UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, and
ROBERT MUISE,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, BRIAN L. MACKIE, in his official capacity as Washtenaw County Prosecuting Attorney,

Defendants.

No. 1:20-cv-00323

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REPLY BRIEF IN SUPPORT OF DEFENDANTS WHITMER AND NESSEL'S MOTION TO DISMISS

CONCISE STATEMENT OF ISSUES PRESENTED

1. Plaintiffs' claims are not properly before this Court. Their claims are moot, unripe, barred by the Eleventh Amendment, and Plaintiffs lack standing.

2. The United States Supreme Court and the Sixth Circuit have confirmed that the Governor is entitled to broad deference in responding to the COVID-19 crisis, even where the response touches upon fundamental constitutional rights.

3. The now-rescinded orders challenged are neutral and generally applicable and meet constitutional scrutiny.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority: *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).

LIFFT v. Whitmer, et al, ___ F.3d ___ (slip opinion), Sixth Cir. No. 20-1581 (June 24, 2020).

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California, 509 U.S. ___, ___ (2020) (summary order released May 29, 2020) (Roberts, C.J., concurring)

INTRODUCTION

The parties have the benefit of additional hindsight since the filing of the motion to dismiss. This hindsight only further demonstrates the effectiveness of the Governor's actions in response to the COVID-19 crisis, and the weakness of Plaintiffs' challenges to them.

The restrictions that Plaintiffs challenge here are part of the broader network of response efforts that the Governor has undertaken to suppress the spread of COVID-19 and avoid many needless deaths. The Governor's executive actions have been a model of success.[1] While today several other states see strong resurgences of the virus and just last week[2] the United States saw a new daily record of infections,[3] Michigan has been one of the most successful states in managing the

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[1] *See, e.g.*, H. Juliette T. Unwin, Swapnil Mishra, Valerie C. Bradley et al., Report 23: State-level tracking of COVID-19 in the United States, VERSION 2 (May 28, 2020), *available at* *https://www.imperial.ac.uk/media/imperial-college/medicine/mrc-gida/2020-05-28-COVID19-Report-23-version2.pdf* (Exhibit A).

[2] *See, e.g.,* New York Times, *Coronavirus Live Updates: Florida Reports a High Number of New Daily Cases and Texas Orders Bars Shut* https://www.nytimes.com/2020/06/26/world/coronavirus-live-updates.html?action=click&module=Spotlight&pgtype=Homepage#link-3ec77bd1 (Exhibit B).

[3] ABC News, *12 states have set record highs in new COVID-19 cases since Friday* (June 21, 2020), available at https://abcnews.go.com/US/12-states-set-record-highs-covid-19-cases/story?id=71374520 (Exhibit C).

pandemic.[4] Countless lives have been saved, and the Governor has gradually lifted the bulk of the previously imposed restrictions.

On April 9, 2020, Governor Whitmer issued Executive Order 2020-42, which extended Executive Order 2020-21 and contained the provisions challenged by Plaintiffs. The Order was in effect during the initial peak of COVID-19 deaths and hospital resource use in Michigan, which according to covid19.healthdata.org, occurred on April 14 and 15, 2020.[5] Even so, executive Order 2020-42 was in place for only two weeks, being rescinded by Executive Order 2020-59 on April 24, 2020.

The very restrictions that Plaintiffs challenge in this lawsuit were lifted weeks, even months, ago. For that reason alone, this Court should dismiss this case. More specifically, because the restrictions challenged here are no longer in effect, Plaintiffs' claims are moot, unripe, and barred by the Eleventh Amendment. Likewise, Plaintiffs lack standing to seek equitable relief regarding these past events. Finally, in any event, the United States Supreme Court and the Sixth Circuit have confirmed that the Governor is entitled to broad deference in responding to the COVID-19 crisis, even where the response touches upon fundamental constitutional rights. And regardless, the now-rescinded orders challenged are neutral and generally applicable and meet constitutional scrutiny.

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[4] Detroit News, *COVID-19 modeling site: Michigan one of three states 'on track to contain' virus* (June 17, 2020), available at https://www.detroitnews.com/story/news/local/michigan/2020/06/17/covid-19-modeling-site-michigan-on-track-contain-virus/3205580001/ (Exhibit D).

[5] https://covid19.healthdata.org/united-states-of-america/michigan (Exhibit E).

Combating a public health crisis of the scale and severity of the COVID-19 pandemic requires countless difficult decisions. Leaving these decisions to the elected branches makes good sense, and the law duly demands it. Plaintiffs present no viable basis to disrupt the Governor's decisions; this case should be dismissed.

ARGUMENT

I. Plaintiffs' claims lack justiciability. Plaintiffs lack standing and their claims are moot, unripe, and barred by the Eleventh Amendment.

Plaintiffs' claims both lack justiciability and are subject to immunity because, as explained above and as Plaintiffs do not dispute, the very restrictions that Plaintiffs challenge are no longer in effect.[6] Plaintiffs are able to engage in the conduct they desire; there is nothing left to enjoin or declare in this case. Instead, what Plaintiffs now seek is for this Court to say that the prior restrictions were unlawful, and that imposing them again sometime in the future would be unlawful. But this is not a justiciable request, and this Court should decline to entertain it.

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[6] Plaintiff Beemer challenges E.O. 2020-42's restrictions on recreational motorboating and traveling to second residences; those restrictions were in effect for only two weeks in April, during the peak of COVID-19's surge in Michigan. Plaintiff Muise challenges E.O. 2020-42's closure of certain businesses to in-person activities, given his desire to patronize gun stores and ranges. Starting in late April and throughout the ensuing weeks, that general restriction was incrementally lifted for various businesses, including gun stores and ranges. And Plaintiff Muise also challenges E.O. 2020-42's restriction on gatherings among people not from the same household, given his desire to assemble his family in his home for religious worship. There is no longer a general prohibition against gatherings with individuals outside one's household, and regardless, engaging in religious worship has always been exempt from penalty under E.O. 2020-42 as well as its predecessor and successors.

A. Plaintiffs' claims are moot.

As the U.S. Supreme Court has recognized, when "temporary restrictions" in an executive order "expire[ ] before . . . [a] [c]ourt [takes] any action," the action is rendered moot. *See Trump v. Hawaii*, 138 S.Ct. 2392, 2404 (2018), citing *Trump v. IRAP*, 138 S.Ct. 353 (2017), and *Trump v. Hawaii*, 138 S.Ct. 377 (2017). Correspondingly, federal courts have routinely dismissed as moot challenges to COVID-19 mitigation measures that had since expired or been rescinded.[7] For the reasons Defendants have already briefed, this Court should do the same here.

As anticipated, Plaintiffs attempt to avoid this outcome by invoking the "voluntary cessation" exception. But as explained in Defendants' principal brief, that misses the mark. As is well settled, when the government takes official action ceasing the challenged conduct, that cessation "provides a secure foundation for dismissal based on mootness so long as it appears genuine." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990), quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988), in turn citing 13A Wright, Miller & Cooper Federal Practice and Procedure § 3533.7, at 353 (2d ed. 1984).

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[7] See, e.g., *Martinko et al. v. Whitmer*, Case No. 20-cv-10931, Opinion and Order Granting Defendant's Motion to Dismiss (E.D. Mich. June 5, 2020) (Exhibit F); *Cameron v. Beshear*, No. 3:20-CV-00023-GFVT, 2020 WL 2573463, at *2 (E.D. Ky. May 21, 2020) (Exhibit G); *Krach v. Holcomb*, No. 1:20-CV-184-HAB, 2020 WL 2197855, at *2 (N.D. Ind. May 6, 2020) (Exhibit H); see also *Spell v. Edwards*, ___ F.3d ___ slip op., pp. 2–3 (June 18, 2020) (Exhibit I) (preliminary-injunction context); *Ministries v. Newsom*, No. 20-CV-683-BAS-AHG, 2020 WL 2991467, at *3 (S.D. Cal. June 4, 2020) (Exhibit J) (same); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *4 (N.D. Ill. May 3, 2020) (Exhibit K) (same).

Such is the case here. The challenged restrictions were never held out to be anything other than temporary, and so they have proven to be. Their official termination was not some shadow to avoid this lawsuit, but instead occurred over the course of a broader, incremental reopening of the State as the spread of COVID-19 – thanks to such restrictions – slowed. See, e.g., E.O.s 2020-59, 2020-70, 2020-77, 2020-92, 2020-96, 2020-110, and 2020-115. As explained in Executive Order 2020-59, which began this incremental reopening process:

> Although the virus remains aggressive and persistent—on April 23, 2020, Michigan reported 35,291 confirmed cases and 2,977 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. But in doing so, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

(Executive Order 2020-59, Preamble).

This reopening process has unavoidably intersected with pending litigation over the Governor's emergency response measures. Depending on the timing of that intersection, some cases, like this one, have been rendered moot fairly quickly, whereas other cases have not. See, e.g., *League of Independent Fitness Facilities and Trainers v. Whitmer*, ___ F.3d ___, slip op. (June 24, 2020) ("*LIFFT*"). The process has at all times been genuine, and driven by nothing other than the Governor's ongoing assessment of the pandemic and the changing needs of the State to combat

it. *Mosely*, 920 F.2d at 415. The "voluntary cessation" exception provides no basis to overlook the resulting mootness of this case.[8]

The same holds true for Plaintiffs' invocation of the "capable of repetition, yet evading review" exception. The recent decision of the Fifth Circuit in *Spell v. Edwards*, ___ F.3d ___ slip op., pp. 2–3 (June 18, 2020) is instructive. There, the plaintiffs – a pastor and his church – challenged an executive order of the Governor of Louisiana that required a ten-person limit on all gatherings, including religious services. *Id*. The restriction expired while a preliminary-injunction ruling was pending on appeal, leading the Fifth Circuit to conclude that the plaintiffs' claims were moot. In so doing, the Fifth Circuit rejected the plaintiffs' reliance on the "capable of repetition" exception, explaining that the plaintiffs had not carried their burden of proving the exception's application:

> Even if the first requirement (duration) is satisfied for the stay-at-home orders, the plaintiffs fail to establish that the Governor might reimpose another gathering restriction on places of worship. The trend in Louisiana has been to reopen the state, not to close it down. [*Id*.]

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[8] Plaintiffs rely heavily on *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), but that case is inapposite. At issue in *Speech First* was a university's ad hoc decision to change certain definitions in its harassment and bullying policy after they were challenged on First Amendment grounds. Importantly, the Sixth Circuit found no grounds to conclude that the change was "genuine"—i.e., not simply a tactic to avoid litigation—given the absence of any indication that the change would have been made absent the lawsuit. *See id*. at 769-770. Not so here. As discussed, the challenged restrictions were always intended to be temporary; the Governor lifted them, just like any number of other restrictions, as soon as the public health permitted; and the Governor has done, and will continue to do, everything in her power to ensure the public health continues to improve. There is nothing to indicate the Governor's official rescission of these restrictions was anything but genuine, and there is nothing in *Free Speech* that casts doubt on the mootness of Plaintiffs' claims as a result.

Like the plaintiffs in *Spell*, Plaintiffs here bear the burden of establishing entitlement to application of the exception. *See Deja Vu of Nashville v. Metro. Govern. of Nashville and Davidson County*, 274 F.3d 377, 390–91 (6th Cir. 2001). And as discussed, like the trend in Louisiana, the steady trend in Michigan "has been to reopen the state, not close it down."

Viewed as a continuum, the Governor's executive orders show an evolution of responses framed by an increasing body of knowledge being brought to bear on ever-changing conditions. For Plaintiffs to survive the mootness test, they must convince the Court that the Governor will be in a position to invoke the same responses in the future to identical conditions. The notion the Governor will again put into place the same restrictions is purely speculative, and the notion that identical conditions will exist in this dynamic situation in the future is conjecture premised on an impossibility. As poignantly observed by the Fifth Circuit in *Spell*:

> To be sure, no one knows what the future of COVID-19 holds. But it is speculative, at best, that the Governor might reimpose the ten-person restriction or a similar one.

Spell, slip op. at 3. The same is true here. The conditions of this pandemic and the resulting needs of this State will surely continue to change. But how exactly they will change, and whether, as a result, Plaintiffs might at some point find themselves again subject to the same restrictions challenged in this case, are matters of pure speculation, not "reasonable expectation." *Mosley*, 920 F.2d at 415. Plaintiffs' claims for equitable relief are thus moot and must be dismissed.

B. Plaintiffs lack standing and their claims are unripe.

A plaintiff seeking to invoke the jurisdiction of the federal courts "must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Plaintiffs fail the first element of standing: an injury in fact. *See ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 659 (6th Cir. 2007). "'Injury in fact' is a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks omitted).

Whether there is a concrete injury to support a plaintiff's standing to seek injunctive or declaratory relief depends on the likelihood of future harm. *See Lyons*, 461 U.S. at 105. "Absent a sufficient likelihood that he will again be wronged in a similar way," a plaintiff is not entitled to injunctive relief. *Id.* at 111. In other words, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding" equitable relief "if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974).

In the absence of a continuing adverse effect, in order to have standing to maintain their equitable action, Plaintiffs must show (1) that they are *now* subject to a genuine threat of falling under the purview of an executive order imposing the restrictions they challenge, *see O'Shea*, 414 U.S. at 496-98; *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298–99 (1979); or (2) that their *future action* will be impeded by an executive order imposing such restrictions, *see Clements v. Fashing*, 457 U.S. 957, 962 (1982); *Babbitt*, 442 U.S. at 298–99.

