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State-Based Travel Conditions in Response to the Coronavirus (SARS-COV-2) Pandemic: Likely an Ineffective Public Health Policy Response

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INTRODUCTION

A novel coronavirus (“SARS-CoV-2”) began circulating late in 2019, and the World Health Organization (“WHO”) declared a pandemic in March 2020.¹ In response to the public health threat the pandemic presented, some states within the United States implemented travel restrictions, typically through executive orders issued by state governors. The term “travel restriction” as used by the states refers to conditions of entry, such as testing, vaccination, or quarantine requirements. Since these are not restrictions on travel, for the purposes of this paper the term “travel condition” is used to more accurately refer to the conditions states imposed on travelers or residents entering from out-of-state.

The issue presented by such travel conditions is whether they are: 1) constitutional exercises of state police powers; or 2) good public policy for managing the public health emergency. While there were some legal challenges to these travel conditions, they failed due to lack of standing by the plaintiff, deference to the state governor or health official’s exercise of state police powers in public health emergencies, or both. Although these legal challenges failed on constitutional grounds, there are still public policy reasons for states to reconsider their use of travel conditions. Principally, the travel conditions likely are not effective due to the nature of SARS-CoV-2, which can be transmitted by asymptomatic individuals, and can take up to fourteen days to cause the illness known as COVID-19. Based on asymptomatic carriers and a long incubation period, by the time a case is identified in a state, the virus could have been circulating in the population for at least fourteen days. At that point a travel condition is akin to closing the barn door after the horse has already escaped.

This paper focuses on the state-level travel conditions imposed in the United States. For

¹ *WHO Director-General’s opening remarks at the media briefing on COVID-19 – 11 March 2020*, WORLD HEALTH ORGANIZATION (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

the purposes of comparing travel conditions, SARS-CoV-2 cases, and COVID-19 deaths, this paper assesses two state pairings based on their similarity in population characteristics: New York and Florida; and California and Texas. Part I begins with an assessment of the legal issues including: an overview of travel conditions in the selected states in Section A; a review of the legal framework for evaluating the constitutionality of travel conditions in Section B; and an application of the legal framework to two cases in Section C. Part II assesses the public policy considerations of state-based travel conditions, beginning with a review of the reasons for travel conditions in Section A, an assessment of the costs versus benefits of travel conditions in Section B, and a conclusion in Section C that travel conditions are likely not a preferred public policy based on the attributes of SARS-CoV-2. Part III continues the public policy assessment of the travel conditions with a comparison of travel conditions used and case count and death statistics for four states: Section A compares New York and Florida; Section B compares California and Texas. These state comparison-pairs have similar population characteristics but applied different travel condition policies.

Based on the data available, even though state-level travel conditions are likely constitutional, they are likely not good public policy tools for diseases like SARS-CoV-2, and likely did not have a discernable effect on case counts or death rates. Additional epidemiological research should be conducted to determine what role, if any, travel conditions may have played in reducing case counts or death rates.

PART I: LEGAL ANALYSIS

States have a history of broad police powers during public health emergencies dating back to the 1900s. Coupled with a deference to state police powers, during the SARS-CoV-2 pandemic, states structured their travel conditions such that they are not travel “bans” but are instead quarantine or testing conditions for entry. These travel conditions do not ban out-of-state

visitors, making it difficult for plaintiffs to establish standing. While there is a Fourteenth Amendment right to travel, under the deference of *Jacobson v. Commonwealth of Massachusetts*, states showed that the travel conditions were necessary based on the public health emergency. Courts focused their review on the unknown characteristics of SARS-CoV-2, the lack of a vaccine against the virus, and the lack of an effective treatment for the illness COVID-19. This could open a potential avenue for new claims now that we are more than twelve months into the pandemic: multiple vaccines are now available for use, and the characteristics of SARS-CoV-2 transmission and the treatment of COVID-19 are better understood. In this evolving environment, a challenge on constitutional grounds may now have a better chance of success.

This Part I focuses on the legal analysis of the travel conditions. Section A reviews the travel conditions in the selected states: New York, Florida, California, and Texas. Section B outlines the legal framework for evaluating the constitutionality of the travel conditions, specifically: i) state police powers; ii) individuals' right to travel; iii) standing; and iv) the dormant commerce clause. Section C applies the framework outlined in Section B to two cases, *Bayley's Campground, Inv. v. Mills* and *Carmichael v. Ige*.

A. Issue: Overview of Travel Conditions in Selected States (New York/Florida and California/Texas)

In early 2020 SARS-CoV-2 arrived in the United States.² Some states implemented travel conditions in response to the spread of the virus and the illness it caused. These travel conditions evolved during the pandemic, and continue to evolve at the time of this paper's submission in May 2021. This section provides an overview of when and how New York, Florida, California, and Texas implemented travel conditions, and how these conditions evolved up to May 2021.

² Eric Schumaker, *Timeline: How coronavirus got started*, ABCNEWS (Sept. 22, 2020, 11:55AM), <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165>

New York reported its first SARS-CoV-2 case on March 1, 2020.³ Case counts progressed rapidly and, on March 16, 2020, New York closed its schools statewide and established a partnership with New Jersey and Connecticut.⁴ On March 28, 2020 the CDC issued a domestic travel advisory for New York, New Jersey, and Connecticut.⁵ New York soon became the first epicenter of COVID-19 cases in the United States.⁶

However, during the time when New York experienced the peak of its outbreak, and was an epicenter of COVID-19 cases in the United States, New York did not implement any travel conditions for visitors.⁷ It was not until Phase 2 of its reopening schedule, June 24, 2020, that New York, in conjunction with New Jersey and Connecticut, announced travel conditions for visitors.⁸ Implementing travel conditions at the end of June 2020 meant that SARS-CoV-2 had already been circulating in New York for four months or more.⁹ Given such a delay, the travel conditions would have only a minimal impact in reducing spread, since coronavirus was already present and widely circulating in the state. Those conditions remained in place until April 10, 2021.¹⁰ Now “[a]symptomatic travelers entering New York . . . **are no longer required** to test or

³ Ben Axelson, *Cornavirus timeline in NY: Here’s how Gov. Cuomo has responded to COVID-19 pandemic since January*, SYRACUSE.COM (Apr. 14, 2020, updated Apr. 15, 2020), <https://www.syracuse.com/coronavirus/2020/04/coronavirus-timeline-in-ny-heres-how-gov-cuomo-has-responded-to-covid-19-pandemic-since-january.html>.

⁴ Kevin Tampone, *NY closing gyms, restaurant dining rooms, movie theaters, more starting tonight over coronavirus*, SYRACUSE.COM (Mar. 16, 2020, updated Apr. 23, 2020), <https://www.syracuse.com/coronavirus/2020/03/gyms-casinos-restaurants-more-in-ny-nj-ct-closing-tonight-over-coronavirus.html>.

⁵ Media Statement, CDC, *CDC Issues Domestic Travel Advisory for New York, New Jersey, and Connecticut* (Mar. 28, 2020) <https://www.cdc.gov/media/releases/2020/s038-travel-advisory.html>.

⁶ Corinne N. Thompson, PhD, et al., *COVID-19 Outbreak – New York City*, February 29-June 1, 2020, MMWR MORB. MORTAL. WKLY REP. 2020, 69:1725-29 (DOI: <http://dx.doi.org/10.15585/mmwr.mm6946a2>, also at [https://www.cdc.gov/mmwr/volumes/69/wr/mm6946a2.htm#:~:text=New%20York%20City%20\(NYC\)%20was,pan%20demic%20in%20the%20United%20States.&text=Approximately%20203%2C000%20cases%20of%20a%20laboratory,an%20d%2032.1%25%20among%20hospitalized%20patients](https://www.cdc.gov/mmwr/volumes/69/wr/mm6946a2.htm#:~:text=New%20York%20City%20(NYC)%20was,pan%20demic%20in%20the%20United%20States.&text=Approximately%20203%2C000%20cases%20of%20a%20laboratory,an%20d%2032.1%25%20among%20hospitalized%20patients)).

⁷ Alexandra Kerr, *A Historical Timeline of COVID-19 in New York City*, INVESTOPEDIA (Updated Oct. 6, 2020), <https://www.investopedia.com/historical-timeline-of-covid-19-in-new-york-city-5071986>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *COVID-19 Travel Advisory*, New York State COVID-19 Updates, <https://coronavirus.health.ny.gov/covid-19-travel-advisory> (last accessed May 2, 2021).

quarantine . . .”¹¹

Like New York, Florida also reported its first SARS-CoV-2 case on March 1, 2020.¹² Florida implemented travel conditions for visitors from states in the “epicenter”, such as New York, New Jersey, and Connecticut, on March 23, 2020.¹³ The virus was circulating in Florida for approximately one month prior to the implementation of travel conditions.¹⁴ This was five days before the CDC issued its domestic travel advisory.¹⁵ Florida moved into its reopening phase in May 2020.¹⁶ On August 5, 2020, Florida lifted its travel conditions.¹⁷

California reported its first positive test for SARS-CoV-2 on January 25, 2020.¹⁸ It also reported COVID-19 deaths of individuals who had not traveled internationally early in the timeline, the first of whom first “became ill on January 31 and died on February 6 . . .”¹⁹ This is notable because this changed the infection timeline in the United States; prior to this information

¹¹ *Id.* (emphasis in original).

¹² Will Mullery and Janie Boschma, *Timeline: How Florida’s coronavirus response compares to three other big states*, CNN (Updated May 4, 2020 at 6:10AM ET), <https://www.cnn.com/2020/05/04/politics/timeline-florida-coronavirus/index.html>.

