearings as prime examples of weak constitutional analysis”).

335 *Wolf*, 486 F. Supp. 3d at 919–21.

336 *Id.* at 899.

337 *Id.* at 893 n.7 (quoting court filings).

338 *County of Butler v. Governor of Pa.*, No. 20-2936, 2020 WL 5868393 (3d Cir. Oct. 1, 2020).

339 *County of Butler v. Governor of Pa.*, 8 F.4th 226, 232 (3d Cir. 2021).

340 Brief for Appellants, *supra* note 228, at 7 n.5.

341 *Lighthouse Fellowship Church v. Northam*, 462 F. Supp. 3d 635, 639 (E.D. Va. 2020).

forcing; attempting to enforce; threatening to enforce; or otherwise requiring compliance with any prohibition on drive-in church services at [the plaintiff's facility]."³⁴² In *On Fire Christian Center, Inc. v. Fischer*,³⁴³ Judge Justin Walker applied strict scrutiny after finding the Louisville mayor's order was not neutral toward religion nor generally applicable.³⁴⁴ Setting the tone for subsequent comparisons—and a departure from past precedent on Free Exercise doctrine—the judge relied heavily on the fact that people were permitted to interact with others for purposes deemed “essential.”³⁴⁵ He wryly noted that “‘essential’ activities include driving through a liquor store’s pick-up window, parking in a liquor store’s parking lot, or walking into a liquor store where other customers are shopping.”³⁴⁶ “[I]f beer is ‘essential,’” Judge Walker quipped, “so is Easter.”³⁴⁷

How real was the threat of enforcement against drive-in church services on Easter Sunday in Louisville? Were drive-in services actually even prohibited? Although Judge Walker asserted that Mayor Greg Fisher had “criminalized the communal celebration of Easter” and that he had “ordered Christians not to attend Sunday services, even if they remained *in their cars* to worship,” he failed to cite the purported order.³⁴⁸ Judge Walker, following the plaintiff’s lead, cited news stories reporting on the mayor’s remarks to the public and the press.³⁴⁹ Apparently prompted by evidence that On Fire’s previous “drive-in” services included close interactions that the mayor and his advisors deemed risky,³⁵⁰ at daily briefings leading up to Easter Sun-

³⁴² *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 904 (W.D. Ky. 2020).

³⁴³ *Id.*

³⁴⁴ *Id.* at 910–11.

³⁴⁵ *Id.* at 911. Similar reasoning was adopted by the Supreme Court several months later. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020).

³⁴⁶ *On Fire Christian Ctr., Inc.*, 453 F. Supp. 3d at 911.

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 905 (emphasis in original); Defendants’ Motion to Dissolve TRO and Response in Opposition to Plaintiff’s Motion for Preliminary Injunction at 1–2, *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. 2020) (No. 20-cv-00264), [hereinafter Defendants’ Motion to Dissolve] (“Plaintiff fails to identify any executive order of Mayor Fischer to support its allegations, but rather reference[s] the Mayor’s public comments urging the religious community not to hold drive-in church services.”).

³⁴⁹ *On Fire Christian Ctr., Inc.*, 453 F. Supp. 3d at 907–08 (citing Savannah Eadens & Ben Tobin, *Church vs. State: Can Kentucky Governments Block Religious Gatherings Amid COVID-19?*, *COURIER J.* (Apr. 9, 2020, 4:07 PM), <https://www.courier-journal.com/story/news/2020/04/09/coronavirus-kentucky-can-beshear-block-religious-gatherings/2972356001/> [https://perma.cc/X5NK-AWX3]).

³⁵⁰ Defendants’ Motion to Dissolve, *supra* note 348, at 8 (describing photos taken by a local newspaper depicting On Fire congregants gathered in close proximity and passing a shared collection basket).

day he urged churches to cancel drive-in services. According to a local media report:

Fischer said during his daily press briefing that he was “imploping, begging, requesting” the “handful” of churches in Jefferson County known to be planning services not to go forward with those plans, saying they would violate Gov. Andy Beshear’s executive order prohibiting gatherings of 10 or more people during the pandemic emergency. “We’re continuing to talk to these folks and ask them not to do that, to please reconsider,” Fischer said.³⁵¹

In their motion to dissolve the TRO, the defendants conceded that “[p]erhaps our non-lawyer Mayor offended some by telling the community what to do rather than simply pleading with folks to avoid these mass gatherings,” but concluded that the mayor’s “remarks have been misinterpreted by the Plaintiff and this Court.”³⁵² When a local official tells residents that their planned actions would violate state law, is that coercion?

Mayor Fischer did not issue a local order prohibiting drive-in worship services, but he did accompany his pleas with a warning. In a statement he read to local media, the mayor said:

If there are gatherings on Sunday, Louisville Metro Police Department will be there on Sunday handing out information detailing the health risks involved, and I have asked LMPD to record license plates of all vehicles in attendance. We will share that information with our public health department, so they can follow up with the individuals that are out in church and gathering in groups, which is clearly a very, very unsafe practice.³⁵³

Is it coercion to warn that local law enforcement will be present, monitoring congregants’ activities, collecting information, and contacting churchgoers in the aftermath of services?

The cases we describe above demonstrate how courts have struggled to evaluate the legal and practical significance of hortatory mandates whose form and function collide. Their assessment of the threat of enforcement may be motivated by their stance on the merits even when they formally decline to reach them. As much as Judge Allen

³⁵¹ Chris Otts, *Fischer: Police Will Collect License Plates of Easter Churchgoers*, WDRB (Dec. 29, 2021), https://www.wdrb.com/in-depth/fischer-police-will-collect-license-plates-of-easter-churchgoers/article_795c708a-7b6d-11ea-8e48-d7138b31add7.html [<https://perma.cc/W35W-LXEH>].

³⁵² Defendants’ Motion to Dissolve, *supra* note 348, at 8.

³⁵³ Otts, *supra* note 351.

seemed eager to avoid the merits in *Lighthouse Fellowship Church*, Judge Walker seemed eager to reach them in *On Fire Christian Center*. The absence of standards for determining when hortatory mandates are reviewable left the door open for ideologically motivated procedural rulings. Below we offer a better alternative.

III. PRINCIPLES FOR LIMITED JUDICIAL REVIEW

Courts understandably struggle with laws that seem at once to be both hortatory and mandatory. These struggles, in turn, invoke very old debates about the proper constitutional role of the judiciary in reviewing legislative and executive actions.³⁵⁴ We begin Part III by engaging these debates and evaluating the arguments for and against judicial review of hortatory mandates. We then discuss existing doctrinal approaches that might serve as models for deciding when judicial review of hortatory mandates is appropriate. Finally, given these lessons, we offer a practical test for courts: Does the hortatory mandate create a binding norm or obligation? If so, it is not really “hortatory” and should be reviewable, just like other species of effective law. If not, it is not really “mandatory” and thus objections should be funneled through existing political or administrative processes. This effort, we hope, can help guide courts and lawmakers alike.

A. *The Benefits of Judicial Review*

In matters of both constitutional interpretation and statutory construction, judicial review is the baseline expectation. Judicial enforcement of the Constitution—both the individual rights it guarantees and the structural constraints it imposes—is the default in constitutional law.³⁵⁵ Doctrinally, the text of the Constitution does not specifically grant the power of judicial review to the courts, but it was contemplated by the founders³⁵⁶ and is enshrined in precedents like *Marbury v. Madison*³⁵⁷ that are nearly as venerated as the Constitution itself. Judicial review of congressional statutes and agency actions enjoys a

³⁵⁴ See Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 673–75 (documenting the history of doctrinal and political debates over judicial review).

³⁵⁵ See THE FEDERALIST NO. 78, at 521 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

³⁵⁶ *Id.* at 525 (“The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.”).

³⁵⁷ 5 U.S. (1 Cranch) 137, 177–78 (1803).

strong doctrinal presumption from courts, absent clear congressional intent to the contrary.³⁵⁸

Normatively, arguments about judicial review may shift with the political winds, depending on whether the judiciary is doing things legal scholars and the public approve or disapprove of. As a matter of institutional design and competency, however, judicial review has much to commend it. The starting point, then, for most debates about judicial review is that it is generally beneficial and should be available as a failsafe mechanism for good governance.³⁵⁹ As a foundation for articulating the principles that should govern limited judicial review of hortatory mandates, we set forth the benefits judicial review is supposed to secure. We focus particularly on how judicial review protects against government overreach, enhances legitimacy, and promotes transparency in the political branches. We also note that judicial review sometimes—though more rarely—protects against government *underreach*.

Judicial review is *intentionally* countermajoritarian, serving as a check on overreach by the politically accountable branches of government³⁶⁰: After all, the founders chose life tenure for federal judges for a reason.³⁶¹ Although majoritarianism is the heart of our constitutional democracy, countermajoritarian constraints on government overreach are also integral to the constitutional design, at least insofar as fundamental individual rights are concerned.³⁶² A hortatory mandate that is perceived by the public as having “the power of a rule”

³⁵⁸ See, e.g., *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986); *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 140 (1967); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 *VAND. L. REV.* 743, 751 (1992).