Plaintiffs cannot meet these requirements. There is no present or continuing adverse effect from the now-rescinded restrictions, nor any suggestion that Plaintiffs currently face a credible threat of such restrictions. Plaintiffs are free to travel between residences, use motorboats, hold religious gatherings within their homes, and patronize gun stores in person. And as discussed, there is nothing but pure speculation to support any notion that Plaintiffs will again, at some point in the future, be subjected to the purview of a new executive order restricting such activities. As a result, Plaintiffs have not established an imminent, concrete injury, and their claims must be dismissed for lack of standing.[9]

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[9] For similar reasons, Plaintiffs are incorrect in arguing that their claims are ripe. "Ripeness . . . is a question of timing," and "becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997); see *id.* ("A case is ripe for pre-enforcement review under the Declaratory Judgment Act only if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (cleaned up)). Where, as here, the claims at issue arise in the pre-enforcement context, the ripeness of the claims depends on: (1) whether "legal analysis [of the claims] would benefit from having [the] concrete factual context" afforded by an enforcement action; (2) "the extent to which the enforcement authority's legal position is subject to change before enforcement"; and (3) "the hardship to the parties of withholding court consideration." *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003).

Under this standard, Plaintiffs' claims are plainly not ripe. There is presently nothing to enforce against Plaintiffs that would prevent them from engaging in their desired conduct. Nor is there any "concrete factual context" by which this Court could measure the constitutionality of any future limitations Plaintiffs might experience, nor any assurance or even indication that any such limitations would resemble the ones that Plaintiffs currently challenge. And there is no hardship that might befall Plaintiffs from this Court waiting for these circumstances to materialize, if they ever do, before attempting to adjudicate any potential claim of constitutional infringement that Plaintiffs might allege to arise from them. There is simply nothing in this case that is "substantial" enough "and of sufficient immediate and reality" for this Court to consider at this time. *Magaw*, 132 F.3d at

C. The Eleventh Amendment precludes retrospective relief as well as the adjudication of state-law claims.

Finally, any award of equitable relief to Plaintiffs on the basis of these rescinded restrictions would be barred by the Eleventh Amendment. In suits against the State or a state official in his or her official capacity, the Eleventh Amendment bars the award of "retrospective relief," which includes not just monetary damages, but also equitable relief as to a law whose challenged portion is no longer in effect. *See Green v. Mansour*, 474 U.S. 64, 68–72 (1985).

The Supreme Court's and the Sixth Circuit's Eleventh Amendment jurisprudence focuses on the time that a court grants final relief, and whether, at that time, there is a violation of federal law that may be enjoined. *Id.* at 74. If the state defendant is now complying with federal law, there is no act or practice that can be enjoined or declared illegal. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Id.* at 68.

Here, deterrence is what Plaintiffs seek with their request for a ruling from this Court that the Governor violated their constitutional rights in the past. Such relief is only permissible when ancillary to a prospective injunction designed to remedy a continuing violation of federal law. *Green*, 474 U.S. at 67–73; *Banas v. Dempsey*, 742 F.2d 277, 286–88 (6th Cir. 1984). Without any continuing violation of

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284. Ripeness thus precludes relief as to the rescinded restrictions, and provides another basis for dismissal.

federal law, there is nothing to enjoin, let alone anything ancillary. Thus, the Eleventh Amendment requires dismissal of the claims for injunctive and declaratory relief that are based upon alleged past violations of federal law. *See, e.g.*, *Martinko et al. v. Whitmer*, Case No. 20-cv-10931, Opinion and Order Granting Defendant's Motion to Dismiss (E.D. Mich. June 5, 2020) (Exhibit F) (dismissing challenges to rescinded orders as moot and barred by the Eleventh Amendment).[10]

II. The United States Supreme Court and the Sixth Circuit have confirmed that the Governor is entitled to broad deference in responding to the COVID-19 crisis, even where the response touches upon fundamental constitutional rights.

In the midst of this pandemic, Chief Justice Roberts has made clear that decisions regarding how to best protect the public should be left to the discretion of "politically accountable officials of the States." *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California,* 509 U.S. ___, ___ (2020) slip op., p. 3 (summary order released May 29, 2020) (Roberts, C.J., concurring). And "[w]hen those officials 'undertake to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *Id.*, quoting *Marshall v. United States*, 414 U. S. 417 (1974).

Indeed, when operating within those broad limits, Chief Justice Roberts explained that these officials "should not be subject to second-guessing" by the

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[10] Furthermore, Plaintiffs' allegations regarding their right to bear arms invoke both the U.S. and Michigan constitutions. Relief under any state-law aspect of this claim, however, is also barred by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 121 (1984); *Ernst v. Rising*, 427 F.3d 351, 368 (6th Cir. 2005).

federal judiciary, which lacks comparable expertise in public health. *Id.,* quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985). The Sixth Circuit has echoed this message, confirming that "the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts." *LIFFT*, slip op. at 3, *citing Jacobson*, 197 U.S. at 29.

Here, in responding to the COVID-19 pandemic, the Governor has had to make countless difficult decisions in short order, with many lives at stake, and with due consideration of the fallout for the economy from these public health measures. Plaintiffs challenge a few leaves in a forest of measures taken to abate the damage caused by COVID-19. And while Plaintiffs may wish to focus on these few leaves while obscuring the view of the forest, the Court should not follow suit. Under settled law, including the separation of powers, judicial deference is owed to the Governor's assessment of how to most effectively implement measures to limit the spread of the virus while not unduly restricting life-sustaining activity and services.

The two-week-long restriction on travel between residences was critical to prevent the virus from spreading from one part of the state to another – in particular, from more densely populated areas to less densely populated areas – during the peak of the virus's surge. The temporary restrictions on recreational motorboating, in-person business activity, and gatherings between persons from separate households were likewise designed to limit the spread of the virus by minimizing in-person interactions between individuals from different households

and communities. And the executive orders consistently exempted from penalty participation in religious worship.

This Court's role is not to "usurp the functions of another branch of government" in deciding how best to protect public health in times of crisis. *Jacobson,* 197 U.S. at 28. "'Under the pressure of great dangers,' constitutional rights may be reasonably restricted 'as the safety of the general public may demand.' That settled rule allows the state to restrict, for example, one's right to peaceably assemble, to publicly worship, to travel, and even to leave one's home." *In re Abbott*, 954 F.3d at 778, quoting *Jacobson*, 197 U.S. at 29. And indeed, "[s]haping the precise contours of public health measures entails some difficult line-drawing. Our Constitution wisely leaves that task to officials directly accountable to the people." *LIFFT*, slip op. at 6.

Although there may be more than one reasonable way to respond to the COVID-19 outbreak, it is clear that the Governor's now-rescinded orders most certainly had a real and substantial relation to protecting public health during this pandemic, and they were not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Given the wide latitude and deference owed to the Governor's actions, Plaintiffs' claims should be dismissed.

III. The rescinded orders were neutral and generally applicable, and could meet any heightened scrutiny that might otherwise apply.

The Governor's former orders were neutral and generally applicable; these kinds of laws are presumed constitutional, even when they encroach on an individual's fundamental constitutional rights. *See Church of the Lukumi Babalu*

Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); *Employment Division v. Smith*, 494 U.S. 872, 878–879 (1990); *New Doe Child #1 v. Congress of the United States*, 891 F.3d 578, 591–593 (6th Cir. 2018). The now-rescinded restrictions did not specifically target fundamental rights like the free exercise of religion or the right to bear arms. Instead, they targeted the spread of COVID-19, in temporary and neutral fashion. As noted in the Governor's principal brief, such measures have routinely been upheld as constitutional.[11]

And while the Supreme Court in *Smith* and *Babalu* did not explicitly mention the term "rational basis," the Sixth Circuit has interpreted those cases as imposing a similar standard of review on neutral laws of general applicability. *See, e.g., Seger v. Ky. High Sch. Athletic Ass'n*, 453 Fed. Appx. 630, 634 (6th Cir. 2011). Under rational basis review, laws "accorded a strong presumption of validity" and will be upheld if they are "rationally related to furthering a legitimate state interest." *Id.* at 635; *see also F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (under rational basis review, a law must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification").

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[11] This also sets the rescinded restrictions apart from Kentucky's restriction on religious gatherings that was at issue in *Maryville Baptist Church, Inc v Beshear*, ___ F.3d ____ (6th. Cir, 2020). That restriction specifically prohibited "faith-based" gatherings by name, slip op at 6, whereas the Governor's executive orders here did no such thing. In fact, E.O. 2020-42 explicitly *exempted*, "[c]onsistent with prior guidance, a place of religious worship, when used for religious worship" from its penalty provision. (Paragraph 13.)

There can be no dispute that slowing the spread of COVID-19 and protecting the public health is a worthy government interest. Plaintiffs do not meaningfully dispute that the best way to slow the spread of COVID-19 is to limit travel and in-person interactions. Nor can Plaintiffs dispute that, to ensure public health, the Governor needed to balance the food, shelter, and security needs of Michigan residents. The now-rescinded restrictions were tailored to limit conduct most likely to spread COVID-19, while still permitting activity required to sustain life.

As summarized by the Sixth Circuit:

> Among other uncertainties of the decisionmaking process, the Order does not close every venue in which the virus might easily spread. Yet the Governor's order need not be the most effective or least restrictive measure possible to attempt to stem the spread of COVID-19. *Heller*, 509 U.S. at 321. Shaping the precise contours of public health measures entails some difficult line-drawing. Our Constitution wisely leaves that task to officials directly accountable to the people.

(*LIFFT*, slip op. at 3.)

Plaintiffs' challenges to these temporary, neutral, generally applicable, and now-expired orders that were put in effect during the peak of a public health crisis in Michigan are subject to the deferential standards set forth by the Supreme Court and the Sixth Circuit. But even if they were not, they would pass constitutional muster for the same reasons outlined in Defendants' principal brief[12] and the reasons discussed above.[13]

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[12] See R. 35, pp. 24-39, Page ID # 760-775.

[13] *See also Altman v. Cty. of Santa Clara*, No. 20-CV-02180-JST, —— F.Supp.3d ——, ——, 2020 WL 2850291, at *9-18 (N.D. Cal. June 2, 2020)(holding that an executive order issued by the Governor of California did not violate the Second Amendment where, as here, the plaintiffs argued that the executive order infringed

CONCLUSION AND RELIEF REQUESTED

Defendants Whitmer and Nessel respectfully request that Plaintiffs' amended complaint be dismissed.

Respectfully submitted,

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Dated: June 29, 2020

CERTIFICATE OF SERVICE

I certify that on June 29, 2020, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record, and I certify that my secretary has mailed by U.S. Postal Service the papers to any non-ECF participant.

/s/ *Joseph T. Froehlich*
Joseph T. Froehlich
Assistant Attorney General
Attorney for Defendants Whitmer and Nessel
State Operations Division

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their Second Amendment rights by preventing them from "acquiring or practicing with firearms or ammunition, and during a time of national crisis," when they claimed those rights were most important.)(Exhibit L).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, and
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Plaintiffs,

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GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, BRIAN L. MACKIE, in his official capacity as Washtenaw County Prosecuting Attorney,

Defendants.

No. 1:20-cv-00323

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT A

Report 23: State-level tracking of COVID-19 in the United States

Version 2 (28-05-2020)

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SUGGESTED CITATION

H Juliette T Unwin, Swapnil Mishra, Valerie C Bradley et al. Report 23: State-level tracking of COVID-19 in the United States - VERSION 2 (28-05-2020), doi: https://doi.org/10.25561/79231.

Summary

As of 20 May 2020, the US Centers for Disease Control and Prevention reported 91,664 confirmed or probable COVID-19-related deaths, more than twice the number of deaths reported in the next most severely impacted country. In order to control the spread of the epidemic and prevent health care systems from being overwhelmed, US states have implemented a suite of non-pharmaceutical interventions (NPIs), including "stay-at-home" orders, bans on gatherings, and business and school closures.

We model the epidemics in the US at the state-level, using publicly available death data within a Bayesian hierarchical semi-mechanistic framework. For each state, we estimate the time-varying reproduction number (the average number of secondary infections caused by an infected person), the number of individuals that have been infected and the number of individuals that are currently infectious. We use changes in mobility as a proxy for the impact that NPIs and other behaviour changes have on the rate of transmission of SARS-CoV-2. We project the impact of future increases in mobility, assuming that the relationship between mobility and disease transmission remains constant. We do not address the potential effect of additional behavioural changes or interventions, such as increased mask-wearing or testing and tracing strategies.

Nationally, our estimates show that the percentage of individuals that have been infected is 4.1% [3.7%-4.5%], with wide variation between states. For all states, even for the worst affected states, we estimate that less than a quarter of the population has been infected; in New York, for example, we estimate that 16.6% [12.9%-21.4%] of individuals have been infected to date. Our attack rates for New York are in line with those from recent serological studies [1] broadly supporting our modelling choices.

There is variation in the initial reproduction number, which is likely due to a range of factors; we find a strong association between the initial reproduction number with both population density (measured at the state level) and the chronological date when 10 cumulative deaths occurred (a crude estimate of the date of locally sustained transmission).

Our estimates suggest that the epidemic is not under control in much of the US: as of 25 May 2020, the reproduction number is above the critical threshold (1.0) in Above 1: 26 [95% CI: 18-34] states. Higher reproduction numbers are geographically clustered in the South and Midwest, where epidemics are still developing, while we estimate lower reproduction numbers in states that have already suffered high COVID-19 mortality (such as the Northeast). These estimates suggest that caution must be taken in loosening current restrictions if effective additional measures are not put in place.

We predict that increased mobility following relaxation of social distancing will lead to resurgence of transmission, keeping all else constant. We predict that deaths over the next two-month period could exceed current cumulative deaths by greater than two-fold, *if* the relationship between mobility and transmission remains unchanged. Our results suggest that factors modulating transmission such as rapid testing, contact tracing and behavioural precautions are crucial to offset the rise of transmission associated with loosening of social distancing.

Overall, we show that while all US states have substantially reduced their reproduction numbers, we find no evidence that any state is approaching herd immunity or that its epidemic is close to over.

