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Constitutional Challenges to Public Health Orders in Federal Courts during the COVID-19 Pandemic

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ARTICLE

CONSTITUTIONAL CHALLENGES TO PUBLIC HEALTH ORDERS IN FEDERAL COURTS DURING THE COVID-19 PANDEMIC

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ABSTRACT

We examine federal judicial cases involving nonreligious civil-liberties challenges to COVID-19-related public health orders from the start of the pandemic in early 2020 to January 27, 2022. Consistent with the tradition of judicial deference toward states during emergencies, we find a high level of success for governments. However, governments did lose in 14.2% of the cases, and in those losses, there is evidence of partisan or ideological influence. Republican-appointed judges were more likely to rule in favor of challengers who brought claims based on gun rights and property rights, while Democratic-appointed judges were more likely to rule in favor of challengers who brought claims based on abortion rights. Judges also split along ideological lines with respect to challenges to federal eviction moratoriums and vaccine mandates. We conclude by arguing that courts should exercise greater deference to public health orders issued during emergencies.

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INTRODUCTION

The COVID-19 pandemic put enormous strain on the federal and state governments of the United States.[1] While the popular view is that the United States botched the crisis response overall, based on the extremely high rate of deaths per capita compared to other countries,[2] there has so far been little serious analysis of the errors and successes of government leaders and institutions. Countless agencies and institutions played a role in the crisis response, including federal, state, and local public health organizations; governors and mayors; federal agencies like the Centers for Disease Control and Prevention ("CDC") and the Food and Drug Administration ("FDA"); and two presidents.[3] As experts untangle the causal pathways, institutional and legal reform will surely follow, as it did after the last two major crises: the 9/11 attacks in 2001 and the financial crisis in 2008.

As lawyers, we focus here on the role of the courts. As in 2001 and 2008, the courts did not serve as primary "first responders" but instead as a backstop, intervening from time to time to prevent other agencies from violating the law and constitutional rights.[4] Conventional wisdom holds that during a crisis, courts are deferential to the government agencies charged with responding to the crisis.[5] The classic example is in times of war: while "*inter arma silent leges*" was always an exaggeration,[6] the U.S. courts have allowed the government to engage in actions during war that would be forbidden in times of peace—not exactly suspending the Constitution but interpreting it to require a greater level of deference to the executive in times of national emergency.[7] The 9/11 attacks put pressure on this understanding because the ensuing conflict with Al-Qaeda and related organizations was not a conventional war.[8] Nonetheless, the courts largely deferred to government actions for the first several years after 9/11, and

[1] *See* Richard W. Parker, *Why America's Response to the COVID-19 Pandemic Failed: Lessons from New Zealand's Success*, 73 ADMIN. L. REV. 77, 78 (2021) (describing COVID-19 as " ultimate test of administrative law and governance").

[2] *See id*. at 79-81 (citing high death rate in United States as indicator of poorer COVID-19 response compared with New Zealand).

[3] *See Federal Agencies Responding to Coronavirus (COVID-19)*, USA.GOV, https://www.usa.gov/government-coronavirus-response [https://perma.cc/DY3R-DLCG] (last updated July 6, 2022) (listing U.S. government agencies involved in COVID-19 response).

[4] *See* David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1415-16 (2014).

[5] *See id*. at 1415-17.

[6] *Cf*. Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting).

[7] *See* Zaring, *supra* note 4, at 1415-16. The concept of deference is tricky and could take many forms. For example, a court might exercise deference during an emergency by crediting empirical claims made by the government that would be regarded as insufficient during normal times. A court might also give more weight to considerations of public order relative to civil liberties than during normal times. The government will accordingly win cases during emergencies that it would lose in the absence of those emergencies. *See infra* Part II.

[8] *See* Zaring, *supra* note 4, at 1407.

with only slightly less deference thereafter, as illustrated by the plight of the prisoners languishing in Guantanamo Bay, untried twenty years later.[9]

The 2008 financial crisis presented a different set of challenges. The main crisis-response agencies—the Federal Reserve, the Department of the Treasury, and the Federal Deposit Insurance Corporation—stretched and broke the law as they sought to rescue the financial system.[10] Courts were again quite passive, refusing to interfere in the moment and frequently turning away lawsuits afterward.[11] A major difference between the 9/11 response and the financial crisis response is that the former involved relatively little coercion: no one was arrested.[12] The government saved the financial system by pouring money into it.[13] The victims, if any, were widely dispersed taxpayers who had little incentive to sue and would have lacked standing if they did.[14] In the few cases where plaintiffs tried to interfere with the government's rescue efforts, the courts were hostile.[15]

This brings us to the COVID-19 crisis response, which reflected both approaches. The government (speaking loosely, as hundreds if not thousands of governments played roles) used both coercion and spending to address the pandemic.[16] Coercion took the form of ubiquitous stay-at-home orders that confined people to their homes except for essential tasks, shutdowns of nonessential businesses, and constraints on the operations of businesses that remained open. Governments also shut down churches, closed borders, and required people to wear masks.[17] Meanwhile, Congress authorized cash disbursements and loans to citizens and businesses, and the Federal Reserve intervened yet again, as the public health panic morphed into a financial panic in March 2020.[18]

The judicial response was in some ways similar to, and in some ways different from, the 9/11 and 2008 responses. While courts usually rejected challenges to public health orders, there were some significant exceptions to this pattern. As Zalman Rothschild has documented, many judges—and particularly judges appointed by President Donald Trump—granted relief to religious organizations

[9] *See id*.

[10] *See* Alexander Mehra, *Legal Authority in Unusual and Exigent Circumstances: The Federal Reserve and the Financial Crisis*, 13 U. PA. J. BUS. L. 221, 222 (2010) (arguing Federal Reserve's response "exceeded the bounds of its statutory authority"); ERIC A. POSNER, LAST RESORT: THE FINANCIAL CRISIS AND THE FUTURE OF BAILOUTS 55 (2018) (arguing agencies "evaded the law" through complex legal maneuvers).

[11] POSNER, *supra* note 10, at 55 (explaining agencies and political figures "did not pay a price for their legal violations").

[12] *Id*.

[13] *Id*. at 1-4.

[14] *Id*. at 6.

[15] *Cf*. Zaring, *supra* note 4, at 1406 ("[P]rivate litigation over losses sustained during the [financial] crisis has been slow to develop and quick to settle.").

[16] *See* Craig Konnoth, *Narrowly Tailoring the COVID-19 Response*, 11 CALIF. L. REV. ONLINE 193, 195-97 (2020).

[17] *Id*.

[18] *Id*. at 200-01.

that challenged public health orders restricting congregation in houses of worship[19] and public health orders mandating vaccination.[20] In this Article, we focus on all civil liberties challenges other than those based on the religion clauses of the First Amendment. These challenges were based on free speech and association rights, due process rights, gun rights, and other constitutional rights. We looked at all cases decided at all levels of the federal judiciary between March 1, 2020, and January 27, 2022, for a total of 200 district court cases, 21 courts of appeals cases, and 4 Supreme Court cases.[21] We also combine our data with Zalman Rothschild's to offer an overall assessment of judicial performance during the pandemic.

Our main findings are as follows:

- In the aggregate, federal courts ruled in favor of plaintiffs—striking down public health orders—in 14.2% of the cases, suggesting a high level of deference to the government. When combined with the religion cases, the plaintiffs' win rate was 20.1%.
- The percentage of rulings in favor of plaintiffs decreased over time. Plaintiffs won 30.4% of the twenty-three cases before June 1, 2020, and 12.4% of the remaining cases from June 2, 2020, to January 27, 2022.
- Overall, judicial partisanship was not as pronounced for nonreligion cases as it was for religion cases in which Democratic-appointed judges ruled in favor of zero plaintiffs, and Republican-appointed judges ruled in favor of plaintiffs in 65.7% of the cases.[22] Excluding abortion, gun, eviction, and vaccine mandate cases, which were outliers, Democratic-appointed judges ruled in favor of plaintiffs 4.8% of the time and Republican-appointed judges ruled in favor of plaintiffs 19.4% of the time.
- Judicial partisanship was pronounced for abortion cases, where Democratic-appointed and Republican-appointed judges switched sides on their deference toward public health orders. Among twenty-eight instances of judicial participation, all ten Democratic-appointed judges (100%) blocked or voted to block public health orders that temporarily suspended elective surgical procedures from applying to abortions, as compared with only seven out of eighteen (38.9%) Republican-appointed judges. Partisanship was also high for cases

[19] Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1068 (2022) ("[A]nd 82% of Trump-appointed judges sided with religious plaintiffs.").

[20] *See* Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1110 (2022) ("While every federal court . . . faced with the issue has rejected vaccine-mandate challenges brought under free-speech or substantive-due-process theories, free exercise challenges have succeeded in securing wins for vaccine objectors.").

[21] *See infra* Part II (providing further information about our search criteria).

[22] *Cf.* Rothschild, *supra* note 19, at 1084-89.

involving gun rights, federal eviction moratoriums, and vaccine mandates.

- In contrast with the pattern in religion cases in which Trump-appointed judges were substantially more likely to strike down public health orders than other Republican-appointed judges (82.1% to 54.8%), Trump-appointed judges and other Republican-appointed judges exhibited similar voting patterns for the nonreligion cases (38.7% and 22.1%, respectively, in favor of plaintiffs).

In addition to counting cases and votes, we searched the opinions for clues that could help explain the level of judicial interference with public health orders. Although comparisons are hazardous, the judicial response was more aggressive than it was after 9/11, the financial crisis of 2008, or during earlier public health emergencies, including the 1918 influenza pandemic.[23] It seems that in some cases, judges simply did not believe that broad stay-at-home or shutdown orders could be justified by the public health emergency.[24] Other cases are better explained by partisan or ideological sympathies. We discuss eight categories of cases: speech, property, eviction moratoriums, vaccine mandates, right to work, right to travel, abortion, and guns. Beneath their diversity, the cases pose the same question: During a public health crisis, to what extent may the government suppress freedoms to address a pandemic? While it might be argued that factual differences account for different outcomes, we do not find in the cases a very rigorous discussion of the facts.[25] Judges do not go into much detail and do not try to distinguish cases based on, for example, the severity of the pandemic in a particular location, the progress of scientific research over time, or the empirical basis of public health measures.[26] Judges focus on issues of fairness—is it fair to constrain group X while allowing group Y to go about its business?—and those that rule against the government sometimes hint at invidious motives and rarely acknowledge the unavoidable arbitrariness of line-drawing.[27]

Many papers written during the pandemic address, mainly from a legal and theoretical standpoint, the question of judicial deference to public health orders during emergencies. Lindsay Wiley and Stephen Vladeck warned against judicial abdication, or what they termed "suspension," and called for normal judicial review.[28] Daniel Farber argued that courts should be highly deferential to public health authorities because of the rapidity of contagion, widespread

[23] *See infra* Part IV.

[24] *See infra* Part I.

[25] *See infra* Part III.

[26] *See infra* Part III.

[27] *See infra* Part IV.

[28] *See* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 183, 187-88 (2020) (blaming judicial suspension for COVID-19-related failures); *see also* Erwin Chemerinsky & Michele Goodwin, *Civil Liberties in a Pandemic: The Lessons of History*, 106 CORNELL L. REV. 815, 834-35 (2021).

uncertainty, and harm to the public—though he also argued that courts should not issue a "blank check."[29] Wendy Parmet evaluated fifty-three abortion, freedom of speech, and free exercise cases decided between March 21, 2020, and May 29, 2020, and argued that the courts took the public health threat seriously and avoided partisanship.[30] We find more evidence of partisanship in our pool of cases—which extends more than a year beyond Parmet's and involves a greater diversity of claims—and we take a less sunny view of the performance of the courts, though we agree that the vast majority of the judges took the crisis seriously. We argue that the partisan reactions of the judges who abandoned the traditional deferential approach cast doubt on the claim that normal judicial review should proceed during a pandemic.

I. SOME BACKGROUND

The claim that courts should show a high degree of deference to emergency orders, including public health orders, is based on a simple and familiar theory of the judicial role in a modern state. For the federal government, it is a widely accepted principle that the president and members of Congress have the primary policymaking authority because, as elected representatives, they have strong incentives to act in the public interest.[31] The judiciary serves to ensure that these officials respect civil liberties and obey other constitutional norms.[32] This

[29] Daniel Farber, *The Long Shadow of* Jacobson v. Massachusetts*: Public Health, Fundamental Rights, and the Courts*, 57 SAN DIEGO L. REV. 833, 863 (2020). Others similarly proposed modifying constitutional tests to incorporate some level of deference. *See* Konnoth, *supra* note 16, at 194 (proposing reassessment of narrow tailoring where courts assess not only burdens imposed by emergency orders but also any offsetting benefits that government provided to alleviate burdens, such as stimulus payments and unemployment benefits); James G. Hodge, Jr., Jennifer L. Piatt, Emily Carey & Hanna N. Reinke, *COVID's Constitutional Conundrum: Assessing Individual Rights in Public Health Emergencies*, 88 TENN. L. REV. 837, 875-79 (2021) (proposing "constitutionally cohesive standard" that examines execution, efficacy, and purpose of public health interventions as constitutional prerogative rather than examining alleged rights infringements framed outside crisis contexts); James R. Steiner-Dillon & Elisabeth J. Ryan, Jacobson *2.0: Police Power in the Time of COVID-19*, ALBANY L. REV. (forthcoming) (manuscript at 6-7, 70-77) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720083 [https://perma.cc/BH83-3P6Q]) (proposing modified version of "*Jacobson* deference" that serves as single standard of review for all public health orders: a six-factor balancing inquiry that requires formal emergency declaration and abandons strict scrutiny).

[30] *See* Wendy E. Parmet, *The COVID Cases: A Preliminary Assessment of Judicial Review of Public Health Powers During a Partisan and Polarized Pandemic*, 57 SAN DIEGO L. REV. 999, 1013-14 (2020) (describing cases to be used in study); *see also* Dorit Rubinstein Reiss & Madeline Thomas, *More Than a Mask: Stay-at-Home Orders and Religious Freedom*, 57 SAN DIEGO L. REV. 947, 961-67 (2020) (analyzing and evaluating constitutional standards for public health orders that impinge on religious freedom or exempt religious organizations from generally applicable restrictions); Cass R. Sunstein, *Our Anti*-Korematsu, 1 AM. J.L. & EQUALITY 221, 222, 222 n.2 (2021) (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66-68 (2020)) (arguing that *Roman Catholic Diocese of Brooklyn v. Cuomo* shows an unusual degree of solicitude toward civil rights during an emergency).

[31] *See* Zaring, *supra* note 4, at 1415-17.

[32] *See id.*

institutional division of labor reflects a basic tradeoff: courts, it is assumed, lack the expertise of the government but are less likely to be influenced by narrow political considerations that may reflect animus, tyranny of the majority, or other dysfunctions of democracy.[33] The cost of the judicial-checking function is that courts may err and may themselves be influenced by political considerations, thus blocking government policies that advance the public interest. This cost may be tolerable in normal times but increases during times of emergency, and thus courts should be more deferential when the government acts in a crisis.[34] With slight modifications, this theory can be applied to state governments, with the additional wrinkle that state governments may be constrained by the federal government and by federal courts within limits.

Critics of this view argue that a crisis creates opportunities for governments to engage in abuses that they avoid during normal times.[35] Governments take advantage of public fear to expand their power, favor special interests, and violate civil liberties.[36] One popular argument is that even when harsh policies intended to address the crisis might be justified on their own terms for the period of crisis, they tend to remain on the books after the crisis, reflecting a ratchet effect that relentlessly tightens constraints on freedom.[37] Courts should, therefore, maintain their watchdog function, perhaps with bared fangs.[38]

Nevertheless, there is a long tradition of judicial deference to executive actions during crises. Until recently, the literature has focused on security crises like wars and terrorism.[39] But there is also a long and somewhat obscure history of judicial deference during public health crises, which were more common in the past than in recent years. In the late nineteenth and early twentieth centuries,

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[33] *See* Zaring, *supra* note 4, at 1415-19.

[34] *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 4 (2010) ("[W]e argue that in the modern administrative state the executive governs, subject to legal constraints that are shaky in normal times and weak or nonexistent in times of crisis."); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1134 (2003); Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 283-94.

[35] *See, e.g.*, Gross, *supra* note 34, at 1024 (arguing against critics by claiming there are adequate checks against abuses).

[36] *See id.* at 1034.

[37] *See id.* at 1090 ("It is commonplace to find on the statute books legislative acts that had originally been enacted as temporary emergency or counterterrorism measures, but that were subsequently transformed into permanent legislation.").

[38] *See, e.g.*, GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 13 (2004); DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 35 (2006). For other views, see generally OREN GROSS & FIONNUALA NÍ AOLÁÍN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006). Additionally, see Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 2 (2004); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 47-53.

[39] The modern literature began in 1948. *See generally* CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948).

various courts heard challenges to public health orders, including requirements that children who attend school receive smallpox vaccination.[40] Most challenges were rejected by the courts, which held that emergency conditions required rapid executive action and a minimum of judicial interference.[41] As the Massachusetts Supreme Judicial Court recognized as far back as 1868, public health authorities' "action is intended to be prompt and summary. They are clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be embarrassed and delayed as little as possible by the necessary observance of formalities."[42] As another court put it, "[w]hile it is true that the character or nature of such [public health] boards is administrative only, still the powers conferred upon them by the legislature, in view of the great public interest confided to them, have always received from the courts a liberal construction."[43] The court went on to conclude that "the right of the legislature to confer upon [the public health boards] the power to make reasonable rules, by-laws, and regulations is generally recognized by the authorities."[44]

The Supreme Court endorsed this view in 1904 in *Jacobson v. Massachusetts*.[45] In rejecting a challenge to a mandatory vaccination law, the court acknowledged that there was a legitimate opinion (at the time) that vaccines may spread disease rather than prevent it.[46] But "[s]mallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged . . . that the mode adopted under the sanction of the State, to protect the people at large, was arbitrary and not justified by the necessities of the case."[47]

This was true even though the "power of a local community to protect itself against an epidemic . . . might be exercised . . . in such an arbitrary, unreasonable manner . . . as to authorize or compel the courts to interfere for the protection of such persons."[48]

Accordingly, the Court acknowledged that not all public health orders or statutes should survive judicial scrutiny. When a statute "has no real or substantial relation to [public health], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."[49] This language—"no real or substantial relation" and "beyond all question, a plain, palpable invasion

[40] French v. Davidson, 77 P. 663, 664 (Cal. 1904); Abeel v. Clark, 24 P. 383, 384 (Cal. 1890); Viemeister v. White, 84 N.Y.S. 712, 716 (App. Div. 1903), *aff'd*, 72 N.E. 97 (1904); Bissell v. Davison, 32 A. 348, 350 (Conn. 1894).

[41] *See, e.g.*, *French*, 77 P. at 664.

[42] City of Salem v. E.R. Co., 98 Mass. 431, 443 (1868).

[43] Blue v. Beach, 56 N.E. 89, 92 (Ind. 1900).

[44] *Id*. at 92-93.

[45] 197 U.S. 11 (1905).

[46] *Id*. at 34-35.

[47] *Id*. at 28.

[48] *Id*.

