



## Ensuring Changes in Emergency Powers and Public Health Authority Will Protect Health

**April 15, 2021** 

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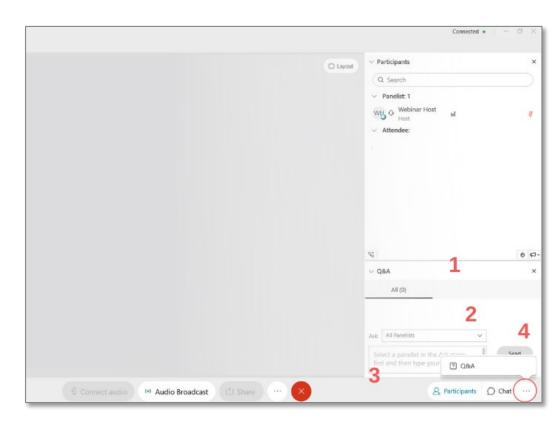






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#### **Moderator**



Donna Levin, J.D., National Director, Network for Public Health Law





#### **Presenter**



Jennifer Piatt, J.D., Senior Attorney, Network for Public Health Law – Western Region Office; Research Scholar, Arizona State University Sandra Day O'Connor College of Law





#### **Presenter**



Jill Krueger, J.D., Director, Network for Public Health Law – Northern Region Office





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Lindsay Wiley, J.D., M.P.H., Professor, American University Washington School of Law; Director, Health Law and Policy Program





## COVID's Constitutional Conundrum: Assessing Individual Rights in Public Health Emergencies

**Jennifer Piatt** 





#### **Acknowledgements**

## COVID'S CONSTITUTIONAL CONUNDRUM: ASSESSING INDIVIDUAL RIGHTS IN PUBLIC HEALTH EMERGENCIES

James G. Hodge, Jr., J.D., LL.M.
Jennifer L. Piatt, J.D.
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Emily Carey

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[currently available on the Social Science Research Network (SSRN)]





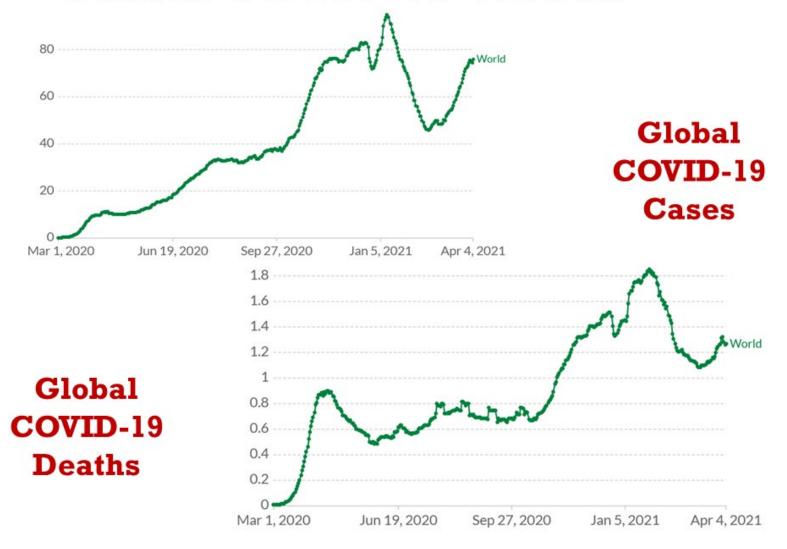
#### **Principle Objectives**

- Unprecedented public health responses and economic impacts tied to COVID-19
- Wave of litigation alleging rights-based infringements re: public health measures
  - Constitutional re-balancing
  - Constitutional set-asides
  - Fundamental flaws and limitations