We invite scientific peer reviews here: `https://openreview.net/group?id=-Agora/COVID-19`

DOI: `https://doi.org/10.25561/79231`

1 Introduction

The first death caused by COVID-19 in the United States is currently believed to have occurred in Santa Clara, California on the 6th February [2]. In April 2020, the number of deaths attributed to COVID-19 in the United States (US) surpassed that of Italy [3]. Throughout March 2020, US state governments implemented a variety of non-pharmaceutical interventions (NPIs), such as school closures and stay-at-home orders, to limit the spread of SARS-CoV-2 and help maintain the capacity of health systems to treat as many severe cases of COVID-19 as possible. Courtemanche *et al.* [4] use an event-study model to determine that such NPIs were successful in reducing the growth rate of COVID-19 cases across US counties. We similarly seek to estimate the impact of NPIs on COVID-19 transmission, but do so with a semi-mechanistic Bayesian model that reflects the underlying process of disease transmission and relies on mobility data released by companies such as Google [5]. Mobility measures reveal stark changes in behaviour following large-scale government interventions, with individuals spending more time at home and correspondingly less time at work, at leisure centres, shopping, and on public transit. Some state governments, like the Colorado Department of Public Health, have already begun to use similar mobility data to adjust guidelines over social distancing [6]. As more and more states ease the stringency of their NPIs, future policy decisions will rely on the interaction between mobility and NPIs and their subsequent impact on transmission.

In a previous report [7], we introduced a new Bayesian statistical framework for estimating the rate of transmission and attack rates for COVID-19. Our approach infers the time-varying reproduction number, R_t, which measures transmission intensity. We calculate the number of new infections through combining previous infections with the generation interval (the distribution of times between infections). The number of deaths is then a function of the number of infections and the infection fatality rate (IFR). We estimate the posterior probability of our parameters given the observed data, while incorporating prior uncertainty. This makes our approach empirically driven while incorporating as many sources of uncertainty as possible. In this report, similar to [8, 9], we adapt our original framework to model transmission in the US at the state level. In our formulation we parameterise R_t as a function of several mobility types. Our parameterisation of R_t makes the explicit assumption that changes in transmission are reflected through mobility. While we do attempt to account for residual variation, we note that transmission will also be influence by additional factors and some of these are confounded causally with mobility. We utilise partial pooling of parameters, where information is shared across all states to leverage as much signal as possible, but individual effects are also included for state- and region-specific idiosyncrasies. Our partial pooling model requires only one state to provide a signal for the impact of mobility, and then this effect is shared across all states. While this sharing can potentially lead to initial over or under estimation effect sizes, it also means that a consistent signal for all states can be estimated before that signal is presented in an individual states with little data.

We infer plausible upper and lower bounds (Bayesian credible interval summaries of our posterior distribution) of the total population that have been infected by COVID-19 (also called the cumulative attack rate or attack rate). We also estimate the effective number of individuals currently infectious given our generation distribution. We investigate how the reproduction number has changed over time and study the heterogeneity in starting and ending rates by state, date, and population density. We assess whether there is evidence that changes in mobility have so far been successful at reducing R_t to less than 1. To assess the risk of resurgence when interventions are eased, we use simple scenarios of increased mobility and simulate forwards in time. From these simulations we study how sensitive individual states are

to resurgence, and the plausible magnitude of this resurgence.

Details of the data sources and a technical description of our model and are found in Sections 4 and 5 respectively. General limitations of our approach are presented below in the conclusions.

2 Results

2.1 Mobility trends, interventions and effect sizes

Mobility data provide a proxy for the behavioural changes that occur in response to non-pharmaceutical interventions. Figure 1 shows trends in mobility for the 50 states and the District of Columbia (see Section 4 for a description of the mobility dimensions). Regions are based on US Census Divisions, modified to account for coordination between groups of state governments [10]. These trends are relative to a state-dependent baseline, which was calculated shortly before the COVID-19 epidemic. For example, a value of -20% in the transit station trend means that individuals, on average, are visiting and spending 20% less time in transit hubs than before the epidemic. In Figure 1, we overlay the timing of two major state-wide NPIs (stay at home and emergency decree) (see [11] for details). We also note intuitive changes in mobility such as the spike on 11th and 12th April for Easter. In our model, we use the time spent at one's residence and the average of time spent at grocery stores, pharmacies, recreation centres, and workplaces. For states in which the 2018 American Community Survey reports that more than 20% of the working population commutes on public transportation, we also use the time spent at transit hubs (including gas stations etc.) [12].

To justify the use of mobility as a proxy for behaviour, we regress average mobility against the timings of major NPIs (represented as step functions). The median correlation between the observed average mobility and the linear predictions from NPIs was approximately 89% (see Appendix A). We observed reduced correlation when lagging (forward and backwards) the timing of NPIs suggesting immediate impact on mobility. We make no explicit causal link between NPIs and mobility, however, this relationship is plausibly causally linked but is confounded by other factors.

The mobility trends data suggests that the United States' national focus on the New York epidemic may have led to substantial changes in mobility in nearby states, like Connecticut, prior to any mandated interventions in those states. This observation adds support to the hypothesis that mobility can act as a suitable proxy for the changes in behaviour induced by the implementation of the major NPIs. In further corroboration, a poll conducted by Morning Consult/Politico on 26th March 2020 found that 81% of respondents agreed that "Americans should continue to social distance for as long as is needed to curb the spread of coronavirus, even if it means continued damage to the economy" [13]. While support for strong social distancing has since eroded slightly (70% agree in the same poll conducted later on 10 May 2020), the overall high support for social distancing suggests strong compliance with NPIs, and that the changes to mobility that we observe over the same time period are driven by adherence to those policy recommendations. However, we note that mobility alone cannot capture all the heterogeneity in transmission risk. In particular, it cannot capture the impact of case-based interventions (such as testing and tracing). To account for this residual variation missed by mobility we use a second-order, weekly, autoregressive process. This autoregressive process is an additional term in our parametric equation for R_t and accounts for residual noise by capturing a correlation structure where current R_t is correlated with previous weeks R_t (see Figures 13).

Figure 2 shows the average global effect sizes for the mobility types used in our model. Estimates for the regional and state-level effect sizes are included in Appendix B. We find that increased time spent in residences reduces transmission by 31.8% [-10.6% - 66.7%], and that decreases in overall average mobility reduced transmission by 69.3% [41.2% - 85.7%]. These two effects are likely related - as people spend less time in public spaces, captured by our average mobility metric, they conversely spend more time at home. Overall, this decreases the number of people with whom the average individual comes into contact, thus slowing transmission, even if more time at home may increase transmission within a single residence. We find less time spent in transit hubs is weakly associated -14.8% [-40.8% - 11.6%] with increased transmission (the reverse of what we might expect). The impact of transit mobility is in contrast to what we observed in Italy [8], and could reflect higher reliance on cars and less use of public transit in the US than Europe [14].

The learnt random effects from the autoregressive process are shown in Appendix C. These results show that mobility explains most of the changes in transmission in places without advanced epidemics, as evidenced by the flat residual variation. However, for regions with advanced epidemics, such as New York or New Jersey, there is evidence of additional decreases in transmission that cannot be explained by mobility alone. These may capture the impact of other control measures, such as increased testing, as well as behavioural responses not captured by mobility, like increased mask-wearing and hand-washing.

2.2 Impact of interventions on reproduction numbers

We estimate a national average initial reproduction number ($R_{t=0}$) of 2.8 [1.9 Nebraska - 4.5 New York] and find that, similar to influenza transmission in cities (see Dalziel *et al.* [15]), $R_{t=0}$ is correlated with population density (Figure 3)[1]. Dalziel *et al.* hypothesize that more personal contact occurs in more densely populated areas, thus resulting in a larger $R_{t=0}$.

$R_{t=0}$ is also negatively correlated with when a state observed cumulative 10 deaths (Figure 3). This negative correlation implies that states began locally sustained transmission later had a lower $R_{t=0}$. A possible hypothesis for this effect is the onset of behavioural changes in response to other epidemics in the US. An alternative explanation is that the estimates of the early growth rates of the epidemics in the states affected earliest are biased upwards by the early national ramp-up of surveillance and testing.

In both these relationships there may are many confounding variables and we discourage causal attribution, these results just serve as qualitative assessments.

In subsequent analysis we use $R_{t=EmergencyDecree}$ rather than $R_{t=0}$. Our reason for this is to allow more focus on current trends. Despite both $R_{t=0}$ and $R_{t=EmergencyDecree}$ being highly variable the majority of states have generally decreased their R_t since the first 10 deaths were observed (Figure 4). We estimate that 27 states have a posterior mean R_t of less than one but only 0 have 95% credible intervals that are completely below one. A posterior mean R_t below one and credible interval that includes one suggests that the epidemic is likely under control in that state, but the potential for increasing transmission cannot be ruled out. Therefore, our results show that very few states have conclusively controlled their epidemics. Of the ten states with the highest current R_t, half are in the Great Lakes region (Illinois, Ohio, Minnesota

[1]We also considered the relationship of R_t with a population density weighted by proportion of the total population of the state in each census tract. This was less strongly correlated to $R_{t=0}$.

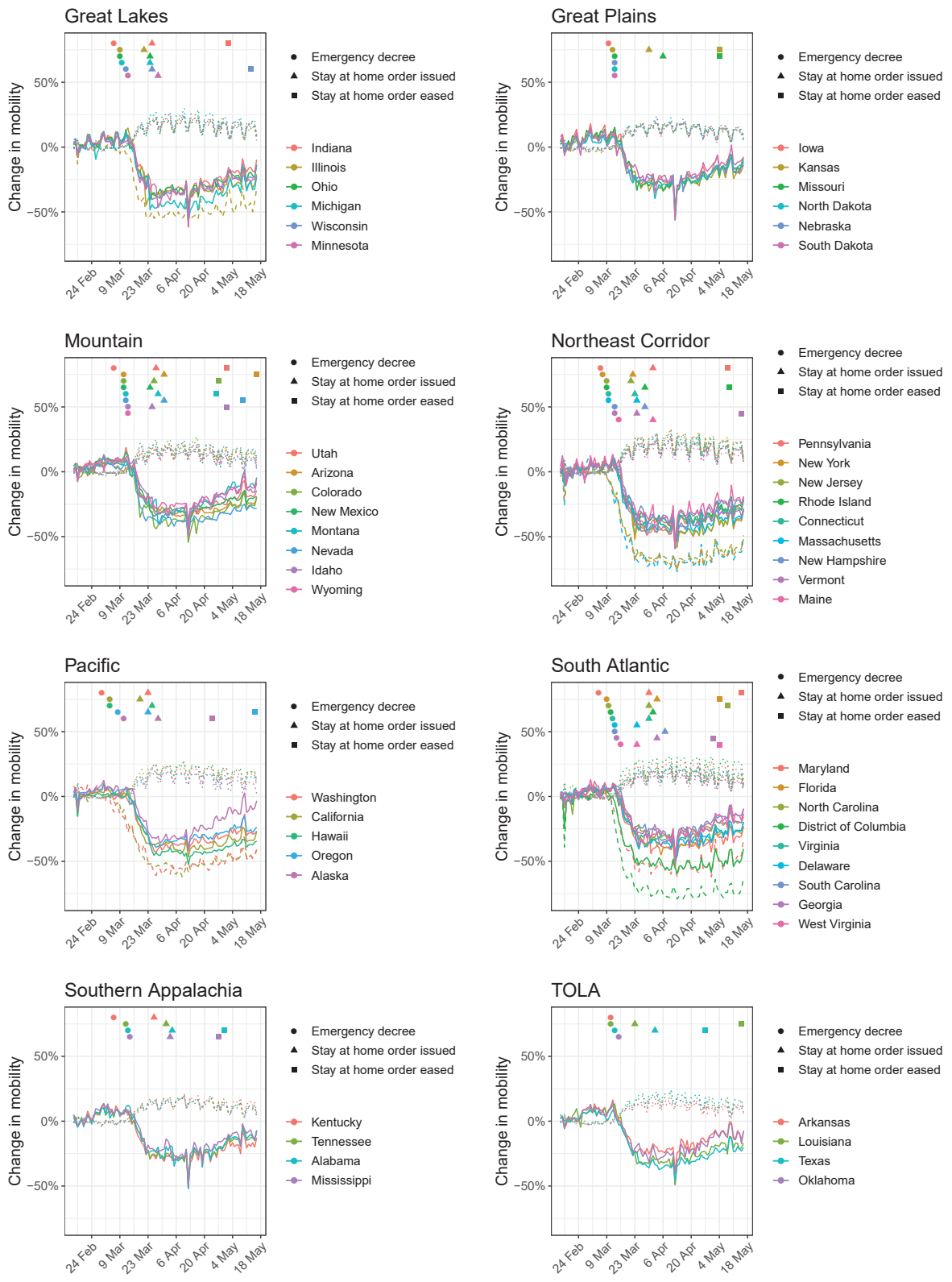


Figure 1: Comparison of mobility data from Google with government interventions for the 50 states and the District of Columbia. The solid lines show average mobility (across categories "retail & recreation", "grocery & pharmacy", "workplaces"), the dashed lines show "transit stations" and the dotted lines show "residential". Intervention dates are indicated by shapes as shown in the legend; see Section 4 for more information about the interventions implemented. There is a strong correlation between the onset of interventions and reductions in mobility.

