

THE PUBLIC’S RIGHT TO HEALTH AND SAFETY TRUMPS AN INDIVIDUAL’S RIGHT TO FREEDOM: THE ROLE OF GOVERNMENT AND COURTS TO PROTECT HEALTH DURING PANDEMICS

Mehrnaz M. Hadian*

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I. INTRODUCTION

In their article, “Health v. Individual Freedom: Is That the Question? (A Re-examination of the Reasonableness Scrutiny in COVID-19 Times),” 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 an appropriate standard of review to approve or overrule government actions that restrict individual freedom during national emergency health crises.¹ They concluded that while the COVID-19 pandemic is an ongoing health emergency, “the courts of law...should never use the reasonableness scrutiny” to determine the constitutionality of

* Mehrnaz Hadian is a practicing Intensive Care Unit (ICU) physician and healthcare lawyer dedicated to improving quality of care for patients through advocacy for safe and free-from-retaliation work environment for physicians and nurses. She has worked as a frontline practitioner throughout COVID-19 pandemic in the intensive care units and represented doctors and nurses in their dispute with hospitals for the lack of PPE, creating unsafe work environment and retaliation against healthcare providers who advocate for better patient care.

1. Alberto B. Bianchi & Estela B. Sacristán, *Health v. Individual Freedom: Is That the Question? (A Re-examination of Reasonable Scrutiny during COVID-19)*, 27 SW. J. INT’L L. 227, 246-52 (2021).

a government emergency order or law “in conditions currently in force” to deprive people’s individual freedom.² While “reasonableness scrutiny,” as currently defined by the Argentine Supreme Court, seems to rubberstamp “Urgent and Necessary” Executive Orders as constitutional, so long as the government sets a “lofty” goal as important as a nation’s health, I disagree that “suspicious category[ies] or “strict scrutiny” should be the standard of review in such circumstances.³

As a disclaimer, my opinions are undoubtedly influenced by my viewpoint as a practicing Intensive Care Unit (ICU) physician. As someone who has been on the forefront of the COVID-19 crisis from the beginning treating patients and witnessing the devastation of the pandemic. Seeing politicians, government officials, and courts continue to politicize this global health disaster in the U.S. and around the world is nothing short of maddening. Despite this disclaimer, I attempt to remain objective in my commentary about the appropriateness of different levels of scrutiny in such circumstances and proposing what should be the standard of review applicable to an extraordinary set of circumstances such as the COVID-19 pandemic.

If, in early 2020, the U.S. government had preemptively acted upon Chinese intelligence reports of a respiratory disease in China, COVID-19 would likely not have become a pandemic.⁴ In the past two decades, the United States has experienced similar cycles of novel viral infections (including H1N1, SARS, MERS, and Ebola, to name a few) popping up around the globe.⁵ Every time, the U.S. government responded swiftly, decisively, and apolitically. It mobilized all the necessary public health, medical, and logistical expertise and resources to help contain any such infectious outbreaks in its local origin. Unfortunately, this time, the public health matter was politicized, which resulted in a global disaster of unimaginable proportion and an enormous amount of death, destruction, and human suffering for the entire world.⁶

2. *Id.* at 253.

3. *Id.* at 249-53.

4. Shane Harris et al., *U.S. Intelligence Reports from January and February Warned About a Likely Pandemic*, WASH. POST (Mar. 20, 2020), https://www.washingtonpost.com/national-security/us-intelligence-reports-from-january-and-february-warned-about-a-likely-pandemic/2020/03/20/299d8cda-6ad5-11ea-b5f1-a5a804158597_story.html.

5. Dennis Wagner & Donovan Slack, *The US Had a Chance to Learn from Anthrax, SARS, H1N1 and Ebola. So Why Is the Federal Coronavirus Response So Messy?*, USA TODAY (Mar. 23, 2020, 12:22 PM), <https://www.usatoday.com/story/news/nation/2020/03/23/coronavirus-shows-trump-administration-problems-with-biodefense-plan/2896252001/>.

