



PRESERVING LIFE AND LIBERTY IN A PUBLIC HEALTH EMERGENCY

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The novel coronavirus, or COVID-19, is a highly contagious respiratory illness that originated in China, found its way to American soil in January 2020 and began spreading rapidly across the country. Louisiana saw its first reported case on March 9, and within a week, Governor John Bel Edwards and New Orleans Mayor LaToya Cantrell responded with stay at home orders. There is neither a vaccine nor a cure for the virus as of August 2020. This disease will be part of our lives until a vaccine is available. Until then, “social distancing,” “flatten the curve,” and “Zoom happy hour” are phrases unlikely to leave our vocabulary any time soon.

No person, and no sector of the Louisiana economy, has been unaffected by the COVID-19 shutdown. Gov. Edwards’ public health emergency declarations shut down schools and businesses and ordered Louisianans to stay at home unless they were deemed essential workers. As a result, graduations moved online, weddings were postponed, and sadly, funeral attendance was limited. Slowing the spread of the disease to prevent it from overwhelming the healthcare system was the justification offered for these draconian measures. **But a more thoughtful approach could have been used to save lives and jobs.**



The Pelican Institute for Public Policy’s goal is to produce research and practical solutions for how to build a freer, more prosperous future for Louisiana citizens.

This paper will **explore the constitutional authority granted to states to protect public health, available federal assistance, and the practical application of Louisiana’s public health emergency statutes.** It will also recommend approaches to this ongoing pandemic and future disasters that better protect both public health and individual liberty.

POLICE POWER: CONSTITUTIONAL AUTHORITY TO RESPOND TO A PUBLIC HEALTH CRISIS

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The Tenth Amendment provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

It is unlikely that anyone alive today can recall a public health emergency that has disrupted society the way COVID-19 has. However, public health emergencies occur more frequently than we realize. There have been dozens of public health emergency declarations since 2005. These declarations are not limited to outbreaks of infectious disease, either. Public health emergencies have been declared in response to natural disasters like Hurricane Katrina, the opioid crisis¹, and contaminated water in Flint, Michigan.² The federal government and the states need policies to respond to and recover from public health emergencies as a result. The Tenth Amendment of the U.S. Constitution confirms elected officials' broad authority to respond to public health emergencies.

The Tenth Amendment provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”³ In 1824, the Supreme Court determined that “quarantine laws [and] health laws of every description” are part of “that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves.”⁴ Later, the Court referred to the authority retained by the states to protect health, safety, and morality of its citizens as the state’s “police power.”⁵

Jacobson v. Massachusetts is the landmark decision discussing a state’s police power during a public health emergency. In this 115-year-old opinion, the Supreme Court upheld a Massachusetts law requiring mandatory smallpox vaccinations to eradicate the disease. The Court recognized that the police power authorized the city of Cambridge to enact this statute:

Although this court has refrained...from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and “health laws of every description”...According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety.⁶

¹ Public Health Emergency Declarations, U.S. Dept. of Health and Human Svcs., available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx>.

² Public health emergency declaration for people using the Flint city water supply with the Flint River as the Source, Genesee Co. Bd. of Comm’rs, available at https://www.gc4me.com/docs/public_health_emergency_announcement_10_1_15.pdf.

³ U.S. Const. amend. X.

⁴ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

⁵ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 442-43 (1827).

⁶ *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905).



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Additionally, the Court deferred to Cambridge’s board of health, which required the smallpox vaccination only when the disease was “prevalent and increasing”.⁷ However, the Court was careful to note that government’s police powers are not unlimited. A court might review the legislature’s police power if it enacts a statute purporting to support public health, but “has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”⁸

The *Jacobson* Court’s exclusion of measures that were “arbitrary, oppressive and unreasonable” was a standard that gave great deference to the state. Decades after *Jacobson*, the strict scrutiny standard evolved as the Court considered monumental civil rights cases. The strict scrutiny standard is applied when testing the constitutionality of legislation affecting fundamental rights.⁹ Public health laws affecting fundamental rights must be narrowly tailored to serve a compelling governmental interest and must use the least restrictive means for achieving the public health objective.¹⁰ Restrictions enacted during a public health emergency that do not affect fundamental rights will be evaluated by a lesser standard.¹¹