DOI: https://doi.org/10.25561/79231

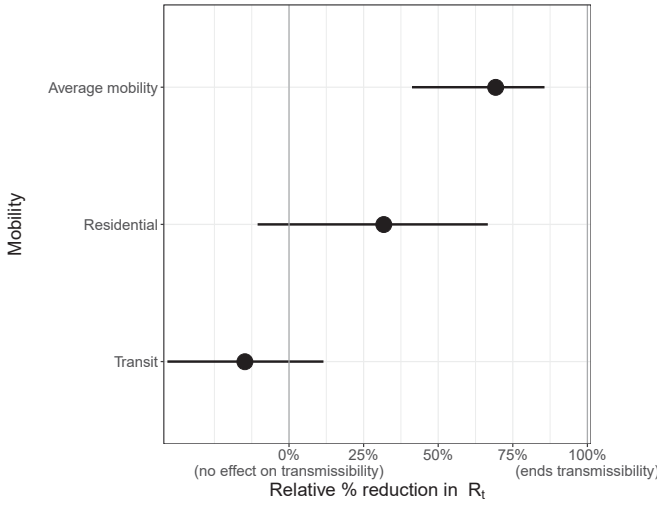
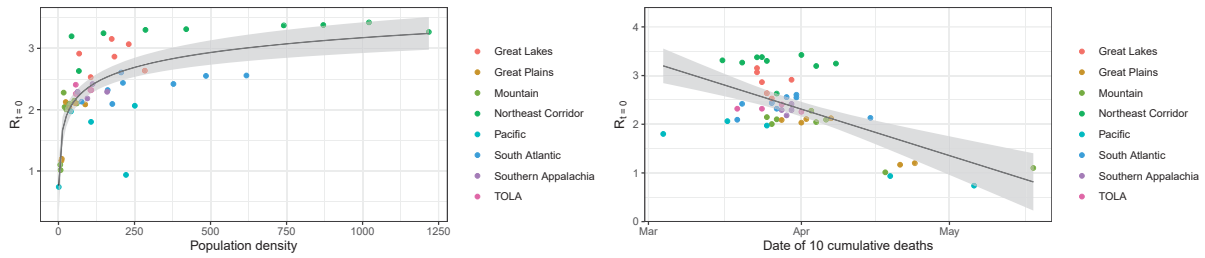


Figure 2: Covariate effect sizes: Average mobility combines “retail & recreation”, “grocery & pharmacy”, “workplaces”. Transit stations is only used as a covariate for states in which more than 20% of the working population commutes using public transportation. We plot estimates of the posterior mean effect sizes and 95% credible intervals for each mobility category. The relative % reduction in R_t metric is interpreted as follows: the larger the percentage, the more R_t decreases, meaning the disease spreads less; a 100% relative reduction ends disease transmissibility entirely. The smaller the percentage, the less effect the covariate has on transmissibility. A 0% relative reduction has no effect on R_t and thus no effect on the transmissibility of the disease, while a negative percent reduction implies an increase in transmissibility.



(a) (b)

Figure 3: Comparison of initial $R_{t=0}$ with population density (a) and date of 10 cumulative deaths (b). R-squared values are 0.558 and 0.377 respectively.

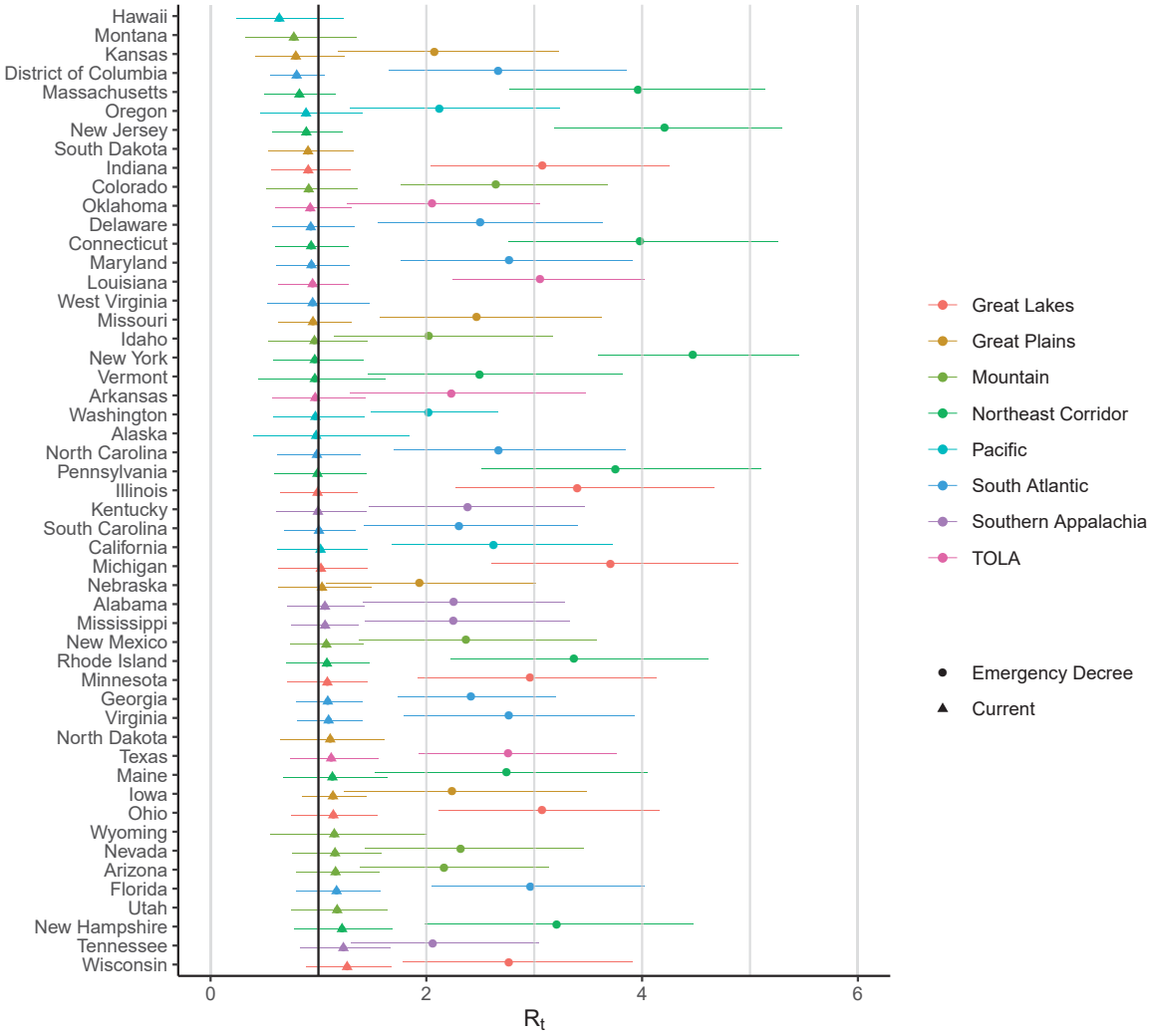


Figure 4: State-level estimates of $R_{t=EmergencyDecree}$ and the average R_t over the week ending 25 May 2020. The colours indicate regional grouping as shown in Figure 1. We do not include estimates of $R_{t=EmergencyDecree}$ for Alaska, Hawaii, Montana, North Dakota, South Dakota, Utah, West Virgina and Wyoming as Emergency Decree was declared in these states before we start modelling these states.

Indiana, and Wisconsin). In Figure 5 we show the geographical variation in the posterior probability that R_t is less than 1; green states are those with probability that R_t is below 1 is high, and purple states are those with low probability. The closer a value is to 100%, the more certain we are that the rate of transmission is below 1 and that new infections are not increasing at present. This is in contrast to many European countries that have conclusively reduced their R_t less than one at present [7].

Figure 5 shows that while we are confident that some states have controlled transmission, we are similarly confident that many states have not. Specifically, we are more than 50% sure that $R_t > 1$ in 26 states. There is substantial geographical clustering; most states in the Midwest and the South have rates of transmission that suggest the epidemic is not yet under control. We do note here that many states with $R_t < 1$ are still in the early epidemic phase with few deaths so far.

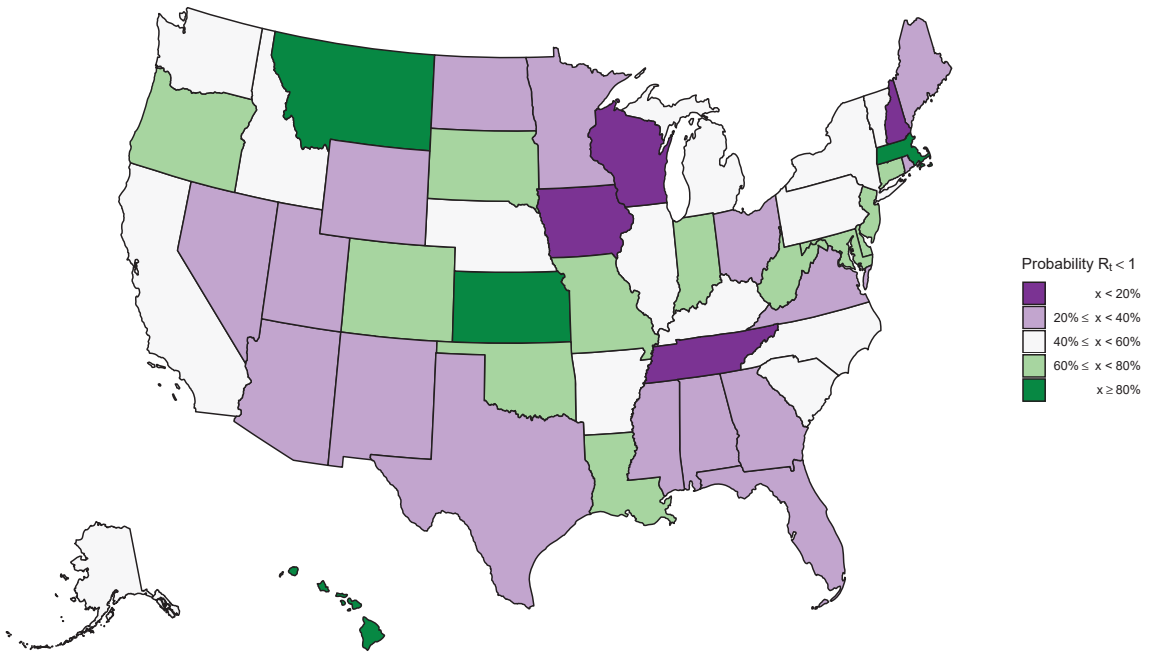


Figure 5: Our estimates of the probability that R_t is less than one (epidemic control) for each state. These values are an average over the week ending 25 May 2020.

2.3 Trends in COVID-19 transmission

In this section we focus on five states: Washington, New York, Massachusetts, Florida, and California. These states represent a variety of COVID-19 government responses and outbreaks that have dominated the national discussion of COVID-19. Figure 6 shows the trends for these states (trends for all other states can be found in appendix D). Regressing average mobility against the timing of NPIs yielded an average correlation of around $\sim$ 97%. Along with the strong visual correspondence, these results suggest that that interventions have had a very strong effect on mobility, which given our modelling assumptions, translates into effects on transmission intensity. We also note that there are clear day-of-the-week fluctuations from the mobility data that affect transmission; these fluctuations are small compared to the overall reductions in mobility.

On February 29th 2020, Washington state announced the nation's first COVID-related death and became the first state to declare a state of emergency. Despite observing its first COVID-19 death only a day after Washington state, New York did not declare a state of emergency until 7 March 2020. We estimate that R_t began to decline in Washington state before it did in New York, likely due to earlier intervention, but that stay-at-home orders in both states successfully reduced R_t to less than one. Approximately one week after New York, Massachusetts issued a stay-at-home order and the mean R_t is currently (0.8 [0.5-1.2]). In Florida, R_t reduced noticeably before the stay-at-home order, suggesting that behaviour change started before the stay-at-home order. However, increasing mobility appears to have driven transmission up recently (1.2 [0.7-1.6]). California implemented early interventions in San Francisco [16], and was the first state to issue a stay-at-home order [17], but the mean R_t still is around 1 (1.0 [0.6-1.5]). For all the five states shown here there is considerable uncertainty around the current value of R_t.

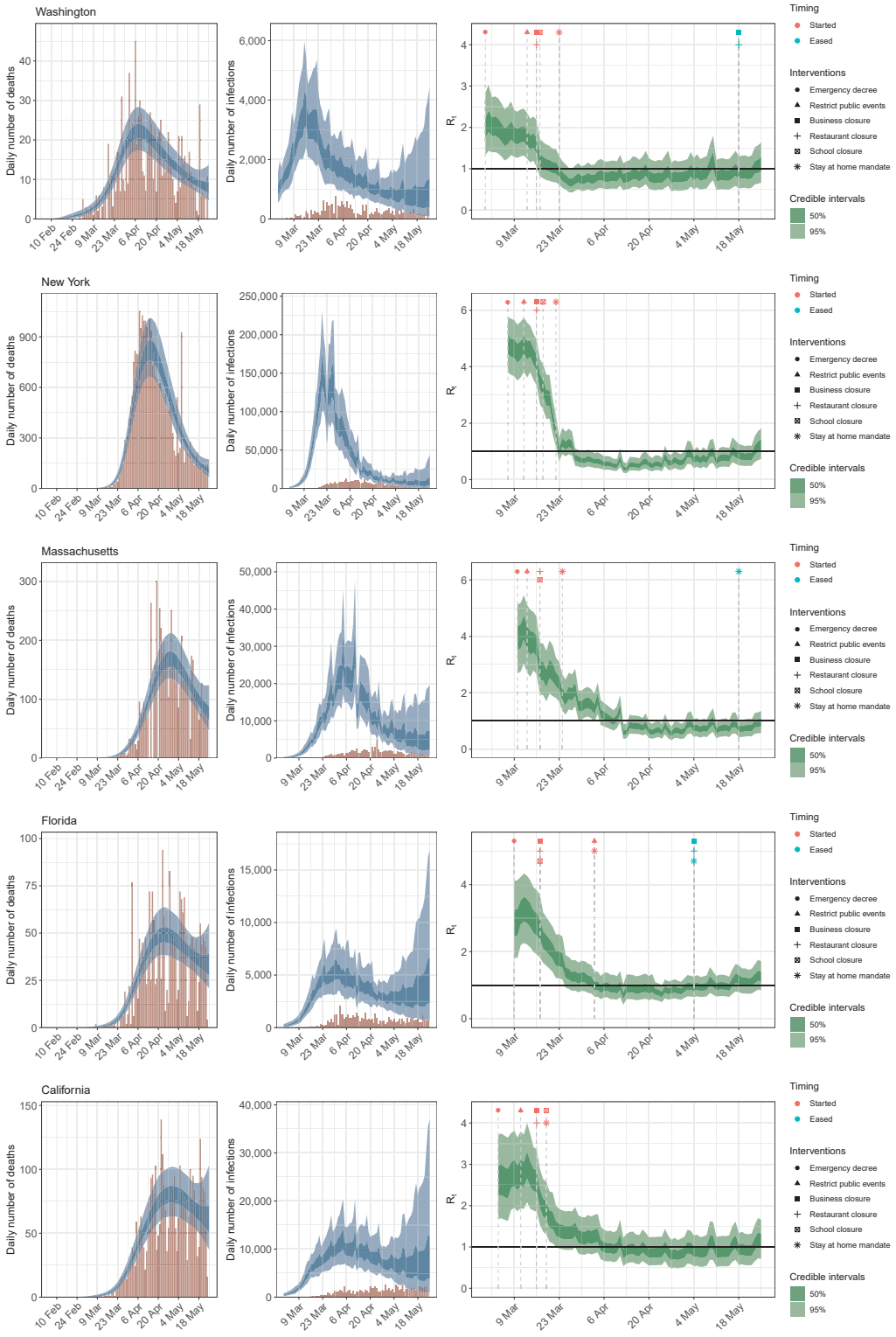


Figure 6: State-level estimates of infections, deaths, and R_t for Washington, New York, Massachusetts, Florida, and California. **Left:** daily number of deaths, brown bars are reported deaths, blue bands are predicted deaths, dark blue 50% credible interval (CI), light blue 95% CI. **Middle:** daily number of infections, brown bars are reported confirmed cases, blue bands are predicted infections, CIs are same as left. Afterwards, if the R_t is above 1, the number of infections will start growing again. **Right:** time-varying reproduction number R_t dark green 50% CI, light green 95% CI. Icons are interventions shown at the time they occurred.