¹³ See e.g. Exec. Order No. 20-80, Office of the Governor of the State of Florida (Mar. 23, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-80.pdf (last accessed Mar. 15, 2021); Exec. Order No. 20-82, Office of the Governor of the State of Florida (Mar. 24, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-82.pdf (last accessed Mar. 15, 2021); Exec. Order No. 20-86, Office of the Governor of the State of Florida (Mar. 27, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-86.pdf (last accessed Mar. 15, 2021); Exec. Order No. 20-139, Office of the Governor of the State of Florida (June 3, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-139.pdf (last accessed Mar. 15, 2021); see also, Adrienne Cutway, *Timeline: The spread of coronavirus in Florida*, CLICKORLANDO.COM (Sept. 25, 2020, 6:11PM), <https://www.clickorlando.com/news/local/2020/03/20/timeline-the-spread-of-coronavirus-in-florida/>.

¹⁴ Adrienne Cutway, *Timeline: The spread of coronavirus in Florida*, CLICKORLANDO.COM (Sept. 25, 2020, 6:11PM), <https://www.clickorlando.com/news/local/2020/03/20/timeline-the-spread-of-coronavirus-in-florida/>; see also Exec. Order No. 20-80, Office of the Governor of the State of Florida (Mar. 23, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-80.pdf (last accessed Mar. 15, 2021); Exec. Order No. 20-82, Office of the Governor of the State of Florida (Mar. 24, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-82.pdf (last accessed Mar. 15, 2021).

¹⁵ Media Statement, CDC, *CDC Issues Domestic Travel Advisory for New York, New Jersey, and Connecticut* (Mar. 28, 2020) <https://www.cdc.gov/media/releases/2020/s038-travel-advisory.html>.

¹⁶ Mullery, *supra* note 12.

¹⁷ Exec. Order No. 20-192, Office of the Governor of the State of Florida (Aug. 5, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-192.pdf (last accessed Mar. 15, 2021)

¹⁸ Jackie Botts, et al., *Timeline: California reacts to coronavirus*, CALMATTERS: CORONAVIRUS (April 1, 2020, updated May 13, 2020), <https://calmatters.org/health/coronavirus/2020/04/ga-vin-newsom-coronavirus-updates-timeline/>.

¹⁹ Michelle A. Jordan, MD, et al., *Evidence for Limited Early Spread of COVID-19 Within the United States*, January-February 2020, MMWR MORB. MORTAL. WKLY REP. 2020; 69:680-684 (DOI: <http://dx.doi.org/10.15585/mmwr.mm6922e1>), also at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6922e1.htm>).

the first death was thought to be in Washington state on February 28, 2020.²⁰ Travel conditions on out-of-state visitors were not imposed until November 13, 2020.²¹ These travel conditions were put in place approximately eleven months after the first case in January 2020. As such, the travel conditions would be expected to have only a minimal impact, since the virus was already circulating in the state. As of May 2021, inter-state travel conditions remain in place in California for unvaccinated travelers.²²

Unlike California, and similar to New York and Florida, Texas reported its first SARS-CoV-2 case on March 4, 2020.²³ Texas announced travel conditions for visitors from New Orleans, New York, New Jersey, and Connecticut on March 26, 2020.²⁴ These travel conditions came after the virus was present in Texas for approximately one month, and cited guidance from the CDC, as well as the travel conditions Florida implemented on March 23, 2020.²⁵ Texas lifted its travel conditions on May 21, 2020.²⁶

²⁰ Paige St. John, Melanie Mason, and Matt Hamilton, *The silent, deadly spread of coronavirus in California began far earlier than first reported*, LOS ANGELES TIMES (Apr. 23, 2020 5:00AM PT), <https://www.latimes.com/california/story/2020-04-23/morgues-hold-key-to-early-spread-of-coronavirus>.

²¹ Geoff Whitmore, *What Are The California Travel Restrictions?*, FORBES.COM (Dec. 8, 2020, 2:23PM EST), <https://www.forbes.com/sites/geoffwhitmore/2020/12/08/what-are-the-california-travel-restrictions/?sh=1ffef9b35751>, see also Travel Advisory, *State of California—Health and Human Services Agency* (Jan. 6, 2021), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Travel-Advisory.aspx>, Julie Weed, *California Travel Restrictions: What You Need to Know*, The New York Times (Dec. 10, 2020, updated Dec. 22, 2020), <https://www.nytimes.com/2020/12/10/travel/california-travel-restrictions-covid.html>, *Travel restrictions issued by states in response to the coronavirus (COVID-19) pandemic, 2020-2021*, BALLOTPEDIA, [https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021](https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021) (last accessed May 9, 2021).

²² Travel, *COVID19.CA.GOV* (Last updated Apr. 27, 2021 2:00 PM), <https://covid19.ca.gov/travel/> (last accessed May 7, 2021), see also, *State of California—Health and Human Services Agency* (April 2, 2021), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Travel-Advisory.aspx>.

²³ *DSHS Announces First Case of COVID-19 in Texas*, TEXAS HEALTH AND HUMAN SERVICES (Mar. 4, 2020), <https://www.dshs.texas.gov/news/releases/2020/20200304.aspx>; see also *Texas Executive Orders & Public Health Disaster Declarations*, TEXAS HEALTH AND HUMAN SERVICES, <https://www.dshs.state.tx.us/coronavirus/execorders.aspx> (last accessed Feb. 14, 2021).

²⁴ Exec. Order No. GA-11, Office of the Governor of the State of Texas (Mar. 26, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-11_airport_travel_reporting_COVID-19_IMAGE_03-26-2020.pdf (last accessed Mar. 15, 2021).

²⁵ *Id.*

²⁶ *Governor Abbott Issues Executive Order Terminating Air Travel Restrictions Related to COVID-19 Pandemic*, OFFICE OF THE TEXAS GOVERNOR (May 21, 2020), <https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-terminating-air-travel-restrictions-related-to-covid-19-pandemic>; see also Exec. Order No. GA-24, Office of the Governor of the State of Texas (May 21, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-24_termination_of_air_travel_restrictions_COVID-19_IMAGE_05-21-20.pdf (last accessed Mar. 15, 2021).

Each of these four states took different approaches based on the information and evolving circumstances. New York and California implemented travel conditions later in the pandemic, and travel conditions are still in place in California as of May 2021. Florida and Texas implemented travel conditions early in the pandemic and removed the travel conditions after only a few months. Part III evaluates in more detail the outcomes for these four states based on positive cases and COVID-19 related deaths; the pattern of travel conditions does not appear dispositive to the state COVID-19 death rates.

B. Legal Framework: Evaluating Constitutionality

Claims challenging travel conditions thus far have relied on the right to travel, found in the Equal Protection Clause of the Fourteenth Amendment. In addition to this claim, some scholars have highlighted the potential for a dormant commerce clause claim, challenging state intrusion which is burdening interstate commerce. It is worth noting that such a claim is unlikely to succeed based on the current balance of protecting public health versus burdening interstate commerce. This section evaluates the four main components of a potential legal claim challenging travel conditions: i) the role of state police powers during a public health emergency; ii) the right to travel, protected under the Fourteenth Amendment; iii) establishing standing to bring a claim; and iv) the potential role of a dormant commerce clause claim.

i. Police Powers

State police powers are located in the Tenth Amendment to the Constitution.²⁷ This amendment gives states the “rights and powers ‘not delegated to the United States.’ States are thus granted the power to establish and enforce laws protecting the welfare, safety, and health of the public.”²⁸ For example, states may impose limitations on residents and non-resident visitors

²⁷ *Legal Information Institute*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/police_powers (last visited Mar. 13, 2021).

²⁸ *Id.*

as long as they are reasonably and substantially related to protecting the public health.²⁹

Two historic cases remain relevant to understanding the breadth of state police powers: *Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana* and *Jacobson v. Commonwealth of Massachusetts*. The Supreme Court decided the first case, *Compagnie Francaise*, in 1902, reinforcing state police powers to prohibit travelers from disembarking in New Orleans, which was under quarantine due to an outbreak of disease.³⁰ The Supreme Court decided the second case, *Jacobson*, in 1905. *Jacobson* reinforced state police powers by upholding Massachusetts's mandatory smallpox vaccination statute.³¹ While the Court did recognize that allowances should be made to accommodate those who would be injured by the vaccine,³² the Court clarified and affirmed a limitation on individual rights, in favor of the broader interests of the state.³³ When assessing the legal justification for the travel conditions used by states in response to the SARS-CoV-2 pandemic, these cases remain relevant.

In *Compagnie Francaise*, the passengers were prohibited from disembarking in multiple cities within Louisiana.³⁴ This prohibition was implemented because certain locations within Louisiana were under quarantine orders³⁵ due to an outbreak of yellow fever.³⁶ In assessing the facts of the case, the Court reiterated: “[t]hat from an early day the power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question.”³⁷ The Court continued:

the health and quarantine laws of the several states are not repugnant to the Constitution of the United States, although they affect foreign and domestic

²⁹ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905).

³⁰ *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of Louisiana*, 186 U.S. 380, 397 (1902).

³¹ *Jacobson*, 197 U.S. at 39.

³² *Jacobson*, 197 U.S. at 36.

³³ *Jacobson*, 197 U.S. at 26.

³⁴ *Compagnie Francaise*, 186 U.S. at 382.

³⁵ *Compagnie Francaise*, 186 U.S. at 382.

³⁶ Dr. James Finck, *Coronavirus quarantine fights not a first for U.S.*, DAILY JOURNAL ONLINE, (Apr. 23, 2020), https://dailyjournalonline.com/community/farmington-press/coronavirus-quarantine-fights-not-a-first-for-u-s/article_4c30f695-aeaa-5532-916c-4821670d27b8.html.

³⁷ *Compagnie Francaise*, 186 U.S. at 387.

commerce, as in many cases they necessarily must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quarantine laws producing such effect on legitimate interstate commerce are not in conflict with the Constitution.³⁸

Looking at the SARS-CoV-2 pandemic and the measures states have taken, there is no doubt that the different travel conditions have impacted interstate commerce by discouraging tourist and business travel. However, as long as the states can show that the measures were taken in order to protect public health, the measures are likely constitutional.