#### **Global COVID-19 Trends**

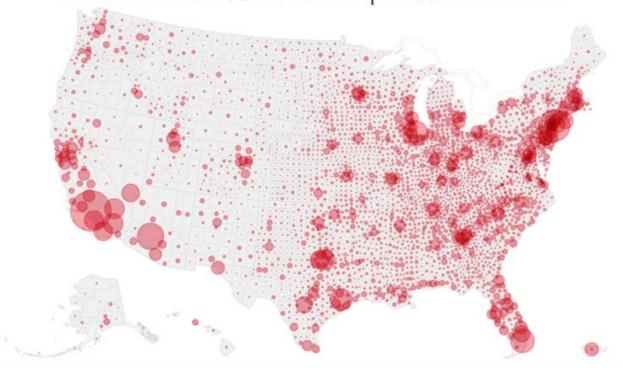






#### **Confirmed COVID Cases & Deaths**

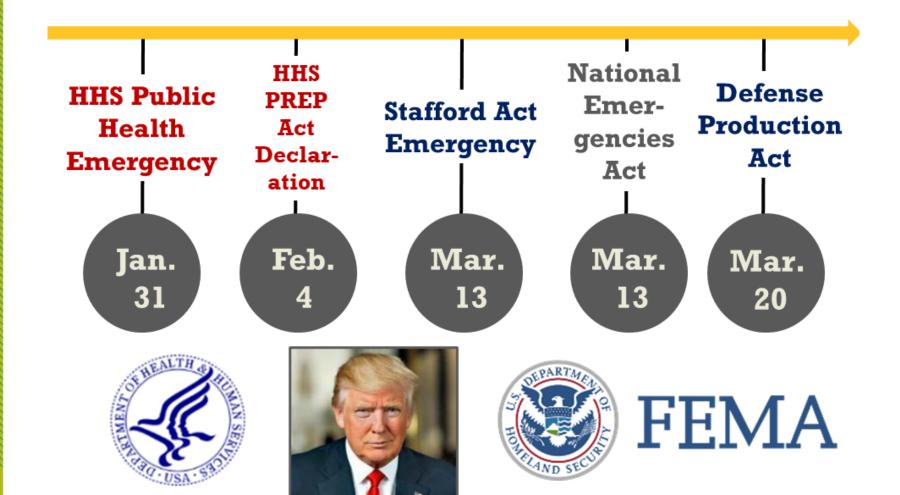
Global Cases 137.5 million | Deaths: 2.9 million
U.S. Cases 31.3 million | Deaths: 562,994
U.S. Stats 23% all cases | 19% all deaths







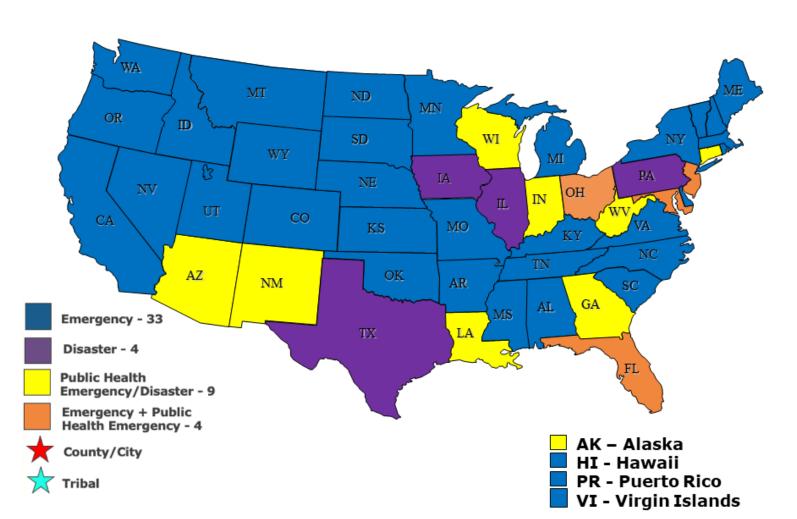
#### Federal Emergencies/Invocations







## State/Territorial Emergency Declarations in Response to COVID-19







## President Biden's National Strategic Plan

"We can and will beat COVID-19. America deserves a response to the COVID-19 pandemic that is **driven** by science, data, and public health — not politics."

l. Restore trust with Americans 2.
Comprehensive vaccination campaign

3.
Mitigate spread
through public
health standards

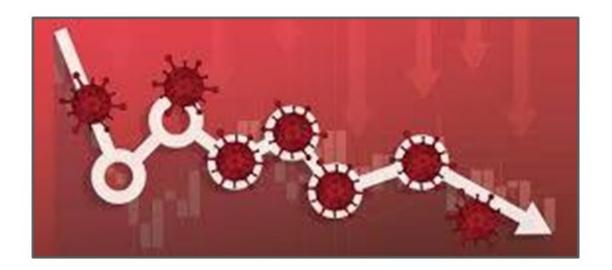
4. Expand emergency relief via DPA

5. Reopen schools, business & travel 6.
Equity across
racial, ethnic &
rural/urban lines





#### **COVID-19's Economic Effects**



Potential for net losses of \$3.2 - \$4.8 trillion in U.S. real gross domestic product over the next couple of years