6. See generally, P. Sol Hart et al., *Politicization and Polarization in COVID-19 News Coverage*, 42 SCI. COMM., 679, 685-92 (2020).

In March 2020, when the existence of a pandemic and the urgency of dealing with it could no longer be denied, the U.S. President finally and grudgingly acknowledged the problem before declaring that it would “disappear” one day “miraculously.”⁷ At this point, many countries had applied strict quarantine rules, travel restrictions, stay-at-home orders, mask mandates, and other preventive measures through executive orders and emergency laws.⁸ In some countries, there was even use of military forces to curb the global wildfire of COVID-19.⁹ Meanwhile, the U.S. federal government tried to find a way to reopen the economy, insisting that COVID-19 was no worse than the seasonal flu.¹⁰

Not only was there a lack of a coherent national federal response to the COVID-19 crisis, the U.S. federal government, in the name of individual freedom, encouraged and assisted with legal challenges to undermine states’ stay-at-home orders and mask mandates, interfering with states’ rights as sovereign under the constitutional separation of powers between the state and federal governments.¹¹ As a result, hospitals were filled with COVID-19 patients.¹² Medical personnel struggled with a lack of personal protective equipment (PPE), fell ill while caring for the patients, and

7. Nancy Dillon, *10 Times President Trump Downplayed Coronavirus*, N.Y. DAILY NEWS (Oct. 2, 2020), <https://www.nydailynews.com/news/politics/ny-president-trump-repeatedly-downplayed-coronavirus-before-infection-20201002-5tsqhvqjhjzafzrorg22vqdy-story.html>.

8. See *Coronavirus: The World in Lockdown in Maps and Charts*, BBC NEWS (Apr. 7, 2020), <https://www.bbc.com/news/world-52103747>.

9. Kevin Sieff, *Soldiers Around the World Get a New Mission: Enforcing Coronavirus Lockdown*, WASH. POST (Mar. 25, 2020), https://www.washingtonpost.com/world/coronavirus-military-enforce-soldiers-armed-forces/2020/03/25/647cbbb6-6d53-11ea-a156-0048b62cdb51_story.html.

10. Tommy Beer, *All the Times Trump Compared Covid-19 to the Flu, Even After He Knew Covid-19 Was Far More Deadly*, FORBES (Sept. 10, 2020, 10:14 AM), <https://www.forbes.com/sites/tommybeer/2020/09/10/all-the-times-trump-compared-covid-19-to-the-flu-even-after-he-knew-covid-19-was-far-more-deadly/?sh=5c22b034f9d2>.

11. Memorandum on Balancing Public Safety with the Preservation of Civil Rights from Att’y Gen. to Assistant Att’y Gen. for Civ. Rts. & All U.S. Att’ys (Apr. 27, 2020), <https://www.justice.gov/opa/page/file/1271456/download> [hereinafter *Memorandum on Balancing Public Safety*]; Michael D. Shear et al., *Inside Trump’s Failure: The Rush to Abandon Leadership Role on the Virus*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirus-response-failure-leadership.html>; Lisa Lerer & Kenneth P. Vogel, *Trump Administration Signals Support for Allies’ Fight Against Virus Orders*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/us/politics/coronavirus-trump-justice-department.html?smid=em-share>.

12. *COVIDView: A Weekly Surveillance Summary of U.S. COVID-19 Activity*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/04032020.html> (last updated Apr. 4, 2020).

tragically died as a result.¹³ The President refused to issue a federal mask mandate, social distancing requirements, and a stay-at-home order for non-essential purposes.¹⁴ He unnecessarily delayed invoking the Defense Production Act¹⁵ to order the manufacturers to produce adequate supplies of sanitizers and PPE, until it was too late. This was perhaps motivated by political expediency amid the greatest health crisis of the century.¹⁶