While *Compagnie Francaise* involved traveling passengers, *Jacobson* remains the reference case for state police powers during public health emergencies. In *Jacobson*, Cambridge, Massachusetts was experiencing a smallpox outbreak.³⁹ In response, the board of health determined that “the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge”⁴⁰ The Court upheld the Massachusetts vaccine requirement and created a two-part analysis: 1) the statute must have a real or substantial relation to public health;⁴¹ and 2) the statute must not be a “plain, palpable invasion of rights secured by the fundamental law”⁴² The Court went further and clarified that state police powers can override individual rights and liberty:

Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that ‘persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.’⁴³

³⁸ *Compagnie Francaise*, 186 U.S. at 391.

³⁹ *Jacobson*, 197 U.S. at 12.

⁴⁰ *Jacobson*, 197 U.S. at 12.

⁴¹ *Jacobson*, 197 U.S. at 31.

⁴² *Jacobson*, 197 U.S. at 31.

⁴³ *Jacobson*, 197 U.S. at 26, (citing *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 471 (1877), (quoting *Thorpe v. Rutland & B.R. Co.*, 27 Vt. 140, 150 (1854))).

Therefore, under *Compagnie Francaise* and *Jacobson*, the constitutional stage is set with broad deferential police powers granted to states to protect public health, even if those police powers impact interstate commerce,⁴⁴ or the rights of an individual.⁴⁵

ii. Right to Travel

While a “right to travel” is not enumerated in the Constitution, this right has been recognized by the Supreme Court.⁴⁶ The right to travel is protected through the Equal Protection Clause of the Fourteenth Amendment,⁴⁷ is embedded in the Supreme Court’s jurisprudence,⁴⁸ and consists of three components:

[1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, [3] the right to be treated like other citizens of that State.⁴⁹

With regards to travel conditions, the first two of these components are relevant.⁵⁰ “A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses ‘any classification which serves to penalize the exercise of that right.’”⁵¹

In *Zemel v. Rusk*, a 1965 case involving the Secretary of State’s ability to refuse to validate passports for travel to Cuba, the Supreme Court stated that the freedom to travel “does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the

⁴⁴ *Compagnie Francaise*, 186 U.S. at 391.

⁴⁵ *Jacobson*, 197 U.S. at 26, (citing *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 471 (1877), (quoting *Thorpe v. Rutland & B.R. Co.*, 27 Vt. 140, 150 (1854))).

⁴⁶ *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1145 (D. Haw. 2020) (citing *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (citation omitted)).

⁴⁷ *Saenz v. Roe*, 526 U.S. 489, 499 (1999).

⁴⁸ *Saenz*, 526 U.S. at 498.

⁴⁹ *Saenz*, 526 U.S. at 500.

⁵⁰ *Carmichael*, 470 F. Supp. 3d, at 1145.

⁵¹ *Carmichael*, 470 F. Supp. 3d at 1145, (citing *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion) (citations omitted)).

safety and welfare of the area or the Nation as a whole.”⁵² This suggest that “any infringements on the right to travel [which] are not overly broad and are necessary to serve a compelling state interest--such as combatting the coronavirus pandemic--[] should withstand court challenges to COVID-19 restrictions on travel.”⁵³

Since the travel conditions apply to everyone, with no exception based on a suspect class such as race or gender, it is unlikely that they violate equal protection under the Fourteenth Amendment. Discriminating against “travelers” vs “non-travelers” is not suspect; “[t]he Supreme Court has ‘repeatedly held that “a classification neither involving fundamental rights nor proceeding along suspect lines ... cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose.”’⁵⁴

iii. Standing

In addition to the deference granted to state police powers under *Compagnie Francaise* and *Jacobson*, plaintiffs struggle to establish standing when challenging the travel conditions. Standing to sue in federal court requires that plaintiffs show: 1) “injury in fact” that is “concrete and particularized” and “actual or imminent”;⁵⁵ 2) the injury must be fairly traceable to the defendant's conduct;⁵⁶ and 3) the injury can be redressed through adjudication.”⁵⁷ When challenging travel conditions, plaintiffs may struggle to demonstrate an “injur[y] they purport to

⁵² *Zemel v. Rusk*, 381 U.S. 1, 15–16 (1965); see also Jeff Thaler, *The Next Surges Are Here: What Can American Governments Lawfully Do in Response to the Ongoing Covid-19 Pandemic?*, 42 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 165, 189 (2020).

⁵³ Jeff Thaler, *The Next Surges Are Here: What Can American Governments Lawfully Do in Response to the Ongoing Covid-19 Pandemic?*, 42 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 165, 189 (2020), (citing *Zemel v. Rusk*, 381 U.S. 1, 15–16 (1965)).

⁵⁴ *Carmichael*, 470 F. Supp. 3d at 1149 (citing *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 127–28 (1999)).

⁵⁵ *Carmichael*, 470 F. Supp. 3d at 1141, (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, (1992)).

⁵⁶ *Carmichael*, 470 F. Supp. 3d at 1141, (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, (1992)).

⁵⁷ *Carmichael*, 470 F. Supp. 3d at 1141, (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, (1992)).

have suffered or are in imminent danger of sustaining as a result of the [travel condition].”⁵⁸ The “threat” of an injury is also hard to establish concretely. With rare exception, such as the Outer Banks of North Carolina, which are reached by only one road which could be patrolled,⁵⁹ states have not barred travel; they have imposed travel conditions on travelers arriving from out-of-state.⁶⁰ Therefore travelers do not face an injury since they are not being refused entry to a state. Travelers can choose to comply with the conditions or choose not to travel. Since travelers have a choice, even if it may seem like a “false choice”, it is difficult to establish an injury and therefore difficult to show standing to proceed with a claim. For example, in a case decided by the Second Circuit in 2020 regarding measures implemented by Connecticut in response to the 2014 Ebola outbreak, the court determined that the plaintiffs did not have standing.⁶¹ The court said that “the notion that Appellants must undertake reasonable efforts in the present to avert injury in the future is also speculative, and Appellants lack standing to pursue any of their prospective claims.”⁶²

These examples serve as guidelines to states for how to structure travel conditions to avoid violating the Constitution. They also warn plaintiffs of the difficulties in succeeding with a case challenging the travel conditions. While standing is hard to establish, a plaintiff could try to establish standing if they can show injury based on lost income due to travel which was cancelled due to the travel conditions. However, while this may help to show injury and establish standing, the plaintiff should be on notice that the court analysis under *Compagnie Francaise*

⁵⁸ *Carmichael*, 470 F. Supp. 3d at 1141.

⁵⁹ See, e.g., Elizabeth Tyree, *Visitors banned from Outer Banks amid coronavirus outbreak*, ABC13 NEWS (Mar. 17, 2020), <https://wset.com/news/coronavirus/visitors-banned-from-outer-banks-amid-coronavirus-outbreak> (some towns did bar visitors).

⁶⁰ See, e.g., Axelson, *supra* note 3; Tampone, *supra* note 4; Botts, *supra* note 18; Whitmore, *supra* note 21, see also Travel Advisory, *State of California—Health and Human Services Agency* (Jan. 6, 2021), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Travel-Advisory.aspx>, Julie Weed, *California Travel Restrictions: What You Need to Know*, The New York Times (Dec. 10, 2020, updated Dec. 22, 2020), <https://www.nytimes.com/2020/12/10/travel/california-travel-restrictions-covid.html>.

⁶¹ *Liberian Cmty. Ass'n of Connecticut v. Lamont*, 970 F.3d 174, 185 (2d Cir. 2020).

⁶² *Liberian Cmty.*, 970 F.3d at 185.

and *Jacobson* is deferential to the state’s use of police powers in a public health emergency.

iv. Dormant Commerce Clause

While it has not yet been used during the SARS-CoV-2 pandemic, one option available to “check” state powers regarding travel conditions could be through a dormant commerce clause claim. This means that even in the absence of Congressional action, if states discriminate or unduly burden interstate commerce, this could represent a state-overreach into Congress’s duties within the Commerce Clause.⁶³ The undue burden test performs a balancing of the interests: the state justification of the action, such as protecting public health, versus the impact on interstate commerce.⁶⁴ To date, a challenge using the dormant commerce clause would likely not succeed based on the strength of the public health argument.⁶⁵ “At least so long as present circumstances persist, with lives at stake through the flatten-the-curve imperative, it is difficult to imagine a court tipping the balance in favor of striking down such measures.”⁶⁶

C. Applying the Legal Framework

Two cases provide examples of how the courts applied the legal framework to challenges to state travel conditions during the SARS-CoV-2 pandemic. The first case is *Bayley’s Campground, Inc., v. Mills*, which applied strict scrutiny review. *Bayley’s Campground* was first heard by the District Court of Maine in May 2020,⁶⁷ and later by the First Circuit Court of Appeals in January 2021. The second case, *Carmichael v. Ige*, applied the *Jacobson* two-part test

⁶³ *Legal Information Institute*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/commerce_clause (last visited Mar. 13, 2021), *see also* Thaler, *supra* note 53 at 193-94 (discussing possible dormant commerce clause claims).

⁶⁴ Thaler, *supra* note 53 at 193 (citing Robert Chesney, *Can the Federal Government Override State Government Rules on Social Distancing to Promote the Economy*, LAWFARE (Mar. 24, 2020), <https://www.lawfareblog.com/can-federal-government-override-state-government-rules-social-distancing-promote-economy>).

⁶⁵ *Id.* (citing Robert Chesney, *Can the Federal Government Override State Government Rules on Social Distancing to Promote the Economy*, LAWFARE (Mar. 24, 2020), <https://www.lawfareblog.com/can-federal-government-override-state-government-rules-social-distancing-promote-economy>).