[49] *Id*. at 31.

of rights secured by the fundamental law"—suggests a highly deferential standard of review. However, it would be wrong to interpret the courts' role as nil. In two earlier cases not cited by *Jacobson*, federal district courts in California struck down discriminatory public health orders that required that only the Chinese residents of San Francisco be vaccinated against the Bubonic plague and quarantined.[50]

Some state courts also struck down public health actions that sought to curb the spread of infectious diseases. In 1909, the Supreme Court of South Carolina held that a public health board abused its authority when it ordered a former missionary afflicted with leprosy to either leave the city or stay in a pesthouse.[51] Fifty years later, in *State v. Snow*,[52] the Arkansas Supreme Court affirmed lower court findings that there was insufficient evidence of tuberculosis on the record to justify isolating an individual.[53] Most recently, in *Mayhew v. Hickox*,[54] a lower court judge in Maine found that isolation measures to contain Ebola were excessive.[55]

But these cases did not involve full-blown public health crises such as a pandemic. For the most part, courts deferred to public health authorities, especially during emergencies like the 1918 influenza pandemic.[56] Although a number of now-forgotten pandemics and epidemics have taken place in the

[50] Wong Wai v. Williamson, 103 F. 1, 7 (N.D. Cal. 1900) ("[T]he only justification offered for this discrimination was a suggestion made by counsel for the defendants in the course of the argument, that this particular race is more liable to the plague than any other. No evidence has, however, been offered to support this claim, and it is not known to be a fact."); Jew Ho v. Williamson, 103 F. 10, 25 (N.D. Cal. 1900) (noting, among other things, that Chinese residents had died of pneumonia, not Bubonic plague). For a comprehensive account of these cases, see generally Charles McClain, *Of Medicine, Race, and American Law: The Bubonic Plague Outbreak of 1900*, 13 LAW & SOC. INQUIRY 447 (1988).

[51] *See* Kirk v. Wyman, 65 S.E. 387, 391 (S.C. 1909) ("We cannot too strongly emphasize the caution which courts should exercise in entertaining applications for injunction[s] against boards of health, yet careful consideration of the record leads us to the conclusion that this is an exceptional case . . . .").

[52] 324 S.W.2d 532 (Ark. 1959).

[53] *Id.* at 534.

[54] Order Pending Hearing, Mayhew v. Hickox, No. CV-2014-36 (Me. Dist. Ct., Fort Kent Oct. 31, 2014).

[55] *See id.* at 3; *see also* Benjamin W. Dexter, Mayhew v. Hickox*: Balancing Maine's Public's Health with Personal Liberties During the Ebola "Crisis,"* 68 ME. L. REV. 263, 274-77 (2016) (explaining court's ruling in *Mayhew v. Hickox*).

[56] For a prescient summary of pandemic-related case law, see Michelle A. Daubert, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFF. L. REV. 1299, 1321-28 (2007) (describing history of judicial responses during pandemics). *See also* Globe Sch. Dist. No. 1 v. Bd. of Health, 179 P. 55, 61 (Ariz. 1919) (upholding school closure during 1918 influenza pandemic); Zucht v. King, 260 U.S. 174, 176 (1922) (upholding mandatory school vaccination); Moore v. Draper, 57 So. 2d 648, 650 (Fla. 1952) (upholding isolation for tuberculosis); United States *ex rel.* Siegel v. Shinnick, 219 F. Supp. 789, 791 (S.D.N.Y. 1963) (upholding quarantine of woman traveling from a "small pox infected area" of Stockholm); Hickox v. Christie, 205 F. Supp. 3d 579, 584-85 (D.N.J. 2016) (upholding quarantine of nurse traveling from Sierra Leone where Ebola outbreak had occurred).

United States since 1918, we could only find two state cases—*Snow* and *Mayhew*—in which an infectious-disease-related public health order was successfully challenged in court.

II. THE JUDICIAL RESPONSE TO THE COVID-19 CRISIS IN NUMBERS

A. *Methodology*

We found 225 cases involving a nonreligious federal constitutional challenge to a COVID-19 public health order decided between the dates of March 1, 2020, and January 27, 2022. Of these cases, 200 were decided by a district court, 21 were decided by a court of appeals, and 4 were decided by the Supreme Court. We will analyze both case outcomes ("case-level") and judicial votes by appellate courts or rulings by district courts ("judge-level") across all cases. Because multiple judges vote in the courts of appeals and the Supreme Court, we counted a total of 312 votes.

We looked only at merit opinions and excluded cases resolved on standing, mootness, ripeness, or sovereign immunity grounds.[57] Given the emergency nature of the pandemic, most merit opinions involved a motion for a temporary restraining order ("TRO") or a motion for preliminary injunction. Although these are technically not merit rulings, they nonetheless reflect judges' merit judgments because one of the four factors weighed is "likelihood of success on the merits."[58] Therefore, we included every TRO and preliminary injunction opinion that analyzed at least the first factor and excluded opinions that only discussed the other three factors. At the courts of appeal level, we included motions to stay lower court decisions pending appeal because they analyzed the likelihood of success on the merits of the ultimate appeal.

We used two methods to find cases. First, we entered specific search terms into Westlaw and Google—"COVID-19" and each one of the following: "free speech," "substantive due process," "procedural due process," "takings," "abortion," "contract clause," "petition clause," "bear arms," "second amendment," "right to work," "interstate travel," "intrastate travel." Second, we went through every COVID-19-related lawsuit listed in Ballotpedia's database.[59] For each case found through these two methods, we exhausted Westlaw's "Citing References" function to find additional cases.

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[57] We collected both merits and nonmerits cases but confined our analysis to merits cases, including cases in which the merits issue was technically dicta. *See, e.g.*, Henry v. DeSantis, 461 F. Supp. 3d 1244, 1253 (S.D. Fla. 2020) (stating that "public interest would be best served" by adding merits analysis on top of dispositive standing analysis).

[58] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (defining preliminary injunction standard).

[59] The database includes over one thousand state and federal complaints. *Lawsuits About State Actions and Policies in Response to the Coronavirus (COVID-19) Pandemic*, BALLOTPEDIA, https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021 [https://perma.cc/B7HB-A37A] (last visited Oct. 25, 2022).

We excluded several categories of claims. First, we excluded claims related to prisoners' rights[60] and immigration detention[61] because they challenge the government's failure to act rather than an order restricting conduct, implicating distinctive issues relating to positive rights. Second, we excluded claims related to ballot access provisions because they involve specialized voting policies rather than generally applicable public health orders.[62] Third, we excluded nonreligious claims brought by churches, pastors, and other institutional actors because their suits primarily focused on free exercise and establishment claims.[63] Fourth, we excluded about a dozen unpublished decisions that were identified through court dockets but not accessible through Westlaw or LEXIS.

Except for these limitations, we examined every nonreligious constitutional challenge to COVID-19 public health orders in federal court, that is, every civil liberties claim that did not arise under the Free Exercise Clause or Establishment Clause. These claims alleged the following violations:

- the rights to free speech, freedom of assembly, freedom of association, and petition of the First Amendment;
- the procedural Due Process Clause of the Fourteenth Amendment;
- the Equal Protection Clause of the Fourteenth Amendment;
- the Takings Clause of the Fifth Amendment;

[60] *See, e.g.*, Valentine v. Collier, 956 F.3d 797, 801 (5th Cir. 2020) (cruel and unusual punishment); Swain v. Junior, 961 F.3d 1276, 1289 (11th Cir. 2020) (deliberate indifference); Mays v. Dart, 974 F.3d 810, 822 (7th Cir. 2020) (objectively unreasonable conditions); United States v. Feiling, 453 F. Supp. 3d 832, 841 (E.D. Va. 2020) (compassionate release statute). For a discussion of prisoners' rights during public health emergencies, see generally Camila Strassle & Benjamin E. Berkman, *Prisons and Pandemics*, 57 SAN DIEGO L. REV. 1083 (2020).

[61] For a discussion of pandemic-related immigration detention cases, see generally Note, *Affirmative Duties in Immigration Detention*, 134 HARV. L. REV. 2486 (2021).

[62] For a summary of pandemic-related election law cases, see Nicholas Stephanopoulos, *Election Litigation in the Time of the Pandemic*, U. CHI. L. REV. ONLINE (June 26, 2020), https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-stephanopoulos/ [https://perma.cc/S3U5-T38F]. For a tracker of COVID-19 election litigation, see *COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/cases [https://perma.cc/54DB-YS6K] (last visited Oct. 25, 2022).

[63] For example, a church in Maine challenged the state's ten-person limitation on gatherings on free exercise, establishment, free speech, and assembly grounds. Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273 (D. Me. 2020), *appeal dismissed*, 984 F.3d 21 (1st Cir. 2020). Although the free speech and assembly claims were nonreligious claims, we did not include them in the dataset because they "[were] premised on the [p]laintiff's . . . religious exercise" claim. *Id.* at 287; *see* Cassell v. Snyders, 458 F. Supp. 3d 981, 994 (N.D. Ill. 2020) ("Specifically, they claim that the Order subjects religious organizations to more onerous restrictions than their secular counterparts."). However, we did not exclude cases where the plaintiff was a noninstitutional actor who brought both religious and nonreligious claims. *See, e.g.*, Denis v. Ige, 538 F. Supp. 3d 1063, 1076-81 (D. Haw. 2021) (involving challenge to state's mask mandate on free exercise, free speech, freedom of association, and due process grounds).

- the Contract Clause of Article I, Section 10;
- the rights to work, to travel, and to have abortions under the substantive due process principle of the Fourteenth Amendment;
- the right to bear arms of the Second Amendment; and
- the nondelegation doctrine, major questions doctrine, Eleventh Amendment, and Commerce Clause (the scope of federal power).

To keep our study within reasonable limits, we largely disregarded state cases. Our impression from an unsystematic reading of the state cases is that they are similar to the federal cases: the government usually wins,[64] but with important exceptions.[65] A systematic review of state cases is left for future research.

B. *Results*

1. Plaintiff Success Rates

Of 225 COVID-19 cases, plaintiffs who challenged public health orders prevailed in 32 (14.2%), while the government prevailed in 193 (85.8%). Aggregate judicial vote counts reflected similar percentages. Table 1 provides the numbers.

[64] *See, e.g.*, Friends of Danny DeVito v. Wolf, 227 A.3d 872, 892-93 (Pa. 2020), *cert. denied*, 141 S. Ct. 239 (2020) (holding orders did not violate separation of powers, did not violate procedural due process, did not violate equal protection principles, did not violate rights to free speech and assembly, and were not takings); Beshear v. Acree, 615 S.W.3d 780, 800-10 (Ky. 2020) (holding Kentucky Governor's executive orders did not raise separation of powers issues); State v. Wilson, 489 P.3d 925, 925 (N.M. 2021) (holding public health orders did not effectuate compensable taking).

[65] *See, e.g.*, Rock House Fitness, Inc. v. Acton, No. 20-cv-000631, 2020 WL 3105522, at *6 (Ohio Ct. Com. Pl. May 20, 2020) (invalidating public health orders because director quarantined "the entire people of the state of Ohio" longer than fourteen-day COVID-19 incubation period); Temporary Restraining Order with Notice at 2, Bailey v. Pritzker, No. 2020-CH-06 (Ill. Cir. Ct. Apr. 27, 2020), *vacated*, No. 5-20-0148 (Ill. App. Ct. May 1, 2020) (temporarily restraining public health order as applied to Republican state representative who was kicked out of assembly meeting for refusing to wear mask); Midwest Inst. of Health, PLLC v. Governor of Mich., 958 N.W.2d 1, 31 (Mich. 2020) (holding Emergency Powers of the Governor Act was unconstitutional delegation of legislative power to executive branch).

Table 1. Nonreligious Challenges to COVID-19 Public Health Orders (Cases).[66]

	Number	Pro-plaintiff	Pro-government
Court-level, aggregated	225 Cases	32 (14.2%)	193 (85.8%)
District	200 Cases	23 (11.5%)	177 (88.5%)
Circuit	21 Cases	6 (28.6%)	15 (71.4%)
Supreme	4 Cases	3 (75%)	1 (25%)
Judge-level, aggregated	312 Votes	70 (22.4%)	242 (77.6%)

Conventional wisdom suggests that courts would be more likely to defer to government action in the early stages of the pandemic, and thus plaintiffs would succeed less often in the initial stages and more often as conditions improve.[67] But as Table 2 shows, the opposite occurred. Plaintiffs were most successful in the first few months, winning seven out of twenty-three (30.4%) cases from March 1, 2020, to June 29, 2020, most of which were abortion and gun rights challenges. They were less successful as time went on, winning just twenty-five out of 202 (12.4%) cases from June 1, 2020, to January 27, 2022. This change may have reflected the decreasing severity of public health restrictions as states obtained more information about the virus and adjusted their orders accordingly.[68]

Table 2. Time Period (Cases).

Dates Signed	Number of Cases	Pro-plaintiff	Pro-government
3/1/20 – 6/29/20	23	7 (30.4%)	16 (69.6%)
6/1/20 – 1/27/22	202	25 (12.4%)	177 (87.6%)

[66] Aggregated court-level data represents one outcome for each case. If a case was decided on the merits at all three levels of the federal court system, it counts as one Supreme Court case in Table 1 and does not count as a district court or court of appeals case, even though those outcomes are considered in the other tables. If a case was decided on the merits at the court of appeals level but not at the Supreme Court level, then it counts as one court of appeals case and not as a district court case. Aggregated judge-level data represents one outcome for each judge. In an unaggregated world, a judge who rules against plaintiffs' three different claims (equal protection, procedural due process, and right to work) yields three government-win judicial votes. In the aggregated world of Table 1, that same judge yields one government-win judicial vote.

[67] *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604-05 (2020) (Alito, J., dissenting) (calling states' initial restrictions on liberty "understandable" because officials must respond decisively to resolve uncertain situations, but explaining that states get less leeway as time passes and more scientific evidence becomes available).

[68] *See Where States Reopened and Cases Spiked After the U.S. Shutdown*, WASH. POST, https://www.washingtonpost.com/graphics/2020/national/states-reopening-coronavirus-map/ (last updated Sept. 11, 2020, 5:43 PM) (documenting when state officials in all fifty states adjusted their public health restrictions).

We also used judge-level results because they allow us to combine district and appellate-level outcomes. To understand which constitutional arguments were most successful, we examined the win rates of various constitutional claims made by plaintiffs, measured by judicial vote counts.[69] Because plaintiffs usually made multiple constitutional arguments, the number of votes exceeds the number of cases or judges. For example, one judge who decides three different claims (speech, equal protection, and procedural due process) in one case will yield three votes. A circuit panel that decides two different claims in one case will yield six votes.

Table 3. Type of Claim (Judicial Votes).[70]

Type of Claim	Number of Votes	Pro-plaintiff	Pro-government
Speech	70	6 (8.6%)	64 (91.4%)
Equal Protection	118	11 (9.3%)	107 (90.7%)
Procedural Due Process	93	9 (9.7%)	84 (90.3%)
Takings	40	1 (2.5%)	39 (97.5%)
Contract	29	1 (3.4%)	28 (96.6%)
Right to Petition	7	2 (28.6%)	5 (71.4%)
Right to Work	53	3 (5.7%)	50 (94.3%)
Right to Travel	29	2 (6.9%)	27 (93.1%)
Abortion	28	17 (60.7%)	11 (39.3%)
Guns	10	6 (60%)	4 (40%)
CDC Eviction	32	17 (53.1%)	15 (46.9%)
State Vaccine	34	0 (0.0%)	34 (100.0%)
Federal Vaccine	36	18 (50.0%)	18 (50.0%)

As Table 3 shows, the most frequently adjudicated claims were equal protection (118 votes) and procedural due process (93 votes), which mostly came from business plaintiffs like restaurants and gym owners. Speech (70 votes), takings (40 votes), right to work (53 votes), and right to travel (29 votes) claims were also frequently adjudicated but to a lesser extent. Within each of these six economic claims, plaintiffs were largely unsuccessful, never crossing a 15% winning threshold. By contrast, plaintiffs won 60.7% of abortion claims, 60% of gun claims, 53.1% of CDC eviction claims, and 50% of federal vaccine claims.

[69] "Vote counts," as we use the term, encompasses actual votes (at the appellate level) and judicial rulings (at the trial level), where a court "votes" by ruling in favor of the plaintiff or defendant.

[70] Speech claims comprise free speech, freedom of assembly, and freedom of association claims. Right to Work claims comprise substantive due process opinions that mentioned the right to choose one's profession. CDC Eviction claims comprise constitutional challenges to the CDC's eviction moratoria. State Vaccine claims comprise constitutional challenges to any vaccine mandate imposed by a state legislature or agency. Federal Vaccine claims comprise constitutional challenges to any vaccine mandate imposed by a federal agency.

As a check on this analysis, we also divided the cases into three categories based on the type of plaintiff: (1) political cases, in which the plaintiff is a politician, political party, or citizen seeking to engage in political activity; (2) business cases, in which the plaintiff is a for-profit business or business owner, including landlords; and (3) personal liberties cases, in which the plaintiff is a citizen who seeks to engage in normally protected activities, including travel, work, gun ownership, and abortion. We find that plaintiffs in personal liberties cases (16.2% win rate) were equally successful as plaintiffs in political cases (16.7% win rate) and more successful than plaintiffs in business cases (13.5% win rate) (Table 4). These numbers are somewhat consistent with the claims-level data, but to a lesser degree: gun claims (42.9%) and speech claims (11.6%) fared better than takings claims (2.9%). They are also consistent with the traditional lower level of protection given to commercial interests in constitutional adjudication.

Table 4. Type of Plaintiff (Cases).[71]

Type of plaintiff	Number of Cases	Pro-plaintiff	Pro-government
Business	104	14 (13.5%)	90 (86.5%)
Personal	99	16 (16.2%)	83 (83.8%)
Political	12	2 (16.7%)	10 (83.3%)
Mixed (business, personal)	7	0 (0%)	7 (100%)
Mixed (business, political)	2	0 (0%)	2 (100%)
Mixed (business, personal, political)	1	0 (0%)	1 (100%)

2. Partisan Differences in Case Outcome

We now examine judge-level data for partisanship. We divide judges into three groups: judges appointed by Democratic presidents, judges appointed by Trump, and judges appointed by non-Trump Republican presidents. We will also refer to the last two categories in combination as "all-Republican-appointed judges." We disaggregate the Trump-appointed judges because of Rothschild's finding that Trump-appointed judges ruled in favor of religious organizations substantially more often (82.1%) than other Republican judges (54.8%) and Democratic-appointed judges (0%).[72] These results give some credence to

[71] Mixed plaintiffs reflect cases in which multiple plaintiffs came from different categories, such as an individual and a gun store claiming their second amendment right to acquire arms.

[72] *See* Rothschild, *supra* note 19, at 1083.

claims that Trump sought to reward Evangelicals for their support by appointing religious judges or judges sympathetic to religious liberties.[73]

As Table 5 shows, our results are not quite as stark and a bit more complicated. With respect to Democratic-appointed judges and all-Republican judges, party affiliations align with votes. For abortion cases, the split is extreme, with Democratic-appointed judges siding with challengers 100% of the time, versus 38.9% for all-Republican-appointed judges. In the opposite direction, all-Republican-appointed judges ruled in favor of gun rights 100% of the time, while Democratic-appointed judges did so 20% of the time, albeit in only a handful of cases. With respect to the other cases involving either political or economic rights, 5.7% of Democratic-appointed judges favored the challenger, compared to 28.7% for all-Republican-appointed judges, a modest difference.

