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# RIGHT TO FREEDOM: THE ROLE OF GOVERNMENT AND COURTS TO PROTECT HEALTH DURING PANDEMICS

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I. INTRODUCTION

Re-Examination of the Reasonableness Scrutiny in COVID-19 Pandemic is DQRQJRKEDEPHKUJHOFHXRWVDZ « VKRXOG QHYHU XVH WKH UHDVRQDEOHQHVV VFUXWLQ\` WR GHWH

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Professors Alberto B. Bianchi and Estela B. Sacristán analyzed whether the scrutiny applied by Argentine courts to measures implemented during the COVID-19 pandemic is the COVID-19

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1. Alberto B. Bianchi & Estela B. Sacristán, Health v. Individual Freedom: Is That the Question? (A Re-Examination of Reasonable Scrutiny during COVID-19), J. INT'L L. 227, 246-52 (2021).

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currently defined by the Argentine Supreme Court, seems to rubberstamp

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infected person can infect three or more persons in close contact.<sup>20</sup> This

purely biological perspective, if all people infected with COVID-19, whether symptomatic or asymptomatic, could be simultaneously isolated for a duration equal or longer to the course of the disease, then the virus could, at least theoretically, be eradicated.<sup>21</sup>

At the beginning of the pandemic, when early eradication was still possible, the United States was unwilling to implement a strict and simultaneous isolation and quarantine of all the COVID-19 cases. Certain countries, however, like New Zealand, controlled COVID-19 by aggressively testing the population, identifying and isolating infected people, enforcing contact barriers (i.e., masks, social distancing, and stay-at-home mandates), and by closing their borders to prevent new cases of COVID-19 entering the country.<sup>22</sup>

Alternatively, the Chinese police and military forcibly closed all businesses and quarantined residents in certain cities effectively enforcing a complete lockdown.<sup>23</sup> Such measures may seem like a clear violation of individual freedom, but given the large population of China, its government was effective in controlling the spread of the disease during those early stages of the pandemic.<sup>24</sup> Therefore, the choice is not simply between health and individual freedom. The question is to what degree sacrificing individual freedom should be acceptable to maintain the health of a population and what balancing test should be used to determine that degree.

Some wanted to exercise their First Amendment right to worship by attending religious services without restriction.<sup>26</sup> Yet this freedom to choose is made irrespective of the fact that the virus will spread to others who may not have the same personal choices.

On April 27, 2020, U.S. Attorney General William Barr issued a memorandum directing U.S. Attorneys to watch for state or local ordinance[s that] cross[] the line from an appropriate exercise of authority to stop the spread of COVID-19 into an overbearing infringement of

Department of Justice could bring actions in federal courts against state and local governments over COVID-19 restrictions.<sup>27</sup> Following this memorandum, the DOJ supported many court challenges to state and local COVID-19 restrictions across multiple states, which resulted in conflicting rulings in lower courts.<sup>28</sup>

Two such cases against the states of California<sup>29</sup> and Nevada<sup>30</sup> reached the U.S. Supreme Court. The Court ruled in May and July 2020, respectively, that state restrictions on the number of attendees at religious services, to decrease the risk of spreading COVID-19, were constitutional.<sup>31</sup> In both cases, Chief Justice John Roberts joined the four liberal members of the Court, and in a five to four vote, ruled in favor of the state imposed restrictions.<sup>32</sup> However, a change in the political balance of the Supreme

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26. Many such lawsuits have been brought in federal courts across the U.S. against several states that had enacted gathering bans or restrictions on the number of people attending indoor activities. For example, three churches have sued Governor of California along with the state public health officials for alleged violation of First and Fourteen Amendments and 42 U.S.C. § 1983: Civil action for deprivation of rights and other statutory federal laws and asked for injunctive relief. Verified Complaint for Declaratory and Injunctive Relief, *Calvary Chapel of Ukiah v. Newsom*, No. 20-CV-01431, 2020 WL 6483099, at \*1 (E.D. Cal. Nov. 4, 2020); 42 U.S.C. § 1983 (2021); Chace Beech, *Three California Churches Sue Newsom over Singing Ban*, L.A. TIMES (July 16, 2020), <https://www.latimes.com/california/story/2020-07-16/california-churches-sue-newsom-singing-ban>.

27. Memorandum on Balancing Public Safety, *supra* note 11.

28. *See id.*; Shear et al., *supra* note 11; Lerer & Vogel, *supra* note 11.

29. S. B80.0

Court resulted in a contrasting ruling against the state of New York.<sup>33</sup> In imposed a cap on the number of attendees in houses of worship, was unconstitutional.<sup>34</sup> This ruling indicated that the politics of COVID-19 pandemic could spill into the highest court of the land,<sup>35</sup> and highlights how lines.<sup>36</sup>

-19 created an environment where people who followed the COVID-19 restrictions were labeled as liberals and mocked by the highest level of government officials.<sup>37</sup> Even the President of the United States went as far as saying that the COVID-19 surges in the United States

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And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

*Newsom*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). In his dissent for the case in Nevada, Justice Alito, joined by Justices Thomas and Kavanaugh, reasoned that the restrictions were unconstitutional because they preferentially treated casinos compared to churches:

Claiming virtually unbounded power to restrict constitutional rights during the COVID 19 pandemic, he has issued a directive that severely limits attendance at religious services. A church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy and in the case of gigantic Las Vegas casinos, this means that thousands of patrons are allowed. . . . We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility.

*Sisolak*, 140 S. Ct. at 2604 (Alito, J., dissenting).