⁶⁶ *Id.* (citing Robert Chesney, *Can the Federal Government Override State Government Rules on Social Distancing to Promote the Economy*, LAWFARE (Mar. 24, 2020), <https://www.lawfareblog.com/can-federal-government-override-state-government-rules-social-distancing-promote-economy>).

⁶⁷ *Bayley’s Campground Inc. v. Mills*, 463 F. Supp. 3d 22 (D. Me. 2020).

and was decided by the District Court of Hawai'i in July 2020. This section evaluates these two cases, and assesses which standard of review the courts applied, as well as each of the items from the legal framework: police powers; right to travel; and standing.

i. *Bayley's Campground, Inc. v. Mills*

In *Bayley's Campground* the Governor of Maine made an executive order in April 2020 creating a fourteen-day quarantine requirement for visitors entering Maine.⁶⁸ The plaintiffs were two New Hampshire residents, and one Maine resident.⁶⁹ The plaintiffs claimed that the executive order:

‘practically’ prevented the three individual plaintiffs from traveling between Maine and New Hampshire ‘to recreate, associate with friends, visit businesses, and simply take trips.’ The complaint also alleged that the requirement caused ‘economic injury’ to the corporate plaintiffs due to ‘a substantial number of cancellations by out-of-state campers who [we]re unable or unwilling to self-quarantine for 14[] days upon their arrival to Maine.’⁷⁰

The plaintiffs sought a preliminary injunction against enforcement of the executive order, but the district court denied their motion.⁷¹ The district court found that the “self-quarantine requirement implicated the federal constitutional right to interstate travel and was subject to strict scrutiny in consequence.”⁷² Though the executive order was later rescinded, the First Circuit determined that the case was not moot, because the Governor could reimpose strict travel conditions.⁷³ However, the First Circuit upheld the district court’s denial of the preliminary injunction after finding that the plaintiffs were unlikely to succeed on the merits because the “interests in ‘protecting Maine’s population from further spread of the COVID-19 virus and preventing Maine’s health care system from being overwhelmed’ by those infected with it are ‘compelling state interests.’”⁷⁴

⁶⁸ *Bayley's Campground, Inc. v. Mills*, 985 F.3d 155 (1st Cir. 2021).

⁶⁹ *Bayley's Campground, Inc.*, 985 F.3d at 155.

⁷⁰ *Bayley's Campground, Inc.*, 985 F.3d at 156.

⁷¹ *Bayley's Campground, Inc.*, 985 F.3d at 155.

⁷² *Bayley's Campground, Inc.*, 985 F.3d at 155, (citing *Bayley's Campground, Inc. v. Mills*, 463 F. Supp. 3d 22, 31-35 (D. Me. 2020)).

⁷³ *Bayley's Campground, Inc.*, 985 F.3d at 157.

⁷⁴ *Bayley's Campground, Inc.*, 985 F.3d at 159.

The First Circuit upheld the Maine district court’s application of strict scrutiny because the travel condition burdened “the federal constitutional right to interstate travel”⁷⁵ To succeed the Governor of Maine had to show that the travel conditions were “the least restrictive means of serving a compelling governmental interest.”⁷⁶ The First Circuit assumed that the district court was correct in subjecting the quarantine requirement to strict scrutiny.⁷⁷ The primary question for the court “concern[ed] the strength of the support in the record for the Governor’s further assertion that ‘there were no other effective less-restrictive alternative[]’ means of serving Maine’s compelling interests at the time that EO 34’s self-quarantine requirement was in place.”⁷⁸ The First Circuit upheld the primary findings of the district court because:

- 1) the coronavirus is easily transmissible and unusually deadly;⁷⁹
- 2) the virus has an incubation period of fourteen days, and someone could be highly contagious but asymptomatic;⁸⁰
- 3) there was no vaccine or effective treatment at the beginning of the pandemic;⁸¹
and
- 4) slowing the spread was critical for Maine, based on the historic summer tourist influx versus the hospital facilities available.⁸²

Neither the district court nor the First Circuit analyzed standing in detail. The district court did not evaluate standing because the “resolution of this motion does not rise or fall on that

⁷⁵ *Bayley’s Campground, Inc.*, 985 F.3d at 155.

⁷⁶ *Bayley’s Campground*, 985 F.3d at 159, *see also* Elizabeth Brenner, *Love (of the Constitution) and Liberty in the Time of Covid-19 the Role of A Lawyer Is Vigilance*, 83 TEX. B.J. 462, 463 (2020).

⁷⁷ *Bayley’s Campground, Inc.*, 985 F.3d at 159.

⁷⁸ *Bayley’s Campground, Inc.*, 985 F.3d at 159.

⁷⁹ *Bayley’s Campground, Inc.*, 985 F.3d at 160-61.

⁸⁰ *Bayley’s Campground, Inc.*, 985 F.3d at 160-61.

⁸¹ *Bayley’s Campground, Inc.*, 985 F.3d at 160-61.

⁸² *Bayley’s Campground, Inc.*, 985 F.3d at 160-61.

question . . .”⁸³ The First Circuit noted only that “[t]here is no problem with our reaching the merits based on any concern about a lack of Article III standing on the part of the plaintiffs, because the individual plaintiffs plainly have suffered an injury-in-fact.”⁸⁴ The opinion leaves the question open of whether the same result would occur now that multiple vaccines are available, and treatments are better understood.

ii. *Carmichael v. Ige*

Carmichael also challenged state travel conditions implemented in response to the SARS-CoV-2 pandemic. In *Carmichael* the plaintiffs were: 1) California residents with a condominium in Hawai‘i; 2) a Hawai‘i resident with family in the continental United States; and 3) a Nevada resident with properties in Hawai‘i.⁸⁵ Ige, the governor of Hawai‘i, issued an Emergency Proclamation order on March 21, 2020, which “imposed a 14-day quarantine, effective March 26, 2020, applying to *all persons entering Hawai‘i*, both residents and non-residents alike, with a few exceptions related to emergency and critical infrastructure functions.”⁸⁶ These travel conditions evolved during 2020, eventually allowing travelers to “avoid quarantine by supplying a negative COVID-19 test obtained within 72 hours of arrival in Hawai‘i.”⁸⁷ The plaintiffs alleged violations of their Fifth and Fourteenth Amendment rights.⁸⁸ The court determined that the Fifth Amendment claim was likely erroneous,⁸⁹ and focused on the Fourteenth Amendment claims,⁹⁰ as well as whether the plaintiffs had standing.⁹¹

The standard of review the court used in *Carmichael* was the *Jacobson* two-part test. In

⁸³ *Bayley's Campground, Inc.*, 463 F. Supp. 3d 22, 30 n.7 (D. Me. 2020).

⁸⁴ *Bayley's Campground, Inc.*, 985 F.3d at 165 n.4.

⁸⁵ *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1138 (D. Haw. 2020).

⁸⁶ *Carmichael*, 470 F. Supp. 3d at 1139, (*citing* Opp'n, Ex. C, ECF No. 34-2 at 1) (emphasis in original).

⁸⁷ *Carmichael*, 470 F. Supp. 3d at 1139, (*citing* Opp'n, Decl. of Bruce S. Anderson, Ph.D (“Anderson Decl.”), ECF No. 33-5 ¶ 8).

⁸⁸ *Carmichael*, 470 F. Supp. 3d at 1139.

⁸⁹ *Carmichael*, 470 F. Supp. 3d at 1145.

⁹⁰ *Carmichael*, 470 F. Supp. 3d at 1146.

⁹¹ *Carmichael*, 470 F. Supp. 3d at 1141.

assessing whether the travel conditions had a real or substantial relation to public health, the court determined that the:

self-quarantine orders were designed to prevent the importation and intrastate spread of COVID-19 and that restrictions on non-essential businesses are necessary to maintain social distancing and stem the spread of community transmission. Defendant successfully demonstrates that his Emergency Proclamations have a real or substantial relation to the public health crisis caused by the COVID-19 pandemic.⁹²

The court then assessed whether the travel conditions were “in palpable conflict with the Constitution.”⁹³ “The Court concluded they [were] not, whether under traditional levels of scrutiny or *Jacobson*’s highly deferential standard.”⁹⁴ The court upheld the travel conditions based on the two-step *Jacobson* analysis. The court clarified that, “based on the record presently before it, the Court [found] that the quarantine survives strict scrutiny and Plaintiffs cannot *at this time* establish a likelihood of success or raise a serious question going to the merits of their right to travel claim.”⁹⁵

Based on this analysis, the *Carmichael* court also concluded that Hawai’i’s travel conditions did not violate the plaintiffs’ Fourteenth Amendment right to travel “whether under traditional levels of scrutiny or *Jacobson*’s highly deferential standard.”⁹⁶ “[T]he Hawai’i court cited to--and agreed with--the Maine court in *Bayley’s Campground Inc., v. Mills* that there were no less restrictive means for the Governor to attempt to protect the public from a rise in COVID-19 cases.”⁹⁷ The court in *Carmichael* found that a quarantine for travelers arriving from another state did not violate the two primary components of the right to travel⁹⁸:

as individuals from other states may freely travel to Hawai’i; they must simply

⁹² *Carmichael*, 470 F. Supp. 3d at 1143.

⁹³ *Carmichael*, 470 F. Supp. 3d at 1144-45, (citing *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905)).

⁹⁴ *Carmichael*, 470 F. Supp. 3d at 1144-45.

⁹⁵ *Carmichael*, 470 F. Supp. 3d at 1147 (citing *Bayley’s Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 24–25, (D. Me. May 29, 2020)) (emphasis in original).

⁹⁶ *Carmichael*, 470 F. Supp. 3d at 1145.

⁹⁷ Thaler, *supra* note 53 at 192 (citing *Carmichael v. Ige*, 470 F. Supp. 3d 1133 (D. Haw. 2020)).

