

LEGAL ANALYSIS:

Year Two of the Pandemic



Sarah Harbison
General Counsel

The year 2020 started out with a series of known unknowns related to the COVID-19 pandemic. Public health officials and governments acted quickly to contain the spread of a disease that was not yet understood. Mitigation measures included stay at home orders, business closures, and capacity limitations. Unfortunately, these measures abridged personal liberties and damaged—even destroyed—businesses and livelihoods. Now that we are well into the second year of the pandemic, have a better understanding of the virus, and a universally available vaccine, will courts continue to defer to elected officials when constitutional rights are in jeopardy?

Appointed judges at every level, from District Courts¹ to the U.S. Supreme Court², were reluctant to second-guess the broad authority granted to states and exercised by elected officials to respond to a public health emergency when the constitutionality of these orders was challenged. *Jacobson v. Massachusetts*, a 1905 U.S. Supreme Court case, provides a standard most courts used to analyze the constitutionality of these public health emergency restrictions. *Jacobson* requires the restrictions to bear a “real or substantial” relation to the public health crisis and to not be a “plain, palpable invasion of rights secured by the fundamental law.”³ Following *Jacobson*, courts upheld executive orders limiting gathering sizes so long as fundamental rights, such as the free exercise of religion, were not targeted⁴; however, some judges struck down restrictions that crossed the line.⁵ As one judge put it, “[t]here is no pandemic exception to the Constitution of the United States or the Free Exercise Clause of the First Amendment.”⁶

Throughout the public health crisis, courts have signaled that deference has an expiration date. In *Calvary Chapel Dayton v. Sisolak*, Justice Samuel Alito acknowledged in his dissent that elected officials understandably reacted quickly and decisively in the early days of the pandemic because they lacked the time to craft more tailored rules to slow the spread of the disease. “Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions,” he wrote. However, he continued:

[A] public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.⁷

Four members of the Texas Supreme Court stated the issue more concisely. “When the present crisis began, perhaps not enough was known about the virus to second-guess the worst-case projections motivating the lockdowns,” wrote the justices.⁸ They continued, cautioning, “[a]s more becomes known about the threat and about the less restrictive, more targeted ways to respond to it, continued burdens on constitutional liberties may not survive judicial scrutiny.”⁹

1 4 Aces Enterprises, LLC, et al. v. John Bel Edwards, et al., No. 2:20-cv-02150-MLCF-DPC, a *36 (E.D. La., August 17, 2020).

2 See *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, (Mem)-1614 (2020).

3 *Jacobson v. Massachusetts*, 197 U.S. 11, 31(1905).

4 *Elim Romanian Baptist Church v. Pritzker*, 962 F.3d 341, 346 (7th Cir. 2020).

5 See, e.g., *Berean Baptist Church v. Governor Roy Cooper, III*, No. 4:20-CV-81-D, 2020 WL 2514313, at *11 (E.D.N.C. May 16, 2020), and *On Fire Christian Ctr., Inc., v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249 at *4 (W.D. Ky. Apr. 11, 2020).

6 *Berean Baptist Church*, supra, 2020 WL 2514313.

7 *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604–05, 207 L. Ed. 2d 1129 (2020) (Alito, J., dissenting).

8 *In re Salon a la Mode, et al.*, No. 20-0340, 2020 WL 2125844, at *2 (Tex. May 5, 2020).

9 *Id.*



A turning point came on Thanksgiving Eve 2020, when the U.S. Supreme Court struck down New York Governor Andrew Cuomo's occupancy limits on religious services.¹⁰ In that case, Justice Neil Gorsuch used his concurring opinion to draw a line in the sand, cautioning, "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."¹¹

Sixteen months after "two weeks to flatten the curve," we have a much better understanding of how the disease spreads and who is most vulnerable. We also have a new weapon at our disposal: universally available vaccines administered free of charge. With fewer known unknowns, a vaccine, and nearly two years of living with the virus, could 2020's shutdowns and restrictions survive judicial scrutiny if reinstated today?

Thanks to Operation Warp Speed, the program commissioned by President Donald Trump to accelerate the development, manufacturing, and distribution of a vaccine effective against COVID-19, Americans can choose from among three shots. These vaccines became available to healthcare workers and high-risk groups in Louisiana in early 2021 but were available to all adults as of mid-March. As of July 2021, children aged 12 and older can receive the Pfizer/BioNTech vaccine. All three vaccines are administered at no cost to the recipient.

Louisiana's elected officials have been some of the most enthusiastic advocates for vaccination. Baton Rouge Mayor-President Sharon Weston Broome is competing with New Orleans Mayor LaToya Cantrell to have the highest vaccination rate in her city by the end of July 2021.¹² Governor Edwards touted the three vaccines' safety and effectiveness.¹³ He urged eligible Louisianans who have not yet been vaccinated to "run, not walk," to receive their shot, and even shot several TikTok videos to promote the vaccine.^{14,15}

The COVID-19 vaccination is the targeted response to the disease the United States and Texas Supreme Court Justices envisioned when they wrote that continued burdens on constitutional rights might not survive judicial scrutiny. Coupled with other mitigation methods, the availability of the vaccine means that governments will need to prove to judges that any new restrictions on constitutional rights are the least restrictive means available.



The development and deployment of a vaccine was always the solution to ending the COVID-19 global pandemic. Before the vaccine became available, courts allowed governments to attempt to slow the spread of the disease even though some measures that curtailed constitutional guarantees. However, many judges cautioned that these restrictions on individual liberties might not pass constitutional muster as the science evolves and we develop targeted ways of dealing with the disease. As we move through the pandemic's second year, courts will not be so reluctant to apply non-emergency standards to restrictions that interfere with constitutional rights. As Justice Gorsuch warned, "[W]e may not shelter in place when the Constitution is under attack. Things never go well when we do."¹⁶

10 Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66, 208 L. Ed. 2d 206 (2020)

11 Id. at 70. (Gorsuch, J. concurring).

12 Cali Hubbard, Baton Rouge vs. New Orleans: Who can get the most vaccinations? WAFB 9, July 6, 2021, available at <https://www.wafb.com/2021/07/06/baton-rouge-vs-new-orleans-who-can-get-most-vaccinations/>

13 Gov. Edwards, FEMA administrator, join forces to promote preparedness, COVID vaccinations, Office of the Governor, June 29, 2021, available at <https://gov.louisiana.gov/index.cfm/newsroom/detail/324>

14 With startling surge in COVID-19 cases among the unvaccinated, Gov. John Bel Edwards encourages all Louisianans to take precautions, Louisiana Department of Health, July 16, 2021, available at <https://ldh.la.gov/index.cfm/newsroom/detail/624>

15 Jonathan Manning, La. Governor turns to TikTok to promote vaccines, KPLC, July 8, 2021, available at <https://www.kplctv.com/2021/07/08/la-governor-turns-tiktok-promote-vaccines/>

16 Roman Cath. Diocese of Brooklyn, 141 S. Ct. at 71.(2020) (Gorsuch, J. concurring).



504-500-0506
info@pelicaninstitute.org
pelicaninstitute.org

[/PelicanInstitute](#)
[@PelicanInst](#)