At least in part, many tragedies of the COVID-19 crisis were preventable had the U.S. federal government not deliberately denied the pandemic's existence early on and acted swiftly and decisively without minimizing its gravity or politicizing the health crisis.¹⁷ A public health matter is not a political matter, and it should not be dealt with as such. Rather, the solution must be driven solely by the relevant medical expertise and proven scientific methods. Unfortunately, the politicization of this pandemic rose to such a degree that wearing a mask, practicing social distancing, getting vaccinated, and even denying COVID-19 as a hoax all have become associated with certain political viewpoints. This politicization of a health crisis should have never happened.¹⁸

II. HEALTH V. INDIVIDUAL FREEDOM BEFORE COVID-19 VACCINES

At the beginning of the pandemic, many countries scrambled to figure out how to control the spread of the disease. With a highly contagious virus, anyone that comes in close proximity (of six feet or less) with an infected person is at high risk of contracting the virus and spreading it to others. Since the virus is airborne and transmitted through respiratory droplets, wearing masks will significantly reduce its transmission.¹⁹ Furthermore, one must understand the virus's nature to spread exponentially—each

13. Jane Spencer & Christina Jewett, *More than 3,600 US Health Workers Died in COVID's 1st Year*, ABC NEWS (Apr. 8, 2021, 7:50 AM), <https://abcnews.go.com/Health/3600-us-health-workers-died-covids-1st-year/story?id=76944085>.

14. *Coronavirus: Donald Trump Vows Not to Order Americans to Wear Masks*, BBC NEWS (July 18, 2020), <https://www.bbc.com/news/world-us-canada-53453468>.

15. Defense Production Act of 1950 (as amended at 50 U.S.C. §§ 4501-4568 (2018)).

16. Priscilla Alvarez et al., *Trump Administration's Delayed Use of 1950s Law Leads to Critical Supplies Shortages*, CNN (July 14, 2020, 8:57 AM), <https://www.cnn.com/2020/07/13/politics/delayed-use-defense-production-act-ppe-shortages/index.html>.

17. Spencer & Jewett, *supra* note 13.

18. Ali Haif Abbas, *Politicizing the Pandemic: A Schemata Analysis of COVID-19 News in Two Selected Newspapers*, INT. J. FOR SEMIOTICS LAW (July 3, 2020), <https://link.springer.com/content/pdf/10.1007/s11196-020-09745-2.pdf>.

19. Hiroshi Ueki et al., *Effectiveness of Face Masks in Preventing Airborne Transmission of SARS-CoV-2*, AM. SOC'Y MICROBIOLOGY: MSPHERE (2020), <https://journals.asm.org/doi/10.1128/mSphere.00637-20>.

infected person can infect three or more persons in close contact.²⁰ This spread thus affects the public's health and safety at a rapid rate. From a 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.²¹

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.²²

Alternatively, the Chinese police and military forcibly closed all businesses and quarantined residents in certain cities—effectively enforcing a complete lockdown.²³ 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.²⁴ 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.

The United States is a nation built on freedom of choice, so some argue they should have a choice of whether to follow the COVID-19 measures.²⁵

20. *Scientific Brief: SARS-CoV-2 Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fscience-briefs%2Fscientific-brief-sars-cov-2.html (last updated May 7, 2021).

21. Anna Jones, *How Did New Zealand Become Covid-19 Free?* BBC NEWS (July 10, 2020, 12:22 PM), <https://www.bbc.com/news/world-asia-53274085>.

22. *Id.*

23. VOA News, *Chinese Police Force Family into Coronavirus Quarantine*, YOUTUBE (Feb. 9, 2020), <https://youtu.be/rKek0Y30Ctw>; Emma Graham-Harrison & Lily Kuo, *China's Coronavirus Lockdown Strategy: Brutal but Effective*, GUARDIAN (March 19, 2020, 1:07 PM), <https://www.theguardian.com/world/2020/mar/19/chinas-coronavirus-lockdown-strategy-brutal-but-effective>.

24. *Id.*

25. On March 24, 2020, Dan Patrick, Lieutenant Governor of Texas said in an interview with Fox News “as a senior citizen, are you willing to take a chance on your survival in exchange for keeping the America that all America loves” suggesting elderly may be willing to die to keep the economy open. Vontux, *Tx Lt Gov Dan Patrick Says Grandparents Should Be Willing to Die to Save the Economy*, YOUTUBE, (Mar. 24, 2020), <https://youtu.be/IK0xtQpe-7M>.