Louisiana’s governor enacted several restrictions to stop or slow the spread of COVID-19 pursuant to the state’s police powers. The governor’s proclamations have closed schools to in-person instruction, mandated face coverings, closed or restricted operation of certain types of businesses, closed bars to on-premises consumption, and limited crowd sizes and social gatherings. Hair salons, nail salons, and tattoo shops were closed during the early months of the pandemic. Some cities and municipalities have enacted stricter policies. In New Orleans, Mayor Latoya Cantrell kept the city in Phase 1 after the rest of the state moved to Phase 2 reopening, and later prohibited bars from selling alcoholic drinks to-go, effectively closing bars that do not also offer food service. As the Supreme Court cautioned in *Jacobson*, the restrictions must have a real or substantial relation to the object of protecting public health. Elected officials should be armed with data to prove that these closures, particularly of targeted businesses, are necessary to prevent the spread of COVID-19.

The Supreme Court also warned that public health laws must not interfere with fundamental rights. Enjoying a meal inside a restaurant is not a fundamental right; however, the free exercise of religion is guaranteed by the First Amendment. Public health emergency declarations affecting religious services are acceptable so long as they are neutral laws of general applicability. In other words, a law may have the effect of regulating religious conduct so long as the law does not target religious conduct.¹² Executive orders that apply to all gatherings, not just religious

⁷ *Jacobson*, 197 U.S. 11, at 27-28).

⁸ *Id* at 30-31.

⁹ *Washington v. Glucksberg*, 521 U.S. 720 (1997).

¹⁰ *Reno v. Flores*, 507 U.S. 292, 301-302 (1993).

¹¹ *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

¹² *Employment Div. v. Smith*, 494 U.S. 872, 877-878 (1990).



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services, are likely to be upheld. The U.S. Seventh Circuit upheld Illinois Gov. J.B. Pritzker's ban on gatherings of more than 10 people because the ban did not single out religious services, nor did it show hostility towards religion.¹³ However, a U.S. District Court judge in North Carolina granted a temporary restraining order against Gov. Roy Cooper's executive order that prohibited indoor religious services of ten or more people, finding that the order violated the plaintiffs' First Amendment right to free exercise of their religion.¹⁴ In Kentucky, a U.S. District Court judge granted a temporary restraining order to On Fire Christian Center after Louisville Mayor Greg Fischer banned drive-in Easter services, but continued to allow liquor stores and restaurants to offer drive-through services.¹⁵ Judge Justin Walker wrote that Mayor Fischer's order violated the Free Exercise Clause “beyond all question.”¹⁶

Since the start of the pandemic, more than 500 lawsuits have been filed challenging restrictions related to COVID-19.¹⁷ Of those lawsuits, two requests for injunction were denied by the U.S. Supreme Court. Plaintiffs in *South Bay United Pentecostal Church v. Newsom*¹⁹ asked the Court to enjoin California Gov. Gavin Newsom's cap of 25% capacity or a maximum of 100 attendees at places of worship. In that case, Chief Justice John Roberts cautioned against courts second-guessing the broad authority granted to states to respond to a public health emergency.²⁰ Likewise, in *Cavalry Chapel Dayton Valley v. Sisolak*²¹, the Supreme Court denied the church's request to enjoin Nevada's order prohibiting churches, synagogues, and mosques from admitting more than 50 persons, but allows Las Vegas casinos to admit 50% of their maximum capacity.²²

¹³ *Elim Romanian Baptist Church v. Pritzker*, 962 F. 3d 341, 346 (7th Cir. 2020).

¹⁴ *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).

¹⁵ *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249, at *4 (W.D. Ky. Apr. 11, 2020).

¹⁶ *Id.* at *6.

¹⁷ Lawsuits about state actions and policies in response to the coronavirus (COVID-19) pandemic, 2020, available at [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020).