2.4 Attack rates

We show the percentage of total population infected, or cumulative attack rate, in Table 1 for all 50 states and the District of Columbia. In general, the attack rates across states remain low; we estimate that the average percentage of people that have been infected by COVID-19 is 4.1% [3.7%-4.5%]. However, this low national average masks a stark heterogeneity across states. New York and New Jersey have the highest estimated attack rates, of 16.6% [12.9%-21.4%] and 15.5% [11.8%-20.3%] respectively, and Connecticut, Massachusetts, and Washington, D.C. all have attack rates over 10%. Conversely, other states that have drawn attention for early outbreaks, such as California, Washington, and Florida, have attack rates of around 2%, and other states where the epidemic is still early, like Maine, having estimated attack rates of less than 1%. We note here that there is the possibility of under reporting of deaths in these states. Under reporting of COVID-19 attributable deaths will result in an underestimate of the attack rates. We note here that we have found our estimates to be reasonably robust in settings where there is significant under reporting (e.g. Brazil [9]).

Figure 7 shows the effective number of infectious individuals and the number of newly infected individuals on any given day for each of the 8 regions in our model. The effective number of infectious individuals is calculated using the generation time distribution, where individuals are weighted by how infectious they are over time. The fully infectious average includes asymptotic and symptomatic individuals. Currently, we estimate that there are 949000 [189000 - 2691000] infectious individuals across the whole of the US, which corresponds to 0.30% [0.06% - 0.84%] of the population. Table 2 shows the number currently infected across different states is highly heterogeneous. Figure 7 shows that despite new infections being in a steep decline, the number of people still infectious, and therefore able to sustain onward transmission, can still be large. This discrepancy underscores the importance of testing and case based isolation as a means to control transmission. We note that the expanding cone of uncertainty is in part due to uncertainties arising from the lag between infections and deaths, but also from trends in mobility. State level estimates of the total number of infectious individuals over time are given in Appendix E and the current number of infectious individuals are given in Figure 2.

2.5 Scenarios

The relationship between mobility and transmission is the principal mechanism affecting values of R_t in our model. Therefore, we illustrate the impact of likely near-term scenarios for R_t over the next 8 weeks, under assumptions of relaxations of interventions leading to increased mobility. We note that mobility is acting here as a proxy for the number of potentially infectious contacts. Our mobility scenarios [18] do not account for additional interventions that may be implemented, such as mass testing and contact tracing. It is also likely that when interventions are lifted behaviour may modify the effect sizes of mobility and reduce the impact of mobility on transmission. Factors such as increased use of masks and increased adherence to social distancing are examples. Given these factors we caution the reader to look at our scenarios as pessimistic, but illustrative of the potential risks.

We define scenarios based on percent return to baseline mobility, which is by definition 0. As an example, say that currently mobility is 50% lower than baseline, or -50%, perhaps due to the introduction of social-distancing NPIs. Then, a 20% increase of mobility from its current level is $-50\% * (1 - 20\%) = -40\%$. Similarly, if mobility in residences increased by 10% following a stay-at-home order, our 20% scenario reduces this to an 8% increase over baseline. This assumes that

Table 1: Posterior model estimates of percentage of total population infected as of 25 May 2020.

State	% of total population infected (mean [95% credible interval])	State	% of total population infected (mean [95% credible interval])
Alabama	2.0% [1.3%-3.1%]	Montana	0.2% [0.0%-0.3%]
Alaska	0.1% [0.0%-0.5%]	Nebraska	1.4% [0.8%-2.5%]
Arizona	2.0% [1.3%-3.3%]	Nevada	2.1% [1.4%-3.1%]
Arkansas	0.6% [0.4%-1.1%]	New Hampshire	3.1% [1.7%-5.8%]
California	1.6% [1.1%-2.4%]	New Jersey	15.5% [11.8%-20.3%]
Colorado	3.7% [2.7%-5.4%]	New Mexico	2.8% [1.7%-4.5%]
Connecticut	13.4% [10.0%-18.3%]	New York	16.6% [12.9%-21.4%]
Delaware	5.1% [3.4%-8.0%]	North Carolina	1.2% [0.8%-2.0%]
District of Columbia	11.6% [8.4%-16.2%]	North Dakota	1.5% [0.8%-3.0%]
Florida	1.4% [0.9%-2.1%]	Ohio	3.0% [1.9%-5.0%]
Georgia	3.2% [2.2%-4.6%]	Oklahoma	1.1% [0.8%-1.6%]
Hawaii	0.1% [0.0%-0.3%]	Oregon	0.4% [0.3%-0.7%]
Idaho	0.7% [0.4%-1.1%]	Pennsylvania	5.4% [3.8%-7.9%]
Illinois	6.2% [4.3%-9.3%]	Rhode Island	9.8% [6.4%-16.3%]
Indiana	4.4% [3.2%-6.5%]	South Carolina	1.3% [0.9%-1.9%]
Iowa	3.1% [1.9%-5.3%]	South Dakota	1.0% [0.5%-1.7%]
Kansas	1.0% [0.6%-1.4%]	Tennessee	1.0% [0.6%-1.6%]
Kentucky	1.3% [0.9%-2.0%]	Texas	1.1% [0.7%-1.7%]
Louisiana	7.8% [5.9%-10.4%]	Utah	0.9% [0.5%-1.6%]
Maine	0.8% [0.4%-1.3%]	Vermont	0.8% [0.5%-1.3%]
Maryland	5.9% [4.2%-8.5%]	Virginia	2.5% [1.7%-3.8%]
Massachusetts	12.2% [9.0%-16.4%]	Washington	2.0% [1.4%-2.7%]
Michigan	6.3% [4.7%-8.3%]	West Virginia	0.6% [0.3%-1.0%]
Minnesota	2.9% [1.9%-4.7%]	Wisconsin	1.4% [0.9%-2.2%]
Mississippi	4.3% [2.7%-6.9%]	Wyoming	0.6% [0.1%-2.0%]
Missouri	1.7% [1.1%-2.5%]	**National**	4.1% [3.7%-4.5%]

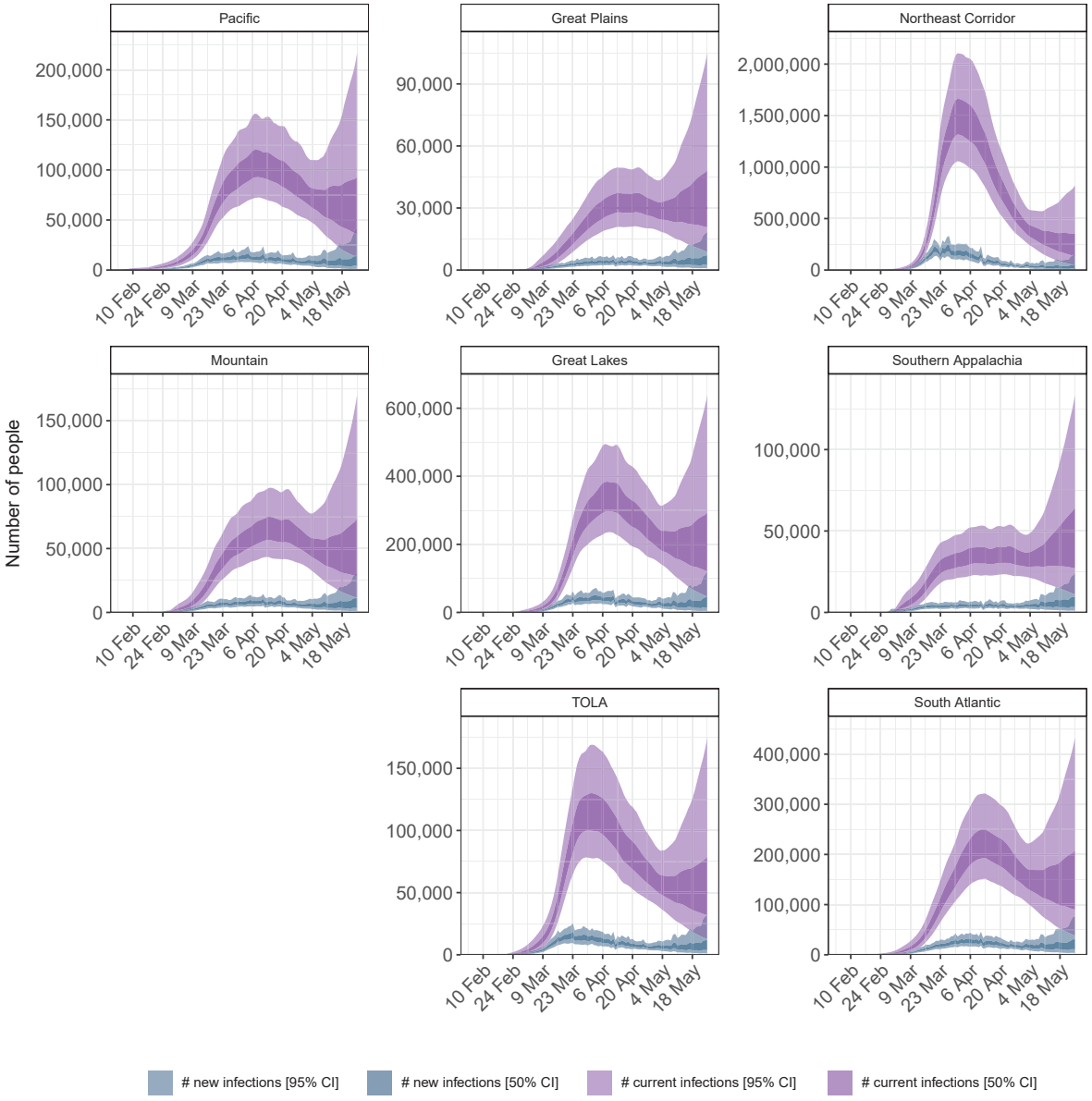


Figure 7: Estimates for the effective number of infectious individuals on a day in purple (light purple, 95% CI, dark purple 50% CI) and for newly infected people per day in blue (light blue, 95% CI, dark blue: 50% CI).

Table 2: Posterior model estimates of the number of currently infectious individuals as of 25 May 2020.

State	Number of infectious individuals (mean [95% credible interval])	State	Number of infectious individuals (mean [95% credible interval])
Alabama	13,000 [2,000-35,000]	Montana	0 [0-1,000]
Alaska	0 [0-2,000]	Nebraska	4,000 [0-13,000]
Arizona	22,000 [5,000-60,000]	Nevada	6,000 [1,000-17,000]
Arkansas	2,000 [0-8,000]	New Hampshire	8,000 [1,000-24,000]
California	65,000 [11,000-190,000]	New Jersey	49,000 [9,000-145,000]
Colorado	14,000 [2,000-48,000]	New Mexico	9,000 [2,000-24,000]
Connecticut	31,000 [6,000-86,000]	New York	68,000 [10,000-210,000]
Delaware	5,000 [0-16,000]	North Carolina	14,000 [2,000-42,000]
District of Columbia	6,000 [1,000-16,000]	North Dakota	2,000 [0-8,000]
Florida	32,000 [7,000-87,000]	Ohio	57,000 [11,000-151,000]
Georgia	38,000 [10,000-95,000]	Oklahoma	3,000 [0-9,000]
Hawaii	0 [0-1,000]	Oregon	1,000 [0-3,000]
Idaho	1,000 [0-4,000]	Pennsylvania	59,000 [9,000-182,000]
Illinois	87,000 [17,000-243,000]	Rhode Island	16,000 [3,000-46,000]
Indiana	24,000 [4,000-74,000]	South Carolina	7,000 [1,000-19,000]
Iowa	20,000 [5,000-50,000]	South Dakota	1,000 [0-4,000]
Kansas	1,000 [0-5,000]	Tennessee	11,000 [2,000-30,000]
Kentucky	5,000 [0-17,000]	Texas	40,000 [8,000-112,000]
Louisiana	17,000 [3,000-47,000]	Utah	5,000 [0-15,000]
Maine	1,000 [0-4,000]	Vermont	0 [0-1,000]
Maryland	31,000 [6,000-87,000]	Virginia	29,000 [8,000-71,000]
Massachusetts	44,000 [7,000-129,000]	Washington	7,000 [1,000-24,000]
Michigan	27,000 [4,000-79,000]	West Virginia	1,000 [0-4,000]
Minnesota	24,000 [5,000-64,000]	Wisconsin	11,000 [2,000-30,000]
Mississippi	21,000 [5,000-54,000]	Wyoming	1,000 [0-5,000]
Missouri	10,000 [2,000-29,000]	**National**	949000 [189000 - 2691000]