³⁵⁹ See, e.g., Erwin Chemerinsky, *In Defense of Judicial Review*, *AM. PROSPECT* (July 18, 2022), <https://prospect.org/justice/in-defense-of-judicial-review/> [<https://perma.cc/VV3Q-K7HY>].

³⁶⁰ Of course, the Constitution itself was adopted as a super statute by an important supermajority at an important moment in history. Thus, privileging the Constitution over congressionally enacted statutes is not entirely countermajoritarian.

³⁶¹ The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body.

THE FEDERALIST NO. 78, *supra* note 355, at 522.

³⁶² Limitations . . . [on legislative authority] can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Id. at 524.

may chill the exercise of constitutionally protected rights even in the absence of enforcement. In addition, officials may send up a hortatory mandate as a trial balloon. If the judiciary fails to scrutinize it in any way, the government's hortatory mandate and the judiciary's acquiescence could effectively shift the Overton window of what is perceived as acceptable—not just politically but legally.³⁶³ Courts do not only look to judicial precedents to guide their decisions; judges are often swayed by whether a challenged government action is novel. If an overreaching government action has been preceded by hortatory mandates that were unenforced and therefore unreviewed, courts may be more likely to uphold it once review is deemed acceptable, solely because it is no longer novel.

Judicial review enhances the legitimacy of political branch actions. Although aggressive judicial review may inappropriately frustrate, delay, or thwart valid legislative and executive action,³⁶⁴ the more common outcome is that judicial review results in decisions upholding—and thus legitimating—government intervention.³⁶⁵ During the pandemic, the courts have almost uniformly rejected most of the constitutional claims grounded in freedom of personal movement, economic liberty, and rights to bodily integrity made by protesters against social distancing restrictions and mask and vaccination requirements.³⁶⁶ The vast majority of challenges to mitigation measures have been unsuccessful.³⁶⁷ Federal courts upheld unprecedented measures, including orders restricting personal movement and interstate travel, orders prohibiting all “non-essential” commercial activity outside of homes, and orders mandating face covering and vaccination.³⁶⁸ Religious liberty challenges and challenges to interventions not authorized by statute in specific terms are notable exceptions,³⁶⁹ which we discuss below.

Judicial review also promotes transparency—a critical component of good governance. Even in cases where a challenged government

³⁶³ Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARV. L. REV. F. 179, 198 (2020).

³⁶⁴ See *infra* Section III.B.

³⁶⁵ Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1680 (2017) (“[J]udicial supremacy serves the coordinate branches by legitimating what they do. The public discourse tends to focus on cases in which the Supreme Court invalidates a government action, but that overlooks the vast majority of cases in which the Court validates, and indeed entrenches, the government’s actions instead.”).

³⁶⁶ See, e.g., *Henry v. DeSantis*, 461 F. Supp. 3d 1244, 1254 (S.D. Fla. 2020).

³⁶⁷ See Wiley, *supra* note 1, at 94.

³⁶⁸ *Id.* at 69–80.

³⁶⁹ *Id.* at 94.

action is ultimately upheld by the courts, the process of adjudication secures the basic obligation of government officials to set forth the basis for their actions.³⁷⁰ Knowing that a threat of litigation looms may prompt officials to be more transparent from the outset when they announce a new intervention. For legislation, that justification may come in the form of more detailed findings and examinations of the legal and policy basis for the legislature's choices. As the pandemic demonstrates, for executive and agency action, transparency may come in the form of prefatory findings in a rule or order as well as press conferences, public-facing websites, and media interviews. "[M]eaningful judicial review requires the government to dot its proverbial i's by building a record that can survive proportionality-driven standards of review."³⁷¹ During the pandemic, journalists and social media commentators broke down the details of lawsuits by challengers, court filings by government defendants, and judicial orders upholding or blocking mitigation measures for the general public, which closely followed developments in the courts. In some cases, court filings and judicial opinions summarizing the evidence introduced by government defendants provided a far more detailed explanation of the scientific basis for pandemic mitigation measures than elected officials offered at press briefings and on websites. Our anecdotal perception as experts who followed state and local executive orders closely is that the prefatory findings in those orders became significantly more detailed over time, presumably as officials became more aware of the likelihood of legal challenges that would require them to defend their interventions in court.

To a lesser extent, judicial review polices government *underreach*³⁷² and promotes legitimacy and transparency with respect to government *inaction*. Under the right conditions, judges may order administrative agencies to hew more closely to the aspirations expressed in hortatory mandates. For example, when agencies shirk responsibility for implementing congressional directives, non-governmental organizations have sometimes sued and courts have occasionally issued orders requiring the administration to comply with mandatory language in statutes.³⁷³ Health and environmental groups have sometimes turned to the courts to hold administrative agencies

³⁷⁰ *Id.* at 113.

³⁷¹ Wiley & Vladeck, *supra* note 363, at 194–95.

³⁷² For a comparative analysis of executive underreach during the COVID-19 pandemic, see David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT'L L. 608, 608–09 (2020).

³⁷³ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 500 (2007).

to account for failing to implement statutory directives as Congress intended.³⁷⁴ During the pandemic, some litigants sought to challenge state and local governments' failure to adopt reasonable mitigation measures, such as mask requirements in schools.³⁷⁵ Others sought to block state orders preempting local authority to adopt mitigation measures. For example, when Texas Governor Greg Abbott issued executive orders restricting mask mandates and vaccine mandates,³⁷⁶ opponents turned to courts for relief.³⁷⁷ In the Texas cases, notably, Abbott's executive orders did not reflect public will—fifty-six percent of Texans supported local authority to require masks versus only thirty-five percent opposed,³⁷⁸ while more than sixty-five percent of

³⁷⁴ Public health, health care, and environmental advocates have repeatedly sued agencies seeking court orders directing agencies to implement more rigorous regulations or more generous supports. *See supra* Section I.C.3.

³⁷⁵ These claims were partially successful in blocking state interference with local school district authority to require masking as an accommodation for particular students' disabilities. *See, e.g.,* *Arc of Iowa v. Reynolds*, 24 F.4th 1162, 1177, 1182 (8th Cir. 2021) (holding plaintiffs were entitled to a preliminary injunction of a state law prohibiting local districts from requiring masks after finding the plaintiffs' argument that the statute violated the Rehabilitation Act was likely to succeed on the merits); *Seaman v. Virginia*, 593 F. Supp. 3d 293, 330 (W.D. Va. 2022) (granting preliminary injunction under the Americans with Disabilities Act and Rehabilitation Act against a state law prohibiting school districts from requiring masks). *But see* *E.T. v. Paxton*, 41 F.4th 709, 721–22 (5th Cir. 2022) (vacating district court's preliminary injunction after finding that disabled plaintiffs lacked standing to challenge state law prohibiting school districts from requiring masks).

³⁷⁶ *Tex. Exec. Order No. GA-38* (July 29, 2021), <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2021/GA-38.pdf> [<https://perma.cc/AG8H-2E5G>]; *Tex. Exec. Order No. GA-40* (Oct. 11, 2021) <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2021/GA-40.pdf> [<https://perma.cc/UT97-6YWZ>].

³⁷⁷ *See, e.g., In re Abbott*, No. 21-00687-CV, 2021 WL 3610314, at *1 (Tex. Ct. App., Aug. 30, 2021); *Abbott v. City of San Antonio*, No. 21-00342-CV, 2021 WL 3819514, at *1 (Tex. Cit. App., Aug. 19, 2021). Ironically, these orders suffered from some of the same confusion surrounding the legal status of hortatory mandates. In response to dozens of suits filed by Texas cities, counties, and school districts, Governor Abbott defended his orders by arguing that neither the governor nor the state attorney general could enforce them, despite declaring through a spokesperson that they “hav[e] the full force and effect of law.” *See* Joshua Fechter, *Texas Gov. Abbott Can't Enforce Mask Mandate Ban, He Argues in Court*, TEX. TRIB. (Aug. 27, 2021, 2:00 PM), <https://www.texastribune.org/2021/08/27/texas-mask-mandates-greg-abbott/> [<https://perma.cc/9YBZ-YC6W>]. The state argued that the orders were enforceable but only via local prosecutors. Of course, many local prosecutors from Texas cities like Houston, Dallas, and San Antonio opposed the orders and supported local efforts to mitigate COVID-19, meaning Governor Abbott's orders would, in fact, go unenforced in Texas's largest cities. *See id.*

³⁷⁸ *Opinion, Abbott's Ban on Mask Mandates Seems to Be Quietly Fading*, BEAUMONT ENTER. (Sept. 21, 2021, 10:06 PM), <https://www.beaumontenterprise.com/opinions/editorials/article/OPINION-Abbott-s-ban-on-mask-mandates-seems-to-16477465.php> [<https://perma.cc/2TF8-EWKJ>]. Similarly, polls indicate that the majority of Texans “thought that masks should be required in all K-12 schools.” Corbett Smith, *Texans Support Mask Mandates in Schools, News/UT-Tyler Poll Finds*, DALLAS MORNING NEWS (Sept. 21, 2021, 7:00 AM), <https://>