⁹⁸ See Saenz, *supra* note 47 at 500.

comply with the quarantine, a requirement *equally applicable to Hawai'i resident*. This limited restriction (not ban) is a reasonable one. We are in the middle of a pandemic, and even Plaintiffs' counsel voluntarily acknowledged at the hearing that the COVID-19 crisis is serious.⁹⁹

The court concluded that “[w]hile not its intended purpose, the quarantine appears to have some deterrent effect, as evidenced by the depressed visitor numbers. But any deterrent effect the quarantine may have on Plaintiffs’ travel to Hawai'i does not amount to a violation of their right to travel.”¹⁰⁰ Since travel conditions, even those which impose fourteen-day quarantine periods, are not recognized as travel bans, the conditions likely do not constitute a violation of an individual’s constitutional right to travel.¹⁰¹

While the court did not reach the standing issue in *Carmichael*,¹⁰² it did provide some insight on how the analysis might proceed:

Plaintiffs argue that the deprivation of their constitutional rights causes them irreparable harm, with each day bringing further injury, and no damages can adequately compensate them for their loss of time and freedom. As discussed above, Plaintiffs’ declarations explain only why they have elected not to travel to Hawai'i due to the potential issues that could arise from having to quarantine, or claim, without supporting explanation or evidence, that undergoing the quarantine is impossible. These cursory and speculative assertions insufficiently *demonstrate* immediate threatened injury and considering Plaintiffs’ failure to show a likelihood of success on the merits, their constitutional claims are too attenuated to establish irreparable harm.¹⁰³

Even with a strict review standard, plaintiffs are failing in their challenges to the travel conditions, based on the compelling government interest in protecting public health and hospital capacity. Additionally, the two-part analysis of *Jacobson* closely resembles a rational basis test, deferring to state police powers as long as: 1) there is a real or substantial relation to public health;¹⁰⁴ and 2) the statute is not a “plain, palpable invasion of rights

⁹⁹ *Carmichael*, 470 F. Supp. 3d at 1145 (emphasis in original).

¹⁰⁰ *Carmichael*, 470 F. Supp. 3d at 1146.

¹⁰¹ *Carmichael*, 470 F. Supp. 3d at 1145.

¹⁰² *Carmichael*, 470 F. Supp. 3d at 1141.

¹⁰³ *Carmichael*, 470 F. Supp. 3d at 1150.

¹⁰⁴ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905).

secured by the fundamental law”¹⁰⁵ Based on these two cases, one sees that public interest during a public health emergency can easily outweigh the rights of individuals, and travel conditions will likely survive the legal challenges brought.

PART II: PUBLIC POLICY CONSIDERATIONS

This Part II evaluates the reasons and implementation strategies for travel conditions, the information available regarding the costs and benefits, and the information available from institutions such as the WHO regarding travel conditions. Since the SARS-CoV-2 virus can be spread by asymptomatic individuals, it is not conducive to travel conditions. Additionally, there is not much research into the costs of travel conditions, so a true cost versus benefit analysis cannot be performed. Based on this, travel conditions in the case of the SARS-CoV-2 virus are likely not a recommended public health response.

A. Travel Conditions: Reasons and Implementation

The effectiveness of measures such as travel conditions in combatting disease spread depends on how strictly the measure is enforced.¹⁰⁶ Public health measures restricting movement are not new. Restrictions such as cordons sanitaires have been used to combat disease since the time of the plague.¹⁰⁷ A cordon sanitaire is barrier segregating the sick individuals from the healthy individuals in a community.¹⁰⁸ Individuals behind the cordon sanitaire cannot enter the

¹⁰⁵ *Jacobson*, 197 U.S. at 31.

¹⁰⁶ Ana LP Mateus et al, *Effectiveness of travel restrictions in the rapid containment of human influenza: a systematic review*, WORLD HEALTH ORGANIZATION (Sept. 29, 2014) (*Bulletin of the World Health Organization* 2014;92:868-880D. doi: <http://dx.doi.org/10.2471/BLT.14.135590>), <https://www.who.int/bulletin/volumes/92/12/14-135590/en/>; see also, Valentina Costantino, David J. Heslop, C. Raina MacIntyre, *The effectiveness of full and partial travel bans against COVID-19 spread in Australia for travelers from China during and after the epidemic peak in China*, J TRAVEL MED. 2020 Aug 20;27(5) (DOI: 10.1093/jtm/taaa081, also at <https://pubmed.ncbi.nlm.nih.gov/32453411/>).

¹⁰⁷ Pere Salas-Vives and Joana-Maria Pujadas-Mora, *Cordons Sanitaires and the Rationalisation Process in Southern Europe (Nineteenth-Century Majorca)*, MEDICAL HISTORY vol. 62,3 (2018): 314-332 (doi:10.1017/mdh.2018.25, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6113753/>).

¹⁰⁸ *Cordon Sanitaire*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/cordon%20sanitaire> (last accessed Mar. 17, 2021); see also, Rachel Kaplan Hoffman, M.D., M.S.Ed., and Keith Hoffman, J.D., *Ethical Considerations in the Use of Cordons Sanitaires*, CLINICAL CORRELATIONS (Feb. 19, 2015), <https://www.clinicalcorrelations.org/2015/02/19/ethical-considerations-in-the-use-of-cordons-sanitaires/>.

“free” area without prior approval.¹⁰⁹ However, the success of a cordon sanitaire depends on the ability to have a clear line of containment, separating the sick from the healthy.¹¹⁰

Extrapolating the cordon sanitaire into a method of isolating individual states from their neighbors does not work as well. The logistics of implementing a firm border between each of the states is difficult, to the point of being impossible, with the exception of island-states such as Hawai'i. In the continental United States, there are too many entry points between the states to patrol. Travel conditions depend on voluntary compliance, with the possible exception of plane travel, which could be more closely overseen to ensure passengers have registered per a state requirement. However, without a full military state implementation and enforcement, there is a risk that visitors to states will not follow the travel conditions imposed by the host-state.

Additionally, the effectiveness of a travel condition typically depends on early identification of the illness.¹¹¹ SARS-CoV-2 does not lend itself to these types of travel conditions, because the virus can be spread by asymptomatic carriers, and individuals can be contagious during the incubation period, approximately fourteen days,¹¹² before an individual may show symptoms of COVID-19.¹¹³ States did not announce travel conditions until March

¹⁰⁹ Rachel Kaplan Hoffman, M.D., M.S.Ed., and Keith Hoffman, J.D., *Ethical Considerations in the Use of Cordons Sanitaires*, CLINICAL CORRELATIONS (Feb. 19, 2015), <https://www.clinicalcorrelations.org/2015/02/19/ethical-considerations-in-the-use-of-cordons-sanitaires/>.

¹¹⁰ Michael Allswede, *The Myth of the Cordon Sanitaire*, DOMESTIC PREPAREDNESS (Apr. 16, 2008), <https://www.domesticpreparedness.com/healthcare/the-myth-of-the-cordon-sanitaire/>.

¹¹¹ See, e.g., Mateus et al, *supra* note 106; Costantino, *supra* note 106; Matteo Chinazzi, et al., *The effect of travel restrictions on the spread of the 2019 novel coronavirus (COVID-19) outbreak*, SCIENCE, 24 Apr. 2020 Vol 368: 6489, pp 397-400 (DOI: 10.1126/science.aba9757, also at: <https://science.sciencemag.org/content/368/6489/395>); Barbara von Tigerstrom, Kumanan Wilson, *COVID-19 travel restrictions and the International Health Regulations (2005)*, BMJ GLOBAL HEALTH 2020 (<http://dx.doi.org/10.1136/bmjgh-2020-002629>, also at: <https://gh.bmj.com/content/5/5/e002629>).

¹¹² *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, CDC: COVID-19 (Updated Feb. 16, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html#:~:text=The%20incubation%20period%20for%20COVID,from%20exposure%20to%20symptoms%20onset>.

¹¹³ *Similarities and Differences between Flu and COVID-19*, CDC: INFLUENZA (FLU), <https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm> (last accessed Mar. 17, 2021).

2020,¹¹⁴ at which point SARS-CoV-2 was already present in the United States for more than one month.¹¹⁵

Further hampering the effectiveness of travel conditions was the delay in testing roll-out across the United States.¹¹⁶ These delays made it difficult to get ahead of the virus and proactively test and identify asymptomatic individuals.¹¹⁷ Once testing was available in the United States, it was initially only available to individuals with known exposure risks.¹¹⁸ Even though examples of transmission unrelated to international travel had already occurred,¹¹⁹ individuals without a known exposure could not access testing, and instead could potentially continue circulating and spreading the virus¹²⁰.

Based on the characteristics of SARS-CoV-2 incubation and transmission, as well as the interconnected nature of the continental United States, it is unlikely that travel conditions were effective at stopping the circulation of the virus.

B. Travel Conditions: Costs vs Benefits

It is difficult to estimate the costs associated directly with the travel conditions. While the economic impact of past pandemics such as H1N1 in 2009 has been assessed, this did not

¹¹⁴ See, e.g., See e.g. Exec. Order No. 20-80, Office of the Governor of the State of Florida (Mar. 23, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-80.pdf (last accessed Mar. 15, 2021); Exec. Order No. 20-82, Office of the Governor of the State of Florida (Mar. 24, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-82.pdf (last accessed Mar. 15, 2021); Exec. Order No. 20-86, Office of the Governor of the State of Florida (Mar. 27, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-86.pdf (last accessed Mar. 15, 2021); Exec. Order No. 20-139, Office of the Governor of the State of Florida (June 3, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-139.pdf (last accessed Mar. 15, 2021); see also, Cutway, *supra* note 14; Exec. Order No. GA-11, Office of the Governor of the State of Texas (Mar. 26, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-11_airport_travel_reporting_COVID-19_IMAGE_03-26-2020.pdf (last accessed Mar. 15, 2021)

¹¹⁵ A *Timeline of COVID-19 Developments in 2020*, AJMC (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

¹¹⁶ *What we know about delays in coronavirus testing*, The Washington Post (Apr. 18, 2020), <https://www.washingtonpost.com/investigations/2020/04/18/timeline-corona-virus-testing/?arc404=true>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*; see also, Schumaker, *supra* note 2 (See subsection “March 3, 2020: CDC lifts restrictions for virus testing”).