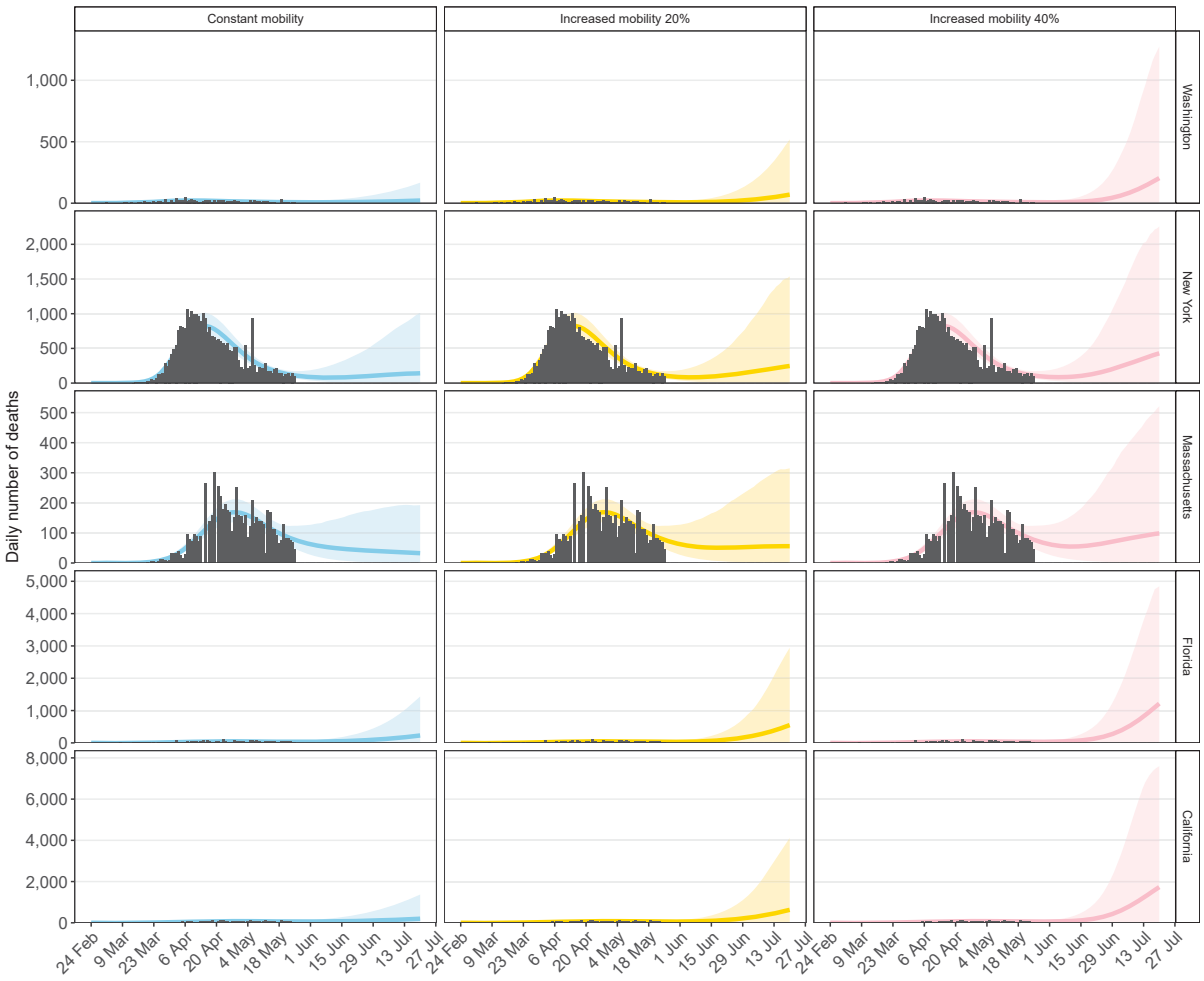


Figure 8: State-level scenario estimates of deaths for Washington, New York, Massachusetts, Florida and California. The ribbon shows the 95% credible intervals (CIs) for each scenario. The first column of plots show the results of scenario (a) where mobility is kept constant, the middle column shows results for scenario (b) where there is a 20% return to baseline mobility, and the right column shows scenario (c) where there is a 40% return to baseline mobility.

people have begun to resume pre-stay-at-home behaviour, but have not yet returned to baseline mobility. We hold this 20% return to baseline constant for the duration of the 8-week scenario.

We present three scenarios (a) constant mobility (mobility remains at current levels for 8 weeks), (b) 20% return to pre-stay-at-home mobility from current levels and (c) 40% return to pre-stay-at-home mobility from current levels. We justify the selection of these scenarios by examining how mobility has changed in states that have already begun to relax social distancing guidelines. For example, Colorado's stay-at-home order expired on the 26th of April, and activity level reported by the Colorado Department of Public Health has recovered approximately 30% of the decrease observed following initial implementation of NPIs [6]. Figure 8 shows the estimated number of deaths for each scenario in the five states discussed above: Washington, New York, Massachusetts, Florida, and California. Results for all the states modelled are included in Appendix F. These estimates are certainly *not* forecasts and are based on multiple assumptions, but they illustrate the potential consequences of increasing mobility across the general population: in almost all cases, after 8 weeks, a 40% return to baseline leads to an epidemic larger than the current wave.

3 Conclusions

In this report we use a Bayesian semi-mechanistic model to investigate the impact of these NPIs via changes in mobility. Our model uses mobility to predict the rate of transmission, neglecting the potential effect of additional behavioural changes or interventions such as testing and tracing. While mobility will explain a large amount of the variance in R_t, there is likely to be substantial residual variation which will be geographically heterogeneous. We attempt to account for this residual variation through a second order, weekly, autoregressive process. This stochastic process is able to pick up variation drive by the data but is unable to determine associations or causal mechanisms. Figure 13 shows the residual variation captured by the autoregressive process, and given these lines are flat for the majority of states, we can conclude that much of the variation we see in the observed death data can be attributed to mobility. However, there are states, such as New York, where this residual effect is large which suggests that additional factors have contributed to the reduction in R_t. We hypothesise these could be behavioural changes but testing this hypothesis will require additional data.

We find that the starting reproduction number is associated with population density and the chronological date of epidemic onset. These two relationships suggest two dimensions which may influence the starting reproduction number and underscore the variability between states. We are cautious to draw any causal relationships from these associations; our results highlight that more additional studies of these factors are need at finer spatial scales.

We find that the posterior mean of the current reproduction is above 1 in 0 states, with 95% confidence, and above 1 in 26 states with 50% confidence. These current reproduction numbers suggest that in many states the US epidemic is not under control and caution must be taken in loosening current interventions without additional measures in place. The high reproduction numbers are geographically clustered in the southern US and Great Plains region, while lower reproduction numbers are observed in areas that have suffered high COVID-19 mortality (such as the Northeast Corridor). We simulate forwards in time a partial return of mobility back to pre-COVID levels, while keeping all else constant, and find substantial resurgence is expected. In the majority of states, the deaths expected over a two-month period would exceed current levels by more than two-fold. This increase in mobility is modest and held constant for 8 weeks. However, these results must be heavily caveated: our results do not account for additional interventions that may be introduced such as mass testing, contact tracing and changing work place/transit practices. Our results also do not account for behavioural changes that may occur such as increased mask wearing or changes in age specific movement. Therefore, our scenarios are pessimistic in nature and should be interpreted as such. Given these caveats, we conjecture at the present time that, in the absence of additional interventions (such as mass testing), *additional* behavioural modifications are unlikely to substantially reduce R_t in of their own.

We estimate the number of individuals that have been infected by SARS-CoV2 to date. Our attack rates are sensitive to the assumed values of infection fatality rate (IFR). We account for each individual state's age structure, and further adjust for contact mixing patterns [19]. To ensure assumptions about IFR do not have undue influence on our conclusions, we incorporate prior noise in the estimate, and perform a sensitivity analysis using different contact matrices. Also, our attack rates for New York are in line with those from recent serological studies [1]. We show that while reductions in the daily infections continue, the reservoir of infectious individuals remains large. This reservoir also implies that interventions should remain in place longer than the daily case count implies, as trends in the number of infectious individuals lags behind. The magnitude of difference between newly infected and currently infected individuals suggest that mass testing

and isolation could be an effective intervention.

Our results suggest that while the US has substantially reduced its reproduction numbers in all states, there is little evidence that the epidemic is under control in the majority of states. Without changes in behaviour that result in reduced transmission, or interventions such as increased testing that limit transmission, new infections of COVID-19 are likely to persist, and, in the majority of states, grow.

4 Data

Our model uses daily real-time state-level aggregated data published by New York Times (NYT) [20] for New York State and John Hopkins University (JHU) [3] for the remaining states. There is no single source of consistent and reliable data for all 50 states. We acknowledge that data issues such as under reporting and time lags can influence our results. In previous reports [8, 9, 7] we have shown our modelling methodology is generally robust to these data issues due to pooling. However, we do recognise no modelling methodology will be able to surmount all data issues; therefore these results should be interpreted as the best estimates based on current data, and are subject to change with future data consolidation. JHU and NYT provide information on confirmed cases and deaths attributable to COVID-19, however again, the case data are highly unrepresentative of the incidence of infections due to under-reporting and systematic and state-specific changes in testing. We, therefore, use only deaths attributable to COVID-19 in our model. While the observed deaths still have some degree of unreliability, again due to changes in reporting and testing, we believe the data are of sufficient fidelity to model. For age specific population counts we use data from the U.S. Census Bureau in 2018 [21]. The timing of social distancing measures was collated by the University of Washington [11].

We use Google's COVID-19 Community Mobility Report [5] [2] which provides data on movement in the USA by states and highlights the percent change in visits to:

- Grocery & pharmacy: Mobility trends for places like grocery markets, food warehouses, farmers markets, speciality food shops, drug stores, and pharmacies.
- Parks: Mobility trends for places like local parks, national parks, public beaches, marinas, dog parks, plazas, and public gardens.
- Transit stations: Mobility trends for places like public transport hubs such as subway, bus, and train stations.
- Retail & recreation: Mobility trends for places like restaurants, cafes, shopping centres, theme parks, museums, libraries, and movie theatres.
- Residential:Mobility trends for places of residence.
- Workplaces: Mobility trends for places of work.

The mobility data show length of stay at different places compared to a baseline. It is therefore relative, i.e. mobility of -20% means that, compared to normal circumstances individuals are engaging in a given activity 20% less.

[2] We use mobility data from the report released on 23^{rd} May, which contains data until 16^{th} May 2020. For dates after 16^{th} May 2020, we impute the Google mobility data using a supervised machine learning approach with random forests, trained with the visitdata.org Foursquare data [22] as predictors and Google data as labels.

5 Methods

We introduced a new Bayesian framework for estimating the transmission intensity and attack rate (percentage of the population that has been infected) of COVID-19 from the reported number of deaths in a previous report [7]. This framework uses the time-varying reproduction number R_t to inform a latent function for infections, and then these infections, together with probabilistic lags, are calibrated against observed deaths. Observed deaths, while still susceptible to under reporting and delays, are more reliable than the reported number of confirmed cases, although the early focus of most surveillance systems on cases with reported travel histories to China may have missed some early deaths. Changes in testing strategies during the epidemic mean that the severity of confirmed cases as well as the reporting probabilities changed in time and may thus have introduced bias in the data.

In this report, we adapt our original Bayesian semi-mechanistic model of the infection cycle to the states in the USA. We infer plausible upper and lower bounds (Bayesian credible intervals) of the total populations infected (attack rates) and the reproduction number over time (R_t). In our framework we parametrize R_t as a function of Google mobility data. We fit the model jointly to COVID-19 data from all regions to assess whether there is evidence that changes in mobility have so far been successful at reducing R_t below 1. Our model is a partial pooling model, where the effect of mobility is shared, but region- and state-specific modifiers can capture differences and idiosyncrasies among the regions.

We note that future directions should focus on embedding mobility in realistic contact mechanisms to establish a closer relationship to transmission.

5.1 Model specifics

We observe daily deaths $D_{t,m}$ for days $t \in \{1, \ldots, n\}$ and states $m \in \{1, \ldots, M\}$. These daily deaths are modelled using a positive real-valued function $d_{t,m} = \mathbb{E}[D_{t,m}]$ that represents the expected number of deaths attributed to COVID-19. The daily deaths $D_{t,m}$ are assumed to follow a negative binomial distribution with mean $d_{t,m}$ and variance $d_{t,m} + \frac{d_{t,m}^2}{\phi}$, where ψ follows a positive half normal distribution, i.e.

$$D_{t,m} \sim \text{Negative Binomial}\left(d_{t,m}, d_{t,m} + \frac{d_{t,m}^2}{\psi}\right),$$
$$\psi \sim \mathcal{N}^+(0, 5).$$

Here, $\mathcal{N}(\mu, \sigma)$ denotes a normal distribution with mean μ and standard deviation σ. We say that X follows a positive half normal distribution $\mathcal{N}^+(0, \sigma)$ if $X \sim |Y|$, where $Y \sim \mathcal{N}(0, \sigma)$.

To mechanistically link our function for deaths to our latent function for infected cases, we use a previously estimated COVID-19 infection fatality ratio (IFR, probability of death given infection) together with a distribution of times from infection to death π. Details of this calculation can be found in [23, 24]. From the above, every region has a specific mean infection fatality ratio ifr_m (see Appendix G). To incorporate the uncertainty inherent in this estimate we allow the ifr_m for every state to have additional noise around the mean. Specifically we assume

$$\text{ifr}_m^* \sim \text{ifr}_m \cdot N(1, 0.1).$$

We believe a large-scale contact survey similar to polymod [19] has not been collated for the USA, so we assume the contact patterns are similar to those in the UK. We conducted a sensitivity analysis, shown in Appendix G, and found that the IFR calculated using the contact matrices of other European countries lay within the posterior of ifr_m^*.