The only claims that mirrored the success of abortion and gun rights claims were plaintiffs' challenges to federal vaccine mandates and the CDC's national eviction moratoriums. A remarkable 72.0% and 76.2% of all-Republican-appointed judges held that the two respective orders exceeded Congress's powers, compared to 0% of Democratic-appointed judges.

We did not find a substantial partisanship difference between Trump-appointed judges and judges appointed by other Republican presidents. If Trump-appointed judges are distinctive, it is only with respect to religion claims.

[73] *See* Sarah Posner, *Trump's Christian Judges March On*, ROLLING STONE (Oct. 9, 2020, 9:00 AM), https://www.rollingstone.com/politics/politics-features/trump-christian-judges-supreme-court-1072773/ (examining actions by Trump-appointed judges); Jeffrey Haynes, *Donald Trump, the Christian Right and COVID-19: The Politics of Religious Freedom*, 10 LAWS 1, 4 (2021) ("Trump's side of the bargain was to show the Christian Right that he would deliver on his electoral promise to improve their religious freedom.").

Table 5. Plaintiff Wins by Partisan Affiliation of Judges (Votes).[74]

Type of Claim	Overall	Democrat	All Republican	Non-Trump Republican	Trump Republican
Nonreligious Claims, Excluding Abortion and Guns					
Speech (combination)	8.6% (6/70)	5.4% (2/37)	12.1% (4/33)	13.6% (3/22)	9.1% (1/11)
Equal Protection	9.3% (11/118)	3.8% (2/53)	13.8% (9/65)	15.9% (7/44)	9.5% (2/21)
Procedural Due Process	9.7% (9/93)	2.4% (1/42)	15.7% (8/51)	14.3% (5/35)	18.8% (3/16)
Takings	2.5% (1/40)	0% (0/18)	4.5% (1/22)	5.6% (1/18)	0% (0/4)
Contract	3.4% (1/29)	0% (0/13)	6.2% (1/16)	8.3% (1/12)	0% (0/4)
Right to Petition	28.6% (2/7)	0% (0/1)	33.3% (2/6)	66.7% (2/3)	0% (0/3)
Right to Work	5.7% (3/53)	4.2% (1/24)	6.9% (2/29)	4.5% (1/22)	14.3% (1/7)
Right to Travel	6.9% (2/29)	8.3% (1/12)	5.9% (1/17)	0% (0/8)	11.1% (1/9)
CDC Eviction	50.0% (16/32)	0% (0/11)	76.2% (16/21)	75% (6/8)	76.9% (10/13)
State Vaccines	0.0% (0/34)	0.0% (0/20)	0.0% (0/14)	0.0% (0/11)	0.0% (0/3)
Federal Vaccines	50.0% (18/36)	0% (0/11)	72.0% (18/25)	60% (6/10)	80% (12/15)
Aggregate[75]	18.6% (52/279)	5.7% (7/122)	28.7% (45/157)	22.1% (21/95)	38.7% (24/62)
Abortion and Gun Claims					
Abortion	60.7% (17/28)	100.0% (10/10)	38.9% (7/18)	54.5% (6/11)	14.3% (1/7)
Guns	60% (6/10)	20.0% (1/5)	100.0% (5/5)	100% (3/3)	100% (2/2)
Religious Claims					
Free Exercise (Rothschild)	37.4% (46/123)	0% (0/53)	65.7% (46/70)	54.8% (23/42)	82.1% (23/28)

Our court-level data corroborate these results, but to a lesser degree, as Table 6 shows. For business cases, all-Republican-appointed judges ruled in favor of challengers 30.6% of the time while Democratic judges did so 20.3% of the time. For cases involving personal civil liberties claims, including gun possession and abortion, the partisan split is less significant, with Democratic-appointed judges

[74] Each judicial vote in Table 5 was coded with the partisan affiliation of the judge who decided the outcome. The outcomes were tallied up according to each type of claim.

[75] Unlike the claims-level data, the aggregated claims data condense overlapping claims. For example, if a judge voted against the plaintiff in a case involving equal protection and takings claims, that judge's vote counts as one vote rather than two.

siding with challengers 16.1% of the time, versus 21.5% for all-Republican-appointed judges. When excluding gun and abortion claims, the split narrows, with Democratic-appointed judges siding with challengers 9.8% of the time, versus 11.1% for all-Republican-appointed judges. There is no substantial difference between Trump-appointed judges and judges appointed by other Republican presidents.

Table 6. Plaintiff Wins by Partisan Affiliation of Judges (Votes).[76]

Type of Plaintiff	Overall	Democrat	All Republican	Non-Trump Republican	Trump Republican
Business	26.7% (42/157)	20.3% (12/59)	30.6% (30/98)	27.2% (15/55)	34.9% (15/43)
Personal	18.9% (24/127)	16.1% (10/62)	21.5% (14/65)	17.9% (7/39)	26.9% (7/26)
Personal, Excluding Abortion and Guns	10.4% (10/96)	9.8% (5/51)	11.1% (5/45)	7.1% (2/28)	17.6% (3/17)
Political	14.9% (2/14)	0% (0/7)	28.6% (2/7)	40% (2/5)	0% (0/2)

The statistics in Tables 1-6 should be interpreted cautiously. Because of selection effects, they may give a misleading impression of the differences among courts. The degree of judicial deference cannot be directly observed but only inferred. It is theoretically possible that courts were not deferential, and the government won so frequently simply because the public health orders were exceedingly reasonable. It is also possible that the courts were even more deferential than the numbers indicate, but that the government's orders were so outrageous that even highly deferential courts felt compelled to strike them down. The partisan differences could also be exaggerated. But as we discuss in Part III, the qualitative evidence suggests otherwise. We will return to this issue in Part IV.

All that said, we find the overall picture is consistent with conventional wisdom about judicial partisan and ideological differences. Republican-appointed and Democratic-appointed judges mirrored the attitudes of Republican and Democratic political officials—both their traditional attitudes toward abortion, guns, property, and federal overreach, and their attitudes toward public health orders during the pandemic. Compared with Democratic politicians, Republican politicians were more skeptical of lockdown and stay-at-home orders, care more about gun rights and religious rights, and care less about abortion rights. So it was with the Republican-appointed judges.

The abortion cases present a special twist. Here, the inclination of Democratic-appointed judges to side with the state during the public health crisis

[76] Each judicial vote in Table 6 was coded with the partisan affiliation of the judge who decided the outcome. The outcomes were tallied according to each type of plaintiff.

conflicted with the commitment to abortion rights. The Republican-appointed judges faced the same tension in the opposite direction: the suspicion of public health orders conflicted with hostility to abortion rights. The groups switched sides, possibly indicating attitudes toward abortion trumped attitudes toward government public health action.

III. THE OPINIONS

We turn now to a deeper look at the cases. For convenience, we recategorize the claims into a similar, but not identical, list of case types: speech rights, property rights, landlord rights, the right to refuse vaccination, the right to work, the right to travel, abortion rights, and gun rights.[77]

A. *Speech*

Most speech cases, seventy to be exact,[78] were district court opinions that denied challenges by residents, businesses, and politicians.[79] The courts mostly sided with the government, even when the speech in question was core political speech.[80] A representative case is *CH Royal Oak, LLC v. Whitmer*,[81] in which a movie theater sought to host a socially distanced Juneteenth film festival to support Black Lives Matter.[82] But the Michigan Governor's executive order required theaters to remain closed, and the state attorney general threatened to file criminal charges if the theater proceeded with its plans.[83] Judge Paul L. Maloney (Bush 43) declined to enjoin enforcement of the order, holding that it was content-neutral and met intermediate scrutiny.[84] Large indoor gatherings

[77] Because the cases often invoked multiple rights, many cases did not fit exclusively into one category. We discuss them whenever relevant.

[78] *See supra* Table 3.

[79] *See, e.g.*, Mitchell v. Newsom, 509 F. Supp. 3d 1195, 1200-03 (C.D. Cal. 2020) (finding stay-at-home order likely did not violate tattoo parlors' free speech rights under rational basis or intermediate review); Benner v. Wolf, 461 F. Supp. 3d 154, 166-67 (M.D. Pa. 2020) (finding orders likely did not violate speech or assembly rights of real estate agents, business owners, and political candidates because they had alternative avenues of communicating digitally); Amato v. Elicker, 460 F. Supp. 3d 202, 223 (D. Conn. 2020) (finding six-person gathering limitation likely did not violate bar owners' association rights, in part because plaintiffs failed to put forward facts to show that their relationships with "employees," "friends," and "like-minded people" were "sufficiently intimate to implicate the First Amendment").

[80] *See* Geller v. Cuomo, 476 F. Supp. 3d 1, 16 (S.D.N.Y. 2020) (rejecting conservative activist's as-applied free speech claim, in part because she had ample alternative channels to communicate through her one million social media followers); Martin v. Warren, 482 F. Supp. 3d 51, 72 (W.D.N.Y. 2020) (rejecting protesters' free speech claims because Rochester's nighttime curfew was justified by COVID-19 and increase in overnight violence during Black Lives Matter movement).

[81] 472 F. Supp. 3d 410 (W.D. Mich. 2020).

[82] *Id.* at 417-20.

[83] *Id.*

[84] *Id.* at 419.

were dangerous, and the theater could still issue public statements and show the movie outdoors to express its speech.[85]

In a few cases, however, the courts ruled against the government. In *Ramsek v. Beshear*,[86] Judge Gregory Van Tatenhove (Bush 43) preliminarily enjoined the Kentucky governor's mass gatherings ban because it infringed on people's right to protest the ban itself. He found that, although the ban was content-neutral, it was not narrowly tailored because the government only considered the size of the gathering when it could have required mitigation measures like mask-wearing.[87] In *Hotze v. Abbott*,[88] Judge Lynn N. Hughes (Reagan) preliminarily enjoined the Houston Mayor from pressuring a leasing agent to cancel its hosting of the Texas Republican Party's annual convention. The judge called the mayor's action "raw political sabotage."[89] In *County of Butler v. Wolf*,[90] Judge William S. Stickman (Trump) held that Pennsylvania's limitations on gatherings that used numerical caps rather than the percentage caps that were applied to businesses failed intermediate scrutiny because they unnecessarily burdened expressive activity, like protests.[91] In *Hund v. Cuomo*,[92] Judge John L. Sinatra, Jr. (Trump) held that New York's restriction on live music events infringed a musician's free speech claims because it was under-inclusive: trivia nights, movie theaters, and restaurants presented similar health risks but were allowed to operate.[93] In *ACA International v. Healey*,[94] Judge Richard G. Stearns (Clinton) temporarily restrained Massachusetts from enforcing an emergency regulation that banned telephonic communications by debt collectors because it restricted commercial speech without materially advancing its consumer protection goals.[95]

The only court of appeals decision in this area was *Illinois Republican Party v. Pritzker*.[96] The Illinois Republican party claimed that an executive order that put a numerical cap on gatherings violated its free speech rights by allowing

[85] *Id*. at 418.

[86] 468 F. Supp. 3d 904 (E.D. Ky. 2020).

[87] *See id*. at 919 ("As written, the Order is not narrowly-tailored, and the blanket ban on mass gatherings must fail.").

[88] 473 F. Supp. 3d 736 (S.D. Tex. 2020).

[89] *Id*. at 739.

[90] 486 F. Supp. 3d 883 (W.D. Pa. 2020), *vacating as moot sub nom*. County of Butler v. Governor of Pa., 8 F.4th 226 (3d Cir. 2021), *cert. denied sub nom*., Butler County v. Wolf, 142 S. Ct. 772 (2022).

[91] *See id*. at 907-08 ("[T]he record in this case failed to establish any evidence that the specific numeric congregate limits were necessary to achieve Defendants' ends.").

[92] 501 F. Supp. 3d 185 (W.D.N.Y. 2020).

[93] *See id*. at 200-02 ("The distinctions drawn here have no real or substantial relation to public health. They are arbitrary.").

[94] 457 F. Supp. 3d 17 (D. Mass. 2020).

[95] *See id*. at 26-32 ("There is nothing offered, however, that suggests that debt collectors are more prone than other commercial entities to defy the social distancing rules decreed by the Governor by chasing down debtors in person.").

[96] 973 F.3d 760 (7th Cir. 2020).

larger groups to gather for worship but not for political speech.[97] The panel held that the advantageous treatment of religion was not an unlawful content-based restriction because the religion clauses allow the government to carve out increased protection for religious expression.[98]

B. *Property*

The largest category of nonreligious COVID-19 claims involved property interests, particularly those of businesses. These property cases often invoked multiple clauses of the Constitution, including the Equal Protection Clause, Takings Clause, and procedural Due Process Clause.

Most property challenges were unsuccessful. For example, in *PCG-SP Venture I LLC v. Newsom*,[99] Judge Jesus G. Bernal (Obama) declined to temporarily restrain California's stay-at-home order, which forced a Palm Springs hotel to close. The hotel claimed that the orders violated the Due Process Clause, Equal Protection Clause, and Takings Clause. Applying the *Jacobson* framework, the judge found no "plain and palpable" violation of any of these rights because an emergency justified the lack of pre-deprivation process (due process), hotels presented a greater risk than grocery stores and pharmacies (equal protection), and the orders merely adjusted the benefits and burdens of economic life to protect public health (takings).[100] But there were several exceptions to the courts' deference to shutdown orders. We examine them clause by clause.

In equal protection cases, a closed, "nonessential" business would claim that states unjustifiably favored open, "essential" businesses. These claims were generally unsuccessful (107 of 118 judicial votes, or 90.7%)[101] because judges readily found that business closures had a rational basis in reducing the spread of COVID-19.[102] *Butler* was an exception. Judge Stickman held that Pennsylvania's business closures failed rational basis because they punished small businesses for selling less of the same items than big-box retailers.[103]

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[97] *See id*. at 760 ("State political party and its affiliates brought action alleging that governor's executive orders limiting public gatherings . . . violated their rights . . . .").

[98] *See id*. at 769 ("[T]here can be no doubt that the First Amendment singles out the free exercise of religion for special treatment.").

[99] No. 20-cv-01138, 2020 WL 4344631 (C.D. Cal. June 23, 2020).

[100] *See id*. at *6-10 ("The State is entitled to prioritize the health of the public over the property rights of the individual.").

[101] *See supra* Table 3.

[102] *See* Big Tyme Invs., L.L.C. v. Edwards, 985 F.3d 456, 468-70 (5th Cir. 2021) (upholding ban on alcohol consumption in bars—even though ban was not equally applied to restaurants—because loud music in bars forced patrons closer to each other and drunk people were less likely to comply with mask-wearing); League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 129 (6th Cir. 2020) (granting stay, pending appeal, of district court's preliminary injunction because Michigan's closure of gyms was reasonable even though it did not equally apply to restaurants and salons: gyms, unlike salons, involved heavy breathing and shared surfaces in enclosed space); Stewart v. Justice, 502 F. Supp. 3d 1057, 1069 n.11 (S.D.W. Va. 2020) (listing cases).

[103] County of Butler v. Wolf, 486 F. Supp. 3d 883, 928 (W.D. Pa. 2020) ("Closing R.W.

Similarly, in *DiMartile v. Cuomo*[104] and *Bill & Ted's Riviera, Inc. v. Cuomo*,[105] Judges Glenn T. Suddaby (Bush 43) and Frederick J. Scullin (Bush 41) found that New York's preferential treatment of regular dining over weddings for the same venue did not rationally relate to curbing the virus because "much the same" activities would occur under social distancing and hygiene protocols.[106]

In takings cases, businesses and landowners argued that stay-at-home orders requiring them to temporarily close constituted an unlawful taking under the Fifth Amendment. Thirty-nine out of forty (97.5%) of these claims were unsuccessful: the judges held that a temporary restriction of operations reasonably adjusted the benefits and burdens of economic life to protect public health.[107] The exception was *Bols v. Newsom*,[108] where Judge Robert T. Benitez (Bush) declined to dismiss claims by hair and nail salons that the shutdowns "have taken away their occupations and businesses for the public good without compensation."[109] Two other Republican-appointed district court judges made sympathetic noises but ruled for the government.[110]

With respect to procedural due process, eighty-four out of ninety-three claims (90.3%) failed[111] because a public health emergency was the quintessential justification for summary action[112] and because the COVID-19 orders were "legislative in nature."[113] In one of the exceptions, *Bols*, Judge Benitez held that

McDonald & Sons did not keep at home a consumer looking to buy a new chair or lamp, it just sent him to Walmart."), *vacating as moot sub nom.* County of Butler v. Governor of Pa., 8 F.4th 226 (3d Cir. 2021), *cert. denied sub nom.*, Butler County v. Wolf, 142 S. Ct. 772 (2022).

[104] 478 F. Supp. 3d 372 (N.D.N.Y. 2020), *vacating as moot* 834 F. App'x 677 (2d Cir. 2021).

[105] 494 F. Supp. 3d 238 (N.D.N.Y. 2020).

[106] *Id.* at 243; *DiMartile*, 478 F. Supp. 3d at 377.

[107] *See, e.g.*, Lebanon Valley Auto Racing Corp. v. Cuomo, 478 F. Supp. 3d 389, 402 (N.D.N.Y. 2020); Our Wicked Lady LLC v. Cuomo, No. 21-cv-00165, slip op. at 6 (S.D.N.Y. Mar. 9, 2021); Underwood v. City of Starkville, 538 F. Supp. 3d 667, 678 (N.D. Miss. 2021); Daugherty Speedway, Inc. v. Freeland, 520 F. Supp. 3d 1070, 1074-75 (N.D. Ind. 2021); Or. Rest. & Lodging Ass'n v. Brown, No. 3:20-cv-02017, 2020 WL 6905319, at *6 (D. Or. Nov. 24, 2020).

[108] 515 F. Supp. 3d 1120 (S.D. Cal. 2021).

[109] *Id.* at 1133.

[110] TJM 64, Inc. v. Harris, 526 F. Supp. 3d 331 (W.D. Tenn. 2021); Blackburn v. Dare County, 486 F. Supp. 3d 988 (E.D.N.C. 2020).

[111] *See supra* Table 3.

[112] *See, e.g.*, Six v. Newsom, 462 F. Supp. 3d 1060, 1073 (stating that government action that affects "large areas" does not require individual notice and hearing); Mich. Rest. & Lodging Ass'n v. Gordon, 504 F. Supp. 3d 717, 720-21 (W.D. Mich. 2020) ("[D]eprivation of property to protect the public health and safety is one of the oldest examples of permissible summary action." (quoting Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264, 300 (1981))); World Gym, Inc. v. Baker, 474 F. Supp. 3d 426, 433 (D. Mass. 2020) (finding that due process does not require usual up-front procedural protections when dealing with emergencies).

[113] Bimber's Delwood, Inc. v. James, 496 F. Supp. 3d 760, 782 (W.D.N.Y. 2020); *see also, e.g.*, Hartman v. Acton, 499 F. Supp. 3d 523, 536-37 (S.D. Ohio 2020) (finding COVID-19

California's shutdown order may not have been legislative in nature and therefore warranted some predeprivation hearing.[114]

C. *Eviction Moratoriums*

A portion of the property cases involving eviction moratoriums showed a greater level of controversy. To challenge state eviction moratoriums, landlords claimed that moratoriums constituted unlawful takings, exceeded constitutional limits on a state's authority to restrict contracts, violated their right to access the courts through the Petition Clause, and deprived them of due process. Landlords also challenged the CDC's moratorium on federalism and Commerce Clause grounds.