33. Following the death of Justice Ruth Bader Ginsburg and confirmation of Justice Amy Coney Barrett, the Supreme Court obtained a conservative majority. Nicolas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html>.

34. *Roman Cath. Diocese of Brooklyn, N.Y. v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam).

35. Adam Liptak, *Urkvpi '7'vq'6. 'Uwr tgo g'Eqwt v'Dcenu'Tgki kpwu'Ej cmgpi g'vq'Ewqo qat' Virus Shutdown Order*, N.Y. TIMES (Nov. 26, 2020), <https://www.nytimes.com/2020/11/26/us/supreme-court-coronavirus-religion-new-york.html?smid=em-share>.

36. Joe Walsh, *Poll: Most Republicans Say Covid Threat Overblown, U.S. Handled Outbreak Well*, FORBES (Oct. 19, 2020), <https://www.forbes.com/sites/joewalsh/2020/10/19/poll-most-republicans-say-covid-threat-overblown-us-handled-outbreak-well/?sh=5f37a8b549d4>.

37. Chris Cillizza, *F qpcf 'Vt wo r at'Ncvu' Cw enlqp'O cun Wearing May Be His Worst Yet*, CNN: THE POINT (Sept. 4, 2020, 3:52 PM), <https://www.cnn.com/2020/09/04/politics/donald-trump-joe-biden->

excessive testing.<sup>38</sup> He also encouraged people to protest and defy local COVID-19 restrictions put in place to protect the public health.<sup>39</sup>

By the spring and summer of 2020, hospitals were overwhelmed beyond their capacity with patients, and healthcare professionals were exhausted, both physically and emotionally, from their often futile attempts to save the many patients battling the illness.<sup>40</sup> The U.S. federal government soon after declared that dealing with COVID-19 was the responsibility of

<sup>41</sup> while encouraging the public to protest and to bring constitutional challenges against state imposed restrictions.<sup>42</sup>

science defying attitudes, PPE shortages, failures to test early for new cases,

guidelines, resulted in an unmitigated healthcare disaster of an epic proportion. Despite its resources, the United States ranked repeatedly at the top of the chart for new COVID-19 cases and deaths for many months during 2020 and early 2021.<sup>43</sup>

### III. HEALTH V. INDIVIDUAL FREEDOM AFTER COVID-19 VACCINES

After December 2020, when several effective COVID-19 vaccines became available in the United States, the constitutionality question shifted to a question of to what degree public and private entities could mandate vaccinations for the employees, patients, visitors, students, customers, and citizens.<sup>44</sup> During a period of time between mid-December 2020 and late February 2021, when the vaccine supplies were inadequate whilst the demand was very high, vaccinations were rolled out in phases. High risk

adults, such as the elderly and nursing home residents, and healthcare workers were able to receive the vaccination first.<sup>45</sup>

However, in March 2021, despite the U.S. federal government announcing an adequate supply of the vaccines to inoculate every eligible person with the first dose by July 2021, the number of people who were willing to take the vaccine hit a ceiling—less than 60% of the U.S. adult population were willing to be vaccinated.<sup>46</sup> Now, the choice between health and individual freedom has shifted to whether, *in the face of a pandemic*, the vaccine should be mandatory. Forced vaccination clearly seems unconstitutional, or at least its constitutionality would be challenged in the U.S. courts, if a government at any level attempted to do so.<sup>47</sup> However, the government may fine citizens, or impose other restrictions on those who refuse to get vaccinated.<sup>48</sup> With emergence of new COVID-19 variants, doctors are anticipating that even



vaccination for all federal employees and contractors, prompting states to bring constitutional challenges in courts.<sup>54</sup>

#### IV. CONCLUSION

If we live in a free society, with the expectation that the government, employers, and businesses can be held civilly, and sometimes criminally, liable for negligence if infected persons are allowed to spread the virus to others,<sup>55</sup> then we cannot argue that our individual freedom during a deadly and highly contagious pandemic must be absolute. In fact, none of our individual rights enshrined in the Constitution are absolute. An absolute individual freedom for one person or group of people in a society undoubtedly infringes on individual freedom of other members of the society.

As such, the courts should not apply the traditional and stringent strict scrutiny standard of review that is reserved for the analysis of an infringement on fundamental rights or for a suspect classification in situations where emergency public health crises may temporarily interfere with individual freedoms. The reasonableness scrutiny, under the Argentine court

Whether the Argentine and the U.S. courts can adopt a judicial review standard reserved specifically for major public health crises of a pandemic magnitude is up to the respective courts and is a topic for constitutional scholars, the legislature, and public health policymakers to discuss. However, a crisis-specific standard of review seems to be the appropriate step to avoid giving the executive branch unlimited power over individual the case in Argentine.<sup>58</sup> In contrast, such an approach may prevent the

of defending individual freedom, politicizing a public health crisis in the process, as it has become the case in the United States.<sup>59</sup>

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58. Bianchi & Sacristán, *supra* note 1, at 228-31.

59. In September 2021, multiple states in the U.S. have prepared for or activated statewide emergency-level rationing of care for all patients. That is so, because about 30% of the U.S. adults refuse to receive a very effective and safe vaccine that is free and readily available to them based

community, by becoming ill with COVID-19 and going to the hospitals utilizing all the limited healthcare resources that should have been reserved for and available to all other patients. Other patients, who may unexpectedly suffer medical emergencies, such as heart attacks, strokes, surgeries, and accidents, do not receive the care they need, timely or at all, to save their lives,

available to care for them. The question is, therefore, if citizens defy medical p

denied the life-  
healthcare professionals to ration care?