¹¹⁹ Erin Schumaker, Morgan Winsor, and Ivan Pereira, *Latest American infected with coronavirus has no relevant travel history: CDC*, ABCNEWS (Feb. 26, 2020, 8:45PM), <https://abcnews.go.com/International/us-military-coronavirus-patient-cases-surge-italy-south/story?id=69225004>.

¹²⁰ Schumaker, *supra* note 2 (See subsection “March 3, 2020: CDC lifts restrictions for virus testing” – infection in those who had not travelled to “hot spots” occurred prior to the lifting of restrictions for testing).

include assessments specific to the travel conditions, but rather focused on medical costs, costs associated with pandemic mitigation, etc.¹²¹ The economic impact of pandemic influenza in the United States was estimated at “US\$71.3 to \$166.5 billion, excluding disruptions to commerce and society.”¹²² A study of the impact of the 2009 H1N1 influenza pandemic in South Korea found that the “annual socioeconomic costs . . . were US\$1.09 billion (0.14% of the national GDP).”¹²³ However while there is some literature regarding the economic impacts of pandemic influenza, it is generally recognized that “there is a lack of economic evaluation for preparedness, prevention, trade and travel restrictions, hygiene recommendations, and human-to-animal transmission interventions.”¹²⁴

In addition to the lack of information regarding the costs of travel conditions, the documented benefits of travel conditions are limited at best. Available information tends to analyze international travel restrictions, not travel conditions within one country. In one study regarding the benefits of international air travel restrictions on pandemic flu, the authors found that, “[c]onsistent with previous work . . . , our study shows that international travel restrictions *per se* do not provide an effective way to contain the epidemic.”¹²⁵ In a 2014 bulletin following the 2009 H1N1 pandemic influenza, the authors performed a systematic review of international and internal travel restrictions and concluded that “[a]s quantitative assessment of the

¹²¹ Martin I. Meltzer, Nancy J. Cox, and Keiji Fukuda. *The Economic Impact of Pandemic Influenza in the United States: Priorities for Intervention*, EMERG INFECT DIS. 1999;5(5):659-671 (<https://dx.doi.org/10.3201/eid0505.990507>, available at https://wwwnc.cdc.gov/eid/article/5/5/99-0507_article).

¹²² *Id.* (emphasis added).

¹²³ Yang-Woo Kim, Seok-Jun Yoon, and In-Hwan Oh, *The economic burden of the 2009 pandemic H1N1 influenza in Korea*, SCAND J INFECT DIS. 2013 May;45(5):390-6. (doi: 10.3109/00365548.2012.749423. Epub 2012 Dec 14. PMID: 23240778, available at <https://pubmed.ncbi.nlm.nih.gov/23240778/#:~:text=Results%3A%20The%20annual%20socioeconomic%20costs,of%20direct%20non%20medical%20costs>)

¹²⁴ Hélène Pasquini-Descomps, Nathalie Brender, and David Maradan, *Value for Money in H1N1 Influenza: A Systematic Review of the Cost-Effectiveness of Pandemic Interventions*, VALUE IN HEALTH, Vol. 20, Issue 6, 2017 : 819-827 (ISSN 1098-3015, <https://doi.org/10.1016/j.jval.2016.05.005>, available at <https://www.sciencedirect.com/science/article/pii/S1098301516304922>) (emphasis added).

¹²⁵ Joshua M. Epstein et al. *Controlling pandemic flu: the value of international air travel restrictions*, PLOS ONE vol. 2,5 e401, 2 May. 2007 (doi:10.1371/journal.pone.0000401, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1855004/>)

effectiveness of travel restrictions in pandemic situations tends to be more challenging, there are scarce data on this topic.”¹²⁶

Without a full understanding of the costs of travel conditions, and a lack of information showing the benefits of travel conditions, it is difficult to perform a full balancing assessment of the costs versus benefits of these measures for limiting disease spread. Based on this dearth of information, it was likely not prudent to impose such a broad restriction as part of managing SARS-CoV-2 spread, based on the attributes of the virus.

C. General Consensus: Travel Conditions Are Not Preferred

Since international travel restrictions “would hamper global travel and trade, such restrictions are not recommended by WHO once the global spread of pandemic influenza is established.”¹²⁷ Based on the timeline of the SARS-CoV-2 outbreak, by the time states implemented travel conditions, not only was global spread of the virus established, but spread within the United States was already present.¹²⁸

Additionally, specific to the SARS-CoV-2 outbreak, the WHO did not recommend international travel restrictions because the information available at the beginning of the pandemic did not support them:

First, there is no reason for measures that unnecessarily interfere with international travel and trade. WHO doesn’t recommend limiting trade and movement. We call on all countries to implement decisions that are evidence-based and consistent. WHO stands ready to provide advice to any country that is considering which measures to take.¹²⁹

While this guidance targeted international travel, the same logic would likely apply for internal

¹²⁶ Mateus et al, *supra* note 106.

¹²⁷ Mateus et al, *supra* note 106.

¹²⁸ Caroline Kantis, Samantha Kiernan, and Jason Socrates Bardi, *UPDATED: Timeline of the Coronavirus*, THINKGLOBALHEALTH (last updated Mar. 26, 2021), <https://www.thinkglobalhealth.org/article/updated-timeline-coronavirus> (last accessed May 9, 2021).

¹²⁹ WHO Director-General’s statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV), WORLD HEALTH ORGANIZATION (Jan. 30, 2020), [https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihf-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihf-emergency-committee-on-novel-coronavirus-(2019-ncov)).

travel conditions because the information available likely did not support implementing state travel conditions. Based on the characteristics of SARS-CoV-2, the lack of information to perform a complete cost versus benefit assessment, and the delay in widely available testing of individuals, travel conditions were not likely effective measures against SARS-CoV-2.

Additionally, the WHO's guidance against international travel restrictions should have served as a point of reference as states considered the use of this tool during the public health emergency.

Travel restrictions hamper trade and are not recommended once a global pandemic is established.¹³⁰ By the time states implemented travel conditions in March 2020 or later, SARS-CoV-2 was already present and spreading via symptomatic and asymptomatic carriers.¹³¹

Implementing a travel condition at that point is akin to closing the barn door after the horse has escaped – it is too late to be effective.

PART III: COMPARISONS OF STATE APPROACHES

This Part III assesses the approaches and results of four different states with regards to travel conditions. Florida and New York were compared together, and California and Texas were compared together. The states were compared by looking at COVID-19 case counts and death rates. The results do not show a significant difference: the use of travel conditions was not dispositive in predicting whether the state fared better or not. Based on this, the travel conditions likely did not have a measurable benefit for state outcomes, even though travel conditions are still in place in California. A more detailed epidemiological analysis would be required to determine what role the travel conditions may have had in the infection and death rates.

A. Comparison: New York and Florida

Throughout the SARS-CoV-2 pandemic, New York and Florida took different measures to respond to the public health situation. New York did not implement travel conditions until

¹³⁰ Mateus et al, *supra* note 106.

¹³¹ Kantis, *supra* note 128.

June 2020, and these conditions were not lifted until April 10, 2021.¹³² By comparison, Florida implemented travel conditions in March 2020; however, these conditions were removed by August 2020. A comparison of the death rates in this section shows that Florida has not done worse as a result of lifting its travel conditions. Instead, Florida seems to be out-performing New York with a lower death rate, while remaining open without travel conditions.

i. Summary of State Death Rates

New York and Florida have similar state populations. Florida has slightly more residents at 21,477,737, with 20.9% of individuals aged 65 or older, a known risk factor for COVID-19 mortality.¹³³ Florida's population per square mile (2010) was 350.6.¹³⁴ New York has 19,453,561 residents, 16.9% of which are aged 65 or older.¹³⁵ New York's population per square mile (2010) was higher than Florida's at 411.2.¹³⁶ New York and Florida have similar population sizes, with some differences in population density as well as elderly population, yet each state took different approaches to the use of travel conditions to manage the public health risk posed by SARS-CoV-2. A comparison of the death rates shows that the presence or absence of travel conditions does not necessarily determine the outcome.

The CDC tracks death rates for each state, splitting New York into two groups, New York (excluding New York City), and New York City. Measured as deaths per 100,000, as of May 7, 2021, New York's death rate was 176; New York City's was 390.¹³⁷ Florida's death rate was 165.¹³⁸ The New York Times publishes charts of the reported cases and reported deaths per

¹³² *COVID-19 Travel Advisory*, New York State COVID-19 Updates, <https://coronavirus.health.ny.gov/covid-19-travel-advisory> (last accessed May 7, 2021).

¹³³ *Quick Facts: Florida*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/FL> (last accessed May 7, 2021).

¹³⁴ *Id.*

¹³⁵ *Quick Facts: New York*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/NY> (last accessed May 7, 2021).