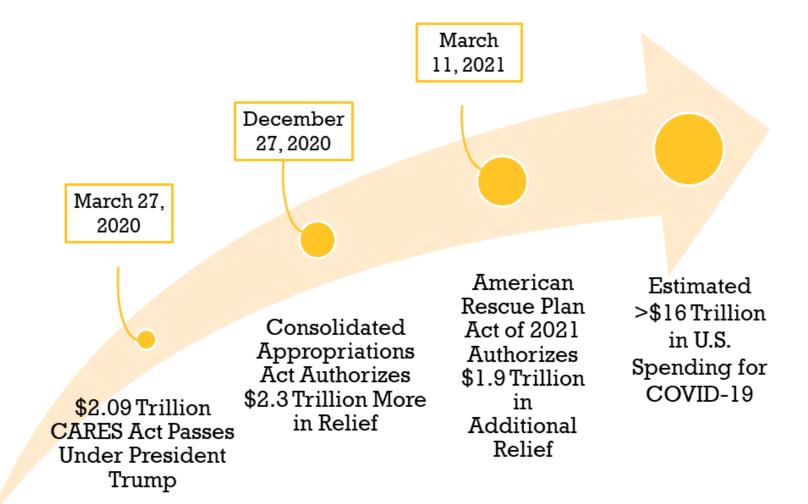
U.S. adults reporting food insecurity rose from 3.4% (prepandemic) to 11% as of Feb. 2021 Roughly 17% of adult renters behind on rent payments according to a Feb. 2021 survey by the U.S. Census Bureau

Consumer spending dropped 3.9% in 2020, the worst since 1932





#### **Economic Relief Efforts**







#### **Social Distancing Measures**







#### **Social Distancing Impacts**













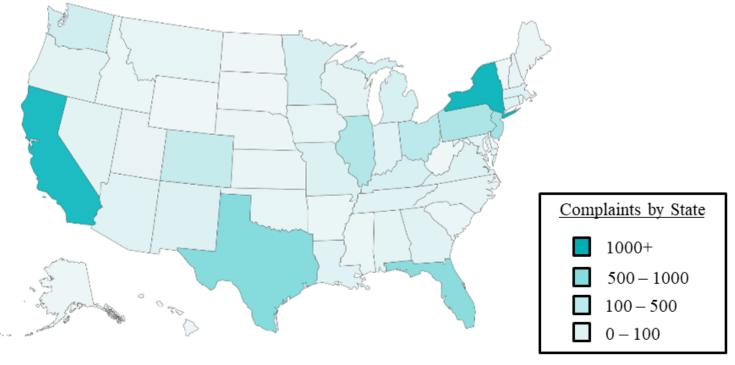
#### **Net Result: Litigation Tsunami**







#### **COVID-19 Litigation Trends**



- 9,927 total complaints filed as of April 14, 2021
- Over 2,020 COVID-19-related cases regarding labor and employment alone





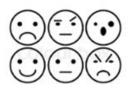
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#### **Array of Constitutional Issues**



Freedom of Expression



Freedom of Assembly



Freedom of Religion



**Takings** 



Equal Protection



Right to Travel



Right to Privacy



Judicial Deference



Separation of Powers



Procedural
Due Process



Substantive Due Process



Economic
Due Process





#### Jacobson v. Massachusetts





The judiciary may "review legislative action in respect of a matter affecting the general welfare...[if the] statute... has <u>no</u> real or substantial relation to those objects, or is, <u>beyond all</u> question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."





#### **Judicial Approaches**

## CONSTITUTIONAL RE-BALANCING

Assessing the shifting nature of rights in emergencies by balancing alleged infringements against governments' compelling interests in protecting the public's health and safety.



## CONSTITUTIONAL SET-ASIDES

Determining whether
specific rights (as articulated
in non-emergencies) may
essentially be set aside
temporarily to the degree
their recognition inhibits
critical facets of emergency









#### Re-Balancing: 3 Approaches

## 1. Emergency/ Deferential Approach

Deferential test
assessing
alleged rightsbased
infringements via
the Court's
guidance in
Jacobson or other
emergency
assessments.