Texans supported a vaccine mandate.³⁷⁹ For years, of course, scholars have questioned whether legislative (and particularly executive) actions necessarily reflect the “popular will.”³⁸⁰

By enhancing legitimacy and transparency, judicial review promotes good governance by the coordinate branches. Pragmatically, “[b]y subjecting government incursions on civil liberties to meaningful judicial review, courts force the government to do its homework—to communicate not only the purposes of its actions, but also how the imposed restrictions actually relate to and further those purposes.”³⁸¹ More philosophically, litigation challenging government mandates are among the “procedures and criteria that allow . . . [communities] to work out personal decisions and public policies in the face of conflicting values.”³⁸² One “way to work out the balance between autonomy and the common good as it applies to specific matters”—including public health emergency response, health care reform, and other controversies we have discussed above—“is to leave these issues to courts.”³⁸³ Political checks and balances and popular constitutionalism are insufficient on their own to police overreach and underreach and ensure legitimate, transparent governance by the political branches. Left to their own devices, elected officials may needlessly infringe the constitutional rights of, and fail to vigorously implement statutory protections for, individuals and communities whose interests do not align with those of the majority—or the minority the official feels most politically beholden to. Judicial oversight absolutely *is* susceptible to political and ideological influence. But politics and ideology are baked into the checks and balances provided by the political branches.

www.dallasnews.com/news/education/2021/09/21/texans-support-mask-mandates-in-schools-new-sut-tyler-poll-finds/ [<https://perma.cc/ADV6-XJ4Z>].

³⁷⁹ Benjamin Wermund, *Over Sixty-five Percent of Texans Support Vaccine Mandate, Poll Says*, HOUS. CHRON. (Aug. 2, 2021, 1:52 PM), <https://www.houstonchronicle.com/politics/texas/article/Over-65-of-Texans-support-vaccine-mandates-poll-16357459.php> [<https://perma.cc/U6MC-A4MA>].

³⁸⁰ See, e.g., Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1292, 1296 (2004); Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1736–37 (2021).

³⁸¹ Lindsay F. Wiley & Steve Vladeck, *COVID-19 Reinforces the Argument for “Regular” Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis*, HARV. L. REV. BLOG (Apr. 9, 2020), <https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/> [<https://perma.cc/R26T-4ZGX>].

³⁸² AMITAI ETZIONI, *HAPPINESS IS THE WRONG METRIC: A LIBERAL COMMUNITARIAN RESPONSE TO POPULISM* 297 (Michael Boylan et al. eds., 2018).

³⁸³ *Id.*

Judges do and should play a role in securing good governance through judicial review.

B. *The Burdens of Judicial Review*

Whatever the merits of judicial review, it undoubtedly can frustrate, delay, or even thwart valid lawmaking efforts. The most well-known problem with judicial review is the “countermajoritarian difficulty,” which has been “the dominant paradigm of constitutional law and scholarship” for decades.³⁸⁴ When unelected judges override legislative enactments and executive actions, they are overriding the will of the people, as expressed through the judgments of democratically accountable officials.³⁸⁵ Although judicial review serves an accepted role in protecting individuals from overbearing majorities, aggressive review undermines the principle of legislative supremacy at the heart of our constitutional order.³⁸⁶ Majoritarian choices—typically crafted through extensive legislative processes, administrative processes, or both—can be nullified by the decisions of unelected judges with life tenure.³⁸⁷ For well over half a century, the countermajoritarian problem has animated both calls for judicial restraint and critiques of judicial activism.³⁸⁸

³⁸⁴ Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 61 (1989).

³⁸⁵ The root difficulty is that judicial review is a counter-majoritarian force in our system . . . [W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens . . . [I]t is the reason the charge can be made that judicial review is undemocratic.

ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962).

³⁸⁶ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348–49 (2006); see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM AT THE SUPREME COURT*, at xiv (1999); Neal Kumar Katyal, Essay, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 135994 (2001).

³⁸⁷ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 3–8 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

³⁸⁸ Some of the most important advocates for theories of judicial restraint include Alexander Bickel, Robert Bork, and John Hart Ely. See BICKEL, *supra* note 385, at 16–17; ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139–41, 153–57, 251–59 (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4–9, 101–03 (1980). Of course, most of the considerable writing on the countermajoritarian problem focuses on legislative action, and its application to executive action—particularly by unelected administrative agency officials—is contested. See, e.g., Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 762–64 (1997).

The countermajoritarian difficulty can seem particularly troubling during a pandemic, when courts sit in judgment of emergency measures adopted by policymakers to mitigate the spread of infectious disease.³⁸⁹ Thus, for example, when the Wisconsin Supreme Court invalidated the governor’s “Safer at Home Order” in May 2020, some viewed it as a judicial incursion on the executive’s authority to protect the public health during a deadly pandemic.³⁹⁰ The dissent in that case lamented that the majority’s decision “failed to provide almost any guidance for . . . how our state is to govern through this crisis moving forward.”³⁹¹

Calls for judicial restraint—and related charges of “judicial activism”—often respond to courts when they assume a policymaking role. Perhaps the best contemporary example is the Supreme Court’s opinion in *Citizens United v. FEC*,³⁹² in which the Court invalidated earnest bipartisan efforts by Congress to regulate the role of corporate money in federal elections.³⁹³ The *Citizens United* majority was widely criticized for a number of choices, including rejecting binding precedents, deciding issues not properly before the Court, gratuitously expanding the scope of its review, turning an as-applied challenge into a facial review of campaign finance laws, and “[p]ulling out the rug beneath Congress . . . show[ing] great disrespect for a coequal branch.”³⁹⁴ Since the 2010 ruling, in fact, many of the concerns raised by Congress and the dissent in *Citizens United* have come to pass.³⁹⁵ The majority’s decision in *Citizens United* reflected staggering judicial activism and immodesty.

But the Supreme Court, perhaps mindful of growing critiques, still honors time-worn limits on judicial review, particularly doctrines of justiciability. As the majority emphasized in *California v. Texas* re-

³⁸⁹ See, e.g., Ian Millhisier, *The Wisconsin Supreme Court’s Conservative Majority Strikes Down State Stay-Home Order*, VOX (May 13, 2020, 8:50 PM), <https://www.vox.com/2020/5/13/21258007/wisconsins-republican-supreme-court-stay-at-home-legislature-palm-roggensack> [<https://perma.cc/75TV-BHD3>].

³⁹⁰ Wis. Legislature v. Palm, 942 N.W.2d 900, 918 (Wis. 2020) (holding that an order to stay at home, limit nonessential travel, and close nonessential businesses was “unlawful, invalid, and unenforceable”); Millhisier, *supra* note 389.

³⁹¹ Wis. Legislature, 942 N.W.2d at 953 (Hagedorn, J., dissenting).

³⁹² 558 U.S. 310 (2010).

³⁹³ *Id.* at 365.

³⁹⁴ *Id.* at 400–12 (Stevens, J., concurring in part and dissenting in part).

³⁹⁵ Richard L. Hasen, *The Decade of Citizens United*, SLATE (Dec. 19, 2019, 5:50 AM), <https://slate.com/news-and-politics/2019/12/citizens-united-devastating-impact-american-politics.html> [<https://perma.cc/U8AW-WTQ9>]. For an exercise in reconciling free-market values and voter equality, see RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS (2016).

garding the ACA's individual mandate, judicial review of "an unenforceable statutory provision would allow a federal court to issue what would amount to 'an advisory opinion without the possibility of any judicial relief,'" and "would threaten to grant unelected judges a general authority to conduct oversight of decisions of the elected branches of Government."³⁹⁶

In the spirit of judicial restraint, perhaps the remedies to some decisions are better left to the political branches. If a hortatory mandate is deemed problematic, albeit unenforceable, legislative and administrative procedures can respond when judicial review is unavailable. After all, as some observe, Congress has more "constitutional authority, democratic legitimacy, and institutional capacity" than courts to make complex tradeoffs among competing policy priorities.³⁹⁷

C. *Existing Frameworks and Potential Models*

If judicial review of hortatory mandates is sometimes necessary and sometimes not, are there principled ways for courts to decide? We evaluate existing frameworks that might serve as useful models, including: (1) standing doctrine, (2) standards for granting preliminary injunctions and TROs, (3) the test for determining when discretionary decisions by administrative agencies should be reviewable, (4) the test for determining when agency guidance should be reviewable, and (5) the test for determining when an agency decision is "final" and thus reviewable under the APA.

These models offer two insights: first, courts can and frequently do determine whether judicial review is appropriate as a threshold matter. If we are concerned with courts being asked to make hair-splitting decisions about whether to review hortatory mandates, we should recall that courts make these kinds of hair-splitting determinations in other contexts. Second, these tests invoke the power of the courts only when there is some binding norm in place, enforcement of which would have some legal consequence. The bottom line is that when the form and function of a government action collide, function rather than form should determine whether it is reviewable.