¹³⁶ *Id.*

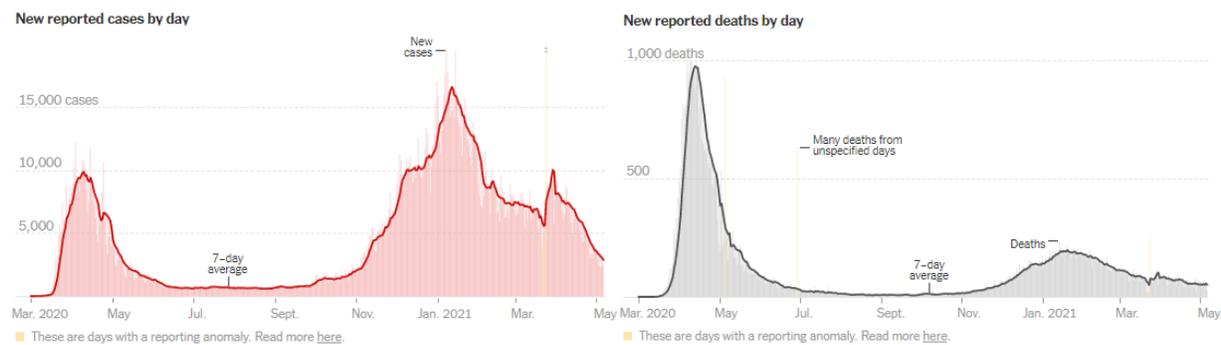
¹³⁷ *United States COVID-19 Cases and Deaths by State*, CDC: COVID DATA TRACKER, https://covid.cdc.gov/covid-data-tracker/#cases_deathsper100klast7days (last accessed May 7, 2021).

¹³⁸ *Id.*

state.¹³⁹ For New York we see the first peak in March and April 2020, when it was the epicenter of COVID-19 cases in the United States, as well as a trough which begins in May 2020 and continues until November 2020. The trough begins well before the travel conditions were announced on June 24, 2020. The second peak in November 2020 occurred while the travel conditions were still in place. Florida saw a first peak of cases around July 2020, and a trough which began in September 2020 and continued until November 2020.

In the second peak New York’s death rate was similar to that of Florida, despite having strong travel conditions in place. New York’s peak death rate during the second peak was roughly 198 on January 20. This was slightly higher than Florida’s peak death rate during the second peak, which was roughly 185 on January 28. See Figures 1 and 2 below:

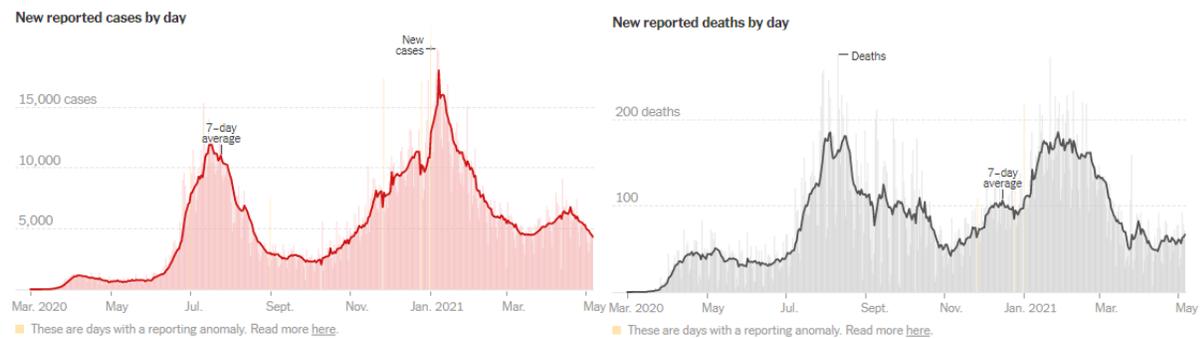
Figure 1: New York¹⁴⁰



¹³⁹ *Coronavirus in the U.S.: Latest Map and Case Count*, THE NEW YORK TIMES: THE CORONAVIRUS OUTBREAK, https://www.nytimes.com/interactive/2021/us/covid-cases.html?name=style-coronavirus®ion=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=LegacyCollection&variant=1>Show&is_new=false (last accessed May 7, 2021).

¹⁴⁰ *Tracking Coronavirus in New York: Latest Map and Case Count*, THE NEW YORK TIMES: THE CORONAVIRUS OUTBREAK (last updated May 7, 2021), <https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html> (last accessed May 7, 2021).

Figure 2: Florida¹⁴¹



ii. Were the Travel Conditions Effective?

Comparing the results of New York and Florida, states with similar populations but different approaches to travel conditions, the results likely do not support the use of travel conditions. Additional epidemiological research is needed to confirm the role travel conditions did or did not play in reducing case counts and death rates. New York implemented its travel conditions on June 24, 2020, when its case counts and death rates were already dramatically decreased from its first peak, and kept travel conditions in place through April 10, 2021. By the summer of 2020 New York had already faced and overcome the first peak with no travel conditions in place. While New York did experience a second peak around the winter holiday season, this was similar to the second peak seen in Florida, a state without travel conditions. While Florida has a slightly lower population density compared to New York, Florida has more elderly residents, who are particularly vulnerable to adverse COVID-19 outcomes. This suggests that the use of strict travel conditions is likely not dispositive to predicting state outcomes. While one can argue that the situation in New York could have been worse during the second peak without the travel conditions, one can also argue that there are a variety of reasons the travel conditions were not, and will not, be effective. This is potentially due to “pandemic fatigue”¹⁴²

¹⁴¹ *Tracking Coronavirus in Florida: Latest Map and Case Count*, THE NEW YORK TIMES: THE CORONAVIRUS OUTBREAK (last updated May 7, 2021), <https://www.nytimes.com/interactive/2021/us/florida-covid-cases.html> (last accessed May 7, 2021).

¹⁴² See, e.g., *U.S. Surgeon General Blames ‘Pandemic Fatigue’ For Recent COVID-19 Surge*, NPR: THE CORONAVIRUS CRISIS (Nov. 14, 2020, 6:38PM ET), <https://www.npr.org/sections/coronavirus-live->

and a lack of adherence to the travel conditions, as well as a lack of resources to strictly enforce the travel conditions, rendering them moot.

B. Comparison: California and Texas

During the SARS-CoV-2 pandemic, California and Texas also took different measures to respond to the public health situation. California did not implement travel conditions until November 2020, and those conditions are still in place for unvaccinated travelers as of May 2021.¹⁴³ By comparison, Texas implemented travel conditions in March 2020, but removed those conditions by May 2020. A comparison of the death rates for these states shows that Texas has not done worse as a result of lifting its travel conditions. The measures of cases and deaths are similar between Texas and California, even though California still has travel conditions in place.

i. Summary of State Death Rates

California has a large population, at 39,512,223, 14.8% of whom are aged 65 or older.¹⁴⁴ California's population per square mile (2010) was 239.1.¹⁴⁵ By contrast, Texas's population is 28,995, 881, of whom 12.9% are 65 or older.¹⁴⁶ Texas's population per square mile (2010) was 96.3.¹⁴⁷ Based on its size and population, is difficult to find a state which is comparable to California, however Texas is the closest approximation.¹⁴⁸ California and Texas took different approaches to the use of travel conditions to manage the public health risk posed by SARS-CoV-2. A comparison of the death rates shows that the presence or absence of travel conditions did

[updates/2020/11/14/934986232/u-s-surgeon-general-blames-pandemic-fatigue-for-recent-covid-19-surge](https://www.clickorlando.com/health/2021/02/25/as-hospital-numbers-fall-fatigued-staff-get-relief-at-last/); Heather Hollingsworth and Todd Richmond, *As hospital numbers fall, fatigued staff get relief at last*, ClickOrlando.com (Feb. 25, 2021, 3:19PM, updated Feb. 25, 2021 4:06PM), <https://www.clickorlando.com/health/2021/02/25/as-hospital-numbers-fall-fatigued-staff-get-relief-at-last/>.

¹⁴³ Travel, *COVID19.CA.GOV* (Last updated Apr. 27, 2021 2:00 PM), <https://covid19.ca.gov/travel/> (last accessed May 7, 2021).

¹⁴⁴ *Quick Facts: California*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/CA> (last accessed May 7, 2021).

¹⁴⁵ *Id.*

¹⁴⁶ *Quick Facts: Texas*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/TX> (last accessed May 7, 2021).

¹⁴⁷ *Id.*

¹⁴⁸ *US States – Ranked by Population 2021*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/states> (last accessed May 9, 2021).

not necessarily determine the outcome.

Measured as deaths per 100,000, California's death rate was 154, as of May 7, 2021.¹⁴⁹ Texas's death rate was 170.¹⁵⁰ According to the New York Times chart of COVID-19 disease spread and impact, California did not have a large first peak before the summer, as was seen in New York and Florida. Rather there is a small "hump" of cases and deaths in the summer months of July and August 2020, and then a peak is seen approximately mid-way through November 2020. Ironically this peak corresponds roughly with the implementation of the travel conditions imposed November 13, 2020. This shows that the travel conditions likely were not a direct result of a peak, which had not yet happened, and the use of travel conditions did not avoid the winter peak which was also seen in New York and Florida. Indeed, during the winter peak in California, the death rate was more than double what was seen in New York, which also had strict travel conditions, as well as Florida, which had no travel conditions.

Texas was also spared a first peak in the spring of 2020, and did not see a "hump" of cases and deaths until that summer, at which point the travel conditions were already lifted. Texas did see the winter peak, which was also present in California, New York, and Florida. Notably, while Texas did see this winter peak, the death rate during this time was lower than that seen in California. Texas's death rate during the winter peak reached a high of roughly 342 on January 27, while California's peak was roughly 561, also on January 27. See Figures 3 and 4 below:

Figure 3: California¹⁵¹

¹⁴⁹ *United States COVID-19 Cases and Deaths by State*, CDC: COVID DATA TRACKER, https://covid.cdc.gov/covid-data-tracker/#cases_deathsper100klast7days (last accessed May 7, 2021).

¹⁵⁰ *Id.*

¹⁵¹ *Tracking Coronavirus in California: Latest Map and Case Count*, THE NEW YORK TIMES: THE CORONAVIRUS OUTBREAK (last updated May 7, 2021), <https://www.nytimes.com/interactive/2021/us/california-covid-cases.html> (last accessed May 7, 2021).