Using estimated epidemiological information from previous studies [23, 24], we assume the distribution of times from infection to death π (infection-to-death) to be

$$\pi \sim \text{Gamma}(5.1, 0.86) + \text{Gamma}(17.8, 0.45).$$

The expected number of deaths $d_{t,m}$, on a given day t, for state m is given by the following discrete sum:

$$d_{t,m} = \text{ifr}_m^* \sum_{\tau=0}^{t-1} c_{\tau,m} \pi_{t-\tau},$$

where $c_{\tau,m}$ is the number of new infections on day τ in state m and where π is discretized via $\pi_s = \int_{s-0.5}^{s+0.5} \pi(\tau) d\tau$ for $s = 2, 3, ...,$ and $\pi_1 = \int_0^{1.5} \pi(\tau) d\tau$, where $\pi(\tau)$ is the density of π.

The true number of infected individuals, c, is modelled using a discrete renewal process. We specify a generation distribution g with density $g(\tau)$ as:

$$g \sim \text{Gamma}(6.5, 0.62).$$

Given the generation distribution, the number of infections $c_{t,m}$ on a given day t, and state m, is given by the following discrete convolution function:

$$c_{t,m} = S_{t,m} R_{t,m} \sum_{\tau=0}^{t-1} c_{\tau,m} g_{t-\tau}, \tag{1}$$
$$S_{t,m} = 1 - \frac{\sum_{i=0}^{t-1} c_{i,m}}{N_m}$$

where, similar to the probability of death function, the generation distribution is discretized by $g_s = \int_{s-0.5}^{s+0.5} g(\tau) d\tau$ for $s = 2, 3, ...,$ and $g_1 = \int_0^{1.5} g(\tau) d\tau$. The population of state m is denoted by N_m . We include the adjustment factor $S_{t,m}$ to account for the number of susceptible individuals left in the population.

We parametrise $R_{t,m}$ as a linear function of the relative change in time spent (from a baseline)

$$R_{t,m} = R_{0,m} \cdot f(-(\sum_{k=1}^{3} X_{t,m,k} \alpha_k) - Y_{t,m} \alpha_{r(m)}^{\text{region}} - Z_{t,m} \alpha_m^{\text{state}} - \epsilon_{m,w_m(t)}), \tag{2}$$

where $f(x) = 2\,\text{exp}(x)/(1 + \text{exp}(x))$ is twice the inverse logit function. $X_{t,m,k}$ are covariates that have the same effect for all states, $Y_{t,m}$ is a covariate that also has a region-specific effect, $r(m) \in \{1, \ldots, R\}$ is the region a state is in (see Figure 1), $Z_{t,m}$ is a covariate that has a state-specific effect and $\epsilon_{m,w_m(t)}$ is a weekly AR(2) process, centred around 0, that captures variation between states that is not explained by the covariates.

The prior distribution for $R_{0,m}$[25] was chosen to be

$$R_{0,m} \sim \mathcal{N}(3.28, \kappa) \text{ with } \kappa \sim \mathcal{N}^+(0, 0.5),$$

where κ is the same among all states.

In the analysis of this paper we chose the following covariates: $X_{t,m,1} = M_{t,m}^{\text{average}}$, $X_{t,m,2} = M_{t,m}^{\text{transit}}$, $X_{t,m,3} = M_{t,m}^{\text{residential}}$, $Y_{t,m} = M_{t,m}^{\text{average}}$, and $Z_{t,m} = M_{t,m}^{\text{transit}}$, where the mobility variables are from [5] and defined as follows (all are encoded so that 0 is the baseline and 1 is a full reduction of the mobility in this dimension):

- $M_{t,m}^{\text{average}}$ is an average of retail and recreation, groceries and pharmacies, and workplaces. An average is taken as these dimensions are strongly collinear.
- $M_{t,m}^{\text{transit}}$ is encoding mobility for public transport hubs. For states where less than 20% of the working population aged 16 and over uses public transportation, we set $M_{t,m}^{\text{transit}} = 0$, i.e. this mobility has no effect on transmission. For states in which more than 20% of the working population commutes using public transportation, $M_{t,m}^{\text{transit}}$ is the mobility on transit.
- $M_{t,m}^{\text{residential}}$ are the mobility trends for places of residences.

The weekly, state-specific effect is modelled as a weekly AR(2) process, centred around 0 with stationary standard deviation σ_w that, in every state, starts on the first day of its seeding of infectons, i.e. 30 days before a total of 10 cumulative deaths have been observed in this state. The AR(2) process starts with $\epsilon_{1,m} \sim \mathcal{N}(0, \sigma_w^*)$,

$$\epsilon_{w,m} \sim \mathcal{N}(\rho_1 \epsilon_{w-1,m} + \rho_2 \epsilon_{w-2,m}, \sigma_w^*) \text{ for } m = 2, 3, 4, \ldots \tag{3}$$

with independent priors on ρ_1 and ρ_2 that are normal distributions conditioned to be in $[0, 1]$; the prior for ρ_1 is a $\mathcal{N}(0.8, .05)$ distribution conditioned to be in $[0, 1]$ the prior for ρ_2 is a $\mathcal{N}(0.1, .05)$ distribution, conditioned to be in $[0, 1]$. The prior for σ_w, the standard deviation of the stationary distribution of ϵ_w is chosen as $\sigma_w \sim \mathcal{N}^+(0, .2)$. The standard deviation of the weekly updates to achieve this standard deviation of the stationary distribution is $\sigma_w^* = \sigma_w \sqrt{1 - \rho_1^2 - \rho_2^2 - 2\rho_1^2\rho_2/(1 - \rho_2)}$.

The conversion from days to weeks is encoded in $w_m(t)$. Every 7 days, w_m is incremented, i.e. we set$w_m(t) = \lfloor (t - t_m^{\text{start}})/7 \rfloor + 1$, where t_m^{start} is the first day of seeding. Due to the lag between infection and death, our estimates of R_t in the last two weeks before the end of our observations are (almost) not informed by corresponding death data. Therefore, we assume that the last two weeks have the same random weekly effect as the week 3 weeks before the end of observation.

The prior distribution for the shared coefficients were chosen to be

$$\alpha_k \sim \mathcal{N}(0, 0.5), k = 1, \ldots, 3,$$

and the prior distribution for the pooled coefficients were chosen to be

$$\alpha_r^{\text{region}} \sim \mathcal{N}(0, \gamma_r), r = 1, \ldots, R, \text{ with } \gamma_r \sim \mathcal{N}^+(0, 0.5),$$
$$\alpha_m^{\text{state}} \sim \mathcal{N}(0, \gamma_s), m = 1, \ldots, M \text{ with } \gamma_s \sim \mathcal{N}^+(0, 0.5).$$

We assume that seeding of new infections begins 30 days before the day after a state has cumulatively observed 10 deaths. From this date, we seed our model with 6 sequential days of an equal number of infections: $c_{1,m} = \cdots = c_{6,m} \sim \text{Exponential}(\frac{1}{\tau})$, where $\tau \sim \text{Exponential}(0.03)$. These seed infections are inferred in our Bayesian posterior distribution.

We estimated parameters jointly for all states in a single hierarchical model. Fitting was done in the probabilistic programming language Stan[26] using an adaptive Hamiltonian Monte Carlo (HMC) sampler.

6 Acknowledgements

We would like to thank Amazon AWS and Microsoft Azure for computational credits and we would like to thank the Stan development team for their ongoing assistance. This work was supported by Centre funding from the UK Medical Research Council under a concordat with the UK Department for International Development, the NIHR Health Protection Research Unit in Modelling Methodology and Community Jameel.

References

[1] S M Kissler et al. "Reductions in commuting mobility predict geographic differences in SARS-CoV-2 prevalence in New York City". In: (2020). URL: http://nrs.harvard.edu/urn-3:HUL.InstRepos:42665370.

[2] Santa Clara County Public Health. *County of Santa Clara Identifies Three Additional Early COVID-19 Deaths*. 2020. URL: https://www.sccgov.org/sites/covid19/Pages/press-release-04-21-20-early.aspx.

[3] E Dong, H Du, and L Gardner. "An interactive web-based dashboard to track COVID-19 in real time". eng. In: *The Lancet. Infectious diseases* (Feb. 2020), pp. 1473–3099. ISSN: 1474-4457. URL: https://pubmed.ncbi.nlm.nih.gov/32087114https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7159018/.

[4] C Courtemanche et al. "Strong Social Distancing Measures In The United States Reduced The COVID-19 Growth Rate". In: *Health Affairs* 39.7 (2020).

[5] A Aktay et al. "Google COVID-19 Community Mobility Reports: Anonymization Process Description (version 1.0)". In: *ArXiv* abs/2004.0 (2020).

[6] J Bayham et al. *Colorado Mobility Patterns During the COVID-19 Response*. 2020. URL: http://www.ucdenver.edu/academics/colleges/PublicHealth/coronavirus/Documents/Mobility%20Report_final.pdf.

[7] S Flaxman et al. *Report 13: Estimating the number of infections and the impact of non-pharmaceutical interventions on COVID-19 in 11 European countries*. 2020.

[8] M Vollmer et al. *Report 20: Using mobility to estimate the transmission intensity of COVID-19 in Italy: A subnational analysis with future scenarios*. 2020.

[9] T A Mellan et al. *Report 21 - Estimating COVID-19 cases and reproduction number in Brazil*. 2020.

[10] M. Reston, K. Sgueglia, and C. Mossburg. *Governors on East and West coasts form pacts to decide when to reopen economies*. 2020. URL: https://edition.cnn.com/2020/04/13/politics/states-band-together-reopening-plans/index.html.

[11] N Fullman et al. *State-level social distancing policies in response to COVID-19 in the US*. 2020. URL: http://www.covid19statepolicy.org.

[12] United States Census Bureau. *Explore Census Data*. 2020. URL: https://data.census.gov/cedsci/.

[13] Morning Consult. *How the Coronavirus Outbreak Is Impacting Public Opinion*. Accessed on 15/05/2020. 2020. URL: https://morningconsult.com/form/coronavirus-outbreak-tracker/.

[14] J Stromberg. *The real reason American public transportation is such a disaster*. 2015. URL: https://www.vox.com/2015/8/10/9118199/public-transportation-subway-buses.

[15] B D Dalziel et al. "Urbanization and humidity shape the intensity of influenza epidemics in U.S. cities". In: *Science* 362.6410 (2018), pp. 75–79. ISSN: 0036-8075. eprint: https://science.sciencemag.org/content/362/6410/75.full.pdf. URL: https://science.sciencemag.org/content/362/6410/75.

[16] City and County of Department of Public Health San Francisco. *ORDER OF THE HEALTH OFFICER No. C19-07c*. 2020. URL: https://sf.gov/sites/default/files/2020-04/2020.04.29%20FINAL%20%28signed%29%20Health%20Officer%20Order%20C19-07c-%20Shelter%20in%20Place.pdf.

[17] L Gamio S Mervosh J Lee and N Popovich. *See Which States Are Reopening and Which Are Still Shut Down*. 2020. URL: https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html.

[18] KEC Ainslie et al. "Evidence of initial success for China exiting COVID-19 social distancing policy after achieving containment". In: *Wellcome Open Research* 5.81 (2020).

[19] J Mossong et al. "Social Contacts and Mixing Patterns Relevant to the Spread of Infectious Diseases". In: *PLOS Medicine* 5.3 (Mar. 2008), pp. 1–1. URL: https://doi.org/10.1371/journal.pmed.0050074.

[20] M Smith et al. *Coronavirus (Covid-19) Data in the United States*. 2020. URL: https://github.com/nytimes/covid-19-data.

[21] Census reporter. *Census reporter*. 2020. URL: https://censusreporter.org.

[22] VisitData. *VisitData Trends*. 2020. URL: https://visitdata.org/index.html.

[23] R Verity et al. "Estimates of the severity of COVID-19 disease". In: *Lancet Infect Dis* (2020).

[24] P Walker et al. *Report 12: The Global Impact of COVID-19 and Strategies for Mitigation and Suppression*. 2020. URL: https://www.imperial.ac.uk/mrc-global-infectious-disease-analysis/news--wuhan-coronavirus/.

[25] Y Liu et al. "The reproductive number of COVID-19 is higher compared to SARS coronavirus". In: *Journal of Travel Medicine* (2020). ISSN: 17088305.

[26] B Carpenter et al. "*Stan*: A Probabilistic Programming Language". In: *Journal of Statistical Software* 76.1 (2017), pp. 1–32. ISSN: 1548-7660. URL: http://www.jstatsoft.org/v76/i01/.

A Mobility regression analysis

In Figure 9 we regress NPIs against average mobility. We parameterise NPIs as piece-wise constant functions that are zero when the intervention has not been implemented and one when it has. We evaluate the correlation between the predictions from the linear model and the actual average mobility. We also lag the timing of interventions and investigate its impact on predicted correlation.

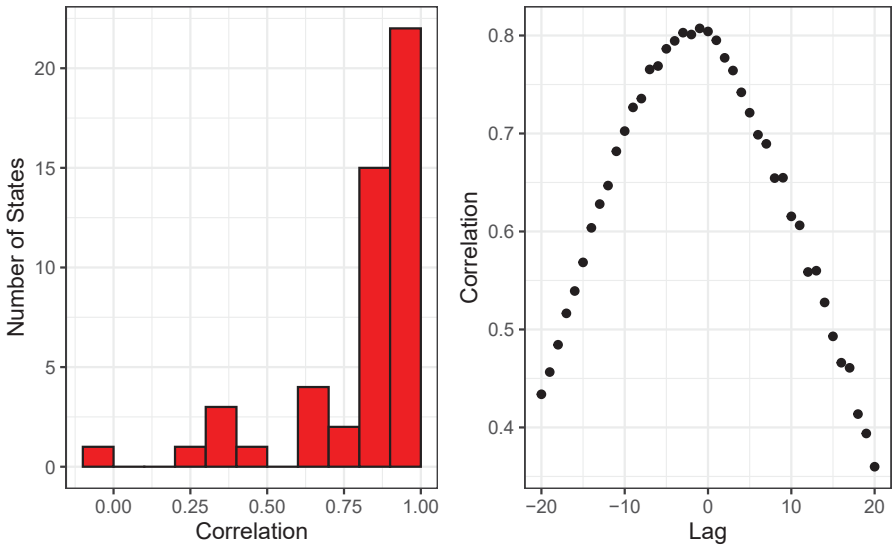


Figure 9: Mobility regression analysis.