¹⁸ At least two lawsuits challenging mask mandates were filed. A Shreveport judge blocked the mayor of enforcing a citywide mask mandate, which threatened non-complying businesses with the elimination of city services. Governor Edwards' statewide mask mandate took effect a few days later. See Emily Enfinger, Judge rules in favor of businesses in Shreveport mask mandate lawsuit, *Shreveport Times*, July 20, 2020, available at <https://www.shreveporttimes.com/story/news/local/2020/07/20/judge-rules-favor-shreveport-businesses-mask-mandate-lawsuit/3287642001/>. A Florida judge rejected claims that Leon County's mask mandate violated the state constitution's guarantees of privacy, due process, religious freedom, and equal protection. The judge wrote that he found the science supporting the mask ordinance to be convincing. See Karl Etters, Judge upholds Leon County mask ordinance, says it 'does not violate any constitutional rights', *Tallahassee Democrat*, Jul 10, 2020, available at <https://www.tallahassee.com/story/news/2020/07/10/leon-county-mask-ordinance-does-not-violate-any-constitutional-rights-judge-rules/5416260002/>.

¹⁹ *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, (Mem)-1614 (2020).

²⁰ *Id.*

²¹ The Court's ruling was limited to the church's request for preliminary injunctive relief. The ruling did not address whether the order was lawful. Further, the denial of the preliminary injunction was opposed by four justices in three dissenting opinions. *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020).

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Closer to home, the U.S. Fifth Circuit Court of Appeals addressed the claims of Pastor Tony Spell in *Spell v. Edwards*. Pastor Spell repeatedly held services at his church in Central, La., for thousands of members in defiance of the governor’s orders limiting in person gatherings to 10 persons in Phase 1, and 50% capacity in Phase 2.²³ Pastor Spell’s complaint was moot by the time it reached the Fifth Circuit because the Phase 1 order expired.²⁴ However, the intervening events of the death of George Floyd at the hands of a police officer and the ensuing protests prompted Judge James Ho to issue a separate concurrence to address officials’ different treatment of gatherings at religious services and massive protests with no social distancing.²⁵

Judge Ho wrote, “If officials are now exempting protesters, how can they justify continuing to restrict worshippers? The answer is they can’t. Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are ‘open’ and which remain ‘closed.’”²⁶ Judge Ho acknowledged that Gov. Edwards held sincere public health concerns when he issued the restrictions on crowd sizes; however, “those concerns must be applied consistently, not selectively...If protests are exempt from social distancing requirements, then worship must be too.”²⁷

On August 17, 2020, Judge Martin Feldman of the Eastern District of Louisiana ruled on a request from several Louisiana bar owners to enjoin Gov. Edwards and Louisiana State Fire Marshal Butch Browning from enforcing orders banning on-site consumption of drinks at bars. Judge Feldman denied the bar owners’ motion because he was convinced by medical testimony demonstrating that the restriction bore a real relationship to the public health crisis, as *Jacobson* requires.²⁸ However, he cautioned that his ruling merely means that the governor’s order closing bars is constitutional; the ruling does not mean that the proclamations are “sound policy...or sufficiently solicitous of the interests of Louisiana small business owners.”²⁹

Although courts have given broad authority to government officials exercising their police power to curb the COVID-19 threat, they have also cautioned that “[t]he Constitution is not suspended when the government declares a state of disaster.”³⁰ Four Texas Supreme Court justices wrote in a concurring opinion that elected officials who curtail civil liberties in response to a pandemic should take advantage of opportunities to demonstrate that those measures are absolutely necessary to combat the disease, and that less restrictive measures would be ineffective.³¹ Restrictive measures burdening constitutional rights might not pass judicial scrutiny as we learn more about the disease and develop more targeted ways to respond to it.³²

²³ *Spell v. Edwards*, 962 F.3d 175, 178 (5th Cir. 2020).

²⁴ *Id.* at 179.

²⁵ *Id.* at 180.

²⁶ *Id.* at 182.

²⁷ *Id.*

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

²⁹ *Id.*

³⁰ *In re Abbott*, No. 20-0291, 2020 WL 1943226, at *1 (Tex. Apr. 23, 2020).

³¹ *In re Salon a la Mode*, No. 20-0340, 2020 WL 2125844, at *1 (Tex. May 5, 2020).