³⁹⁶ *California v. Texas*, 141 S. Ct. 2104, 2116 (2021) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 129 (1983) (Marshall, J., dissenting)).

³⁹⁷ Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1286, 1287 (2014).

1. *Standing Doctrine*

If we are concerned about courts overstepping their bounds when reviewing hortatory mandates, do Article III standing requirements assuage these concerns? In theory, yes. The Constitution limits the federal courts to hearing only “cases” or “controversies” and prohibits them from issuing advisory opinions.³⁹⁸ To delineate justiciable from nonjusticiable cases, plaintiffs must have proper standing to sue,³⁹⁹ which they establish by showing that they have suffered an “injury in fact,” the injury is “fairly . . . trace[able]” to the defendant’s conduct, and the injury will likely be “redressed by a favorable [court] decision.”⁴⁰⁰ Any plaintiff challenging a hortatory mandate in federal court must demonstrate all three elements.⁴⁰¹ If a plaintiff can demonstrate all three elements, does it resolve concerns about judicial overreach? Perhaps. But standing doctrine is malleable enough to allow a determined court to reach the merits of conflicts that are better left to the legislature or executive.

First, consider the “injury in fact” requirement. To demonstrate an injury in fact, plaintiffs must establish some sort of personal stake—“an invasion of a legally protected interest” that is concrete, particularized, and actual or imminent rather than conjectural or hypothetical.⁴⁰² The Supreme Court often looks for an injury that is “distinct and palpable.”⁴⁰³

The problem, as Justice Douglas once observed, is that “[g]eneralizations about standing to sue are largely worthless as such.”⁴⁰⁴ The question is often “one of degree and is ‘not discernible by any precise test.’”⁴⁰⁵ Standing is in the eye of the beholder, thus raising suspicions that judges use standing either to “avoid uncomfort-

³⁹⁸ U.S. CONST. art. III, § 2.

³⁹⁹ Standing “has been largely a creature of twentieth century decisions of the federal courts,” invoked mostly in “litigation asserting the illegality of government action.” 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, 6 (3d ed. Oct. 2020 update).

⁴⁰⁰ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁴⁰¹ *Id.* Moreover, courts sometimes invoke “prudential” standing to decline to hear cases, reflecting judicial anxiety about stepping outside of their lane. See *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012). But doctrines of prudential standing introduce even more malleable rules that courts and litigants might manipulate. See *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1110 (9th Cir. 2003).

⁴⁰² *Lujan*, 504 U.S. at 560; see *Baker v. Carr*, 369 U.S. 186, 204 (1962).

⁴⁰³ *McConnell v. FEC*, 540 U.S. 93, 225 (2003).

⁴⁰⁴ *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970).

⁴⁰⁵ *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 542 (5th Cir. 2008).

able issues or to disguise a surreptitious ruling on the merits.”⁴⁰⁶ Particularly in controversial cases, standing often reflects deeper debates about justiciability and the proper role of courts vis-à-vis the other branches.⁴⁰⁷

In most cases, standing is obvious and not contested, particularly when plaintiffs claim injury to traditional forms of property, to economic or pecuniary interests, or to interests expressly recognized by statute.⁴⁰⁸ But standing is harder to discern when plaintiffs claim injury to less tangible interests.⁴⁰⁹ Injuries that are noneconomic, nonpecuniary, or not explicitly recognized by statute—or that seem trivial—may not qualify as a “legally protected interest.”⁴¹⁰ Or sometimes courts simply punt on cases that do not seem well suited to judicial resolution.⁴¹¹

As such, standing doctrine is exceedingly pliable. As scholars observe, standing “is regularly recognized for litigants who have suffered only the slightest—the most abstract—of injuries,” while it is “often denied to litigants whose sense of outrage . . . [is] equal.”⁴¹² Courts may thus deny standing when the injury is too remote, too abstract, too attenuated, or better resolved through democratic processes.⁴¹³ But courts may find standing even when these elements are present.⁴¹⁴ Standing doctrine alone thus may not be a reliable indicator of whether a hortatory mandate warrants judicial review.

⁴⁰⁶ WRIGHT, ET AL., *supra* note 399, at 17–19.

⁴⁰⁷ *See id.* at 21–22.

⁴⁰⁸ *See id.* § 3531.4.

⁴⁰⁹ *See, e.g.,* Gill v. Whitford, 138 S. Ct. 1916, 1929–31 (2018) (concluding plaintiffs lacked standing in a partisan gerrymandering case); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 792–93 (2015) (concluding the Arizona legislature had standing to challenge an effort by Arizona voters to amend the state constitution “to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission”).

⁴¹⁰ WRIGHT, ET AL., *supra* note 399, at § 3531.4 (citing cases).

⁴¹¹ *Id.* (citing cases).

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ An oft-cited example are the plaintiffs in *United States v. Students Challenging Regulatory Agency Procedures* (“SCRAP”). *See* 412 U.S. 669 (1973). The injury asserted was that an order by the Interstate Commerce Commission to allow railroads to impose “a 2.5% surcharge on nearly all freight rates” would discourage the use of recycled goods, leading to more use of virgin materials, thus injuring the plaintiffs’ use and enjoyment of forests, rivers, streams, mountains, and other natural resources. *Id.* at 674, 687–90. Despite the attenuated claim, the Supreme Court found the plaintiffs had standing, although it recognized that the injuries were “far less direct and perceptible” than those claimed in prior cases. *Id.* In fact, the Court later characterized the SCRAP decision as the most “expansive expression” of standing, *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 889 (1990), that resides at “the very outer limit” of the law. *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990).

Still, many courts deny standing when the plaintiffs cannot establish that they have suffered or will suffer any adverse impact. As discussed above in Part I, government action that causes no past, present, or future injury is merely *hortatory*. Wright and Miller's *Federal Practice and Procedure* cites forty cases in which courts denied standing because plaintiffs failed to demonstrate any injury.⁴¹⁵ The latest and most high profile decision, of course, was the Supreme Court's ruling in *California v. Texas*, discussed above.⁴¹⁶ Although the ACA tells individuals to maintain coverage, it "has no means of enforcement" and "the IRS can no longer seek a penalty from those who fail to comply."⁴¹⁷ The Breyer majority stressed that the Court's "cases have consistently spoken of the need to assert an injury that is the result of a statute's actual or threatened *enforcement*, whether today or in the future," and that in the absence of contemporaneous enforcement, "a plaintiff claiming standing must show that the likelihood of future enforcement is 'substantial.'"⁴¹⁸

An analogous case is *Poe v. Ullman*,⁴¹⁹ where plaintiffs challenged a Connecticut law criminalizing the use of contraception.⁴²⁰ The Supreme Court denied standing because the law had been prosecuted only once in seventy-five years, and that prosecution was merely a ploy to challenge the law itself.⁴²¹ In the Court's words, "[t]he fact that Connecticut has not chosen to press the enforcement of this stat-

⁴¹⁵ WRIGHT, ET AL., *supra* note 399, at § 3531.4 n.180. See, e.g., *Baldwin v. Sebelius*, 654 F.3d 877, 879–80 (9th Cir. 2011) (finding no standing by a plaintiff challenging the ACA's individual mandate because he did not argue that he lacked health insurance, did not argue that he would have to save money to afford insurance when the mandate took effect, and did not demonstrate any "injury in fact, or a genuine threat of prosecution").

⁴¹⁶ See *California v. Texas*, 141 S. Ct. 2104, 2120 (2021); see *supra* notes 13–26 and accompanying text.

⁴¹⁷ *California v. Texas*, 141 S. Ct. at 2114.

⁴¹⁸ *Id.* (citation omitted). Before the Supreme Court's decision in *California v. Texas*, Judge King's *Texas v. United States* dissent in the Fifth Circuit Court of Appeals captured the problem with courts reviewing unenforceable mandates:

Without any enforcement mechanism to speak of, questions about the legality of the individual "mandate" are purely academic, and people can purchase insurance—or not—as they please. No more need be said; it has long been settled that the federal courts deal in cases and controversies, not academic curiosities. . . . Nobody has standing to challenge a law that does nothing. . . . [C]ourts do not change anything when they invalidate a law that does nothing. . . . The great power of the judiciary should not be invoked to disrupt the work of the democratic branches when the plaintiffs can easily avoid injury on their own.

Texas v. United States, 945 F.3d 355, 403–05, 410 (5th Cir. 2019) (King, J., dissenting).

⁴¹⁹ 367 U.S. 497 (1961).

⁴²⁰ *Id.* (plurality opinion).

⁴²¹ *Id.* at 501–02.

ute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication,” and the Court could not “be umpire to debates concerning harmless, empty shadows.”⁴²² Of course, in a post-*Dobbs* world in which *Roe v. Wade* no longer stands,⁴²³ the court would have to determine whether enforcement was a realistic possibility.