Some wanted to exercise their First Amendment right to worship by attending religious services without restriction.²⁶ 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 constitutional and statutory protections.” It essentially announced that the Department of Justice could bring actions in federal courts against state and local governments over COVID-19 restrictions.²⁷ 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.²⁸

Two such cases against the states of California²⁹ and Nevada³⁰ 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.³¹ 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.³² However, a change in the political balance of the Supreme

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. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring).

30. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

31. *See id.* at 2604 (Alito, J., dissenting); *Newsom*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

32. In his concurring opinion Justice Roberts wrote:

Although California’s guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.

Court resulted in a contrasting ruling against the state of New York.³³ In November 2020, the Court ruled that New York’s emergency order, which imposed a cap on the number of attendees in houses of worship, was unconstitutional.³⁴ This ruling indicated that the politics of COVID-19 pandemic could spill into the highest court of the land,³⁵ and highlights how the government’s responses to the pandemic can become political dividing lines.³⁶

The country’s division over COVID-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.³⁷ Even the President of the United States went as far as saying that the COVID-19 surges in the United States were due to “fake news media conspiracy” and

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, *Splitting 5 to 4, Supreme Court Backs Religious Challenge to Cuomo’s 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, *Donald Trump’s Latest Attack on Mask-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-masks/index.html>.

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

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.⁴⁰ The U.S. federal government soon after declared that dealing with COVID-19 was the responsibility of the states, and “referred to this as ‘state authority handoff,’”⁴¹ while encouraging the public to protest and to bring constitutional challenges against state imposed restrictions.⁴² These contradictory policies, people’s science defying attitudes, PPE shortages, failures to test early for new cases, and constant disregard of healthcare professionals’ advice and CDC 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 2021.⁴³

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.⁴⁴ 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

38. Berkeley Lovelace Jr., *Trump Claims the Worsening U.S. Coronavirus Outbreak is a ‘Fake News Media Conspiracy’ Even as Hospitalizations Rise*, CNBC (Oct. 26, 2020, 10:38 AM), <https://www.cnbc.com/2020/10/26/coronavirus-trump-claims-the-worsening-us-outbreak-is-a-fake-news-media-conspiracy-even-as-hospitalizations-rise.html>.

39. Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions*, N.Y. TIMES (Apr. 19, 2020), <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html>.

40. Francesca Trianni, *Doctors and Nurses Talk About Burnout as Another Wave of COVID-19 Hits U.S.*, TIME (Nov. 23, 2020, 1:55 PM), <https://time.com/5914409/covid-19-health-care-worker-burnout/>.

41. Shear, *supra* note 11.

42. Lerer & Vogel, *supra* note 11.

43. *Covid Map: Coronavirus Cases, Deaths, Vaccinations by Country*, BBC NEWS, <https://www.bbc.com/news/world-51235105> (last updated Sept. 10, 2021, 11:33 AM).

44. Wen W. Shen, Cong. Rsch. Serv., R46745, *State and Federal Authority to Mandate COVID-19 Vaccination 2* (2021).

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

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.⁴⁶ 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.⁴⁷ However, the government may fine citizens, or impose other restrictions on those who refuse to get vaccinated.⁴⁸ With emergence of new COVID-19 variants, doctors are anticipating that even if at least seventy percent of a population is vaccinated, the so-called “herd immunity” will not be achieved.⁴⁹

In the months to follow since July 2021, the courts have been dealing with cases brought mainly by citizens and local officials against the state governments that banned local municipalities, school boards, and private businesses from requiring proof of vaccination from their employees, students, and customers or from imposing mask mandates and frequent testing in lieu of vaccination.⁵⁰

45. Peter Loftus, et al., *CDC Panel Recommends Giving First Covid-19 Vaccines to Health Workers, Nursing Homes*, WALL ST. J. (Dec. 1, 2020, 8:08 PM), <https://www.wsj.com/articles/cdc-panel-recommends-giving-first-covid-vaccines-to-health-workers-nursing-homes-11606862069>.