³² *Id.*



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POLICE POWER IN ACTION: LOUISIANA PUBLIC HEALTH EMERGENCY STATUTES

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All states provide their governors with tools to respond to an emergency and activate resources that are not available during non-emergency conditions.³³ Louisiana provides its governor with two emergency preparedness acts: The Louisiana Homeland Security and Emergency Assistance and Disaster Act, which is used to respond to natural disasters or terrorist attacks; and the Louisiana Health Emergency Powers Act. The governor is granted sweeping authority to act during a public health emergency.

The Louisiana Health Emergency Powers Act defines a public health emergency as the occurrence or imminent threat of an illness or health condition caused by bioterrorism, a novel or previously controlled infectious agent or biological toxin, or a natural or manmade disaster, that poses the possibility of widespread exposure or a large number of deaths.³⁴ The Act grants “extraordinary government powers and functions” to rapidly combat a public health emergency, and provides that the health emergency powers of the state coordinate to the maximum extent possible with the federal government, local governments, other states, and private agencies in response to a health emergency.³⁵

Public health emergencies are declared by executive order or proclamation of the governor.³⁶ The governor is the only person authorized to declare a public health emergency; the legislature may not make such a declaration. The declaration activates the state’s response and recovery plan under the direction of the Governor’s Office of Homeland Security and Emergency Preparedness (GOHSEP), which coordinates with the Louisiana Department of Health (LDH). Under a public health emergency declaration, the governor is empowered to suspend provisions of regulatory statutes or orders, rules, or regulations of any state agency if strict compliance hinders response to the disaster. He or she may also control the ingress or egress to and from a disaster area, or the movement of persons within the area, and suspend or limit the sale of alcoholic beverages, explosives, and combustibles.³⁷ Additionally, the governor is authorized to compel evacuation, repurpose state departments or agencies, and commandeer private property.^{38,39}

³³ Emergency Authority and Immunity Toolkit, Association of State and Territorial Health Officials, available at <https://astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Authority-and-Immunity-Toolkit/Emergency-Declarations-and-Authorities-Fact-Sheet/#:~:text=All%20states%20give%20the%20governor,to%20declare%20public%20health%20emergencies>.

³⁴ La. R.S. §29:762(12)(a)-(b).

³⁵ La. R.S. §29:760(B).

³⁶ La. R.S. §29:766.

³⁷ La. R.S. §29:766(D)(1)-(9).

³⁸ *Id.*

³⁹ La. R.S. §27:771(C) requires compensation for private property lawfully taken by a public health authority in response to a public health emergency. The amount of compensation is calculated in the same manner as compensation due in a non-emergency situation.





The Act charges the Subcommittee on Chemical and Biological Terrorism of the Homeland Security Advisory Council with presenting the governor with a plan to respond to a public health emergency.⁴⁰ Everything from ensuring the continuity of the judicial system and the appointment of emergency judges to rule on matters of isolation and quarantine, to administering vaccination and treatment, to housing and feeding of emergency workers should be addressed by the plan.⁴¹ Notably, the plan is required to protect the civil liberties of Louisianans and use the least restrictive means necessary when quarantine or isolation are required.⁴²

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GOHSEP and LDH are also given special powers during a public health emergency. These agencies are empowered to decontaminate facilities and destroy materials that may endanger public health.⁴³ The state health officer, who is a member of the Louisiana Department of Health, is authorized to “employ any means” including rationing, quotas, allocations, or other means, to control the use of food, fuel, clothing, and other commodities during a public health emergency.⁴⁴

Responding to a disease that can potentially overwhelm the state’s healthcare system requires cooperation at the local, state, and federal levels. Louisiana’s Public Health Emergency Act anticipates this all-hands-on-deck approach and provides that the state should cooperate to the maximum extent possible with private agencies, other states, and the federal government in response to a health crisis. Certain conditions that do not exist unless an emergency is declared make it easier for governments to work together and more likely that the private sector will lend support.

Since the start of the COVID-19 crisis, Louisianans were cautioned that the state’s healthcare system could be overwhelmed. One way to address personnel shortages is to allow healthcare providers with current, unrestricted licenses in other states to temporarily register in Louisiana during a public health emergency. La. R.S. 29:769(E) allows relevant boards and commissions to create a process allowing healthcare workers from other states to work in Louisiana during a public health emergency. The Act authorizes the Louisiana Department of Health (LDH) to use “any means” to secure personal protective equipment, such as masks and gloves.⁴⁵

⁴⁰ La. R.S. §29:764.
⁴¹ La. R.S. §29:764(1)-(5).
⁴² *Id.*
⁴³ La. R.S. §29:769(A-B).
⁴⁴ La. R.S. §29:769(C).