## 2. Traditional Tiered Scrutiny

More traditional tiered analysis, reviewing infringements under rational basis, intermediate, or strict scrutiny, (like courts would do in nonemergencies).

### 3. Amalgam Approach

Application of both traditional scrutiny and Jacobson analyses. In other words, Approach 1 + 2 in the same decision.





#### Constitutional Re-Balancing

Constitutional rights are malleable in declared emergencies based primarily on the degree and importance of governments' interests.

#### On Fire Christian Center v. Fisher

(W.D. Ky., Apr. 11, 2020)



April 12, 2020: On Fire Christian Center Pastor Chuck Salvo speaks during drive-in Easter service.

- Court employed traditional scrutiny analysis to assess
   First Amendment challenge to an executive order banning
   Easter church services.
- Court largely assumed the compelling nature of the government's interest but found the order unconstitutional.





#### Constitutional Re-Balancing

Re-balancing approaches incorporate additional nuances.

#### Givens v. Newsom

(E.D. Cal., May 8, 2020)

Narrow Tailoring







#### Constitutional Re-Balancing

Balancing alleged infringements against governments' compelling interests in protecting the public's health and safety.



#### Carmichael v. Ige

(D. Haw. 2020, Jul 2., 2020)
Upholding Hawaii's statebased quarantine against a
right to travel challenge





#### County of Butler v. Wolf

(W.D. Pa. Sept. 14, 2020)
Striking down Pennsylvania's limits on gatherings for failure to withstand rational basis scrutiny







## SCOTUS Approach First Amendment Rights

#### South Bay I

May 29, 2020

Denied motion to enjoin CA Executive Order limiting attendance at places of worship

#### Roman Catholic Diocese v. Cuomo

Nov. 25, 2020

Struck down an executive order impacting places of worship as contrary to the free exercise of religion

#### South Bay II

Feb. 5, 2021

Enjoined
California from
enforcing a ban on
indoor worship







Source Source Source





#### **Constitutional Set-Asides**

Rights may be essentially set aside temporarily to the degree their recognition inhibits critical facets of emergency responses.

#### Binford v. Sununu

N.H, Mar. 25, 2020

"In an emergency situation, fundamental rights . . . may be temporarily limited or suspended."

An executive's (1) good faith action, (2) taken with some factual basis supporting the necessity of the curfew, is constitutional even if individual freedoms are temporarily restricted.



https://www.nhpr.org/post/watch-listen-live-summus-covid-19-update-surge-nh-response





#### **Constitutional Set-Asides**

Rights may be essentially set aside temporarily to the degree their recognition inhibits critical facets of emergency responses.

#### In re Abbott

(5th Cir., Apr. 20, 2020)

"All constitutional rights may be reasonably restricted to combat a public health emergency."



#### In re Rutledge

(8th Cir., Apr. 22, 2020)

"Arkansas directive prohibiting surgical abortions not subject to constitutional challenge unless it 'has no real or substantial relation to' the public health crisis."







## Limitations of Extant Approaches: Set-Asides

"[E]ven in a pandemic, the Constitution cannot be put away and forgotten." Cuomo (Per Curiam Opinion)

- Cuomo (Sotomayor, J., dissenting) "Free religious exercise is one of our most treasured and jealously guarded constitutional rights. States may not discriminate against religious institutions, even when faced with a crisis as deadly as this one."
- South Bay II (Roberts, C.J., concurring) "I adhere to the view that the 'Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.' . . . But the Constitution also entrusts the protection of the people's rights to the Judiciary . . . ."







#### Limitations of Extant Approaches: Re-Balancing

- Based on rigid perspectives of rights in non-emergencies
- Litigants and courts mischaracterize rights
- Discordance over which method to employ
- Dissonant outcomes result
- Second-guessing implicates separation of powers concerns
- Complexities and confusion around scope/limits of rights interrupts response







#### **Questions/Comments**

Special thanks to **Hanna Reinke** and **Emily Carey** at ASU's *Center for Public Health Law & Policy* for their assistance with this presentation.





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# Changing State Laws Regarding Emergency Powers and Public Health Authority

Jill Krueger





"Pretty much everything that we ever talked about when I went through training on how to manage pandemics and bioterrorism has played out in this. With the exception that nobody ever talked about what to do if we weren't able to convince the public that this was serious."