Finally, in a case somewhat analogous to COVID-19 mitigation orders, members of the armed forces sued to challenge the Defense Department’s administration of a mandatory anthrax vaccine that required six scheduled doses.⁴²⁴ Because the Department had to suspend administration between 2000 and 2002 due to vaccine shortages—in the middle of some scheduled doses—the plaintiffs argued that the interrupted regimen became experimental, and that continued administration would violate federal law requiring service-members to give informed consent before receiving any investigational new drug.⁴²⁵ But the servicemembers failed to show that any of them began their shot sequences before the two-year pause or would otherwise be subject to an interrupted shot sequence.⁴²⁶ None of the plaintiffs alleged that they themselves had been, or would be, subject to an interrupted vaccine schedule. The D.C. Circuit thus found they failed to allege an injury in fact to support standing.⁴²⁷

These cases might suggest that standing doctrine is capable of distinguishing justiciable from nonjusticiable hortatory mandates. Unfortunately, for every decision applying the standing criteria in a sensible way (*California v. Texas*⁴²⁸ and *Poe v. Ullman*⁴²⁹) there are decisions that defy common sense (the lower court decisions in *Texas v. United States*).⁴³⁰ Standing doctrine thus prods some useful inquiries (“can plaintiffs demonstrate a past, present, or future injury?”) but may be too pliable to be the sole barrier between hortatory mandates and courts.

⁴²² *Id.* at 508.

⁴²³ See *supra* notes 121–30 and accompanying text.

⁴²⁴ See *Rempfer v. Sharfstein*, 583 F.3d 860 (D.C. Cir. 2009).

⁴²⁵ *Id.* at 863–64, 864 n.2 (citing 10 U.S.C. § 1107(f)(1)).

⁴²⁶ *Id.* at 868.

⁴²⁷ *Id.* at 868–69.

⁴²⁸ See 141 S. Ct. 2104, 2120 (2021).

⁴²⁹ See 367 U.S. 497, 498, 508–09 (1961).

⁴³⁰ See 340 F. Supp. 3d 579, 595 (N.D. Tex. 2018); 352 F. Supp. 3d 665, 678 (N.D. Tex. 2018); 945 F.3d 355, 387 (5th Cir. 2019).

2. *Rules for Preliminary Injunctions and Temporary Restraining Orders*

The threat of enforcement plays a significant role in the standards judges apply when parties request preliminary injunctions and TROs before the merits of their claims are resolved. During the COVID-19 pandemic, courts have pointed to lack of enforcement activity as a reason to deny temporary injunctive relief.⁴³¹

A party requesting preliminary relief “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”⁴³² The irreparable harm prong is a particularly apt doctrinal hook for judges to examine the threat of enforcement. In *Faust v. Inslee*, for example, Judge Settle denied a motion for a TRO to a plaintiff who had previously protested Washington state’s stay-at-home order, and planned to do so again, on the grounds that she had “fail[ed] to establish a realistic threat of any criminal enforcement action as a result of her course of conduct.”⁴³³ In other cases, however, judges have deemed a chilling effect on a party’s exercise of protected rights sufficient to establish irreparable harm. Indeed, in the First Amendment context, concern about the chilling effect is strong enough to warrant a presumption of irreparable harm.⁴³⁴

Standards for granting temporary injunctive relief invite judges to put their own policy commitments front and center. Thus, they do not offer a useful model for determining when hortatory mandates are reviewable by courts.

3. *Review of Agency Discretion*

Another model for considering whether to invoke the power of the courts is the framework for deciding when discretionary decisions by agencies should be reviewable under the APA. The question is prompted by the APA itself, which includes contradictory language on whether discretionary decisions are reviewable. To wit, section 701(a)(2) of the APA says courts cannot review agency actions that

431 See, e.g., *Faust v. Inslee*, No. C20-5356, 2020 WL 2557329 (W.D. Wash. May 20, 2020).

432 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

433 *Faust*, 2020 WL 2557329, at *2.

434 See, e.g., Beatrice Catherine Franklin, Note, *Irreparability, I Presume? On Assuming Irreparable Harm for Constitutional Violations in Preliminary Injunctions*, 45 COLUM. HUM. RTS. L. REV. 623, 635–40 (2014).

are “committed to agency discretion by law.”⁴³⁵ Yet section 706(2)(A) includes an “abuse of discretion” standard, allowing courts to set aside or hold unlawful agency actions that are “arbitrary, capricious, [or] an abuse of discretion.”⁴³⁶

In determining which discretionary decisions are reviewable under the APA and which are not, the Supreme Court in *Heckler v. Chaney*⁴³⁷ adopted the “no law to apply” test from *Citizens to Preserve Overton Park v. Volpe*.⁴³⁸ Per this test, judicial review is inappropriate where “statutes are drawn in such broad terms that in a given case there is no law to apply.”⁴³⁹ In *Heckler*, prisoners on death row asked courts to compel FDA to bring an enforcement action against drugs used for lethal injections, on the grounds that such products would violate the Food, Drug, and Cosmetic Act.⁴⁴⁰ After FDA refused, the Supreme Court held that its refusal was committed to agency discretion by law, reasoning that “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”⁴⁴¹ The Court explained that judicial review is particularly unsuitable when agencies exercise their discretion *not* to bring an enforcement action, as such a decision “often involves a complicated balancing of a number of factors which are peculiarly within its expertise.”⁴⁴² The Court found, “[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.”⁴⁴³ Under *Heckler*, courts should consider whether judicial review will be particularly intrusive or even counterproductive.

Importantly, one of the rationales in *Heckler* was that judicial review is inappropriate when an “agency refuses to act” and thus “does not exercise its *coercive* power over an individual’s liberty or property rights.”⁴⁴⁴ Under our proposed framework, a hortatory mandate that is truly *hortatory*, and does not deploy the state’s coercive powers, would be unsuitable for judicial review. The same factors that call for judicial restraint in *Heckler* can justify judicial restraint in reviewing

435 5 U.S.C. § 701(a)(2).

436 *Id.* § 706(2)(A). For an early analysis of the apparent contradiction, see Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965).

437 470 U.S. 821 (1985).

438 401 U.S. 402 (1971).

439 *Id.* at 410 (quoting S. REP. NO. 752, at 26 (1945)).

440 21 U.S.C. §§ 301–99; see *Heckler*, 470 U.S. at 823–24.

441 *Heckler*, 470 U.S. at 824, 830.

442 *Id.* at 831.

443 *Id.* at 831–32.

444 *Id.* at 832.

hortatory mandates, including whether the decision is an “inherently discretionary judgment call, whether it is the sort of decision that has traditionally been nonreviewable, and whether review would have disruptive practical consequences.”⁴⁴⁵ In particular, hortatory mandates used during the pandemic often involve the type of “complicated balancing” that calls for judicial restraint in these other cases.⁴⁴⁶

Still, this doctrine is vulnerable to the same critique as standing doctrine—it is inherently pliable and thus may be used to justify (or decline) judicial review depending on whether the court wants to confront (or to avoid) the merits. Courts applying the “no law to apply test” usually can stretch to find *some* law to apply if they choose.⁴⁴⁷ We do not argue that the “no law to apply” test is a useful test for hortatory mandates; we simply note that the same factors that caution judicial restraint when reviewing discretionary decisions by agencies also caution restraint when reviewing hortatory mandates, particularly those used during public health emergencies.

4. *Review of Agency Guidance*

Another model with useful parallels to hortatory mandates is the framework for deciding whether courts should review agency guidance. Guidance is distinguishable from legislative rules issued by agencies because rules have the force of law and often determine the rights and obligations of citizens.⁴⁴⁸ Guidance, in contrast, is not legally binding or enforceable on private persons or the government itself.⁴⁴⁹ Thus the federal APA exempts guidance—including both policy statements and interpretive rules—from notice-and-comment requirements.⁴⁵⁰

However, sometimes the distinction breaks down, and agencies treat guidance as binding, or regulated parties treat guidance as de facto requirements, or both.⁴⁵¹ Private parties are often “confused about the legal import of documents like these, and frustrated at their

445 *Webster v. Doe*, 486 U.S. 592, 609 (1988) (Scalia, J., dissenting) (citations omitted).

446 *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

447 *See Webster*, 486 U.S. at 608 (Scalia, J., dissenting). For a thorough evaluation of section 701(a)(2) of the APA and the “no law to apply” test, see generally Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

448 Often we refer to such rules as “legislative rules,” which are distinguishable from guidance, also known as “nonlegislative rules.” John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004).

449 *See, e.g., Viet. Veterans of Am. v. Sec’y of Navy*, 843 F.2d 528, 536–38 (D.C. Cir. 1988).