46. *US Coronavirus Vaccine Tracker*, USA FACTS, <https://usafacts.org/visualizations/covid-vaccine-tracker-states/> (last updated Aug. 28, 2021, 8:04 PM).

47. See Eric Tucker & Alanna Durkin Richter, *Biden’s Vaccine Rules to set Off Barrage of legal Challenges*, ASSOCIATED PRESS (Sept. 10, 2021), <https://apnews.com/article/joe-biden-health-lawsuits-business-coronavirus-pandemic-0f668373b0a2f0f6af6e5b39e2ceaae9>.

48. *Jacobson v. Massachusetts*, 197 U.S. 11, 37 (1905).

49. Gypsyamber D’Souza & David Dowdy, *What is Herd Immunity and How Can We Achieve It with COVID-19?*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Apr. 6, 2021), <https://www.jhsph.edu/COVID-19/articles/achieving-herd-immunity-with-COVID19.html>.

50. Nick Anderson, *Federal Judge Upholds Coronavirus Vaccine Mandate for Indiana University Students*, WASH. POST (July 19, 2021), <https://www.washingtonpost.com/education/2021/07/19/iu-vaccine-lawsuit-mandate-judge/>; Press Release, White House, *President Biden to Announce New Actions to Get More Americans Vaccinated and Slow the Spread of the Delta Variant* (July 29, 2021), <http://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-president-biden-to-announce-new-actions-to-get-more-americans-vaccinated-and-slow-the-spread-of-the-delta-variant/>; *Bridges v. Houston Methodist Hosp.*, No. H-21-1774, 2021 WL 2399994 (S.D. Tex. Jun. 12, 2021), *appeal filed*, No. 21-20311 (5th Cir. June 14, 2021). In one example, the governor of Florida issued an executive order (EO) on July 30, 2021, under the title of “Ensuring Parents’ Freedom to Choose” effectively blocking mask mandate for school students by

On August 12, 2021, Justice Coney Barrett rejected the Indiana University (IU) students' emergency application for writ of injunction, upholding the university vaccination requirement, allowing the lower court's rulings to stand.⁵¹ Both the federal court and the U.S. Court of Appeals for the 7th Circuit had ruled in favor of the university.⁵² The emergency injunction presented two questions: (1) whether heightened scrutiny applies to Indiana University's mandate that all IU students take the COVID-19 vaccine in violation of their constitutional rights to bodily integrity and autonomy and medical treatment choice so that IU must prove that its mandate is justified, which the courts below erroneously failed to do; and (2) whether IU failed to prove that its mandate is justified under heightened scrutiny.⁵³ The Supreme Court's decision to reject the petition may imply that schools requiring proof of vaccination for COVID-19 is constitutional. It may also be interpreted to mean that heightened scrutiny is not required in the circumstances of a public health crisis. On September 9, 2021, through an executive order, the U.S. President required COVID-19