But for the declaration's elimination of bureaucracy, LDH might not be able to adequately protect healthcare workers or meet hospital staffing needs.

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Limitations of liability that do not exist during non-emergency conditions are activated during a public health emergency. Similar in spirit to Good Samaritan laws, increasing the standard to gross negligence encourages citizens to participate in disaster response, rather than shy away for fear of a frivolous lawsuit. People who volunteer their property to be used as a shelter are absolved of civil liability for negligently causing death, injury, or property damage.⁴⁶ Those acting under the direction of the state or in performance of a state contract shall not be held civilly liable for death, injury, or property damage except in the event of gross negligence or willful misconduct.⁴⁷ The willful misconduct or gross negligence standard also applies to healthcare providers and those rendering assistance or advice at the request of the state.⁴⁸ Anyone responsible for causing the public health emergency in whole or in part is not eligible for these immunities.^{49 50}

Once the danger posed by a public health emergency has passed and the emergency conditions no longer exist, the declaration is terminated by executive order or proclamation. No state of emergency shall continue for longer than 30 days unless it is renewed by the governor.⁵¹ The legislature can also act to terminate the state of emergency. A majority of surviving members of either house⁵² may terminate the state of emergency at any time after consulting with a public health authority.⁵³

Despite these broad grants of authority, the governor should heed the Texas Supreme Court Justices’ warning that the constitution is not suspended during a pandemic. Both the U.S.⁵⁴ and Louisiana⁵⁵ constitutions require that no person shall be deprived of life, liberty, or property without due process of law. Louisiana’s Constitution also provides that “no one of these branches [legislative, executive, judicial], nor any person holding office in one of them, shall exercise power belonging to either of the others.”⁵⁶ The executive branch should be careful not to usurp powers of the other branches in the enforcement of its emergency declarations.

⁴⁵ La. R.S. § 29:769(C).

⁴⁶ La. R.S. § 29:771(2)(a).

⁴⁷ La. R.S. § 29:771(2)(b).

⁴⁸ La. R.S. § 29:771(2)(c)-(d).

⁴⁹ La. R.S. § 29:771(2)(e).

⁵⁰ The President or the Health and Human Services Secretary may declare a public health emergency in a state even if the governor did not do so. However, the limitations on liability available to businesses, property owners, and some healthcare providers are not available under state law if the disaster is declared only at the federal level.

⁵¹ La. R.S. §29:764(A).

⁵² This statutory language is eerily prescient. Freshman representative Reggie Bagala died of COVID-19 in April 2020. See Ramon Antonio Vargas, Louisiana lawmaker Reggie Bagala dies amid battle with coronavirus at age 54, *The Times Picayune*, Apr. 9, 2020, available at https://www.nola.com/news/coronavirus/article_1b719610-7ab6-11ea-9ec8-0f29eb03c71b.html.

⁵³ La. R.S. §29:764(B).

⁵⁴ U.S. Const. amend. XIV, §1.

⁵⁵ La. Const. art. 1, §2.

⁵⁶ La. Const. art. II, §2.



FEDERAL RESOURCES AVAILABLE DURING A PUBLIC HEALTH EMERGENCY

Public health emergencies can quickly overwhelm a state's resources. The President and the Health and Human Services (HHS) Secretary can declare a public health emergency to help states with their response. Federal aid includes financial, personnel, services, logistical, and technical assistance; statutory immunities and liability protections; an easing of regulatory requirements; and activation of emergency response systems. The Stafford Act, National Emergencies Act, and the Public Health Emergency Act are available for the federal government to help states fill in gaps.