450 APA § 3, 5 U.S.C. § 553(b)(A), (d)(2).

451 *See* Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 169–74 (2019).

inability to escape the practical obligations or standards the documents impose.”⁴⁵² Regulated firms may perceive no real alternatives other than compliance.⁴⁵³ In such cases, parties often challenge agency guidance as a procedurally invalid rule—that is, a legislative rule that failed to satisfy the procedural requirements of notice and comment and delayed effect under the APA.⁴⁵⁴

There are numerous federal cases considering whether guidance qualifies as a legislative rule that should have been issued only pursuant to notice and comment.⁴⁵⁵ Like hortatory mandates, legally binding guidance is a contradiction in terms, combining incompatible forms and functions.⁴⁵⁶ When confronted with discordant guidance, courts consider a number of factors that are also useful in considering hortatory mandates. First, courts consider “the agency’s characterization of its own rule,” without giving overwhelming weight or deference to the designation.⁴⁵⁷ Thus, the starting point is whether the agency labels the statement to be a legislative rule or a mere policy statement or interpretive rule.

Such pronouncements are not conclusive; they are mere prelude to “what the agency does in fact.”⁴⁵⁸ As courts have noted, the “touchstone of a substantive rule is that it establishes a binding norm.”⁴⁵⁹ Are agency personnel free to follow the policy or not? Are private parties free to follow the policy or not? Courts will consider both the plain language of the policy (its use of mandatory or permissive terms) and how the agency treats the policy in practice, particularly during

⁴⁵² Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1372 (1992); see also BLAKE EMERSON & RONALD M. LEVIN, ADMIN. CONF. OF THE U.S., AGENCY GUIDANCE THROUGH INTERPRETIVE RULES: RESEARCH AND ANALYSIS. 2 (2019), <https://www.acus.gov/sites/default/files/documents/ACUS%20IR%20final%20report.5.28.2019.pdf> [<https://perma.cc/8ZC5-BH5P>] (explaining how policy statements may become “binding as a practical matter”).

⁴⁵³ See Parrillo, *supra* note 451, at 165 (demonstrating that many regulated entities often feel compelled to comply with agency guidance that is legally non-binding).

⁴⁵⁴ 5 U.S.C. § 553.

⁴⁵⁵ See, e.g., *Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592 (5th Cir. 1995).

⁴⁵⁶ See Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2132 (2019) (“The law and commentary on guidance . . . raise fundamental questions of legal theory: What does ‘binding’ mean? And how, if at all, might a document qualify as a form of law if it is not binding?”).

⁴⁵⁷ *Pros. & Patients for Customized Care*, 56 F.3d at 595.

⁴⁵⁸ *Id.* at 596.

⁴⁵⁹ *Id.* at 596–97, 597 n.28 (citing *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)).

enforcement actions.⁴⁶⁰ Does the agency accommodate deviations from the policy? Does it leave room for discretion? In a frequently quoted passage, the D.C. Circuit observed:

If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or [the government to comply] . . . then the agency's document is for all practical purposes "binding."⁴⁶¹

The key inquiry, then, is whether agency guidance establishes a "binding norm." If it does, it should be reviewable. If not, it is fair to say the guidance or policy statement is merely hortatory. Recognizing both the benefits and burdens of guidance, agencies have been urged by the President, the Office of Management and Budget, and the Administrative Conference of the United States to avoid using guidance or policy statements to create binding standards for the public.⁴⁶² Similarly, the key inquiry for hortatory mandates should be whether the government articulates a binding norm. Like guidance, hortatory mandates may be packaged as hortatory but treated in practice as mandatory. Each should be reviewable.

5. *The Final Order Rule*

A final model that parallels the inquiry we think is appropriate for hortatory mandates is the final order rule. Several federal statutes, including section 704 of the APA, allow courts to review only "final" actions by agencies—rather than tentative, intermediate, or interlocutory decisions—under the rationale that agency decision-making procedures should run their course before courts intervene.⁴⁶³ As articulated by the Supreme Court in *Bennett v. Spear*,⁴⁶⁴ the "final order rule" asks two questions: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must

⁴⁶⁰ *Id.* at 597–601.

⁴⁶¹ *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

⁴⁶² *See* Exec. Order No. 13,892, § 3, 84 Fed. Reg. 55,239 (Oct. 15, 2019) (revoked by Exec. Order No. 13,992 § 2, 86 Fed. Reg. 7,049 (Jan. 25, 2021)); Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432, 3,436–37 (Jan 15, 2007); Administrative Conference Recommendation 2017-5: Agency Guidance Through Policy Statements, 82 Fed. Reg. 61,734 (Dec. 14, 2017).

⁴⁶³ *See* *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

⁴⁶⁴ 520 U.S. 154 (1997).

be one by which rights or obligations have been determined, or from which legal consequences will flow.”⁴⁶⁵ Agency actions that have “no direct consequences” and serve “more like a tentative recommendation than a final and binding determination” are not “final” and thus should not be reviewable.⁴⁶⁶ Actions that are “in no way binding,” where the target has “absolute discretion to accept or reject them,”⁴⁶⁷ and “in no way affect[] the legal rights of the relevant actors” may not be reviewed.⁴⁶⁸ Likewise, hortatory mandates that do not, in actuality, determine anyone’s legal rights or obligations are merely hortatory and are not in any way mandatory.

Later cases detail how the Supreme Court applies this test. In *Sackett v. EPA*,⁴⁶⁹ the Court held that legal consequences did flow from an EPA order that plaintiff’s wetland areas were “navigable waters” because Sackett faced liability and monetary penalties if he refused to restore it.⁴⁷⁰ Similarly, in *U.S. Army Corps of Engineers v. Hawkes Co.*,⁴⁷¹ the Court held that a preliminary determination by the Army Corps that property included “waters of the United States,” and thus required a pollution discharge permit, met the *Bennett v. Spear* test for finality because a positive determination deprived Hawkes of a five-year safe harbor from civil enforcement proceedings that a negative determination would have provided.⁴⁷²

Of course, in an earlier case, *FTC v. Standard Oil of California*,⁴⁷³ the Court suggested that even nonfinal agency action could be reviewable if significant legal or *practical* consequences flowed from the agency action.⁴⁷⁴ Standard Oil had argued that the FTC’s decision to issue a complaint against the company—based on the agency’s determination that it had “reason to believe” Standard Oil had engaged in unfair competition—was final agency action due to the burdens and expense of responding to the complaint.⁴⁷⁵ The Supreme Court disagreed, noting that having to reply to an agency complaint was merely “the expense and annoyance of litigation” that came with “the social

⁴⁶⁵ *Id.* at 177–78. (citations omitted).

⁴⁶⁶ *Id.* at 178 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992)).

⁴⁶⁷ *Id.* (quoting *Dalton v. Spencer*, 511 U.S. 462, 469–71 (1994)).

⁴⁶⁸ *Id.*

⁴⁶⁹ 566 U.S. 120 (2012).

⁴⁷⁰ *Id.* at 126.

⁴⁷¹ 578 U.S. 590 (2016).

⁴⁷² *See id.* at 598–99.

⁴⁷³ 449 U.S. 232 (1980).

⁴⁷⁴ *Id.* at 239–47.

⁴⁷⁵ *Id.* at 242–44.

burden of living under government.”⁴⁷⁶ The Court held that the FTC’s complaint was a tentative, interlocutory decision that did not determine the company’s legal rights or obligations, even though the litigation expense was acknowledged to be a “substantial and unrecoverable cost.”⁴⁷⁷

As with the other frameworks above, the final order rule is not useful for ascertaining whether hortatory mandates are “final” per se but in ascertaining whether they determine anyone’s legal rights or obligations. A health insurance mandate that requires individuals to investigate whether they must purchase insurance or not is thus merely part of the expense and annoyance of living in a nation with laws. Without any penalties or enforcement mechanisms, judicial review is inappropriate.

D. A Practical Test

Informed by these models, we offer a practical test for courts confronted with hortatory mandates. When the form and function of a pronouncement collide—when a pronouncement seems both hortatory and mandatory—courts should look beyond the form to its function. Does it create a binding norm or legal obligation? That is, regardless of how a pronouncement is styled, is it functionally hortatory or functionally mandatory? A law may be functionally mandatory if: (1) the government sends credible signals that it is binding and enforceable or (2) the government in fact uses coercive means to achieve compliance.

1. Does the Government Credibly Signal Legal Consequences?

A hortatory mandate backed by credible signals of enforcement is not really hortatory. Thus, government “guidance” that is styled as voluntary but treated in practice as binding and enforceable creates de facto legal requirements. When the San Francisco Police Department (“SFPD”) threatened misdemeanor citations for anyone violating “shelter in place” orders during the pandemic, they credibly signaled legal consequences, even if the SFPD also promised to rely on an “education first” approach to enforcement.⁴⁷⁸ Likewise, CDC “guide-

⁴⁷⁶ *Id.* at 244 (quoting *Petrol. Expl., Inc. v. Pub. Serv. Comm’n*, 304 U.S. 209, 222 (1938)).