withholding school funds from those districts where the school boards had voted to enforce a mask mandate. Fla. Exec. Order No. 21-175 (July 30, 2021), <https://www.flgov.com/wp-content/uploads/2021/07/Executive-Order-21-175.pdf>. In response to a legal action against the Governor's EO, a circuit court judge sided with the parents holding that the governor has exceeded his constitutional authority under the state law. See Rozsa & Strauss, *Florida School Mask Fights Heat up Again as Appeals Court Backs DeSantis and Biden Administration Opens Civil Rights Investigation*, WASH. POST (Sept. 10, 2021, 9:32 PM). However, a Court of Appeal reversed the lower court ruling reinstating the anti-mask mandate Executive Order on September 10, 2021. See Order Granting Appellants' Motion to Quash, *DeSantis v. Scott*, No. 1D21-2685 (Fla. Dist. Ct. App. Sept. 10, 2021). The parents now want to appeal the ruling to Florida Supreme Court that had declined in July 2021 to hear a challenge brought by anti-mask advocates against Palm Beach County in Florida. *Machovec v. Palm Beach County*, No. SC21-254, 2021 WL 2774748 (Fla. July 2, 2021); *Florida Parents Want to Speed Mask Mandate Case to Supreme Court*, CBS MIAMI (Sept. 13, 2021, 3:17 PM, <https://miami.cbslocal.com/2021/09/13/florida-parents-want-to-speed-mask-mandate-case-to-supreme-court/>). In other legal actions, the State of Florida challenged "the Conditional Sailing Order" imposed by the CDC (Center of Disease Control) on the cruise ship industry, which required COVID-19 testing, mask mandate and social distancing for passengers. Emergency Application to Vacate the Eleventh Circuit's Stay of the Preliminary Injunction Issued by the United States District Court for the Middle District of Florida, *Florida v. Becerra*, No. 21-12243 (U.S. July 23, 2021). The State of Texas has been also involved in several legal challenges regarding school mask mandates. These have also brought a federal civil right violation investigation by the U.S. Department of Education against the state for attempting to ban school mask mandate. Joshua Fechter, *Gov. Greg Abbott and Local Officials are Fighting Several Legal Battles over Mask Mandates. Here's What You Need to Know.*, TEX. TRIB. (Sept. 21, 2021), <https://www.texastribune.org/2021/09/21/texas-school-mask-mandates/>.

51. John Kruzel, *Supreme Court Leaves Intact Indiana University's Vaccination Requirement*, HILL (Aug. 12, 2021), <https://www.thehill.com/regulation/court-battles/567676-supreme-court-leaves-intact-indiana-universitys-vaccination>.

52. Emergency Application for Writ of Injunction, at 2, *Klaassen, v. Tr. of Ind. Univ.*, No. 21-2326 (U.S. Aug. 12, 2021).

53. *Id.*

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

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,⁵⁵ 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 courts' standard of review (or rational basis review under the American courts standard) should suffice as long as the courts demand that the government show the reasonableness of the law or the restriction imposed to achieve the goal necessary to protect the public health.⁵⁶ If there is a desire to provide a slightly higher level of protection given the enormous deference that a rational basis standard of review gives government, the rational basis test can be strengthened by shifting the burden on to the government to show the reasonableness of the means chosen, by presenting relevant facts and expert opinions to the court. Such heightened standard review seems to be equivalent to a modified "reasonableness scrutiny" under the Argentine courts' standard, where the courts must do a substantive review of the law and its factual justifications, in addition to the proportionality between the end goal and the means, before ruling on its constitutionality.⁵⁷ The burden should be on the government to prove that the means is reasonable based on objective and scientific facts.

54. Exec. Order No. 14042, 86 Fed. Reg. 50985 (Sept. 9, 2021). On September 14, 2021, Arizona became the first state challenging the Biden Administration's vaccine mandate. Complaint for Declaratory Relief, *Brnovich v. Biden*, No. 21-cv-01568 (D. Ariz. Sept. 14, 2021).

55. Amanda Robert, *What Types of Lawsuits Were Filed over COVID-19 in 2020?*, A.B.A. J. (Jan. 4, 2021, 1:15 PM), <https://www.abajournal.com/news/article/law-firms-schools-identify-lawsuits-filed-over-covid-19-in-2020>.

56. Bianchi & Sacristán, *supra* note 1.

57. *Id.* at 1.

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 freedom in the name of preserving citizens' health, as it seems to have been the case in Argentina.⁵⁸ In contrast, such an approach may prevent the courts from intervening unnecessarily with the government's obligations and reasonable actions to preserve citizens' health and safety, in the name of defending individual freedom, politicizing a public health crisis in the process, as it has become the case in the United States.⁵⁹

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 on "personal freedom of choice." As a result, they have created a crisis for everyone in the 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, because of the "personal choices" of their fellow citizens caused no ICU bed or personnel remain available to care for them. The question is, therefore, if citizens defy medical professionals' advice to get vaccinated based on "personal freedom," then shouldn't they be the ones who are denied the life-saving care when the limited resources caused by their "personal choices" force the healthcare professionals to ration care?