Most state moratorium challenges were unsuccessful.[115] In *Baptiste v. Kennealy*,[116] for example, Judge Mark L. Wolf (Reagan) declined to preliminarily enjoin the enforcement of Massachusetts's moratorium law.[117] The law banned evictions for failure to pay rent and certain notices related to evictions.[118] Applying rational basis, Judge Wolf rejected landlords' claims under the Contract Clause, Takings Clause, and Petition Clause because the industry was already heavily regulated, the right to evict was only temporarily suspended, and the measure reasonably addressed COVID-19 spread.[119] But plaintiffs enjoyed some success from Republican-appointed appellate judges

order was "legislative" act because of its general applicability); Steel MMA, LLC v. Newsom, No. 21-cv-00049, slip op. at 4 (S.D. Cal. Mar. 1, 2021) (finding COVID-19 restrictions were "legislative in nature" because they affected all citizens and "direct[ed] restrictions towards nationwide groups and classes of individuals and businesses"); Hopkins Hawley LLC v. Cuomo, 518 F. Supp. 3d 705, 715 (S.D.N.Y. 2021) (finding that plaintiffs are unlikely to succeed on claims under Fourteenth Amendment).

[114] Bols v. Newsom, 515 F. Supp. 3d 1120, 1129 (S.D. Cal. 2021) ("If the shutdown orders are, as they appear to be, pure executive action, then general notice may not suffice.").

[115] *See, e.g.*, Elmsford Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148, 162, 169 (S.D.N.Y. 2020) (granting summary judgment for government on Takings Clause and Contract Clause claims because landlords did not plead loss of property value as a whole, rent payments have always been premised on compliance with regulation, and government action was temporary payment freeze rather than affirmative exploitation); Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 221-27 (D. Conn. 2020) (rejecting landlords' substantive due process claim because there was no liberty interest independent from Takings Clause, rejecting Contract Clause claims because governor acted reasonably, and rejecting procedural due process claim because it simply delayed rather than eradicated access to eviction proceedings).

[116] 490 F. Supp. 3d 353 (D. Mass. 2020).

[117] *Id.* at 390.

[118] Subsequent regulations also encouraged landlords to notify tenants how much rent they owed and required such notices to refer tenants to nonprofit and legal aid organizations. *Id.* at 402-04. The judge held that these regulations likely compelled landlords' speech in violation of the First Amendment, but he did not immediately grant a preliminary injunction because the government promised to "rectify" the regulations. *Id.* at 405-409. We do not focus on the First Amendment in this Section.

[119] *See id.* at 382-90 ("Balancing these factors, the court finds that plaintiffs are not likely to prove that there was a non-categorical regulatory taking of their properties when the Moratorium was enacted in April 2020.").

and justices. In *Chrysafis v. Marks*,[120] the six conservative justices on the panel struck down a portion of a New York statute that prevented landlords from contesting a tenant's self-certification of financial hardship, thereby depriving landlords of procedural due process. The three Democratic-appointed justices dissented, finding that the law "simply delay[ed] the exercise of [due process]."[121]

Plaintiffs enjoyed even more success with their challenges to the CDC's eviction moratorium, which was first issued in September 2020.[122] The CDC acted under its authority "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."[123] Because people who are evicted must move to a new location, evictions pose a threat of contagion. Landlords argued that a reading of this statute that permitted the CDC to block evictions ran afoul of the Commerce Clause and federalism values.[124] Judges split along partisan lines. A D.C. Circuit panel of Democratic-appointed judges—Judge Patricia A. Millett (Obama), Cornelia T.L. Pillard (Obama), and Robert L. Wilkins (Obama)—ruled for the CDC.[125] A Sixth Circuit panel of Republican-appointed judges, Judge Alan E. Norris (Reagan), Amul Thapar (Trump), and John K. Bush (Trump), ruled for the plaintiffs, holding that the order exceeded statutory authority and intruded on the authority of the states to regulate leases.[126] A Trump-appointed district judge held that the order violated the Commerce Clause because real estate did "not move across state lines,"

[120] 141 S. Ct. 2482 (2021).

[121] *See id*. at 2482-83 ("This order enjoins the enforcement of only Part A of the COVID Emergency Eviction and Foreclosure Prevention Act . . . .").

[122] Unlike some of the state laws, the order did not prohibit landlords from commencing eviction suits and obtaining judgments; it only prohibited the actual eviction. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021).

[123] 42 U.S.C. § 264(a).

[124] *See* Josh Blackman & Ilya Shapiro, *The CDC's Eviction Moratorium Is Unconstitutional*, CATO INST. (June 3, 2021, 1:34 PM), https://www.cato.org/blog/cdcs-eviction-moratorium-unconstitutional [https://perma.cc/ATE9-EGRS]. Landlords also argued that Congress could not delegate the power to regulate such payments to an agency under the nondelegation doctrine. *See* GianCarlo Canaparo, Amy Swearer & Zack Smith, *CDC's Unlawful, Unconstitutional Moratorium on Evictions*, HERITAGE FOUND. (Sept. 15, 2020), https://www.heritage.org/the-constitution/commentary/cdcs-unlawful-unconstitutional-moratorium-evictions [https://perma.cc/5H2J-FC9H] ("Putting these obvious problems aside, the CDC's order has bigger constitutional problems. The agency purports to wield power delegated to it by Congress, but Congress can't delegate power it does not have.").

[125] Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 21-cv-05093, 2021 WL 2221646, at *1-3 (D.C. Cir. June 2, 2021) (affirming district court's stay of injunction against CDC order because CDC was likely to succeed on the merits).

[126] Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev., 992 F.3d 518, 523 (6th Cir. 2021) (denying motion to stay district court's injunction against CDC order because CDC was unlikely to succeed on merits).

public health fell within the state's police power, and the connection between evictions and interstate commerce was too attenuated.[127]

The dispute reached the Supreme Court twice. The first time, without oral argument or a majority opinion, the three liberal justices, Chief Justice Roberts, and Justice Kavanaugh, denied an application to vacate an order that left the eviction moratorium in place.[128] Justice Kavanaugh cast the deciding vote for the CDC, but only because the moratorium would soon expire at the end of July 2021.[129] The Biden Administration called Justice Kavanaugh's bluff and extended the moratorium from July to October. The Court promptly struck down the moratorium on statutory interpretation grounds.[130] The three liberal justices dissented, finding that the CDC's extended moratorium was substantially more tailored than the first moratorium because it targeted people with dangerous levels of transmission rather than automatically applying nationwide.[131] The conservative justices found that the sheer scope of the claimed authority and its intrusion into the landlord-tenant relationship counseled against a broad interpretation of the statute.[132]

D. *Vaccine Mandates*

One year into the pandemic, vaccines took center stage in the COVID-19 saga. Both the federal government and state governments issued vaccine-or-test mandates for their employees, universities, and citizens.[133] Similar to the eviction moratorium cases, challenges to state and local vaccine-or-test mandates universally failed, while challenges to federal vaccine-or-test mandates achieved success along partisan lines.

In the state and local cases, public school teachers, students, healthcare workers, security guards, and municipal employees claimed a substantive due process right to refuse vaccination[134] and argued that the vaccine-or-test

[127] Terkel v. CDC, 521 F. Supp. 3d 662, 669-77 (E.D. Tex. 2021). Another Trump-appointed judge cited *Terkel* to note in dicta that the CDC order raised "serious constitutional concerns." Skyworks, LTD. v. CDC, 524 F. Supp. 3d. 745, 758 (N.D. Ohio 2021).

[128] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2320, 2320 (2021).

[129] *See id*. at 2321.

[130] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (per curiam).

[131] *See id*. (Breyer, J., dissenting) ("The CDC's current order is substantially more tailored than its prior eviction moratorium, which automatically applied nationwide.").

[132] *See id*. at 2489 (majority opinion) ("Even if the text were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation.").

[133] All but two of the thirty-six state vaccine mandate cases involved mandates that only applied to employees or students. The other two cases applied to the general public. *See* Commey v. Adams, No. 22-cv-00018, slip op. at 1 (S.D.N.Y. Jan. 6, 2022) (New York City's proof-of-vaccine requirement for indoor spaces); Dixon v. De Blasio, 566 F. Supp. 3d 171 (E.D.N.Y. 2021), *vacated*, No. 21-cv-02666, 2022 WL 961191 (2d Cir. Mar. 28, 2022).

[134] They also invoked equal protection, procedural due process, the Contract Clause, and substantive due process right to work.

mandates violated their fundamental rights to bodily integrity, privacy, and medical freedom. Two courts of appeals panels[135] and at least twenty district court judges[136] squarely rejected these arguments by citing *Jacobson* and distinguishing vaccines from precedent that protected citizens from unwanted medical treatment.[137]

Employees subject to federal vaccine-or-test mandates fared much better than the state or local claims, but only under Republican-appointed judges.[138] Rather than invoking a substantive due process right, these plaintiffs challenged the statutory bases of the Biden Administration's authority and invoked structural constitutional arguments, such as the nondelegation and major questions doctrines. In one such case, an all-Republican-appointed Fifth Circuit panel stayed the agency's requirement that businesses with one hundred or more employees adopt vaccine-or-test mandates for employees.[139] In dicta, the panel noted "serious constitutional concerns" under the Commerce Clause because it regulated noneconomic activity that fell within the state's police power.[140] The case was then consolidated with other federal vaccine challenges before a Sixth Circuit panel.[141] Judges Jane B. Stranch (Obama) and Julia Smith Gibbons (Bush

[135] *See* Klaassen v. Trs. of Ind. Univ., 7 F.4th 592, 593 (7th Cir. 2021); We The Patriots USA, Inc. v. Hochul, 17 F.4th 266, 277 (2d Cir. 2021), *clarified by* 17 F.4th 368 (2d Cir. 2021).

[136] *See* Halgren v. City of Naperville, No. 21-cv-05039, 2021 WL 5998583, at *13-14 (N.D. Ill. Dec. 19, 2021); Williams v. Brown, 567 F. Supp. 3d 1213, 1224-25 (D. Or. 2021); Johnson v. Brown, 567 F. Supp. 3d 1230, 1248-49 (D. Or. 2021); Valdez v. Grisham, 599 F. Supp. 3d 1161, 1175 (D.N.M. 2021); Troogstad v. City of Chicago, 571 F. Supp. 3d 901, 908-09 (N.D. Ill. 2021); Bacon v. Woodward, No. 2:21-cv-00296, slip op. at 7 (E.D. Wash. Nov. 8, 2021); Garland v. N.Y.C. Fire Dep't, 574 F. Supp. 3d 120, 133-34 (E.D.N.Y. 2021); Broecker v. N.Y.C. Dep't of Educ., 573 F. Supp. 3d 878, 888-89 (E.D.N.Y. 2021); Harris v. Univ. of Mass., Lowell, 557 F. Supp. 3d 304, 313 (D. Mass. 2021); Gold v. Sandoval, No. 3:21-cv-00480, slip op. at 4 (D. Nev. Dec. 3, 2021); Messina v. Coll. of N.J., 566 F. Supp. 3d 236, 245-49 (D.N.J. 2021); Norris v. Stanley, 567 F. Supp. 3d 818, 821-23 (W.D. Mich. 2021); Children's Health Def., Inc. v. Rutgers State Univ. of N.J., No. 21-cv-15333, slip op. at 4 (D.N.J. Sept. 27, 2021); Am.'s Frontline Drs. v. Wilcox, No. 21-cv-01243, slip op. at 8 (C.D. Cal. July 30, 2021); Wise v. Inslee, No. 2:21-cv-00288, slip op. at 7 (E.D. Wash. Oct. 25, 2021); Bauer v. Summey, 586 F. Supp. 3d 573, 592-95 (D.S.C. 2021); Mass. Corr. Officers Federated Union v. Baker, 567 F. Supp. 3d 315, 324-27 (D. Mass. 2021).

[137] *See, e.g.*, Kheriaty v. Regents of the Univ. of Cal., No. 21-cv-00136, slip op. at 5 (C.D. Cal. Sept. 29, 2021) (holding that vaccine-or-test mandate did not implicate fundamental right to bodily integrity because vaccines protected broader community as opposed to only patients).

[138] *See supra* Table 5 (showing that 72%, or eighteen of twenty-five, federal vaccine challenges succeeded under Republican-appointed judges, whereas 0%, or zero of eleven, federal vaccine challenges succeeded under Democratic-appointed judges).

[139] *See* BST Holdings, L.L.C. v. Occupational Safety & Health Admin., U.S. Dep't of Lab., 17 F.4th 604, 611 (5th Cir. 2021) (noting that under nondelegation doctrine, Occupational Safety and Health Act could not be intended to "make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways").

[140] *See id.* at 617 ("[C]oncerns over separation of powers principles cast doubt over the [m]andate's assertion of virtually unlimited power . . . .").

[141] An initial procedural decision to deny a petition to hear the case en banc split along

43) dissolved the stay, interpreting the authorizing statute more favorably, in part because it involved a policy choice "so much on the frontiers of scientific knowledge" that it exceeded the court's fact-finding role.[142] Judge Joan L. Larsen (Trump) dissented, echoing the Sixth Circuit's concerns.[143] All six conservative Supreme Court justices reimposed the stay, while the three liberal justices dissented.[144]

E. *Right to Work*

Plaintiffs also claimed that public health orders unlawfully interfered with their right to work—also known as the right to make a living or choose one's profession. Fifty out of fifty-three (94.3%) judges rejected these claims,[145] recognizing a generalized right to choose one's profession, but not a fundamental right to a particular job.[146] For example, in *Culinary Studios, Inc. v. Newsom*,[147] Judge Anthony W. Ishii (Clinton) dismissed the plaintiffs' challenge to California's stay-at-home order, which required all residents to stay home except those working in essential industries.[148] The plaintiffs were owners of gyms and restaurants whose nonessential designation allegedly violated their substantive right to pursue an occupation.[149] The court found that the right to pursue work was not fundamental, and therefore subject to reasonable

mostly partisan lines. *In re* MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing, 20 F.4th 264, 266-67 (6th Cir. 2021). Five Democratic-appointed judges and three Bush-appointed judges denied the petition. Eight Trump-appointed or Reagan-appointed judges dissented, arguing that the Occupational Safety and Health Administration improperly claimed authority to regulate an area traditionally regulated by the states and that the Commerce Clause likely did not grant Congress the power to issue a de facto vaccine mandate for eighty million workers. *Id.* at 267-68.

[142] *In re* MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing, 21 F.4th 357, 375 (6th Cir. 2021), *rev'd sub nom.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam).

[143] *See id.* at 389-400.

[144] *See generally id.*

[145] *See supra* Table 5.

[146] *See, e.g.*, Henry v. DeSantis, 461 F. Supp. 3d 1244, 1255 (S.D. Fla. 2020) (holding that "there is no fundamental right to a job, or right to work" under substantive due process); Amato v. Elicker, 534 F. Supp. 3d 196, 215 (D. Conn. 2021) (recognizing generalized right to choose one's field of employment subject to reasonable regulation and finding that shutdown orders were reasonable); Pro. Beauty Fed'n v. Newsom, No. 2:20-cv-04275, slip op. at 8 (C.D. Cal. June 8, 2020) ("The right to work is not a fundamental right; laws affecting the right to work are subject to rational basis review."); Ricky Dean's, Inc. v. Marcellino, No. 5:20-cv-04063, slip op. at 3 (D. Kan. Nov. 19, 2020) ("Although the Supreme Court has recognized a liberty interest in the right of individuals to work, it has not addressed the extent to which such a right protects business operations.").

[147] 517 F. Supp. 3d 1042 (E.D. Cal. 2021).

[148] *Id.* at 1074-75.

[149] *Id.*

regulations.[150] The order satisfied rational basis because it allowed businesses to operate at a reduced capacity.[151]

Butler dealt with nearly identical restrictions but reached the opposite conclusion. Judge Stickman held that Pennsylvania's designation of "non-life-sustaining businesses" failed rational basis,[152] proclaiming that "[i]n a free state, the ability to earn a living by pursing [sic] one's calling and to support oneself and one's family is not an economic good, it is a human good."[153] Two other courts also ruled in favor of right-to-work claims. In *Bols*, Judge Benitez declined to dismiss a claim that California's business closures infringed the right to work of hairdressers and manicurists.[154] In *Hund*, Judge Sinatra held that a ban on live music events plausibly infringed a musician's rights to choose his field of employment.[155]

F. *Right to Travel*

In addition to the right to work, the right to travel was invoked in constitutional challenges to public health orders. The right to travel can either refer to the right to interstate travel or the right to intrastate travel.[156]

Nearly all courts recognize that the right to interstate travel is fundamental and, therefore, triggers strict scrutiny.[157] In the COVID-19 context, the right was mostly implicated by fourteen-day quarantine measures directed at people entering a particular state. Even under strict scrutiny, courts mostly upheld the quarantine measures. For example, in *Bayley's Campground, Inc. v. Mills*,[158] the First Circuit upheld a district court's denial of emergency relief from a quarantine order because there was no less restrictive but equally effective alternative.[159] Other courts reached the same result but did so under *Jacobson*

[150] *See id*. at 1052 ("While the Ninth Circuit has recognized a potential liberty interest in pursuing one's calling, those cases involve a complete prohibition on the right to engage in a calling and not brief interruptions. Such a right is narrow and has not been held to be fundamental.").

[151] *See id*. at 1053 ("Plaintiffs' businesses can continue through outdoor operations.").

[152] County of Butler v. Wolf, 486 F. Supp. 3d 883, 921-25 (W.D. Pa. 2020), *vacating as moot sub nom*. County of Butler v. Governor of Pa., 8 F.4th 226 (3d Cir. 2021), *cert. denied sub nom*., Butler County v. Wolf, 142 S. Ct. 772 (2022).

[153] *Id*. at 926.

[154] Bols v. Newsom, 515 F. Supp. 3d 1120, 1124-26 (S.D. Cal. 2021) (finding that Plaintiff's claims were not moot).

[155] Hund v. Cuomo, 501 F. Supp. 3d 185, 202-04 (W.D.N.Y. 2020)(finding that incidental-music rule violated plaintiff's substantive due process rights).

[156] *See generally* Duane W. Schroeder, Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 117 (1975) (discussing Constitutional source for right to travel, including both interstate and intrastate travel).

[157] Not unlike scholars, the courts largely equivocated on which part of the Constitution gives rise to the right.

[158] 985 F.3d 153 (1st Cir. 2021).