⁴⁷⁷ *Id.* (quoting *Renegot. Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

⁴⁷⁸ Members may directly enforce health orders under state law, and the SIP [Shelter in Place] Order is such an order. . . . Members may educate, admonish, seek voluntary compliance, and use enforcement for violations of the SIP (“progressive enforcement”). Members issuing citations for violating the SIP should cite SF Admin 7.17(b) [misdemeanor for violating a lawful order, the SIP] Cal Penal Code § 148

lines” that are incorporated into state or local laws, backed by penalties, are more than merely precatory or symbolic.⁴⁷⁹ Dietary “guidelines” from HHS and the USDA that are used to dictate what products are included in federal nutrition programs and labeling requirements take on legal dimension.⁴⁸⁰ And “voluntary consensus standards” incorporated into FDA medical device regulations are not purely voluntary if noncompliance can form the basis for a statutory or regulatory violation.⁴⁸¹

The signals can be telling. As noted above, during the pandemic, state and local officials warned that “[i]ndividuals who fail to comply [with CDC’s isolation and quarantine guidelines] may be subject to involuntary detention” pursuant to state and local disease control statutes.⁴⁸² And other CDC “guidelines” recommending face coverings and establishing a recommended schedule for vaccinations formed the basis for state and local orders *requiring* face coverings or COVID-19 vaccinations.⁴⁸³ On this reasoning, the court in *Faust v. Inslee* was wrong to deny a TRO on the grounds that the plaintiff failed to establish a realistic threat of criminal enforcement because it disregarded credible statements by the Washington Governor that he planned to enforce his “Stay Home–Stay Healthy” order as a gross misde-

[misdemeanor for willful resisting, delaying, or obstructing the SIP order, if appropriate[]].

See, e.g., S.F. POLICE DEP’T, NOTICE 20-045, ENFORCEMENT OF PUBLIC HEALTH ORDERS (2020), <https://www.sanfranciscopolice.org/sites/default/files/2020-03/SFPDNotice20.045.20200323.pdf> [<https://perma.cc/C42U-4ACW>] (summary of law alterations in original) (citations and emphasis omitted).

⁴⁷⁹ See King Cnty., Wash., *COVID-19 Quarantine and Isolation Guidance* (Dec. 30, 2021), <https://kingcounty.gov/depts/health/covid-19/care/quarantine.aspx> [<https://web.archive.org/web/20211231002355/https://kingcounty.gov/depts/health/covid-19/care/quarantine.aspx>].

⁴⁸⁰ Wiley, *supra* note 186, at 82–96 (detailing the incorporation of nutrition guidelines into federal nutrition assistance programs).

⁴⁸¹ See sources cited *supra* note 188.

⁴⁸² See King Cnty., *supra* note 479 (citing WASH. REV. CODE § 70.05.070(2)–(3) (2020) and WASH. ADMIN. CODE § 246-100-036(3) (2023) as authority for involuntary detention); see also Cnty. of L.A. Dep’t of Pub. Health, Health Off. Order for the Control of COVID-19 (Dec. 31, 2021) (ordering isolation and specifying that the local health officer “may take additional action(s), which may include civil detention or requiring one to stay at a health facility or other location, or issuance of an administrative citation, to protect the public’s health if an individual who is subject to this Order violates or fails to comply with this Order”).

⁴⁸³ See, e.g., Md. Exec. Order No. 21-05-12-01 Amending and Restating the Order of April 28, 2021, Regulating Certain Businesses and Facilities and Generally Requiring Use of Face Coverings (May 12, 2021); COVID-19 Pandemic: Orders and Guidance, OFF. GOVERNOR LARRY HOGAN, <https://governor.maryland.gov/covid-19-pandemic-orders-and-guidance/> [<https://web.archive.org/web/20221222114345/https://governor.maryland.gov/covid-19-pandemic-orders-and-guidance/>]; see also sources cited *supra* note 218.

meanor⁴⁸⁴ while encouraging the public to report violations.⁴⁸⁵ At the very least, the court should have taken the governor's statements at face value.

Conversely, a declaration without any credible signals of enforcement remains hortatory. A government proclamation may rely on "the power of a rule"⁴⁸⁶ to encourage or discourage certain behavior, but it may not have any genuine *legal* power. Thus, the warning at 4 U.S.C. § 8 that the flag of the United States "should never be used for advertising purposes in any manner whatsoever"⁴⁸⁷ seems unequivocal, but "the Flag Code does not prescribe any penalties for non-compliance nor does it include enforcement provisions."⁴⁸⁸ Without such, the law is merely precatory.⁴⁸⁹ Likewise, no matter how much mandatory phrasing an official English language law may feature, without enforcement mechanisms it is merely hortatory or symbolic. It establishes no binding norm or legal obligation.

One complication, of course, is what to do with mixed signals from the government. For example, an official might characterize an order as binding ("This is not a request. It's an order.") but later declare that there will be not, in fact, be enforcement.⁴⁹⁰ Similarly, a statute may, in one section, declare a directive and even include complex formulas for calculating tax penalties for violating that directive, yet in a later section clarify that the penalty shall be zero dollars. Or, a law may speak in mandatory terms and include potential enforcement mechanisms, but only after close scrutiny by a court does it become apparent that the law is unenforceable.⁴⁹¹ Government declarations of policy, preferences, and the like may purposefully obfuscate whether they are in fact binding or not. If the signals themselves are contradictory, what then?

484 WASH. REV. CODE § 43.06.220(5).

485 See, e.g., Proclamation, *supra* note 296, at 5; Wash. Governor's Off., *supra* note 301.

486 Lindholm, *supra* note 6.

487 4 U.S.C. § 8(i).

488 JOHN R. LUCKEY, CONG. RSCH. SERV., RL30243, THE UNITED STATES FLAG: FEDERAL LAW RELATING TO DISPLAY AND ASSOCIATED QUESTIONS 1 (2011). Rather, "the Code functions simply as a guide to be voluntarily followed by civilians and civilian groups." *Id.*

489 In contrast, the Flag Protection Act of 1989, 18 U.S.C. § 700, did provide criminal penalties for desecrating the flag, including a fine and up to one year in prison, until the law was struck down by the Supreme Court on constitutional grounds. See *United States v. Eichman*, 496 U.S. 310, 319 (1990).

490 See *supra* notes 5, 8.

491 See *supra* Section I.B.2 (discussion regarding the National Environmental Policy Act of 1970 and the Developmentally Disabled Assistance and Bill of Rights Act).

2. *Does the Government Use Coercive Means for Enforcement?*

Hortatory mandates should not evade judicial review simply because they are styled as a mere plea or exhortation or include mixed messages regarding enforceability. Conversely, hortatory mandates not backed by actual or threatened enforcement give rise to no case or controversy. Thus, hortatory mandates that provide for some mechanism of monitoring and enforcement are not really hortatory. Sanctions, fines, penalties, or any other legal repercussion or change in formal legal status (such as a revoked license, permit, or privilege) gives coercive dimension to a government policy otherwise phrased as being merely hortatory. For example, an agency guidance document declared to be nonbinding that is nevertheless treated as binding and enforceable during inspections or investigations is not really “guidance” but a rule.⁴⁹² Conversely, if deviations from the guidance are permitted, or are merely factors for agencies considering enforcement, the guidance may be hortatory.

An official English language law with no enforcement mechanisms (Illinois) is hortatory, but such a law with enforcement mechanisms (Iowa) is mandatory.⁴⁹³ COVID-19 mitigation orders with no realistic threat of enforcement are hortatory, while those with credible threats of enforcement are mandatory.⁴⁹⁴ A widely ignored and never enforced prohibition against using the U.S. flag in advertisements is hortatory while a ban on flag burning with penalties attached is mandatory.⁴⁹⁵ An insurance mandate with zero tax penalties or other repercussions is hortatory, while a mandate with tax penalties calculated according to a sliding scale of income has legal consequences.⁴⁹⁶ Laws calling for cleaner air, without creating a workable framework to achieve such, are hortatory in a way that laws with workable, enforceable standards are not.⁴⁹⁷

At the same time, orders that are not feasibly enforced en masse may still be backed by coercive measures, such as a natural disaster

⁴⁹² KATE R. BOWERS, CONG. RSCH. SERV., LSB10591, AGENCY USE OF GUIDANCE DOCUMENTS (2021); Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 15, 2019).

⁴⁹³ See *supra* Section I.B.1.

⁴⁹⁴ See *supra* Section II.A.

⁴⁹⁵ See *supra* Sections I.A., I.B.5.

⁴⁹⁶ See *supra* Section I.C.2. Note that before the individual mandate penalty was zeroed out, the Supreme Court observed that section 5000A provided a *lawful* choice to either maintain minimum essential coverage or not maintain such coverage but pay a tax penalty. *NFIB v. Sebelius*, 567 U.S. 519, 574 (2012). Even though individuals had two lawful choices, a tax penalty is still a legal consequence under the *Bennett v. Spear* framework. See *supra* Section III.C.5.