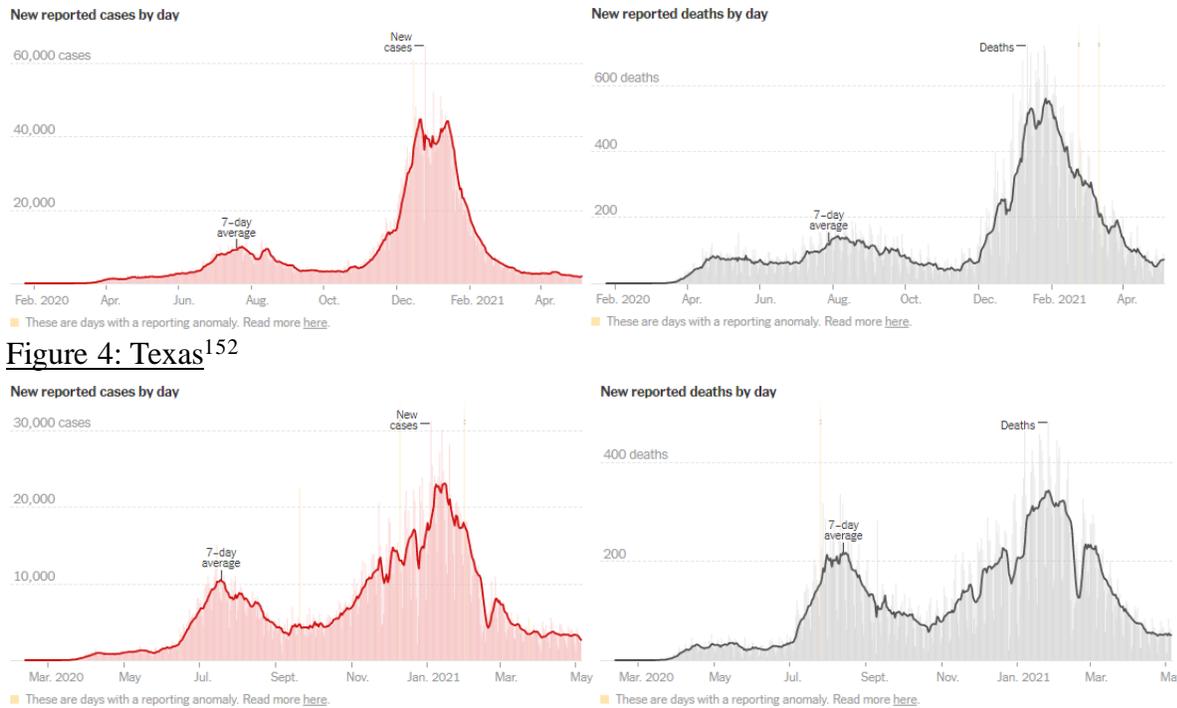


Figure 4: Texas¹⁵²

ii. Were the Travel Conditions Effective?

Comparing the results of California and Texas highlights the different approaches taken regarding the use of travel conditions to manage a public health situation. California did not implement any travel conditions until just prior to the United States’ Thanksgiving holiday period, in mid-November 2020. Prior to that, California had not seen a peak of COVID-19 cases. California then experienced a winter peak, which was also seen in Texas, a state which removed its travel conditions in May 2020. While both states experienced a winter peak, the death rate in California was higher than that in Texas, which had no travel conditions at the time. As of May 2021, California’s travel conditions have not been lifted for unvaccinated travelers.¹⁵³

California’s case rate and death rate increased dramatically starting in November, even though California implemented strict travel conditions. Some of this could be attributed to the

¹⁵² *Tracking Coronavirus in Texas: Latest Map and Case Count*, THE NEW YORK TIMES: THE CORONAVIRUS OUTBREAK (last updated May 7, 2021), <https://www.nytimes.com/interactive/2021/us/texas-covid-cases.html> (last accessed May 7, 2021).

¹⁵³ Travel, COVID19.CA.GOV (Last updated Apr. 27, 2021 2:00 PM), <https://covid19.ca.gov/travel/> (last accessed May 7, 2021).

holiday season; in addition to strict inter-state travel conditions, California also implemented local requirements to reduce exposure across households. This could indicate that 1) the spike seen in December and January would have been worse without the travel conditions, or 2) the travel conditions were not followed to the extent needed to keep the rate flat. Texas did not see a jump in cases until the summer timeframe, and death rates did not spike until July 7th. Cases and death rates came down during the fall, September through November, before spiking again in December and January.

Texas and California both saw the same spike in December and January, however Texas did not have any travel conditions while California had implemented conditions right before the Thanksgiving holiday. While one could hypothesize that the travel conditions may have helped California to reduce the effect of the spike, other states also saw the same holiday spike, including New York and Florida from Section A. This indicates that the use of travel conditions may not be dispositive as to whether states saw spikes in the November 2020 through December 2020 timeframe. This may also indicate that residents were experiencing “pandemic fatigue” and were no longer following the guidance of the travel conditions, thereby diminishing their effectiveness. The Economist also noted this similarity in results between Texas and California in the face of contrasting approaches.¹⁵⁴ The article quotes Ken Miller of Claremont McKenna college: “[p]eople in California are frustrated because they feel like they are experiencing the worst of both worlds.”¹⁵⁵

CONCLUSION

In an address to the Federalist Society in November 2020, Justice Alito stated that “[t]he pandemic has resulted in previously unimaginable restrictions on individual liberty. . . . We have

¹⁵⁴ *Life, liberty; California v Texas v covid-19*, THE ECONOMIST 6 Feb. 2021: 19(US). BUSINESS INSIGHTS: GLOBAL. Web. 1 Mar. 2021.

¹⁵⁵ *Id.* (quoting Ken Miller, Claremont McKenna college, author of *Texas vs California*).

never before seen restrictions as severe, extensive, and prolonged as those experienced for most of 2020.”¹⁵⁶ He continued that “[i]t [*Jacobson*] did not involve sweeping restrictions imposed across the country for an extended period. And it does not mean that whenever there is an emergency, executive officials have unlimited, unreviewable discretion.”¹⁵⁷ With regards to broad executive powers and deference to state police powers, Justice Alito reminded us that:

whatever one may think about the COVID restrictions, we surely don’t want them to become a recurring feature after the pandemic has passed. All sorts of things can be called an “emergency” or “disaster of major proportions.” Simply slapping on that label cannot provide the ground for abrogating our most fundamental rights. And whenever fundamental rights are restricted, the Supreme Court, and other courts, cannot close their eyes.¹⁵⁸

While challenges to state travel conditions were not successful, the examples seen were raised early in the SARS-CoV-2 pandemic, when much was still unknown about this “‘novel severe acute respiratory illness’ with ‘no known cure, no effective treatment, and no vaccine.’”¹⁵⁹ As of this paper’s submission in May 2021, we are more than twelve months from when the pandemic began, more is known about the virus’s transmission and treatment, and there are currently three vaccines authorized under the FDA’s Emergency Use Authorization.¹⁶⁰

Measures which were accepted by courts in 2020 may no longer be accepted based on our current knowledge of the virus and methods for treating and vaccinating against it. Now that we know more regarding the risk factors, treatment, and have multiple vaccines available, courts may no longer show such broad deference to governors exercising state police powers to manage

¹⁵⁶ Justice Samuel A. Alito, Address to the Federalist Society on the Declination of Individual Liberty (Nov. 12, 2020) (transcript available at AMERICAN RHETORIC.COM <https://www.americanrhetoric.com/speeches/PDFFiles/Samuel%20Alito%20-%20Federalist%20Society.pdf>).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1137 (D. Haw. 2020) (*citing* *S. Bay United Pentecostal Church v. Newsom*, — U.S. —, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring)).

¹⁶⁰ *FDA Issues Emergency Use Authorization for Third COVID-19 Vaccine*, FDA U.S. FOOD & DRUG ADMINISTRATION (Feb. 27, 2021), <https://www.fda.gov/news-events/press-announcements/fda-issues-emergency-use-authorization-third-covid-19-vaccine>.

the coronavirus risk.¹⁶¹ “Government imposed restrictions that survive strict-scrutiny analysis today will likely not meet this standard in the future. Even as states loosen restrictions, these measures may return with the ebb and flow of coronavirus transmission.”¹⁶²

State-based travel conditions are likely constitutional due deference afforded to state police powers, especially during a public health emergency. However, in the states assessed, the travel conditions likely did not lead to different public health outcomes when compared to states without travel conditions. Travel conditions are likely ineffective because SARS-CoV-2 does not lend itself to early detection. Further epidemiological research should be conducted to determine what role, if any, travel conditions played in reducing case counts and death rates.

Though the travel conditions were likely ineffective, entities such as the CDC and WHO can continue to publish information regarding disease incidence and death rates based on geography, to inform and possibly dissuade travelers.¹⁶³ Travelers who are determined to take the risk armed with such knowledge likely would not be deterred by travel conditions.

Based on their likely ineffectiveness as a public health response to the SARS-CoV-2 pandemic, travel conditions should be lifted, and information should continue to be published regarding illness rates for traveler awareness.

¹⁶¹ Elizabeth Brenner, *Love (of the Constitution) and Liberty in the Time of Covid-19 the Role of A Lawyer Is Vigilance*, 83 TEX. B.J. 462, 463 (2020).

¹⁶² Brenner, *supra* note 161 at 463.

¹⁶³ See, e.g., *CDC Current Outbreak List*, CDC, <https://www.cdc.gov/outbreaks/index.html> (last accessed May 9, 2021); *Flu Activity & Surveillance*, CDC: INFLUENZA (FLU), <https://www.cdc.gov/flu/weekly/fluactivitysurv.htm> (last accessed May 9, 2021).