Lisa Clute

First District Health Unit, Administrator

Minot, North Dakota

Atul Gawande, *Inside the Worst-Hit County, in the Worst-Hit State, in the Worst-Hit Country*, New Yorker, February 8, 2021 (Feb. 15 and 22 issue), <a href="https://www.newyorker.com/magazine/2021/02/15/inside-the-worst-hit-county-in-the-worst-hit-state-in-the-worst-hit-country">https://www.newyorker.com/magazine/2021/02/15/inside-the-worst-hit-country</a>.





#### **Challenges Confronting Local Health Officers**

Threats to Public Health

Threats to Public Health Officials

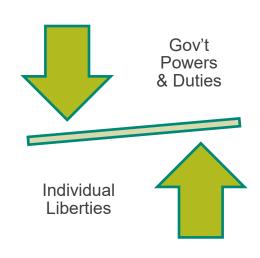
Threats to Public Health Authority





#### What is Public Health Law?

The study of the legal powers and duties of the state to assure the conditions for people to be healthy (to identify, prevent, and ameliorate risks to health in the population) and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary or other legally protected interests of individuals for the common good.



Lawrence O. Gostin and Lindsay F. Wiley, *Public Health Law: Power, Duty, Restraint*. Berkeley: Univ. of California Press, 2016 (3<sup>rd</sup> ed.)





## Which Government? What Powers and Duties?





## 2020-2021 Bills to Limit Emergency Powers and Public Health Authority

» Public health or emergency authority for COVID-19

Limits on business liability

Mask mandates, vaccine mandates

» Limit or re-assign emergency powers generally

Legislative oversight of governor or SHO orders

Time limits on emergency orders

» Limit or re-assign public health authority generally

Review of LHO or BOH orders by city council, county board, etc.

Re-assign authority re school closures from LHO to school board





/14/2021

The end of the imperial governorship - POLITICO

#### **POLITICO**



Cite Acta House

The New York Times https://www.nytimes.com/2021/03/26/world/covid-governors-emergency-powers.html

Covid-19: Several Vaccine Production Sites Approved in E.U. >

#### THE FIFTY

#### The end of the imperial governorship

Lawmakers across the country want to curtail the sweeping powers of state executives after the pandemic led governors to flex their muscles in historic new ways.



POLITICO illustration/Photos by AP, Michigan Office of the Governor

By NICK NIEDZWIADEK 04/14/2021 04:30 AM EDT

### State lawmakers take aim at the emergency powers governors have relied on in the pandemic.

By Michael Wines

March 27, 2021

When the pandemic began, the nation's governors suited up for a new role as state bodyguards, issuing emergency orders to shutter schools, close cinemas and ban indoor dining in an effort to curb a mushrooming threat.

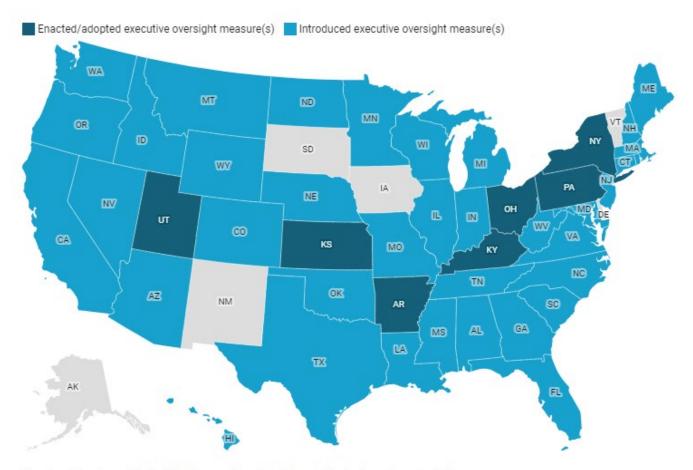
But not everyone likes killjoys, no matter how well-intentioned.

Now, state legislatures — saying the governors have gone too far — are churning out laws aimed at reining in the power of their executives to respond to the pandemic and emergencies like it.

A Kansas bill that became law this week requires Gov. Laura Kelly to suspend all emergency orders and give legislators the option to void any that she reissues. Mask mandates are likely to be among the first to fall. Ohio legislators overrode Gov. Mike DeWine's veto this week, limiting his powers to make emergency declarations. Utah lawmakers voted for an April 10 end to mask requirements and to rein in powers of the governor and state health officials to deal with crises; the bill became law on Wednesday.