⁴⁹⁷ See *supra* Section I.C.1.

order backed by blockades, curfews, and door-to-door visits from local police.⁴⁹⁸ Louisville Mayor Greg Fischer threatened to send police officers to write down the license plate numbers of congregants at drive-in church services during the early months of the COVID-19 pandemic.⁴⁹⁹ Former New York Governor Andrew Cuomo threatened to station police officers outside the door of churches and synagogues in New York City to monitor compliance with pandemic occupancy limits.⁵⁰⁰ Former Rhode Island Governor Gina Raimondo called for state troopers to pull over vehicles with New York license plates when COVID-19 cases were surging in New York.⁵⁰¹

But these might be relatively easy cases. Other cases might require painstaking review of both the government's statements and actions. Yet, as noted above in Section III.C, courts are not strangers to these hair-splitting inquiries, frequently weighing how the government labels or characterizes its action against the legal or practical consequences for noncompliance. For example, there may be political reasons not to use certain labels to characterize an order. Just like Congress bends over backwards to avoid labeling new revenue-raising measures as "taxes" (even though functionally a "user fee" or similar measure is a targeted tax), officials during the pandemic avoided characterizing their orders as "shelter-in-place" or "lockdown" measures lest the public think of active shooters or nuclear war.⁵⁰²

These situations suggest that officials are trying to have it both ways: they want to encourage widespread compliance but disavow certain labels or harsher enforcement mechanisms that could draw backlash. Thus, the Rhode Island governor at once could caution residents not to "break[] the rules" during a stay-at-home order while conceding that "there would be nothing the state would do to prohibit people from" gathering.⁵⁰³ These mixed signals generate discord between form and function, leading to significant confusion and undermining trust in government.

⁴⁹⁸ See, e.g., *Smith v. Avino*, 91 F.3d 105, 109–10 (11th Cir. 1996) (upholding an extended curfew imposed by a county manager in the aftermath of Hurricane Andrew in a case where police made door-to-door visits to explain the command to stay at home during curfew hours and the process for requesting authorization to travel during those hours for permitted purposes).

⁴⁹⁹ *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 908 (W.D. Ky. 2020); *Ottis*, *supra* note 351.

⁵⁰⁰ *Blackman*, *supra* note 255; *Agudath Israel of Am. v. Cuomo*, 979 F.3d 177, 183 (2d Cir. 2020) (Park, C.J., dissenting).

⁵⁰¹ ASSOCIATED PRESS, *supra* note 259.

⁵⁰² Mervosh et al., *supra* note 274.

⁵⁰³ GOLOCALPROV, *supra* note 282.

Conditional enforcement also presents problems. For example, Governor Abbott issued orders in Texas to ban local mask mandates and vaccine mandates,⁵⁰⁴ but the orders could only be enforced by local prosecutors; there was no mechanism of state enforcement. However, local prosecutors in the largest cities—Austin, Dallas, Houston, and San Antonio—openly opposed these orders, making it unlikely they would ever be enforced in those jurisdictions.⁵⁰⁵ Of course, the orders were formally enforceable if prosecutors so wished.

Another complication is that courts have not always been particularly adept at identifying statutes that are merely symbolic, aspirational, or hortatory.⁵⁰⁶ For example, some of the courts that relied on lack of enforcement to reject challenges to COVID-19 orders disregarded significant threats of enforcement by the government, while other courts reached the merits despite credible assurances that there would be no enforcement.⁵⁰⁷ These patterns suggest that judges might lean on the notion that a law is functionally hortatory to avoid review. Likewise, judges eager to set new precedents on a highly salient or controversial issue may disregard the hortatory nature of the mandate to reach the merits. After all, two Supreme Court Justices (Alito and Gorsuch) were willing to invalidate at least parts of the ACA despite the complete absence of any enforcement mechanism for the individual mandate.⁵⁰⁸ We see these potential problems as endemic to judging and essentially unavoidable without the legislature specifying clearly, in the statute itself, that judicial review is not available.⁵⁰⁹

⁵⁰⁴ Tex. Exec. Order No. GA-38 (July 29, 2021) (mask mandate ban); Tex. Exec. Order No. GA-40 (Oct. 11, 2021) (vaccine mandate ban).

⁵⁰⁵ See Fechter, *supra* note 377.

⁵⁰⁶ See Dwyer, *supra* note 47, at 308.

⁵⁰⁷ Compare *Faust v. Inslee*, No. C20-5356, 2020 WL 2557329, at *2 (W.D. Wash. May 20, 2020) (denying a motion for a TRO to a plaintiff who had previously protested a stay-at-home order, because she had “fail[ed] to establish a realistic threat of any criminal enforcement action as a result of her course of conduct”), with *Ramsek v. Beshear*, 468 F. Supp. 3d 904, 911 (E.D. Ky. 2020) (accepting as settled that plaintiffs had standing despite lack of specific injury due to governor’s declaration that he would not seek enforcement for assembly ban during COVID-19 pandemic).

⁵⁰⁸ See *California v. Texas*, 141 S. Ct. 2104, 2134 (2021) (Alito, J., dissenting).

⁵⁰⁹ Note there are doubts whether Congress can entirely preclude judicial review of constitutional claims.

Withdrawing all federal jurisdiction with respect to a particular constitutional claim forces litigants into state courts, which our Framers thought to be hostile or unsympathetic to federal interests Basic due process requires independent judicial determinations of federal constitutional rights [and] [b]ecause state courts are potentially (if not actually) hostile to federal interests and rights, . . . due process requires the availability of an Article III forum.

A final consideration is whether less legalistic and less formal, but equally damaging consequences should warrant judicial review. Should social pressure, shame, or denormalization be enough for the injury-in-fact prong of Article III standing? Justice Thomas suggested as much in *California v. Texas* oral argument.⁵¹⁰ What government action would be required to make social consequences actionable?⁵¹¹ If hortatory mandates create strong social pressures (likely by design), should these ever give rise to a case or controversy in the absence of a binding legal norm or obligation? Such a case is not beyond imagination—environmental and public health advocates routinely invoke social pressure as a mechanism to change behavior⁵¹²—but that is a question for a future project, and we do not endeavor to resolve it here.

CONCLUSION

Hortatory mandates are a peculiar species of law where form and function collide. For a variety of reasons, federal, state, and local policymakers increasingly deploy hortatory mandates to accomplish their objectives. But courts and the public are understandably confused about the legal status and effect of hortatory mandates. This Article answers that call by describing what hortatory mandates are, when lawmakers use them, and why. Our understanding of the rationales for hortatory mandates informs the principles we offer to guide judicial review. We observe that judicial review of hortatory mandates

Michael J. Gerhardt, *The Constitutional Limits to Court-Stripping*, 9 LEWIS & CLARK L. REV. 347, 359 (2005); see *id.* at 349–51.

⁵¹⁰ See Transcript of Oral Argument, *supra* note 13, at 8–10.

⁵¹¹ One potential model is the stigma-plus requirement for damage to reputation under procedural due process. Stigma from government action alone is not enough to give rise to due process procedural requirements; some change of right or status recognized by law is also required. Thus, in *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971), the Supreme Court held that when a state listed a man as a public drunkard, he was entitled to a due process hearing because he was thus also prohibited from purchasing alcohol. But in *Paul v. Davis*, 424 U.S. 693, 693 (1976), the Court rejected a similar claim by a person labeled as an “active shoplifter[,]” because, although certainly stigmatizing, it did not connect to some loss of right or status recognized by law. See also *Bishop v. Wood*, 426 U.S. 341, 341–42 (1976) (police officer discharged for potentially stigmatic reasons, but those reasons were not publicized and thus there was no “plus” factor); *Siebert v. Gilley*, 500 U.S. 226 (1991) (Siebert quit his government job at a hospital to avoid being fired and requested his prior supervisor to furnish information to his new employer, which was adverse to Siebert).

⁵¹² See, e.g., Michael P. Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 NW. U. L. REV. 1101, 1106 (2005); Lindsay F. Wiley, *Shame, Blame, and the Emerging Law of Obesity Control*, 47 U.C. DAVIS L. REV. 121 (2013); Ross Silverman & Lindsay F. Wiley, *Shaming Vaccine Refusal*, 45 J.L. MED. & ETHICS 569 (2017).

will consider both the form and the function of the law in question. But when form and function disagree, how the law functions in practice—whether it creates any binding norms or legal obligations—should be the key inquiry. Formally voluntary but functionally mandatory laws should be reviewable.

Conversely, formal mandates that are functionally hortatory should not be subject to judicial review. But policymakers would be wrong to view them as low-risk or low-cost interventions. Lack of legal constraints could embolden policymakers to adopt a hortatory mandate with a bark worse than its bite. Attempting to regulate behavior through laws that invoke formally mandatory language in the absence of any penalties or enforcement may come at a cost—not only to the policymakers, voters, and any special interest groups deemed responsible, but to the legitimacy and efficacy of government. If policymakers repeatedly invoke the power of a rule that is not backed up by enforcement mechanisms, they risk diminishing that power.

By applying the principles set forth in this Article, courts will reserve judicial review for laws that are functionally mandatory—those whose binding nature is backed up by coercive enforcement or signaled as enforceable by official statements to the public or the media—and facilitate political checks and balances for unreviewable laws by clarifying their functionally hortatory nature.