The Stafford Act grants the President the power to declare a national emergency. On March 13, 2020, President Donald Trump invoked the Stafford Act to declare an emergency under Section 501(b) in response to the COVID-19 pandemic. The Stafford Act allows state governments and tribal authorities to request disaster assistance from the federal government. The governor of each declared state or territory, or the chief executive of each declared Indian tribal government, must execute a FEMA-State agreement to receive assistance pursuant to their COVID-19 emergency declaration.⁵⁷

President Trump also declared a national emergency pursuant to Section 201 of the National Emergencies Act on the same date. Section 301 of the Act enables access to statutory emergency authorities not otherwise available. The proclamation empowers the Secretary of Health and Human Services to exercise authority under Section 1135 of the Social Security Act.⁵⁸ Also known as an “1135 Waiver,” the Secretary can waive or modify certain requirements of Medicare, Medicaid, and State Children’s Health Insurance programs

throughout the duration of the emergency. In addition, the HHS Secretary has the power to reimburse and exempt sanctions for the good faith providers of these services who are unable to comply with certain statutory requirements absent fraud or abuse. For the current pandemic, the 1135 waivers have loosened the restrictions on telehealth usage and certain requirements for hospitals and healthcare providers, so they can better respond to the crisis.⁵⁹

⁵⁷ COVID-19 Emergency Declaration, Federal Emergency Management Agency, March 13, 2020, available at <https://www.fema.gov/news-release/20200726/covid-19-emergency-declaration>.

⁵⁸ President Trump declares state of emergency for COVID-19, National Conference of State Legislatures, March 25, 2020, available at <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/president-trump-declares-state-of-emergency-for-covid-19.aspx>.

⁵⁹ Public Health Emergency: 1135 Waivers, U.S. Department of Health & Human Services, available at <https://www.phe.gov/Preparedness/legal/Pages/1135-waivers.aspx>.

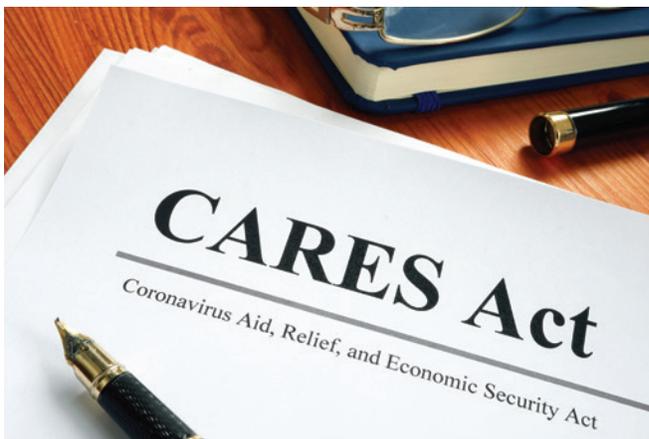


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Section 319 of the Public Health Emergency Act authorizes the HHS Secretary to take such action as may be appropriate to respond. These actions include making grants, entering into contracts, and directing and supporting investigations into the cause, treatment, or prevention of the disease or disorder. In addition, the Secretary may access funds appropriated to the Public Health Emergency Fund. The Secretary may also grant extensions or waive sanctions relating to submission of data or reports required under HHS laws, when the Secretary determines that as a result of the public health emergency, individuals or public or private entities are unable to comply with deadlines for such data or reports.⁶⁰

Each of the Acts authorizing federal action in a public health emergency allows the states to retain some decision-making power. For instance, a public health emergency declaration does not waive or preempt state licensing requirements. States determine whether and under what circumstances a non-Federal healthcare provider is authorized to provide services in the state without state licensure. Healthcare providers licensed in other states, who are not affirmatively barred from practicing, may be allowed to work in Louisiana when a public health emergency is declared. A Section 1135 waiver allows the HHS Secretary to waive Medicare, Medicaid, or CHIP requirements that health care professionals hold licenses in the state where they provide services.⁶¹

Under both the Public Health Service Act and the Section 1135 of the Social Security Act, governors of the states are not required to make a formal request for a Public Health Emergency Declaration or an 1135 waiver. However, they are encouraged by the Department of Health and Human Services to reach out to the Regional Emergency Coordinator at the Health and Human Services office in their region.⁶²



Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act in response to the COVID-19 pandemic. The CARES Act established the \$150 billion Coronavirus Relief Fund to provide federal aid for states, territories, tribes, and local governments to make up for the losses that occurred due to stopping the spread of COVID-19. Louisiana has received \$1.8 billion in CARES Act funds so far.