Map: State Net • Source: National Conference of State Legislatures • Get the data • Created with Datawrapper

https://www.lexisnexis.com/en-us/products/state-net/news/2021/04/02/Will-Govs-Lose-Battles-with-Lawmakers-Over-Emergency-Powers.page





## Example: Senate Bill 22 (Ohio)(Limiting Governor's Emergency Powers and Requiring Oversight by a Legislative Panel)

#### » Bill Purpose

Limit length of state of emergency unless approved by General Assembly Permits General Assembly to terminate state of emergency after 30 days Permits General Assembly to rescind emergency orders and rules

#### » Current status

Legislature over-rode governor's veto, passed into law

» Other states with similar bills or laws (Arkansas, Kansas, Kentucky, New York, Ohio, Utah, Pennsylvania, Indiana, Alabama, etc.)





# Example: Senate Bill 1 (Michigan) (Requiring Legislative or Gubernatorial Approval In Order to Extend Emergency Orders Issued by Dep't Health and Human Services)

#### » Bill Purpose

Limit the length of emergency orders issued by Director of Department of Health and Human Services to 28 days without specific legislative approval

#### » Current Status

Vetoed by the Governor

» Other states with similar or related bills or laws (Alabama, Kansas, Missouri, Montana, Ohio)





## Example: Senate Bill 2006 (Florida) (Grants state governor and legislature the authority to strike local ordinances and policies)

#### » Bill Purpose

Grants governor and state legislature the authority to invalidate local policies, if they "unnecessarily restrict" individual rights

#### » Current Status

Pending before the Senate

Other states with similar or related bills or laws (Oklahoma, Alabama)





## Example: House Bill 121 (Montana) (Require Elected Official Approval of Local Board of Health and Health Officer Actions)

» Bill Purpose

Provide local legislative oversight of local health officer and Board of Health actions, including by approving, revising, or revoking orders and ordinances. Amendment may limit scope to emergency actions. Another amendment seeks to prevent limitations on religious freedom.

» Current Status

On the governor's desk

» Other states with similar or related bills or laws (Kansas, Missouri, Colorado, Utah, Alabama, Indiana, etc.)





#### Montanans Trust Their Health Officials and Want to Keep Decision-Making Local.

A recent poll in Montana found that Montanans trust their local public health professionals over elected politicians. Montanans say they want to preserve their local public health systems and the ability to react to health issues quickly.

#### Montana voters say, "We support local health decisions!"

More than two-thirds of Montana voters say that local boards of health and health officers should be able to set standards and take action to address local health situations without being subject to additional review and authorization. Additionally, more than three-quarters (77 percent) of Montana voters say that local communities should be able to set and keep standards in place for local businesses.





94% Montanans agree: A healthy economy needs a healthy workforce.

> Nearly all Montana voters—a stunning 94 percent-agree with the statement that "a healthy economy depends on first having a healthy and productive workforce."

Montana voters say, "We trust health officials, not politicians!"

By more than a four-to-one margin, Montana voters say that they trust their local boards of health more than elected officials to make decisions regarding health concerns in their counties.



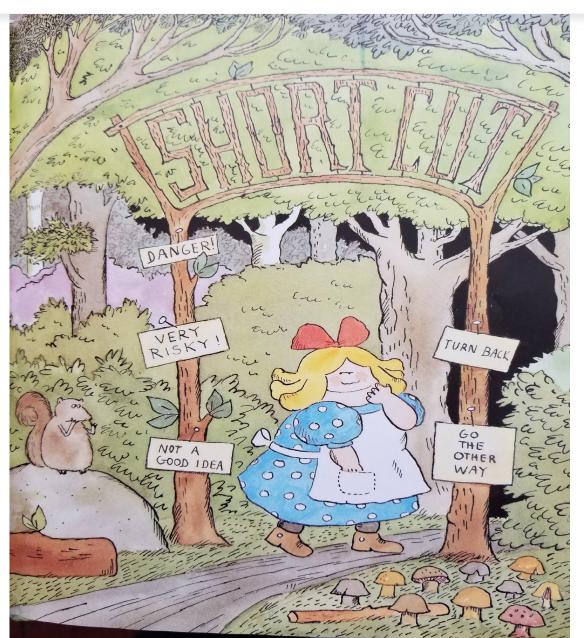
Methodology: Polling firm New Bridge Strategy conducted a survey among N=500 voters in Montana via live telephone interviews. The poll was conducted on behalf of the American Cancer Society Cancer Action Network, Inc. and American Heart Association. Interviews were conducted March 9-12, 2021, and were distributed proportionally throughout the state. For more information go to montanakidsvsbigtobacco.org