[159] *See id*. at 160-61 (explaining that deadly virus lacked effective treatment, minimal testing kits made contract tracing impossible, state anticipated 2,000% population increase in coming summer months, and state's critical care capacity was already half full).

deferential review rather than traditional strict scrutiny.[160] In one notable exception, *Roberts v. Neace*,[161] Judge William O. Bertelsman (Carter) held that the Kentucky Governor's travel ban was not narrowly tailored because it arbitrarily punished hypothetical residents living near the border of Ohio and Kentucky.[162]

Circuit courts are split on whether this right to intrastate travel is fundamental.[163] All but one of the COVID-19 cases rejected intrastate travel challenges to lockdown orders. They either explicitly declined to recognize a fundamental right to intrastate travel[164] or stated that, even if one existed, the orders did not infringe on it.[165] Once again, *Butler* was the exception. Judge Strickman held that a stay-at-home order violated residents' fundamental rights to intrastate travel.[166] But while the Third Circuit recognized the right as "deeply rooted" and held that intermediate scrutiny was appropriate,[167] Judge Strickman applied strict scrutiny because "[b]road population-wide lockdowns [were] such

[160] *See* Page v. Cuomo, 478 F. Supp. 3d 355, 364-70 (N.D.N.Y. 2020) (discussing at length why *Jacobson* is appropriate framework and finding that executive order was permissible response to crisis because it treated nonresidents and residents alike); Carmichael v. Ige, 470 F. Supp. 3d 1133, 1142, 1146-47 (D. Haw. 2020) (denying preliminary injunction under *Jacobson* review—and alternatively, under strict scrutiny—because people remained free to enter state, albeit with quarantine requirement, and order treated nonresidents and residents equally).

[161] 457 F. Supp. 3d 595 (E.D. Ky. 2020).

[162] *See id.* at 602 (explaining that resident could visit friend eight miles away in Kentucky, but if she visited another friend eight miles away in Ohio, she would have to quarantine).

[163] *See* Kathryn E. Wilhelm, Note, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U. L. REV. 2461, 2477-78 (2010) (discussing variances in circuit court opinions on whether interstate travel is a fundamental right).

[164] *See* Six v. Newsom, 462 F. Supp. 3d 1060, 1069 (C.D. Cal. 2020) ("But neither the Supreme Court nor the Ninth Circuit have recognized as a protected component the right to *intrastate* travel . . . ."); Lawrence v. Polis, 505 F. Supp. 3d 1136, 1147 (D. Colo. 2020) ("The right to travel within a state is not a recognized fundamental right . . . ."); Best Supplement Guide, LLC v. Newsom, No. 2:20-cv-00965, 2020 WL 2615022, at *5 (E.D. Cal. May 22, 2020) ("This Court cannot find that the [s]tate and [c]ounty orders violate . . . a right that is not yet known to exist.").

[165] *See* Disbar Corp. v. Newsom, F. Supp. 3d 747, 753 (E.D. Cal. 2020) ("[E]ven if Plaintiffs have a constitutional right to travel through the community, it is unclear whether the Orders infringe on such a right."); Forbes v. City of San Diego, No. 20-cv-00998, slip op. at 7 (S.D. Cal. Mar. 4, 2021) (finding plaintiff did not adequately show that mask rules inhibited their right to travel); Lewis v. Walz, 491 F. Supp. 3d 464, 470-71 (D. Minn. 2020) (finding plaintiffs failed to state claim for violation of right to travel because the gathering restrictions were "clearly related to public health"); Village of Orland Park v. Pritzker, 475 F. Supp. 3d 866, 884-85 (N.D. Ill. 2020) (finding Plaintiffs did not adequately show that they were actually "prevented from traveling from place to place within Illinois").

[166] *See* County of Butler v. Wolf, 486 F. Supp. 3d 883, 916-18 (W.D. Pa. 2020), *vacating as moot sub nom.* County of Butler v. Governor of Pa., 8 F.4th 226 (3d Cir. 2021), *cert. denied sub nom.*, Butler County v. Wolf, 142 S. Ct. 772 (2022).

[167] *Id.* at 916 (quoting Lutz v. City of York, 899 F.2d 255, 268 (3d Cir. 1990)).

a dramatic inversion of the concept of liberty in a free society as to be nearly presumptively unconstitutional."[168]

G. *Abortion*

In the early days of the pandemic, some states banned elective and nonemergency surgical procedures to conserve personal protective equipment and reduce in-person contact.[169] In some states, these bans applied to surgical abortions.[170] The Fifth Circuit and Eighth Circuit upheld these orders.[171] The Sixth Circuit, Eleventh Circuit, and the Western District of Oklahoma struck down these orders.[172]

The divisions among the judges fell almost exclusively along partisan lines. In *Robinson v. Attorney General*,[173] a full panel of Democratic-appointed judges in the Eleventh Circuit—Judges Adalberto Jordan (Obama), Beverly B. Martin (Obama), and Daniel R. Dominguez (Clinton)—held that the orders imposed an undue burden under *Planned Parenthood of Southeastern Pennsylvania v. Casey*[174] and were not permitted by *Jacobson* because the right to abortion is fundamental, and the states could not show that the orders would mitigate the spread of COVID-19. In *In re Abbott* (*Abbott I*)[175] and *In re Abbott* (*Abbott II*),[176] a Republican-appointed-majority panel in the Fifth Circuit—Judge Jennifer Walker Elrod (Bush 43) and Stuart Kyle Duncan (Trump), with James L. Dennis (Clinton) dissenting—held that the state had shown adequate evidence of the risks of pandemic under the *Jacobson* standard and that those risks justified a

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[168] *Id*. at 918.

[169] *See* AM. MED. ASS'N, FACTSHEET: STATE ACTION RELATED TO DELAY AND RESUMPTION OF "ELECTIVE" PROCEDURES DURING COVID-19 PANDEMIC 1 (2020), https://www.ama-assn.org/system/files/2020-06/state-elective-procedure-chart.pdf [perma.cc/Y2YZ-DWXU] (identifying state directives ordering health care facilities and providers to delay elective procedures during COVID-19).

[170] *See* B. Jessie Hill, Essay, *Essentially Elective: The Law and Ideology of Restricting Abortion During the COVID-19 Pandemic*, 106 VA. L. REV. ONLINE 99, 100-02 (2020) (describing some states' orders to limit medical and/or surgical abortions).

[171] *See In re* Abbott (*Abbott I*), 954 F.3d 772, 783 (5th Cir. 2020) (finding that temporary restraining order on executive order did not meet narrow tailoring requirement for injunctive relief), *vacated sub nom*., Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021); *In re* Abbott (*Abbott II*), 956 F.3d 696 (5th Cir. 2020) (reaffirming *Abbott I*), *vacated sub nom*., Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021); *In re* Rutledge, 956 F.3d 1018, 1025-27 (8th Cir. 2020) (adopting the reasoning from *Abbott I* to enter a writ of mandamus).

[172] *See* Adams & Boyle, P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020); S. Wind Women's Ctr. LLC v. Stitt, 455 F. Supp. 3d 1219 (W.D. Okla. 2020).

[173] 957 F.3d 1171 (11th Cir. 2020).

[174] 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[175] *Abbott I*, 954 F.3d 772.

[176] *Abbot II*, 956 F.3d 696.

temporary delay in surgical abortions that did not apply to abortion providers with adequate supplies of personal protective equipment.[177]

The Supreme Court did not resolve the circuit split, though it did vacate some of the rulings on mootness grounds.[178] However, the Court decided another COVID-19 abortion measure on the merits. In *FDA v. American College of Obstetricians & Gynecologists*,[179] the FDA and the Department of Health and Human Services waived in-person pick-up requirements for a number of drugs but not for mifepristone (which is used to end pregnancies) during the pandemic.[180] Three lower courts ordered the waiver to be extended to mifepristone, citing risks of contracting the virus at a hospital or doctor's office.[181] In concurrence, Chief Justice Roberts argued that the Court should defer to the government.[182] In her dissent, Justice Sotomayor argued that the requirement placed an undue burden on women.[183] She also argued that the agency exempted many other drugs from the pick-up requirement, suggesting that it was motivated by hostility to abortion rights rather than public health considerations.[184] Chief Justice Roberts stands out as the only justice who was able to maintain a consistent institutional commitment across cases with different ideological valences: in cases challenging public health orders brought by religious organizations, all the justices except Chief Justice Roberts flipped, with the liberal justices holding in favor of the state and the conservative justices

[177] The same three judges issued four other decisions in this litigation that largely pertained to procedural matters. *See In re* Abbott, 800 F. App'x 293, 296 (5th Cir. 2020) (administratively staying TRO in part); *In re* Abbott, 800 F. App'x 296, 298 (5th Cir. 2020) (denying motion to lift the stay); *In re* Abbott, 809 F. App'x 200, 202 (5th Cir. 2020) (denying the stay in part and lifting the stay in part); Sw. Women's Surgery Ctr. v. Abbott, 802 F. App'x 150, 151 (5th Cir. 2020) (denying motion to stay), *vacating as moot sub nom.* Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021) (instructing Fifth Circuit to dismiss case as moot). For dataset purposes, we consider all the appellate *Abbott* decisions as one case.

[178] *See generally Planned Parenthood Ctr. for Choice*, 141 S. Ct. 1261 (2021) (vacating Fifth Circuit decision); Slatery v. Adams & Boyle, P.C., 141 S. Ct. 1262 (2021) (vacating Sixth Circuit decision).

[179] 141 S. Ct. 578 (2021).

[180] *Id.* at 579.

[181] *Id.* at 580.

[182] *See id.* at 579 (Roberts, C.J., concurring) (noting no basis for lower court to instruct FDA in this instance).

[183] *See id.* at 582-84 (Sotomayor, J., dissenting) (citing statistics related to higher mortality for Black and Hispanic individuals, longer travel times, and other risks for minority communities).

[184] *See id.* at 584-85 ("This country's laws have long singled out abortions for more onerous treatment than other medical procedures that carry similar or greater risks.").

holding in favor of the challengers.[185] Chief Justice Roberts also ruled counter-ideologically in the evictions moratorium case, holding for the CDC.[186]

H. *Guns*

Seven district courts and one court of appeals addressed Second Amendment challenges to public health orders. Only one judge applied strict scrutiny,[187] while the rest declined to do so, either because the orders were permissible under the standard of *District of Columbia v. Heller*[188] or because people had alternative means of acquiring guns for self-defense in other nearby stores.[189] Four judges upheld public health orders, while six judges struck them down.

Most cases dealt with stay-at-home orders that required gun stores to close because they were "nonessential" businesses. The district judges generally upheld these closure orders.[190] For example, in *Altman v. County of Santa Clara*,[191] Judge Jon S. Tigar (Obama) held that the order satisfied either intermediate scrutiny or the *Jacobson* standard because it reasonably protected public health, was facially neutral, did not target firearms retailers or shooting ranges in particular, and was limited in time.[192]

However, one Reagan-appointed district judge and a fully Trump-appointed court of appeals panel invalidated the orders. In the early stages of the pandemic, Judge Douglas P. Woodlock (Reagan) ordered Massachusetts to allow gun stores to operate under certain conditions because the closures improperly burdened Second Amendment rights, and the Governor provided inadequate

[185] *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

[186] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Serv., 141 S. Ct. 2485, 2487 (2021) (per curiam).

[187] McDougall v. County of Ventura, 23 F.4th 1095, 1110-13 (9th Cir. 2022), *vacated*, 26 F.4th 1016, 1016-17 (9th Cir. 2022), *aff'd on reh'g*, 38 F.4th 1162 (9th Cir. 2022).

[188] 554 U.S. 570 (2008); *see* Brandy v. Villanueva, No. 20-cv-02874, slip op. at 3 (C.D. Cal. Apr. 6, 2020), *vacated*, Martinez v. Villanueva, No. 20-56233, 2022 WL 2452308, at *1 (9th Cir. July 6, 2022).

[189] Dark Storm Indus. LLC v. Cuomo, 471 F. Supp. 3d 482, 497-98 (N.D.N.Y. 2020).

[190] *See Brandy*, slip op. at 3 (finding that closure of nonessential businesses reasonably fits objective of reducing COVID-19 spread); *Dark Storm*, 471 F. Supp. 3d at 503 (finding that social distancing was effective means of reducing spread of COVID-19); McDougall v. County of Ventura, 495 F. Supp. 3d 881, 891 (C.D. Cal. 2020) (finding no "plain and palpable violation" under *Jacobson* because measure was temporary).

[191] 464 F. Supp. 3d 1106 (N.D. Cal. 2020).

[192] *See id.* at 1120-25, 1128-32 ("The Court need not decide whether *Jacobson* or the Ninth Circuit's Second Amendment framework applies here because . . . the Court concludes that the [o]rder survives review under either test.").

public justification.[193] In *McDougall v. County of Ventura*,[194] Judges Lawrence J.C. VanDyke (Trump), Andrew J. Kleinfeld (Trump), and Ryan D. Nelson (Trump) found that a county "fail[ed] to provide *any* evidence or explanation suggesting that [gun establishments] posed a greater risk of spreading COVID-19 than other businesses and activities deemed 'essential.'"[195]

In two cases involving measures that fell short of outright closures, courts also ruled in favor of the plaintiffs. In *Connecticut Citizens Defense League, Inc. v. Lamont*,[196] Judge Jeffrey A. Meyer (Obama) preliminarily enjoined an executive order that suspended fingerprinting related to background checks, which aspiring gun owners needed to obtain a state permit. The judge struck down the order because the order effectively precluded new gun ownership and because the state could have adopted mitigation measures like scheduled appointments and sanitization between uses.[197] For similar reasons, in *Stafford v. Baker*,[198] Judge Louise W. Flanagan (Bush 43) struck down the state's suspension of pistol permit applications.[199]

IV. DISCUSSION

The federal judicial response to pandemic-related public health orders was partly, but not entirely, consistent with the tradition of judicial deference to emergency orders in the United States, except for religion cases, where the outcomes hostile to the government were mostly driven by recent appointments of President Trump. In the vast majority of nonreligion cases, the courts refused to block public health orders in response to constitutional challenges. But partisan disagreement surfaced in cases relating to property rights, abortion access, gun rights, federal eviction moratoriums, and federal vaccine mandates.

Let us start with the broad pattern. In the typical case, an executive official—usually a governor, mayor, or public health officer—issues an order prohibiting certain constitutionally protected behavior. The official acts are based on a statute that broadly authorizes the official to issue any necessary orders to protect public health and safety. The plaintiffs who challenge the order argue that it prevents them from engaging in political activity (including protests, party

[193] *See generally* McCarthy v. Baker, No. 20-cv-10701, 2020 WL 2297278 (D. Mass. May 7, 2020). For further analysis, see Matt Stout, *Federal Judge Issues Order Allowing Mass. Gun Shops to Reopen*, BOS. GLOBE, May 8, 2020, at B1.

[194] 23 F.4th 1095 (9th Cir. 2022), *vacated*, 26 F.4th 1016, 1016-17 (9th Cir. 2022), *aff'd on reh'g*, 38 F.4th 1162 (9th Cir. 2022).

[195] *Id.* at 1115.

[196] 465 F. Supp. 3d 56 (D. Conn. 2020).

[197] *See id.* at 71-74 ("Indeed, the Commissioner himself in one of his affidavits lists available protective measures that would be less overbroad than a shutdown of the permitting process.").

[198] 520 F. Supp. 3d 803 (E.D.N.C. 2021).

[199] *Id.* at 811 (holding complete suspension "does not reasonably fit with the government objective to ameliorate 'concerns over social distancing' and 'concerns related to the COVID-19 pandemic'" and plaintiffs could recover nominal damages).

organization, and speechifying), conducting business, working, traveling, obtaining abortions, and using guns.

The courts that held for the government reached this result through several doctrinal pathways. In many cases, the courts used rational basis review because of the limited nature of the constitutional right and easily found that the public health emergency justified the public health order.[200] In other cases, where intermediate scrutiny or strict scrutiny applied, the courts found that, in light of the gravity of the public emergency, the order was justified, largely crediting the government's claim that there was no less restrictive alternative to the order given the uncertainty surrounding the behavior of the virus.[201] Some courts put weight on *Jacobson*, holding that public health emergencies were special and justified deferential review.[202] A few courts treated *Jacobson* as a dead letter, a relic of constitutional law before the rights revolution, but nonetheless found that the public health order survived traditional scrutiny.[203] Some courts found for the government without taking a position on the continuing viability or meaning of *Jacobson*.[204] The courts that held against the government either

[200] *See, e.g.*, ETP Rio Rancho Park, LLC v. Grisham, 522 F. Supp. 3d 966, 1033 (D.N.M. 2021) ("The Defendants' Feb. 24 [Public Health Order] . . . rationally relates to its legitimate purpose of protecting the health and lives of its citizens by preventing the spread of COVID-19."); Xponential Fitness v. Arizona, No. 20-cv-01310, slip op. at 6-9 (D. Ariz. July 14, 2020) (rejecting plaintiff's substantive due process and equal protection claims because Governor's Executive Order "was implemented to prevent the spread of COVID-19 and to protect the health and safety of individuals living in Arizona," a legitimate interest).

[201] *See* Bayley's Campground, Inc. v. Mills, 985 F.3d 153, 160-61 (1st Cir. 2021) (holding that district court supportably found that Maine's Executive Order was least restrictive means to slow spread of COVID-19); Tandon v. Newsom, 517 F. Supp. 3d 922, 971 (N.D. Cal. 2021) ("Plaintiffs' two less restrictive alternatives are insufficient to reduce community spread, protect high-risk individuals, and prevent the healthcare system from being overwhelmed."); Altman v. County of Santa Clara, 464 F. Supp. 3d 1106, 1130 (N.D. Cal. 2020) ("This evidence forecloses Plaintiffs' argument that allowing firearms and ammunition retailers to operate under social distancing and sanitation guidelines would constitute a less restrictive alternative . . . .").

[202] *See* Carmichael v. Ige, 470 F. Supp. 3d 1133, 1143 (D. Haw. 2020) ("*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency.") (quoting *Abbott I*, 954 F.3d 772, 786 (5th Cir. 2020))); Brach v. Newsom, No. 20-cv-06472, slip op. at 3 (C.D. Cal. Aug. 21, 2020) (stating that "*Jacobson* requires the Court to apply a presumption of constitutionality" at TRO stage).

[203] *See* Culinary Studios, Inc. v. Newsom, 517 F. Supp. 3d 1042, 1063 (E.D. Cal. 2021) ("[T]his Court concludes that the normal constitutional standards of review should apply, not a separate '*Jacobson* standard.'").