⁶⁰ Public Health Emergency Declaration, U.S. Department of Health & Human Services, available at <https://www.phe.gov/Preparedness/legal/Pages/phedeclaration.aspx>.

⁶¹ *Id.*

⁶² *Id.*

ADOPTING APPROACHES THAT PRESERVE BOTH LIFE AND LIBERTY DURING A PUBLIC HEALTH CRISIS

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Federal and state laws provide Louisiana with abundant resources to protect human life during the COVID-19 pandemic. Laws that suspend health care worker licensing or limit liability allow the government to respond quickly to a disaster and encourage private sector involvement. After Hurricane Katrina, lawmakers reevaluated the state's emergency statutes and made changes considering the lessons they learned during that disaster. COVID-19 provides us with a similar opportunity to consider how Louisiana will respond to a future public health emergency.

Louisiana lawmakers responded to some of the challenges posed by COVID-19 during the two 2020 legislative sessions held thus far.

The legislature met during the COVID-19 pandemic and passed legislation geared toward easing recovery and encouraging Louisiana's businesses to respond to the state's needs. Act 303 by Sen. Sharon Hewitt limits liability for businesses that donate recovery services or manufacture products, such as hand sanitizer, outside of their regular course of business. Portions of Act 336 by Rep. Thomas Pressly limit liability for manufacturers of personal protective equipment in response to the public health emergency. Additionally, Act 9 by Rep. Buddy Mincey bans lawsuits against school districts and colleges over COVID-19 claims, and Act 305 by Sen. Patrick McMath bans lawsuits against restaurants for claims related to transmission of COVID-19 through preparation or serving of food. These new laws contain exceptions for gross negligence or willful misconduct and are only in effect during a declared state of emergency. Notably, parts of Act 336 shield businesses, government agencies, trade show organizers, and event planners from claims related to COVID-19, gross negligence excepted, even outside of an emergency declaration.

Lawmakers also addressed the potential for civil liberties violations in existing statutes. Louisiana's constitution recognizes the right to keep and bear arms as fundamental and any laws restricting this right are subject to strict scrutiny.⁶³ Bills carried by Rep. Blake Miguez amended the public health emergency statutes to prohibit the government from firearm confiscation or ammunition sales.⁶⁴

⁶³ La. Const. Art. I, §11.

⁶⁴ 2020 La. Sess. Law Serv. Act 325 (H.B. 781) (WEST).



RECOMMENDATIONS FOR FUTURE PUBLIC HEALTH EMERGENCIES

Lawsuits related to COVID-19 shutdowns are making their way through the court system. Eventually, courts will update the century-old body of pandemic law from the *Jacobson* decision and provide some additional guardrails for the police power. Lawmakers should pay careful attention to these rulings and be prepared to present legislation within this framework.

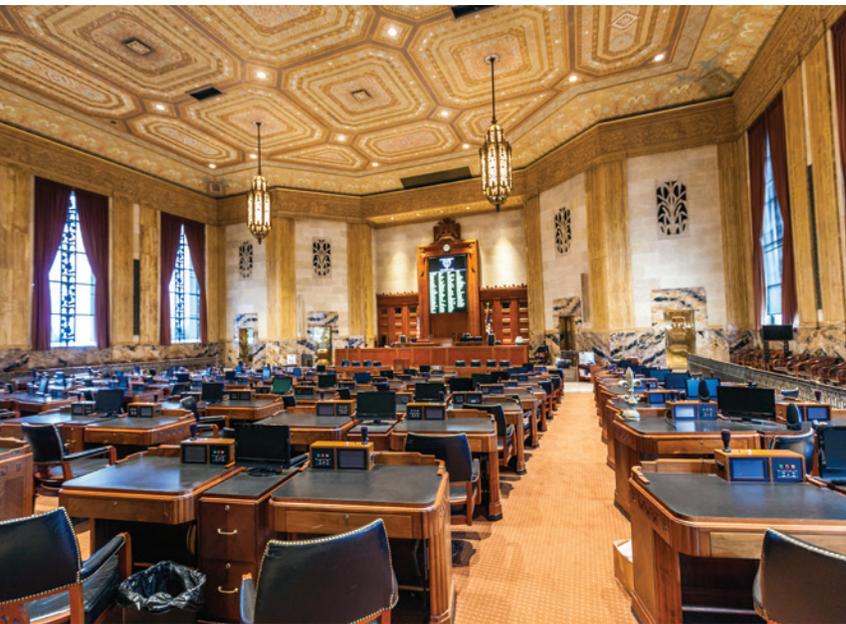
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Louisiana’s legislature should require the governor to seek legislative approval to extend a state of emergency beyond 30 days.”