James Marshall, Goldilocks and the Three Bears





## 2020-2021 Bills that May Offer Opportunities for Public Health and Public Health Authority

- » Clarify public health authority or emergency powers
- » Commission or task force to study the pandemic response and propose statutory or regulatory changes
- » COVID health equity task forces/ Declarations of racism as a public health crisis
- » Investments in public health infrastructure and workforce
- » Protect public health officials, or public officials generally, from threats and harassment when performing their duties
- » Health in All Policies/ Public Health 3.0





#### **Additional Resources**

- » Protecting Public Health Authority to Protect the Health of Our Communities (Network blog, Feb. 24, 2021)
- » COVID-19's Impact on Public Health Authority Requires Careful Deliberation, Not a Rush to Legislate (Network blog, March 11, 2021).
- » An Emerging Threat to Public Health Authority
- » Uniform Law Commission
- » Ohio Legislative Service Commission Bill Analysis: SB 22
- » An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response (2019)
- » Poll Results: Montanans Support Local Health Officers





#### **Contact Me:**

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## Seven Principles to Guide Post-2020 Public Health Emergency Powers Reform

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## Principle 1:

Executive authority to issue compulsory social distancing and face covering orders should be contingent on a public health emergency declaration.

## Principle 2:

Declarations should be time-limited but unilaterally renewable.

## Principle 3:

Transparency should be mandated by statute, with requirements to disclose the strategic purpose of and best available scientific understanding supporting each order.

## Principle 4:

Statutes should authorize a scaled response, with no intervention taken entirely off the table in advance.

### Principle 5:

Statutory standards should promote neutral, risk-based orders that do not discriminate on the basis of religion.

### Principle 6:

Statutes should mandate provision of supports, legal protections, and accommodations of safer alternatives, within available means

## Principle 7:

Criminal enforcement against individuals should be authorized only if justified as the least restrictive alternative

## Recent publications

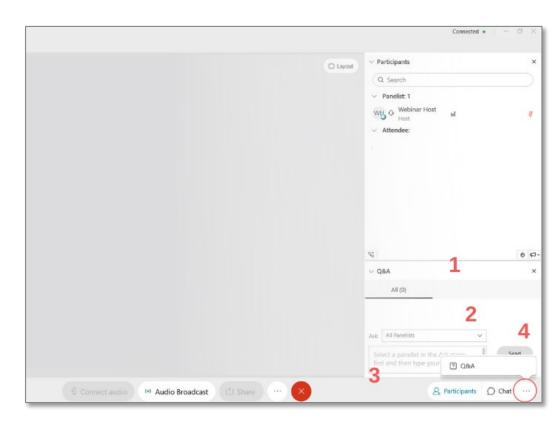
- Lindsay F. Wiley & Stephen I. Vladeck, <u>Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review</u>, 133 HARV. L. REV. F. 179 (2020).
- Lindsay F. Wiley, <u>Democratizing the Law of Social Distancing</u>, 19 YALE J. HEALTH POL'Y, L. & ETHICS 50 (2020).
- Lindsay F. Wiley, <u>Public Health Emergency Reform is Coming—These Five Principles Should Guide It</u>, HEALTH AFF. BLOG (January 12, 2020).
- Lindsay F. Wiley, <u>CDC's Boundary-Pushing Eviction Freeze</u>, AMERICAN CONSTITUTION SOCIETY EXPERT FORUM (September 3, 2020).
- Lindsay F. Wiley, <u>The Role of Religious Liberty in (the Development of)</u> <u>Social Distancing Law</u>, Berkeley Forum (Jun. 3, 2020).
- Lindsay F. Wiley, <u>Wisconsin's "Safer at Home" Order Isn't a Quarantine—But that Doesn't Mean it Isn't Necessary to Control the Spread of Coronavirus</u>, AMERICAN CONSTITUTION SOCIETY EXPERT FORUM (May 7, 2020).





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September 21 – 23, 2021 | Baltimore, MD



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