[204] *See* M. Rae, Inc. v. Wolf, 509 F. Supp. 3d 235, 246 (M.D. Pa. 2020) ("We need not resolve that difficult question here, because *Jacobson* is easily reconciled with the rational-basis standard of review that would otherwise apply to plaintiffs' class-of-one claim."). For a more detailed summary of courts' varying approaches to *Jacobson* during the pandemic, see Steiner-Dillon & Ryan, *supra* note 29, at 32-40.

rejected *Jacobson*'s continuing relevance[205] or ruled that the government order was unconstitutional despite *Jacobson*'s call for deferential review.[206]

In evaluating the constitutional challenges, courts vacillated between two approaches: an equal protection-like analysis in which they evaluated whether the challenged order treated some groups worse than other groups and a substantive approach in which they considered whether the magnitude of the public health threat justified the order. Plaintiffs were more successful with the equal-protection approach, which echoes *Wong Wai v. Williamson*[207] and *Jew Ho v. Williamson*,[208] the early decisions striking down public health orders that targeted Chinese residents in San Francisco. Courts plainly saw those orders for what they were: attempts to control the Chinese population issued under the pretext of public health ("with an evil eye and an unequal hand").[209] In the COVID-19 cases, some courts extended this logic to its limit. One court found that a Pennsylvania order that temporarily closed "non-life-sustaining businesses" while allowing "life-sustaining businesses" to remain open with limited occupancy violated the Fourteenth Amendment because both types of businesses sell consumer goods (the larger businesses sold food as well as nonessentials like furniture, while the small business sold only nonessential items).[210] The court seemed to think that if the government had been serious, it would have prohibited the large businesses from selling nonessential items.[211] Another court held that New York's restriction on live music events was unconstitutional because restaurants and movie theaters were allowed to remain open.[212] Yet another court held that the mayor of Houston could not close a

[205] *See, e.g.*, County of Butler v. Wolf, 486 F. Supp. 3d 883, 897 (W.D. Pa. 2020) (noting *Jacobson*'s irrelevance due to a "century of development" creating "tiered levels of scrutiny for constitutional claims"), *vacating as moot sub nom.* County of Butler v. Governor of Pa., 8 F.4th 226 (3d Cir. 2021), *cert. denied sub nom.*, Butler County v. Wolf, 142 S. Ct. 772 (2022). However, most courts have held that Jacobson continues to be good law. *See* AJE Enter. LLC v. Justice, No. 1:20-cv-00229, slip op. at 3 (N.D. W. Va. Oct. 27, 2020) (summarizing cases), *appeal dismissed*, No. 20-cv-02256, 2021 WL 2102318 (4th Cir. Jan. 27, 2021).

[206] *See* DiMartile v. Cuomo, 478 F. Supp. 3d 372, 386 (N.D.N.Y. 2020) ("[D]espite the application of *Jacobson* and its progeny, the State's 50-person gathering restriction on social gatherings is impermissibly arbitrary under the facts of this case."), *vacating as moot* 834 F. App'x 677 (2d Cir. 2021).

[207] 103 F. 1 (N.D. Cal. 1900).

[208] 103 F. 10 (C.C.N.D. Cal. 1900).

[209] *Id.* at 23 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886)).

[210] *Butler*, 486 F. Supp. 3d at 927.

[211] *Id.* at 928 ("[T]he arbitrary method of distinction used by Defendants almost universally favored businesses which offered more, rather than fewer products. As such, the largest retailers remained open to attract large crowds, while smaller specialty retailers . . . were required to close. The distinctions were arbitrary in origin and application.").

[212] *See* Hund v. Cuomo, 501 F. Supp. 3d 185, 200 (W.D.N.Y. 2020) (finding that New York's incidental-music rule "prohibits one kind of live music and permits another"); League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 468 F. Supp. 3d 940, 950 (W.D. Mich. 2020) ("Defendants cannot rely on the categorization of gyms as 'dangerous,' without a single supporting fact, to uphold their continued closure. This is particularly true when

political convention when he allowed grocery stores to remain open,[213] while a Ninth Circuit panel said that an order to close gun shops and shooting ranges for forty-eight days was unconstitutional because bike shops could stay open.[214]

The district court in the Pennsylvania case also used the substantive approach to strike down stay-at-home orders. It made clear that it did not believe that stay-at-home orders could be justified, speculating that the Wuhan lockdown in China "started a domino effect where one country, and state, after another imposed draconian and hitherto untried measures on their citizens."[215] In fact, the CDC and other government agencies had made plans for these measures years earlier.[216] But because the stay-at-home orders applied to everyone in the state, regardless of the risk, and because stay-at-home orders of such magnitude had never been used in the past, they were unconstitutional.[217] The court did not offer a serious discussion of the risk of the disease and indeed expressed skepticism about containment efforts, pointing out that a government official who worried that large gatherings would be "mega-spreading events" was unable to identify such an event among the recent mass protests in the state.[218] This may be why the Third Circuit immediately granted a stay of the order pending appeal.[219] The Ninth Circuit panel that struck down the forty-eight-day closure of gun shops and shooting ranges complained that the county offered no evidence that the order would slow the spread of COVID-19.[220] The abortion cases are similar, but this time with Republican-appointed judges arguing that the states acted reasonably in light of the risks and uncertainties, and Democratic-appointed judges arguing that states failed to offer sufficient evidence of public health risks to justify the burdens they imposed on women.[221]

From the standpoint of the judicial role during national emergencies, one might begin by noting that the pandemic cases involve a health/liberty tradeoff that parallels the security/liberty tradeoffs in the national security cases. In national security cases, the government claims that an emergency exists based

almost all other indoor businesses have been opened, and indoor gatherings of up to 50 people are permitted—so long as they are not inside a gym.").

[213] Hotze v. Abbott, 473 F. Supp. 3d 736 (S.D. Tex. 2020).

[214] McDougall v. County of Ventura, 23 F.4th 1095, 1115 (9th Cir. 2022), *vacated*, 26 F.4th 1016, 1016-17 (9th Cir. 2022), *aff'd on reh'g*, 38 F.4th 1162 (9th Cir. 2022).

[215] *Butler*, 486 F. Supp. 3d at 916. Orders akin to lockdowns, it may be noted, have been used as a response to public health emergencies for centuries. *See, e.g.*, A. LLOYD MOOTE & DOROTHY C. MOOTE, THE GREAT PLAGUE: THE STORY OF LONDON'S MOST DEADLY YEAR 19, 184 (2004).

[216] *See* Eric Lipton & Jennifer Steinhauer, *The Social Distancing Origin Story: It Starts in the Middle Ages*, N.Y. TIMES, Apr. 23, 2020, at A1 (discussing decades-long federal governments effort to prepare for pandemics).

[217] *See Butler*, 486 F. Supp. 3d at 918.

[218] *Id*. at 908.

[219] County of Butler v. Wolf, No. 20-cv-02936, 2020 WL 5868393, at *2 (3d Cir. Oct. 1, 2020).

[220] *See* McDougall v. County of Ventura, 23 F.4th 1095, 1098 (9th Cir. 2022), *vacated*, 26 F.4th 1016, 1016-17 (9th Cir. 2022), *aff'd on reh'g*, 38 F.4th 1162 (9th Cir. 2022).

[221] *See supra* Section III.G.

on a new threat from foreign nations or terrorists, arguing that the magnitude and uncertainty of the threat unsettle the balance struck between these concerns in normal times, and justify a tilt toward greater restrictions on civil liberties. In the pandemic cases, one can similarly argue that the magnitude and uncertainty of the risks posed by the COVID-19 virus justify restrictions on liberty that would not be accepted during normal times.[222] In both settings, the temporary nature of emergency conditions helps justify the restrictions on liberties.

The difficulty of these judgments can scarcely be exaggerated. When the pandemic began, public health authorities relied on guidelines based on certain practices that had been used for decades, even centuries, to control infectious diseases: lockdowns, quarantines, business shutdowns, masks.[223] Experience had shown these practices were effective, but they were also highly intrusive, economically disruptive, and even deadly for vulnerable populations. At the same time, public health authorities understood from the start that all viruses behave differently, and so what had worked in the past would not necessarily work for COVID-19. Some early guidelines—to shut down outdoor areas like parks, not to wear masks, to avoid touching items touched by others—were eventually withdrawn. Other guidelines—to suspend evictions or require vaccination—were strengthened or altered. Authorities disagreed with each other, as did experts, and different approaches were tried in different places. As far as we know, no government attempted to perform a rigorous cost-benefit analysis of any mitigation measure, no doubt because of the uncertainty of the virus's behavior, and perhaps the lack of time. Economists who weighed in produced vastly different estimates.[224] Indeed, the "inputs" for their estimates were predictions about the course of the virus, which also varied greatly. One unresolvable problem was that the future course of the virus depended in part on

[222] *See* Sen Pei, Sasikiran Kandula & Jeffrey Shaman, *Differential Effects of Intervention Timing on COVID-19 Spread in the United States*, 6 SCI. ADVANCES 1, 4 (2020) (estimating that United States could have saved more than 32,000 lives had observed control measures been adopted one week earlier); Victor Chernozhukov, Hiroyuki Kasahara & Paul Schrimpf, *Causal Impact of Masks, Policies, Behavior on Early COVID-19 Pandemic in the US*, 220 J. ECONOMETRICS 23, 51-52 (2021) (finding cases and deaths would have been approximately 40% higher at the end of May without business closures, and there would have been 37% more cases per week by the start of June without stay-at-home orders); Charles Courtemanche, Joseph Garuccio, Anh Le, Joshua Pinkston & Aaron Yelowitz, *Strong Social Distancing Measures in the United States Reduced the COVID-19 Growth Rate*, 39 HEALTH AFFS. 1237, 1241-42 (2020) (finding shelter-in-place orders and four other social distancing orders, such as closures of schools, restaurants, or entertainment centers, led to statistically significant reductions in the COVID-19 case growth rate).

[223] *See supra* note 215.

[224] *Compare* Michael Greenstone & Vishan Nigam, *Does Social Distancing Matter?* 1 (Becker Friedman Inst., Working Paper No. 2020-26, 2020) (estimating that benefits of social distancing would be eight trillion dollars), *with* Casey B. Mulligan, Kevin M. Murphy & Robert H. Topel, *Some Basic Economics of COVID-19 Policy*, CHI. BOOTH REV. (Apr. 27, 2020), https://www.chicagobooth.edu/review/some-basic-economics-covid-19-policy [https://perma.cc/UC4Q-FDWP] (estimating six trillion dollars against economic cost of seven trillion dollars). These papers were written early in the pandemic; there is now a more substantial literature. *See infra* Part I.

the government and social response which in turn depended on the predictions of experts.[225]

What role can courts play in a cloud of so much uncertainty—scientific, economic, and, we might add, political, as public cooperation with government orders (which were often not enforced) was crucial? The fact that few courts tried to seriously evaluate the scientific and economic basis of any particular public health order suggests that the courts themselves believed that their role must be limited.[226] The focus on fairness evaluated as whether similarly situated groups were treated alike, preserved a role for courts without embroiling them in technical questions—or so it may have seemed. We are skeptical. Governments shut down churches rather than casinos, gun ranges rather than liquor stores, restaurants rather than hardware stores, and elective surgical procedures that might be more important than nonelective procedures, because they were juggling an array of political, economic, and scientific considerations in a vacuum of facts. While it was certainly possible that a government official may have indulged a hidden animus against religious people or gun owners or may simply have given insufficient weight to the interests of groups they were

[225] An early influential estimate was NEIL M. FERGUSON ET AL., IMPACT OF NON-PHARMACEUTICAL INTERVENTIONS (NPIS) TO REDUCE COVID-19 MORTALITY AND HEALTHCARE DEMAND (2020). The authors predicted 2.2 million deaths in the United States without preventive measures and 1.1-1.2 million deaths with "the most effective mitigation strategy." *Id*. at 7, 16. Needless to say, numerous commentators with varying degrees of expertise contributed their own numbers, ranging as low as a few thousand. One scientist with a Nobel laureate in chemistry influentially predicted 170,000 deaths and that the pandemic would end by August 2020. *See* Freddie Sayers, *Prof Michael Levitt: Here's What I Got Wrong*, UNHERD: THE POST (Aug. 28, 2020), https://unherd.com/thepost/prof-michael-levitt-heres-what-i-got-wrong/ [https://perma.cc/LD5U-X887]. The actual number is 904,000 as of February 7, 2021. *Daily New Confirmed COVID-19 Deaths per Million People*, OUR WORLD IN DATA, https://ourworldindata.org/explorers/coronavirus-data-explorer [https://perma.cc/TM9Y-8CZT] (last visited Oct. 25, 2022).

[226] *See, e.g.*, Dark Storm Indus. LLC v. Cuomo, 471 F. Supp. 3d 482, 501 n.13 (N.D.N.Y. 2020) ("[W]hile [p]laintiffs are doubtless correct that it will be some time before scientists, researchers, and courts can establish with precision the efficacy of different social distancing and other preventative measures, [d]efendants do not need to conclusively prove causation for the Executive Orders to survive intermediate scrutiny."); Hund v. Cuomo *Oral Argument*, CT. LISTENER, at 10:19, https://www.courtlistener.com/audio/73844/hund-v-cuomo/ [https://perma.cc/987X-NJRB] (last visited Oct. 25, 2022) ("Who are we [as judges] to [decide] what distinctions may sense where economics [and] well-being hold bear? . . . I understand the religion cases because of the particular language of the First Amendment . . . but to expand that [logic to New York's incidental music rule] seems to me to be getting into wild things."). There were few exceptions to this general trend of not closely engaging with the medical evidence. *See, e.g.*, Tandon v. Newsom, 517 F. Supp. 3d 922, 957 (N.D. Cal. 2021) (finding that a medical expert "ignore[d] the serious long-term effects" of COVID-19 on young, "non-vulnerable people who have recovered from COVID-19"); Klaassen v. Trs. of Ind. Univ., 591 F. Supp. 3d 836, 878 (N.D. Ind. 2021), *vacated*, 24 F.4th 638 (2022) ("A close review of Dr. McCullough's testimony reveals a true failing. Even he . . . a credentialed and board-certified physician in internal medicine and cardiovascular disease, stops short of declaring a causative link between any vaccine and myocarditis.").

unfamiliar with, no evidence was presented that they acted in anything other than good faith.[227]

In all three crises, plaintiffs claimed that their rights were violated and that they were unfairly burdened or even targeted for spurious reasons. After 9/11, the claims were brought mostly by Arab Americans, Muslim Americans, and various foreigners who were caught up in the dragnet. With the financial crisis, claims were brought by investors. People who supported judicial scrutiny of government action argued that temporary infringements of liberty inevitably become permanent[228] and governments overreact in emergencies because of irrational fears.[229]

But there were also some important differences between the 9/11 attacks and the COVID-19 pandemic. The burdens of security operations really did fall on an unpopular minority, whether or not that was justified.[230] The vast majority of Americans put up with little more than long security lines in airports. During the pandemic, the burdens fell on everyone. Moreover, government action was far less transparent after 9/11 than during the pandemic, when the public health orders were necessarily directed at the public, and the justifications for them were well known and widely debated. Because the pandemic response was led by states rather than by the national government, governments can make tradeoffs that were more sensitive to the values and interests of their populations, leading to significant differences in pandemic responses across the country. For the pandemic, unlike 9/11, government intrusions have not become permanent and almost everyone hates them. Opinion is divided on whether the government overreacted because of excessive public fear or underreacted because of insufficient public fear: in either event, the traditional argument that governments take advantage of public fear during national emergencies to violate civil liberties seems a much more awkward fit for a pandemic than for wartime. All of this suggests that courts should have been more deferential during the pandemic than after 9/11. But they weren't. Why not?

One possibility is that the public health authorities really did overreact: they took excessive actions that were out of proportion to the threat to public health, and a small number of (mainly Republican-appointed) judges possessed the

[227] A possible exception could be made for the abortion cases. The states that prohibited surgical abortions had a long history of using the law to restrict abortions in ways blocked by the courts. Thus, a plausible argument could be (and was) made that states used the pandemic as a pretext for blocking abortions. By contrast, many states that restricted religious worship did not have a long or any history of using the law to restrict religious practices.

[228] *See* Wiley & Vladeck, *supra* note 28, at 187. The ratchet argument was made by the court in *Butler*. County of Butler v. Wolf, 486 F. Supp. 3d 883, 901 n.12 (W.D. Pa. 2020) ("Professors Wiley & Vladeck recognized that this situation could lead to the situation of the permanent emergency . . . ."), *vacating as moot sub nom.* County of Butler v. Governor of Pa., 8 F.4th 226 (3d Cir. 2021), *cert. denied sub nom.*, Butler County v. Wolf, 142 S. Ct. 772 (2022).

[229] *See* Wiley & Vladeck, *supra* note 28, at 187.

[230] *See generally* Kam C. Wong, *The USA Patriot Act: A Policy of Alienation*, 12 MICH. J. RACE & L. 161 (2006) (describing mistreatment of Muslim Americans by federal government after 9/11).

wisdom and backbone to push back. This argument, coming from the right, mirrors the liberal defense of judges who protect criminal defendants or terrorism suspects from authorities who were too willing to sacrifice the liberties of citizens to combat crime. Bolstering this view, there is even now a great deal of controversy over social distancing policies like masking, the value of mandatory stay-at-home requirements, and the negative health, educational, and economic effects of lockdowns.[231] A nonfrivolous argument can be made that some of these requirements—shutting down public parks, for example—really were unnecessary, and that the skeptical judges distinguished themselves by demanding stronger justifications than public health officials were often able to provide. Normatively speaking, the magnitude of the public health crisis did not justify restrictions on property, gun, or religious rights. We are unconvinced. Government officials will make errors when confronted by the complexities of a public health emergency, but nothing we read in the opinions of the judges who ruled against them persuades us that the judges showed superior insight.

Another possibility is that state and local governments lacked the authority of the national government, and for that reason, federal courts were less inclined to defer to their judgments. But as the pandemic wore on, some federal courts struck down federal orders—including vaccine mandates and mask mandates. A third possibility is that the broader impact of restrictions on the population led to polarization, whipped up by politicians, which infected the courts. Guns, abortion, and religion are among the most polarizing issues of our time; executive overreach has become a *cri de coeur* on the right. The special solicitude of Trump-appointed judges to the claims of religious organizations also raises questions about the impact of a fragmenting political consensus on judicial practice.[232] It is hard to avoid the conclusion that some judges allowed their passions to overcome the wisdom of deference, as embodied in *Jacobson*.[233]

However, we do not believe that the government should always win, and *Jacobson* itself is not the clearest guide. As Daniel Farber notes, the courts have interpreted the case in many different ways, perhaps confused by its archaic language.[234] Drawing on the lessons of *Wong Wai* and *Jew Ho*, we argue that courts should strike down public health orders only where a public health emergency is clearly a pretext for violating constitutional rights or targeting an unpopular group. Given the line-drawing problems, merely unequal treatment should not be sufficient to establish a pretext, but a history of targeting an unpopular group may be.

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[231] For some popular commentary, see James Glanz & Campbell Robertson, *Waiting to Lock Down Cost 36,000 Lives, Estimate Says*, N.Y. TIMES, May 21, 2020, at A1.

[232] *See* Jonathan L. Entin, *Over the Top: Judges, Lawyers, and COVID-19 Rhetoric*, 31 HEALTH MATRIX 51, 52-53 (2021) (giving examples of "judicial hyperbole" in either approving or opposing lawfulness of public health orders).

[233] *See, e.g.*, On Fire Christian Ctr., Inc. v. Fischer. 453 F. Supp. 3d 901, 905 (W.D. Ky. 2020) (referring to municipal order prohibiting drive-in religious services, court said "[o]n Holy Thursday, an American mayor criminalized the communal celebration of Easter").

[234] Farber, *supra* note 29, at 834.

CONCLUSION

After 9/11, liberals argued that government counterterrorism measures were unconstitutional because they were excessive in relation to the magnitude of the threat. The government was hampered in its attempts to justify those measures because it could not quantify that threat, partly because of uncertainty and partly because of unwillingness to expose the sources and methods of intelligence. Nonetheless, courts largely deferred to these new measures. After the pandemic, the baton was passed to conservatives, who argued that the public health orders were excessive relative to the harms and risks of the pandemic. Courts again largely deferred to the government but departed from the tradition of deference in the ideologically charged areas of abortion, guns, religion, and federal executive overreach.