In the meantime, **legislators can find some guidance in other states’ emergency powers acts.** A public health emergency declaration in Louisiana must be renewed every 30 days. Some states allow the governor to declare a state of emergency but require legislative approval on renewals. Wisconsin, for example, requires a joint resolution of the legislature to extend a state of emergency.⁶⁵ Louisiana’s legislature should require the governor to seek legislative approval to extend a state of emergency beyond 30 days.

Legislators should also consider clarifying the statutes terminating an emergency pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act. The public health emergency statute is clear that if the majority of either house terminates a state of public health emergency, no other declaration of public health emergency may be issued for a period of time specified in the petition. In other words, the governor’s authority to declare an emergency in the

event of a hurricane or other natural disaster would not be hindered if the legislature terminated the public health emergency. A similar provision under the Louisiana Homeland Security and Emergency Assistance and Disaster Act is less clear.

La. R.S. §29:724(B)(2) provides that a majority of surviving members of either house may terminate an emergency declaration and establish a period of time during which “no other declaration of emergency or disaster may be issued.” Amending this section to provide that no other declaration of emergency or disaster pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act may be issued for a certain period of time makes it clear that the termination of an emergency due to a natural disaster or act of terrorism does not affect the governor’s ability to declare a public health emergency.



⁶⁵ Wis. Stat. § 323.10.

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Several court decisions addressing shutdown orders demonstrate that courts are unlikely to second-guess the steps governments take to preserve public health ...”

Several court decisions addressing shutdown orders demonstrate that courts are unlikely to second-guess the steps governments take to preserve public health, with the notable exception of stay-at-home orders that violate separation of powers guarantees.⁶⁶ However, in the same decisions, judges put elected officials on notice that there are no pandemic exceptions in the U.S. Constitution. When a vaccine becomes available and doctors better understand COVID-19, courts will expect emergency declarations to be more narrowly tailored.

One way elected officials can narrowly tailor shutdown orders to preserve life and liberty is by reframing their approach. Future executive orders should consider business operations as “safe” and “unsafe” rather than “essential” or “non-essential”. Louisiana took a one-size-fits-all approach to the shutdown; and yet, COVID-19 cases continued to rise. Rather than blanket bans on certain types of businesses, elected officials should consider whether any part of a business’ operations can be done in a way unlikely to spread the disease. Most insurers added exclusions for losses due to virus or bacteria following the 2002-2003 SARS outbreak,⁶⁷ so business interruption claims will not cover losses during a pandemic. Elected officials owe it to their constituents to put some thought into their shutdown orders and give businesses a fighting chance.

Voters can also play a role in holding elected officials accountable. Public records requests are a powerful tool that citizens can use to access data and information elected officials use to make decisions related to the shutdown. Requests could also be used to discover whether and how shutdown orders are being enforced.

Most everyone agrees that 2020 is a year we would all rather forget. COVID-19 and dismal economic numbers combined to make a year that broke all the wrong records. **However, we should seize the opportunity to make 2020 the year we put limits on government overreach so that we are better prepared the next time we face a pandemic, hurricane, or any other disaster.**

⁶⁶ See Lake County, Ohio, Court of Common Pleas, “Rock House Fitness, Inc., v. Acton: Order Granting Preliminary Injunction” May 20, 2020, available at <https://ohioconstitution.org/wp-content/uploads/2020/05/20CV000631-Rock-House-Fitness-Inc.-v-Amy-Acton-Director-ODOH-order-granting-preliminary-injunction.pdf>.

⁶⁷ Todd C. Frankel, Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage, Washington Post, Apr. 2, 2020, available at <https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage/>





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