We close with some words of skepticism about the call for greater judicial involvement during emergencies. While the courts need to play a role in disciplining governments during emergencies, the opinions of the courts that ruled against the states during the COVID-19 pandemic leave much to be desired. Few of the judges who struck down public health orders engaged with the scientific basis for health authorities' actions by, for example, criticizing assumptions about the rate of contagion, the risk of death, or the effectiveness of social-distancing measures, no doubt because the judges themselves realized that they were not equipped to evaluate these assumptions. That was all for the best. But without such engagement, the case for striking down the orders was flimsy, regardless of whether the argument was couched in the idiom of equal protection or substantive reasonableness.

This judicial carping was unfortunate for numerous reasons. The overwhelming problem with the pandemic response was that governments acted too slowly rather than too quickly. While the courts can only step on the brakes; they cannot press down the gas pedal.[235] The net result is that the courts added drag to an already too-slow government response. Because of the exponential rate of growth of contagion, the optimal pandemic response occurs before widespread illness and death become visible; a delay of needed measures by a few days or weeks can cause thousands of deaths.[236] It should have been obvious that, in the face of massive controversy and public resistance, governments needed the flexibility to formulate pandemic responses that secured public compliance.

Partisan differences among judges who struck down public health orders suggest that the courts failed to contribute to public health policy during a crisis in the main respect in which they could—by standing aside, or by acting as honest brokers if they did not. Judges who should have known better will have to take responsibility for their role in America's botched pandemic response.

[235] Only in narrow areas in which the government exercises control of a population (for example, prisoners) may courts be more proactive.

[236] *See supra* note 222.

APPENDIX A.
COVID-19 CASES

* Government lost at least one claim, but also won at least one claim
PDP: Procedural Due Process
SDP: Substantive Due Process
EP: Equal Protection
4A: Fourth Amendment
5A: Fifth Amendment
9A: Ninth Amendment
14A: Fourteenth Amendment
ADA: Americans with Disabilities Act

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
ACA Int'l v. Healey (457 F. Supp. 3d 17)	D. Mass.	5/6/20	Business	Speech	No
Adams & Boyle, P.C. v. Slatery (956 F.3d 913)	6th Cir.	4/24/20	Personal	Abortion	No
Adams & Boyle, P.C. v. Slatery (455 F. Supp. 3d 619)	M.D. Tenn.	4/17/20	Personal	Abortion	No
AJE Enter. LLC v. Justice (2021 WL 4241018)	N.D. W. Va.	1/6/21	Business	PDP, SDP, EP, Takings	Yes
Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs. (141 S. Ct. 2320)	U.S.	6/29/21	Business	CDC Eviction	No
Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs. (2021 WL 2221646)	D.C. Cir.	6/2/21	Business	CDC Eviction	Yes
Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs. (539 F. Supp. 3d 29)	D.D.C.	5/5/21	Business	CDC Eviction	No
Alsop v. DeSantis (2020 WL 4927592)	M.D. Fla.	8/21/20	Personal	PDP, EP	Yes
Altman v. County of Santa Clara (464 F. Supp. 3d 1106)	N.D. Cal.	6/2/20	Mixed	Guns	Yes
Amato v. Elicker (460 F. Supp. 3d 202)	D. Conn.	5/19/20	Business	Speech, Work, Takings, EP	Yes
Am. Cruise Ferries, Inc. v. Vázquez Garced (2020 WL 7786939)	D.P.R.	12/17/20	Business	Commerce, EP, PDP	Yes

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
Am.'s Frontline Drs. v. Wilcox (2021 WL 4546923)	C.D. Cal.	7/30/21	Personal	State Vaccine	Yes
Am. Coll. of Obstetricians & Gynecologists v. Food & Drug Admin. (472 F. Supp. 3d 183)	D. Md.	7/13/20	Personal	Abortion	No*
Andre-Rodney v. Hochul (569 F. Supp. 3d 128)	N.D.N.Y.	11/1/21	Personal	State Vaccine, PDP, EP	Yes
Antietam Battlefield KOA v. Hogan (461 F. Supp. 3d 214)	D. Md.	5/20/20	Mixed	Speech, Commerce, Takings	Yes
Apartment Ass'n of L.A. Cnty. v. City of Los Angeles (10 F.4th 905)	9th Cir.	8/25/21	Business	Contract	Yes
Apartment Ass'n of L.A. Cnty. v. City of Los Angeles (500 F. Supp. 3d 1088)	C.D. Cal.	11/13/20	Business	Contract, SDP	Yes
ARJN #3 v. Cooper (517 F. Supp. 3d 732)	M.D. Tenn.	2/5/21	Business	Work, EP	Yes
Ass'n of Jewish Camp Operators v. Cuomo (470 F. Supp. 3d 197)	N.D.N.Y.	7/6/20	Personal	SDP	Yes
Auracle Homes, LLC v. Lamont (478 F. Supp. 3d 199)	D. Conn.	8/7/20	Business	Takings, PDP, SDP, Contract	Yes
Aviles v. de Blasio (2021 WL 796033)	S.D.N.Y.	3/2/21	Personal	4A, PDP, SDP, EP	Yes
Bacon v. Woodward (2021 WL 5183059)	E.D. Wash.	11/8/21	Personal	State Vaccine, Contract, PDP	Yes
Bannister v. Ige (2020 WL 4209225)	D. Haw.	7/22/20	Personal	Travel, EP	Yes
Baptiste v. Kennealy (490 F. Supp. 3d 353)	D. Mass.	9/25/20	Business	State Eviction	No*
Bauer v. Summey (568 F. Supp. 3d 573)	D.S.C.	10/21/21	Personal	Speech, State Vaccine, PDP, EP	Yes
Bayley's Campground, Inc. v. Mills (985 F.3d 153)	1st Cir.	1/19/21	Mixed	Travel	Yes
Bayley's Campground, Inc. v. Mills (463 F. Supp. 3d 22)	D. Me.	5/29/20	Mixed	Travel, PDP	Yes

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
Beahn v. Gayles (550 F. Supp. 3d 259)	D. Md.	7/26/21	Personal	Speech, EP	Yes
Benner v. Wolf (461 F. Supp. 3d 154)	M.D. Pa.	5/21/20	Mixed	Speech, PDP	Yes
Best Supplement Guide, LLC v. Newsom (2020 WL 2615022)	E.D. Cal.	5/22/20	Business	Speech, Travel, Work, PDP, EP	Yes
Big Tyme Invs., L.L.C. v. Edwards (985 F.3d 456)	5th Cir.	1/13/21	Business	EP	Yes
Bill & Ted's Riviera, Inc. v. Cuomo (494 F. Supp. 3d 238)	N.D.N.Y.	10/13/20	Business	EP	No*
Bimber's Delwood, Inc. v. James (496 F. Supp. 3d 760)	W.D.N.Y.	10/21/20	Business	Speech, Takings, EP, PDP	Yes
Blackburn v. Dare County (486 F. Supp. 3d 988)	E.D.N.C.	9/15/20	Personal	Takings	Yes
Bols v. Newsom (515 F. Supp. 3d 1120)	S.D. Cal.	1/26/21	Business	Contract, Takings, Work, PDP, EP	No
Borishkevich v. Springfield Pub. Schs. Bd. of Educ. (541 F. Supp. 3d 969)	W.D. Mo.	5/27/21	Personal	SDP, PDP, EP	Yes
Brach v. Newsom (6 F.4th 904)	9th Cir.	7/23/21	Personal	SDP, EP	No*
Brach v. Newsom (2020 WL 7222103)	C.D. Cal.	12/1/20	Personal	SDP, EP	Yes
Brandy v. Villanueva (2020 WL 3628709)	C.D. Cal.	4/6/20	Personal	Guns	Yes
Brass v. Biden (2022 WL 136903)	D. Colo.	1/14/22	Personal	Federal Vaccine, 4A	Yes
Brnovich v. Biden (562 F. Supp. 3d 123)	D. Ariz.	1/27/22	Personal	Federal Vaccine	Yes
Broecker v. N.Y.C. Dep't of Educ. (573 F. Supp. 3d 878)	E.D.N.Y.	11/24/21	Personal	State Vaccine	Yes
Brown v. Azar (497 F. Supp. 3d 1270)	N.D. Ga.	10/29/20	Business	CDC Eviction	Yes
BST Holdings, L.L.C. v. Occupational Safety & Health Admin. (17 F.4th 604)	5th Cir.	11/12/21	Business	Federal Vaccine	No

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
B.P. v. N. Allegheny Sch. Dist. (579 F. Supp. 3d 713)	W.D. Pa.	1/12/22	Personal	Speech, PDP, SDP	Yes
Butler v. City of New York (559 F. Supp. 3d 253)	S.D.N.Y.	9/8/21	Personal	Speech	Yes
Cal. Grocers Ass'n v. City of Long Beach (2021 WL 1034839)	C.D. Cal.	1/22/21	Business	EP, Contract	Yes
Calm Ventures LLC v. Newsom (2021 WL 1502657)	C.D. Cal.	3/25/21	Business	Speech, PDP, SDP, EP	Yes
Carmichael v. Ige (470 F. Supp. 3d 1133)	D. Haw.	7/2/20	Personal	Travel, Work, PDP, EP	Yes
Case v. Ivey (542 F. Supp. 3d 1245)	M.D. Ala.	6/1/21	Mixed	Contract, Takings, Work, SDP	Yes
Castillo v. Whitmer (823 F. App'x 413)	6th Cir.	9/2/20	Business	EP	Yes
Castillo v. Whitmer (2020 WL 5029586)	W.D. Mich.	8/21/20	Business	EP	Yes
Chambless Enters., LLC v. Redfield (508 F. Supp. 3d 101)	W.D. La.	12/22/20	Business	CDC Eviction	Yes
Child.'s Health Def., Inc. v. Rutgers State Univ. of N.J. (2021 WL 4398743)	D.N.J.	9/27/21	Personal	State Vaccine	Yes
Chrysafis v. Marks (141 S. Ct. 2482)	U.S.	8/12/21	Business	PDP	No
Chrysafis v. Marks (544 F. Supp. 3d 241)	E.D.N.Y.	6/11/21	Business	Speech, PDP	Yes
CH Royal Oak, LLC v. Whitmer (472 F. Supp. 3d 410)	W.D. Mich.	7/16/20	Political	Speech	Yes
Clementine Co. v. de Blasio (2021 WL 5756398)	S.D.N.Y	12/3/21	Business	Speech, EP	Yes
Cloister E., Inc. v. N.Y. State Liquor Auth. (483 F. Supp. 3d 221)	S.D.N.Y.	9/2/20	Business	PDP, EP	Yes
Coffee Hut v. County of Ventura (2021 WL 461591)	C.D. Cal.	2/9/21	Business	Takings	Yes
Columbia Cnty. Corr. Officer's Benevolent Ass'n v. Murell (2020 WL 5074194)	N.D.N.Y.	8/27/20	Business	Contract	Yes

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
Conn. Citizens Def. League, Inc. v. Lamont (465 F. Supp. 3d 56)	D. Conn.	6/8/20	Personal	Guns	No
Columbus Ale House, Inc. v. Cuomo (495 F. Supp. 3d 88)	E.D.N.Y.	10/16/20	Business	Speech, Travel	Yes
Commey v. Adams (2022 WL 62155)	S.D.N.Y.	1/6/22	Personal	Speech, State Vaccine, PDP	Yes
County of Butler v. Wolf (2020 WL 5868393)	3rd Cir.	10/1/20	Mixed	Speech, Travel, EP	Yes
County of Butler v. Wolf (486 F. Supp. 3d 883)	W.D. Pa.	9/14/20	Mixed	Speech, Travel, EP	No
Culinary Studios, Inc. v. Newsom (517 F. Supp. 3d 1042)	E.D. Cal.	2/8/21	Business	Takings, Work, PDP, EP	Yes
Dark Storm Indus. LLC v. Cuomo (471 F. Supp. 3d 482)	N.D.N.Y.	7/8/20	Mixed	Guns	Yes
Daugherty Speedway, Inc. v. Freeland (520 F. Supp. 3d 1070)	N.D. Ind.	2/17/21	Business	Takings	Yes
Day v. Johnston (510 F. Supp. 3d 1296)	S.D. Fla.	12/29/20	Personal	Speech, Travel	Yes
Denis v. Ige (538 F. Supp. 3d 1063)	D. Haw.	5/12/21	Political	Speech, 9A, SDP	Yes
Denver Homeless Out Loud v. Denver, Colorado (514 F. Supp. 3d 1278)	D. Col.	1/25/21	Personal	4A, PDP, SDP	No*
DiMartile v. Cuomo (478 F. Supp. 3d 372)	N.D.N.Y.	8/7/20	Personal	EP	No
Disbar Corp. v. Newsom (508 F. Supp. 3d 747)	E.D. Cal.	12/22/20	Business	Travel, EP	Yes
Dixon v. de Blasio (566 F. Supp. 3d 171)	E.D.N.Y.	10/12/21	Personal	Speech, State Vaccine, Work, EP	Yes
Dodero v. Walton County (2020 WL 5879130)	N.D. Fla.	4/17/20	Personal	4A	Yes
Doe #1-#14 v. Austin (572 F. Supp. 3d 1224)	N.D. Fla.	11/12/21	Personal	Federal Vaccine	Yes
Doe v. Franklin Square Union Free Sch. Dist. (568 F. Supp. 3d 270)	E.D.N.Y.	10/26/21	Personal	SDP	Yes
Donovan v. Vance (576 F. Supp. 3d 816)	E.D. Wash.	12/17/21	Personal	Federal Vaccine	Yes

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
Elmsford Apartment Assocs., LLC v. Cuomo (469 F. Supp. 3d 148)	S.D.N.Y.	6/29/20	Business	State Eviction	Yes
El Papel LLC v. Inslee (2021 WL 71678)	W.D. Wash.	1/8/21	Business	Contract	Yes
ETP Rio Rancho Park, LLC v. Grisham (522 F. Supp. 3d 966)	D.N.M.	2/26/21	Business	Work, PDP, EP	Yes
Excel Fitness Fair Oaks, LLC v. Newsom (2021 WL 795670)	E.D. Cal.	3/2/21	Business	Takings, Work, PDP	Yes
Faust v. Vilsack (519 F. Supp. 3d 470)	E.D. Wis.	6/10/21	Business	EP	No
FDA v. Am. Coll. of Obstetricians & Gynecologists (141 S. Ct. 578)	U.S.	1/12/21	Personal	Abortion	Yes
Feds for Med. Freedom v. Biden (581 F. Supp. 3d 826)	S.D. Tex.	1/21/22	Personal	Federal Vaccine	No
Frantz v. Beshear (2021 WL 254299)	E.D. Ky.	1/25/21	Business	Work, PDP	Yes
Forbes v. County of San Diego (2021 WL 843175)	S.D. Cal.	3/4/21	Personal	Travel, SDP	Yes
Garland v. N.Y.C. Fire Dep't (574 F. Supp. 3d 120)	E.D.N.Y.	12/6/21	Personal	State Vaccine, PDP	Yes
Geller v. Cuomo (476 F. Supp. 3d 1)	S.D.N.Y.	8/3/20	Political	Speech, EP	Yes
Geller v. de Blasio (2020 WL 2520711)	S.D.N.Y.	5/18/20	Political	Speech	Yes
Givens v. Newsom (459 F. Supp. 3d 1302)	E.D. Cal.	5/8/20	Political	Speech, SDP	Yes
Gold v. Sandoval (2021 WL 5762190)	D. Nev.	12/3/21	Personal	State Vaccine, 4A, EP	Yes
Gunter v. N. Wasco Cnty. Sch. Dist. Bd. of Educ. (577 F. Supp. 3d 1141)	D. Or.	12/22/21	Personal	PDP, SDP	Yes
Guettlein v. U.S. Merch. Marine Acad. (577 F. Supp. 3d 96)	E.D.N.Y.	12/20/21	Personal	Federal Vaccine, Work, EP	Yes
Halgren v. City of Naperville (577 F. Supp. 3d 700)	N.D. Ill.	12/19/21	Personal	State Vaccine, PDP, EP	Yes
Haney v. Pritzker (563 F. Supp. 3d 840)	N.D. Ill.	9/27/21	Personal	EP	No

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
HAPCO v. City of Philadelphia (482 F. Supp. 3d 337)	E.D. Pa.	8/28/20	Business	State Eviction	Yes
Bella 'N Harmony, Inc. v. Newsom (2021 WL 3686758)	C.D. Cal.	7/13/21	Business	Speech, Work, EP, PDP	Yes
Harrington v. City of Omaha (2021 WL 2321757)	D. Neb.	6/7/21	Business	Speech, 4A, PDP, SDP, EP	Yes
Harris v. Univ. of Mass. (557 F. Supp. 3d 304)	D. Mass.	8/27/21	Personal	State Vaccine, PDP	Yes
Hartman v. Acton (499 F. Supp. 3d 523)	S.D. Ohio	11/3/20	Business	Vagueness, PDP, EP	Yes
Hayes v. Oregon (849 F. App'x 209)	9th Cir.	6/1/21	Personal	5A, 14A	Yes
Hayes v. Oregon (2021 WL 374967)	D. Or.	2/3/21	Personal	5A, 14A	Yes
Heidel v. Hochul (2021 WL 4942823)	S.D.N.Y.	10/21/21	Business	Takings, Work, EP	Yes
Heights Apartments, LLC v. Walz (510 F. Supp. 3d 789)	D. Minn.	12/31/20	Business	Contract, Petitition, Takings	Yes
Helbachs Café, LLC v. City of Madison (571 F. Supp. 3d 999)	W.D. Wis.	11/16/21	Business	Speech, Takings, EP	Yes
Henry v. DeSantis (461 F. Supp. 3d 1244)	S.D. Fla.	5/14/20	Personal	Speech, Work, EP	Yes
Hernandez v. Grisham (494 F. Supp. 3d 1044)	D.N.M.	10/14/20	Personal	PDP, SDP, EP	Yes
Herrin v. Reeves (2020 WL 5748090)	N.D. Miss.	9/25/20	Personal	Speech, Takings, PDP, SDP, EP	Yes
Hopkins Hawley LLC v. Cuomo (2021 WL 465437)	S.D.N.Y.	2/9/21	Business	Commerce, Speech, Work, PDP	Yes
Hotze v. Abbott (473 F. Supp. 3d 736)	S.D. Tex.	7/19/20	Political	Speech, EP	No
Hund v. Cuomo (501 F. Supp. 3d 185)	W.D.N.Y.	11/13/20	Personal	Speech, Takings, Work, EP	No*
H's Bar, LLC v. Berg (2020 WL 6827964)	S.D. Ill.	11/21/20	Business	Speech	Yes
Ill. Republican Party v. Pritzker (973 F.3d 760)	7th Cir.	9/3/20	Political	Speech	Yes
Ill. Republican Party v. Pritzker (470 F. Supp. 3d 813)	N.D. Ill.	7/2/20	Political	Speech	Yes

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
Images Luxury Nail Lounge, Inc. v. Newsom (2021 WL 3686759)	C.D. Cal.	7/13/21	Business	Speech, Work, PDP, EP	Yes
In re Abbott (956 F.3d 696)	5th Cir.	4/20/20	Personal	Abortion	Yes
In re MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing (20 F.4th 264)	6th Cir.	12/15/21	Business	Commerce, Federal Vaccine	Yes
In re Rutledge (956 F.3d 1018)	8th Cir.	4/22/20	Personal	Abortion	Yes
Johnson v. Brown (567 F. Supp. 3d 1230)	D. Or.	10/18/21	Personal	State Vaccine	Yes
Johnson v. Murphy (527 F. Supp. 3d 703)	D.N.J.	3/22/21	Business	Contract, EP	Yes
Jones v. Cuomo (542 F. Supp. 3d 207)	S.D.N.Y.	6/2/21	Personal	Travel, EP	Yes
Kelley O'Neil's Inc. v. Ige (2021 WL 767851)	D. Haw.	2/26/21	Business	Work, PDP, EP	Yes
Kheriaty v. Regents of the Univ. of Cal. (2021 WL 4714664)	C.D. Cal.	9/29/21	Personal	State Vaccine, EP	Yes
Klaassen v. Trs. of Ind. Univ. (7 F.4th 592)	7th Cir.	8/2/21	Personal	State Vaccine	Yes
Klaassen v. Trs. of Ind. Univ. (549 F. Supp. 3d 836)	N.D. Ind.	7/18/21	Personal	State Vaccine	Yes
Lawrence v. Polis (505 F. Supp. 3d 1136)	D. Colo.	12/4/20	Personal	Travel, EP	Yes
League of Indep. Fitness Facilities & Trainers v. Whitmer (814 F. App'x 125)	6th Cir.	6/24/20	Business	EP	Yes
League of Indep. Fitness Facilities & Trainers v. Whitmer (468 F. Supp. 3d 940)	W.D. Mich.	6/19/20	Business	Commerce, PDP, EP	No
Lebanon Valley Auto Racing Corp. v. Cuomo (478 F. Supp. 3d 389)	N.D.N.Y.	8/11/20	Business	Speech, Takings, EP	Yes
Let Them Play MN v. Walz (517 F. Supp. 3d 870)	D. Minn.	2/8/21	Personal	PDP, EP	Yes
Lewis v. Walz (491 F. Supp. 3d. 464)	D. Minn.	9/30/20	Political	Travel, EP	Yes

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
Lipsman v. Cortés-Vázquez (2021 WL 5827129)	S.D.N.Y.	12/7/21	Personal	PDP, SDP, EP	Yes
Little Rock Fam. Plan. Servs. v. Rutledge (454 F. Supp. 3d 821)	E.D. Ark.	4/14/20	Personal	Abortion	No
Local Spot, Inc. v. Cooper (2020 WL 7554247)	M.D. Tenn.	12/21/20	Business	PDP, SDP, EP	Yes
Luke's Catering Serv., LLC v. Cuomo (485 F. Supp. 3d 369)	W.D.N.Y.	9/10/20	Business	EP, Takings	Yes
L.T. v. Zucker (2021 WL 4775215)	N.D.N.Y.	10/13/21	Personal	Speech	Yes
C.W. *ex rel*. L.W. v. Canon-McMillan Sch. Dist. (2021 WL 3883971)	W.D. Pa.	8/30/21	Personal	PDP, SDP	Yes
Madsen v. City of Lincoln (574 F. Supp. 3d 683)	D. Neb.	12/8/21	Business	Speech, 4A, PDP, SDP, Takings	Yes
Maniscalco v. N.Y.C. Dep't of Educ. (563 F. Supp. 3d 33)	E.D.N.Y.	9/23/21	Personal	State Vaccine, Work, EP	Yes
Maniscalco v. N.Y.C. Dep't of Educ. (2021 WL 4814767)	2nd Cir.	10/15/21	Personal	State Vaccine, Work, EP	Yes
Martin v. Warren (482 F. Supp. 3d 51)	W.D.N.Y.	8/26/20	Political	Speech, PDP	Yes
Mass. Corr. Officers Federated Union v. Baker (567 F. Supp. 3d 315)	D. Mass.	10/15/21	Personal	Commerce, Contract, State Vaccine	Yes
Maxwell v. Lee (2020 WL 4220123)	W.D. Tenn.	7/23/20	Personal	PDP	Yes
McCafferty v. Wolf (2021 WL 1340002)	W.D. Pa.	4/9/21	Business	PDP, EP	Yes
McCarthy v. Baker (2020 WL 2297278)	D. Mass	5/7/20	Personal	Guns	No
McCarthy v. Cuomo (2020 WL 3286530)	E.D.N.Y.	6/18/20	Business	Speech, Takings, 4A, EP	Yes
McDougall v. County of Ventura (23 F.4th 1095)	9th Cir.	1/20/22	Personal	Guns	No
McDougall v. County of Ventura (495 F. Supp. 3d 881)	C.D. Cal.	10/21/20	Personal	Guns	Yes

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
McGhee v. City of Flagstaff (2020 WL 2308479)	D. Ariz.	5/8/20	Personal	Travel, PDP	Yes
Melendez v. City of New York (503 F. Supp. 3d 13)	S.D.N.Y.	11/25/20	Business	Contract, Speech, Vagueness	Yes
Messina v. Coll. of N.J. (566 F. Supp. 3d 236)	D.N.J.	10/14/21	Personal	State Vaccine	Yes
Metroflex Oceanside LLC v. Newsom (532 F. Supp. 3d 976)	S.D. Cal.	4/5/21	Business	Takings, Work, PDP	Yes
Mich. Nursery & Landscape Ass'n v. Whitmer (2020 WL 3430062)	W.D. Mich.	4/22/20	Business	Commerce, Work, PDP	Yes
Mich. Rest. & Lodging Ass'n v. Gordon (504 F. Supp. 3d 717)	W.D. Mich.	12/2/20	Business	Commerce, PDP, EP	Yes
Minn. Voters All. v. Walz (492 F. Supp. 3d 822)	D. Minn.	10/2/20	Political	Speech	Yes
Mission Fitness Ctr., LLC v. Newsom (2021 WL 1856552)	C.D. Cal.	5/10/21	Business	Vagueness, Work, PDP	Yes
Mitchell v. Newsom (509 F. Supp. 3d 1195)	C.D. Cal.	12/23/20	Business	Speech	Yes
Miura Corp. v. Davis (2020 WL 5224348)	C.D. Cal.	6/25/20	Mixed	Speech, 4A	Yes
Morris v. Keuhl (2021 WL 678684)	C.D. Cal.	1/19/21	Personal	Commerce, Speech, PDP, SDP	Yes
Moxie Owl, Inc. v. Cuomo (527 F. Supp. 3d 196)	N.D.N.Y.	3/18/21	Business	EP	Yes
Muldoon v. Newsom (2020 WL 5092911)	C.D. Cal.	5/8/20	Business	Commerce, 4A, PDP, SDP	Yes
Murphy v. Lamont (2020 WL 4435167)	D. Conn.	8/3/20	Personal	Speech, PDP, SDP	Yes
M. Rae, Inc. v. Wolf (509 F. Supp. 3d 235)	M.D. Pa.	12/23/20	Business	EP	Yes
Nat'l Ass'n of Theatre Owners v. Murphy (2020 WL 5627145)	D.N.J.	8/18/20	Business	Speech, EP, PDP, Takings	Yes
Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (142 S. Ct. 661)	U.S.	1/13/22	Business	Federal Vaccine	No

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
New Orleans Catering, Inc. v. Cantrell (523 F. Supp. 3d 902)	E.D. La.	3/2/21	Business	Work, SDP, EP	Yes
Nigen v. New York (2020 WL 1950775)	E.D.N.Y.	3/29/20	Personal	Speech, Travel	Yes
Northland Baptist Church of St. Paul, Minn. v. Walz (530 F. Supp. 3d 790)	D. Minn.	3/30/21	Business	Speech, Takings, EP	Yes
Norris v. Stanley (567 F. Supp. 3d 818)	W.D. Mich.	10/8/21	Personal	State Vaccine, Work	Yes
Nw. Grocery Ass'n v. City of Burien (2021 WL 1554646)	W.D. Wash.	4/20/21	Business	Contract, EP	Yes
Nw. Grocery Ass'n v. City of Seattle (526 F. Supp. 3d 884)	W.D. Wash.	3/18/21	Business	Contract, EP	Yes
Norwegian Cruise Line Holdings, Ltd. v. Rivkees (553 F. Supp. 3d 1143)	S.D. Fla.	8/8/21	Business	Commerce, Speech, DP	No
Nowlin v. Pritzker (2021 WL 669333)	C.D. Ill.	2/17/21	Mixed	Speech, Takings, Travel, EP	Yes
Oakes v. Collier County (515 F. Supp. 3d 1202)	M.D. Fla.	1/27/21	Business	Speech, EP	Yes
Oberheim v. Bason (565 F. Supp. 3d 607)	M.D. Pa.	9/30/21	Personal	Speech, PDP, SDP	Yes
Oklahoma v. Biden (577 F. Supp. 3d 1245)	W.D. Okla.	12/28/21	Personal	Federal Vaccine	Yes
Omnistone Corp. v. Cuomo (485 F. Supp. 3d 365)	E.D.N.Y.	5/15/20	Business	Commerce, Contract, PDP	Yes
Open Our Or. v. Brown (2020 WL 2542861)	D. Or.	5/19/20	Business	Work, EP, DP	Yes
Or. Moms Union v. Brown (540 F. Supp. 3d 1008)	D. Or.	5/20/21	Business	SDP, EP	Yes
Or. Rest. & Lodging Ass'n v. Brown (2020 WL 6905319)	D. Or.	11/24/20	Business	Commerce, Takings, SDP, EP	Yes
Our Wicked Lady LLC v. Cuomo (2021 WL 915033)	S.D.N.Y.	3/9/21	Business	Taking, Work, PDP, EP	Yes
Page v. Cuomo (478 F. Supp. 3d 355)	N.D.N.Y.	8/11/20	Personal	Travel, PDP	Yes
Paradise Concepts, Inc. v. Wolf (482 F. Supp. 3d 365)	E.D. Pa.	8/31/20	Business	Work, SDP, EP	No*

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
PCG-SP Venture I LLC v. Newsom (2020 WL 4344631)	C.D. Cal.	6/23/20	Business	Work, PDP, Vagueness, Takings, Commerce, EP	Yes
Peinhopf v. Leon Guerrero (2021 WL 2417150)	D. Guam	6/14/21	Business	Takings, PDP, SDP, EP	Yes
Peterson v. Kunkel (492 F. Supp. 3d 1183)	D.N.M.	10/2/20	Personal	Contract, Speech, PDP, EP	Yes
Phila. Viet. Veterans Mem'l Soc'y v. Kenney (509 F. Supp. 3d 318)	E.D. Pa.	12/23/20	Political	Speech	Yes
Planned Parenthood Ctr. for Choice v. Abbott (450 F. Supp. 3d 753)	W.D. Tex.	3/30/20	Personal	Abortion, DP	No
Plaza Motors of Brooklyn, Inc. v. Cuomo (2021 WL 222121)	E.D.N.Y.	1/22/21	Business	Commerce, Contract, 9A, EP	Yes
Preterm-Cleveland v. Att'y Gen. of Ohio (456 F. Supp. 3d 917)	S.D. Ohio	4/23/20	Personal	Abortion, SDP	No
Pro. Beauty Fed'n of Cal. v. Newsom (2020 WL 3056126)	C.D. Cal.	6/8/20	Business	Takings, Work, EP, PDP, SDP	Yes
Prop. Mgmt. Connection, LLC v. Uejio (2021 WL 1946646)	M.D. Tenn.	5/14/21	Business	Speech	Yes
Ramsek v. Beshear (468 F. Supp. 3d 904)	E.D. Ky.	6/24/20	Political	Speech	No
Reinoehl v. Whitmer (2021 WL 1165695)	W.D. Mich.	3/26/21	Personal	ADA, Speech, 4A, PDP, SDP, EP	Yes
Reed v. City of Emeryville (2021 WL 1817103)	N.D. Cal.	5/6/21	Personal	PDP, SDP	Yes
Ricky Dean's, Inc. v. Marcellino (2020 WL 6798813)	D. Kan.	11/19/20	Business	Work, PDP	Yes
Roberts v. Neace (457 F. Supp. 3d 595)	E.D. Ky.	5/4/20	Personal	Speech, Travel, PDP, SDP	No*
Robinson v. Att'y Gen. (957 F.3d 1171)	11th Cir.	4/23/20	Personal	Abortion	No
Robinson v. Marshall (454 F. Supp. 3d 1188)	M.D. Ala.	4/12/20	Personal	Abortion	No

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
Rodriguez-Vélez v. Pierluisi-Urrutia (2021 WL 5072017)	D.P.R.	11/1/21	Personal	State Vaccine, PDP	Yes
Rydie v. Biden (572 F. Supp. 3d 153)	D. Md.	11/19/21	Personal	Federal Vaccine, PDP	Yes
Sausalito/Marin Cnty. Chapter of Cal. Homeless Union v. City of Sausalito (522 F. Supp. 3d 648)	N.D. Cal.	3/1/21	Personal	SDP	No
Savage v. Mills (478 F. Supp. 3d 16)	D. Me.	8/7/20	Business	Commerce, Takings, Travel, Work, PDP, SDP	Yes
Shelton v. City of Springfield (497 F. Supp. 3d 408)	W.D. Mo.	10/28/20	Personal	Speech, 4A, PDP	Yes
SH3 Health Consulting, LCC v. Page (459 F. Supp. 3d 1212)	E.D. Mo.	5/8/20	Business	Speech, Work, PDP	Yes
Skyworks, Ltd. v. CDC (524 F. Supp. 3d 745)	N.D. Ohio	3/10/21	Business	CDC Eviction	No
Slidewaters LLC v. Wash. State Dep't of Lab. & Indus. (4 F.4th 747)	9th Cir.	7/8/21	Business	Work	Yes
Slidewaters LLC v. Wash. Dep't of Lab. & Indus. (2020 WL 3979661)	E.D. Wash.	7/14/20	Business	Work	Yes
Six v. Newsom (462 F. Supp. 3d 1060)	C.D. Cal.	5/22/20	Personal	Travel, PDP, SDP, EP	Yes
Snider v. Cain (2020 WL 6262192)	N.D. Tex.	10/23/20	Personal	Travel	Yes
S. Wind Women's Ctr. LLC v. Stitt (455 F. Supp. 3d 1219)	W.D. Okla.	4/20/20	Personal	Abortion, SDP, EP	No
S. Cal. Healthcare Sys., Inc. v. City of Culver City (2021 WL 3160524)	C.D. Cal.	7/23/21	Business	Contract, EP	Yes
S. Cal. Rental Hous. Ass'n v. County of San Diego (550 F. Supp. 3d 853)	S.D. Cal.	7/26/21	Business	Contract, Takings	Yes
Stafford v. Baker (520 F. Supp. 3d 803)	E.D.N.C.	2/18/21	Personal	Guns	No

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
Steel MMA, LLC v. Newsom (2021 WL 778654)	S.D. Cal.	3/1/21	Business	Speech, Work, PDP, EP	Yes
Stepien v. Murphy (574 F. Supp. 3d 229)	D.N.J.	12/7/21	Personal	Speech, EP	Yes
Stewart v. Justice (518 F. Supp. 3d 911)	S.D. W. Va.	2/9/21	Business	Speech, Work, PDP, EP	Yes
Student "A" v. Hogan (513 F. Supp. 3d 638)	D. Md.	1/13/21	Personal	Takings	Yes
Talleywhacker, Inc. v. Cooper (465 F. Supp. 3d 523)	E.D.N.C.	6/8/20	Business	Speech, Work, EP, PDP, Takings	Yes
Tandon v. Newsom (517 F. Supp. 3d 922)	N.D. Cal.	2/5/21	Business	Speech, Work, EP	Yes
Terkel v. CDC (521 F. Supp. 3d 662)	E.D. Tex.	2/25/21	Business	CDC Eviction, Commerce	No
Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev. (992 F.3d 518)	6th Cir.	7/23/21	Business	CDC Eviction	No
Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev. (525 F. Supp. 3d 850)	W.D. Tenn.	3/15/21	Business	CDC Eviction	No
Tigges v. Northam (473 F. Supp. 3d 559)	E.D. Va.	7/21/20	Business	Speech, EP	Yes
TJM 64, Inc. v. Harris (475 F. Supp. 3d 828)	W.D. Tenn.	7/29/20	Business	Takings, SDP	Yes
Troogstad v. City of Chicago (576 F. Supp. 3d 578)	N.D. Ill.	12/21/21	Personal	State Vaccine, PDP, SDP	Yes
Underwood v. City of Starkville (538 F. Supp. 3d 667)	N.D. Miss.	5/11/21	Business	Work, EP, SDP, Takings	Yes
Valdez v. Grisham (559 F. Supp. 3d 1161)	D.N.M.	9/13/21	Personal	Contract, State Vaccine, Work, PDP, SDP, EP	Yes
Village of Orland Park v. Pritzker (475 F. Supp. 3d 866)	N.D. Ill.	8/1/20	Mixed	Travel, Work, PDP, EP	Yes
Vincent v. Bysiewicz (2020 WL 6119459)	D. Conn.	10/16/20	Personal	Speech, Travel, SDP	Yes
Weisshaus v. Cuomo (512 F. Supp. 3d 379)	E.D.N.Y.	1/11/21	Personal	Travel, SDP	Yes

Case	Court	Date	Type of Plaintiff	Type of Case or Rights Invoked	Gov't Wins?
We The Patriots USA, Inc. v. Hochul (17 F.4th 266)	2nd Cir.	11/4/21	Personal	State Vaccine, SDP	Yes
W. Growers Ass'n v. City of Coachella (548 F. Supp. 3d 948)	C.D. Cal.	7/12/21	Business	Vagueness, EP	Yes
Williams v. Brown (567 F. Supp. 3d 1213)	D. Or.	10/19/21	Personal	State Vaccine, PDP, EP	Yes
Wise v. Inslee (2021 WL 4951571)	E.D. Wash.	10/25/21	Personal	Contract, State Vaccine, PDP	Yes
World Gym, Inc. v. Baker (474 F. Supp. 3d 426)	D. Mass.	7/24/20	Business	PDP, SDP, EP	Yes
Sonderman *ex rel*. W.S. v. Ragsdale (540 F. Supp. 3d 1215)	N.D. Ga.	5/12/21	Personal	EP	Yes
Xponential Fitness v. Arizona (2020 WL 3971908)	D. Ariz.	7/14/20	Business	Contract, Takings, Work, PDP, EP	Yes
Young v. James (2020 WL 6572798)	S.D.N.Y.	10/26/20	Personal	Speech	Yes
Zaal Ventures Corp. v. Baker (2021 WL 1026715)	D. Mass.	3/17/21	Business	Speech, EP	Yes
Zinman v. Nova Se. Univ. (2021 WL 4226028)	S.D. Fla.	9/15/21	Personal	Speech, SDP	Yes
4 Aces Enters., LLC v. Edwards (479 F. Supp. 3d 311)	E.D. La.	8/17/20	Business	Work, PDP, EP	Yes
7020 Ent., LLC v. Miami-Dade County (519 F. Supp. 3d 1094)	S.D. Fla.	2/11/21	Business	Speech, 4A, EP	Yes
910 E Main LLC v. Edwards (481 F. Supp. 3d 607)	W.D. La.	8/21/20	Business	Work, PDP, EP	Yes