B Effect sizes

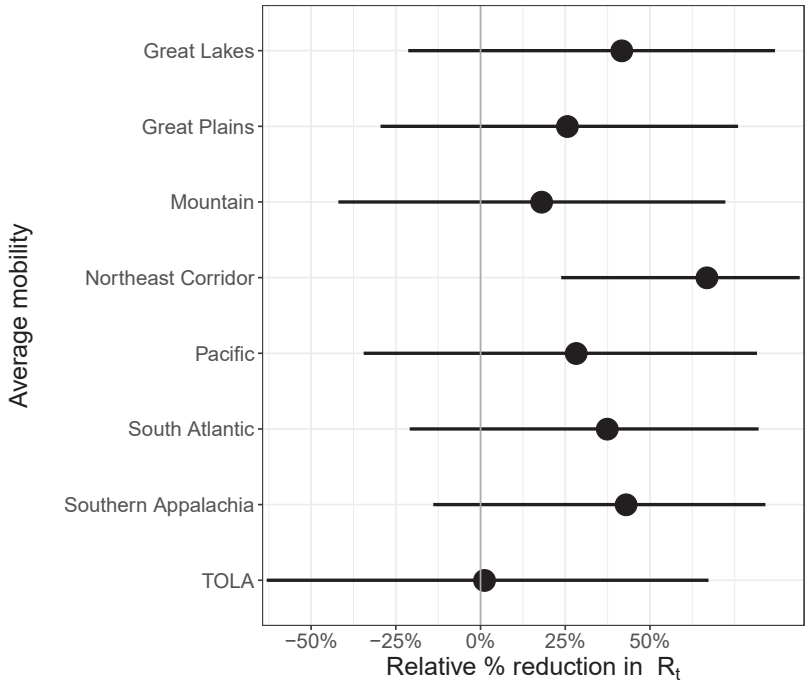


Figure 10: Regional average mobility covariate effect size plots.

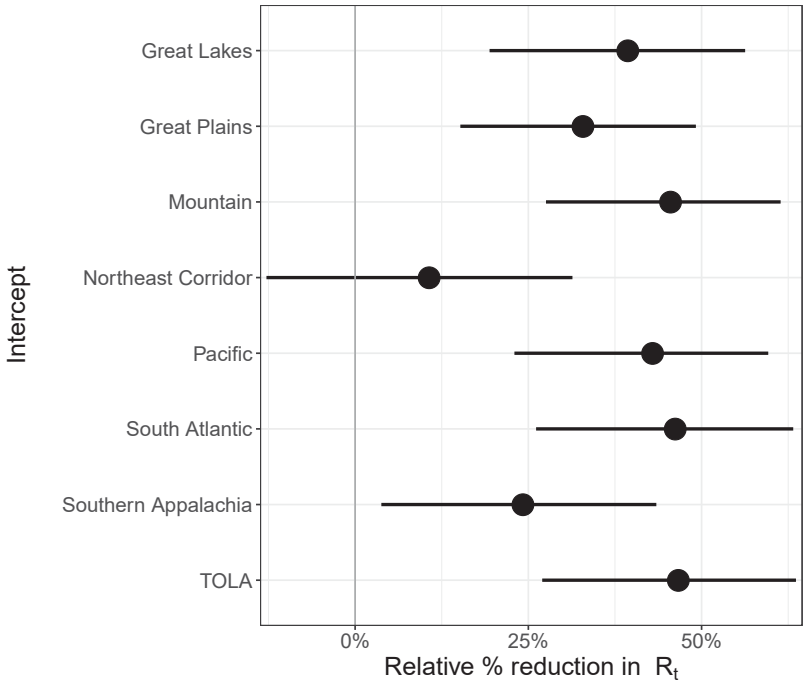


Figure 11: Regional intercept covariate effect size plots.

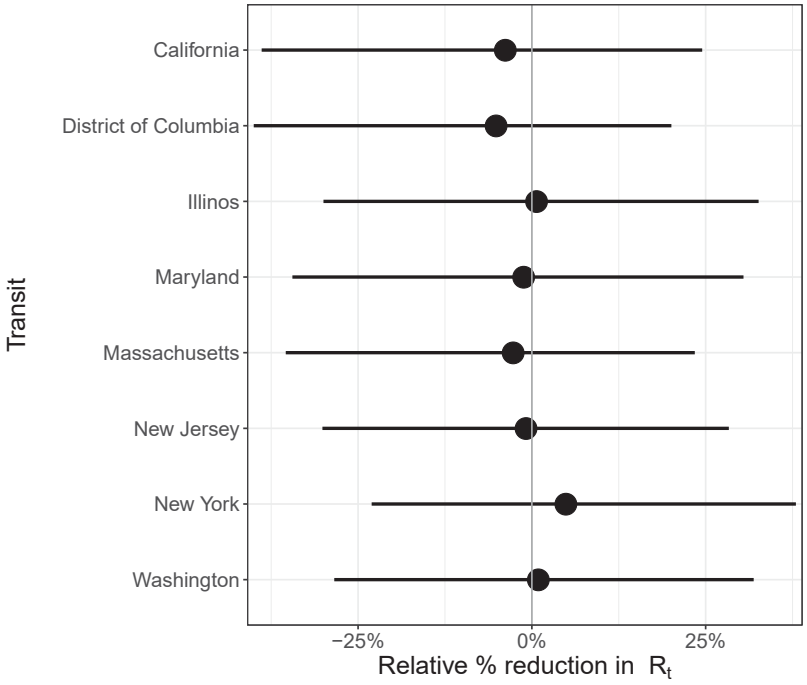


Figure 12: State-level covariate effect size plots.

C State-specific weekly effects

Our model includes a state-specific weekly effect $\epsilon_{w,m}$ (see equations 2, 3) for each week w in the epidemic period for a state. As described in Section 5, We assign an autoregressive process with mean 0 as prior to this effect. This weekly effect is held constant for the 4 weeks up to the present week. Figure 13 shows the posterior of this effect on the same scale as in Figure 2, that is, the percent reduction in R_t with mobility variables held constant[3]. Values above 0 have the interpretation that the state-specific weekly effect lowers the reproduction number $R_{t,m}$, i.e. transmission for week t and state m is lower than what is explained by the mobility covariates.

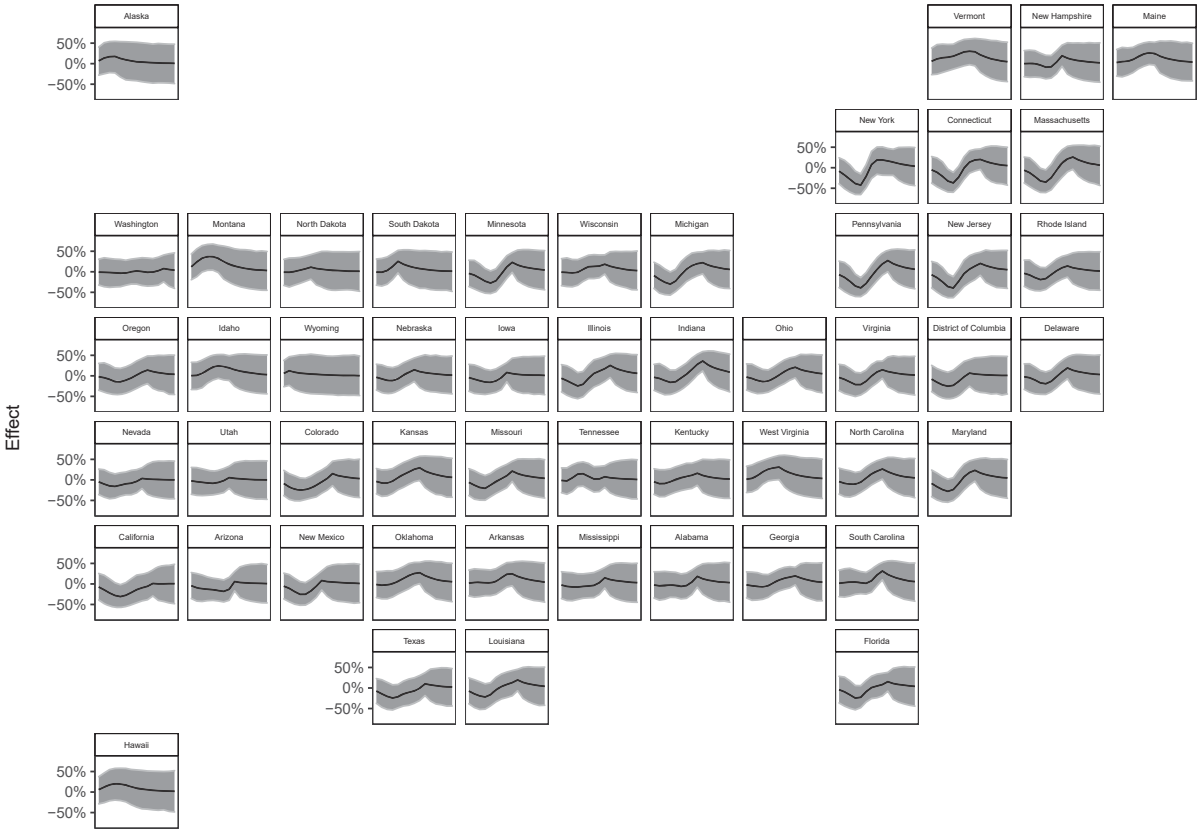
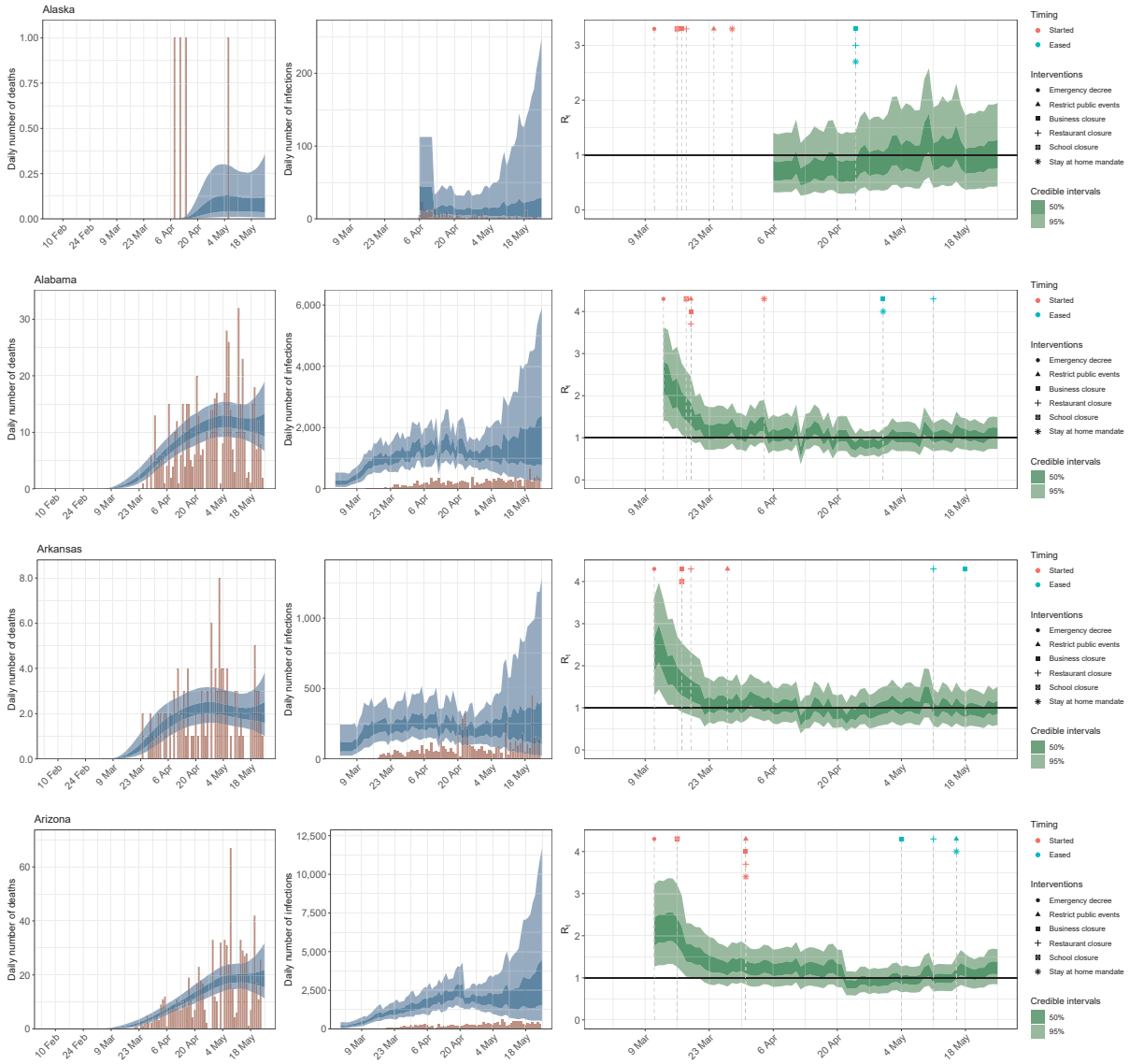


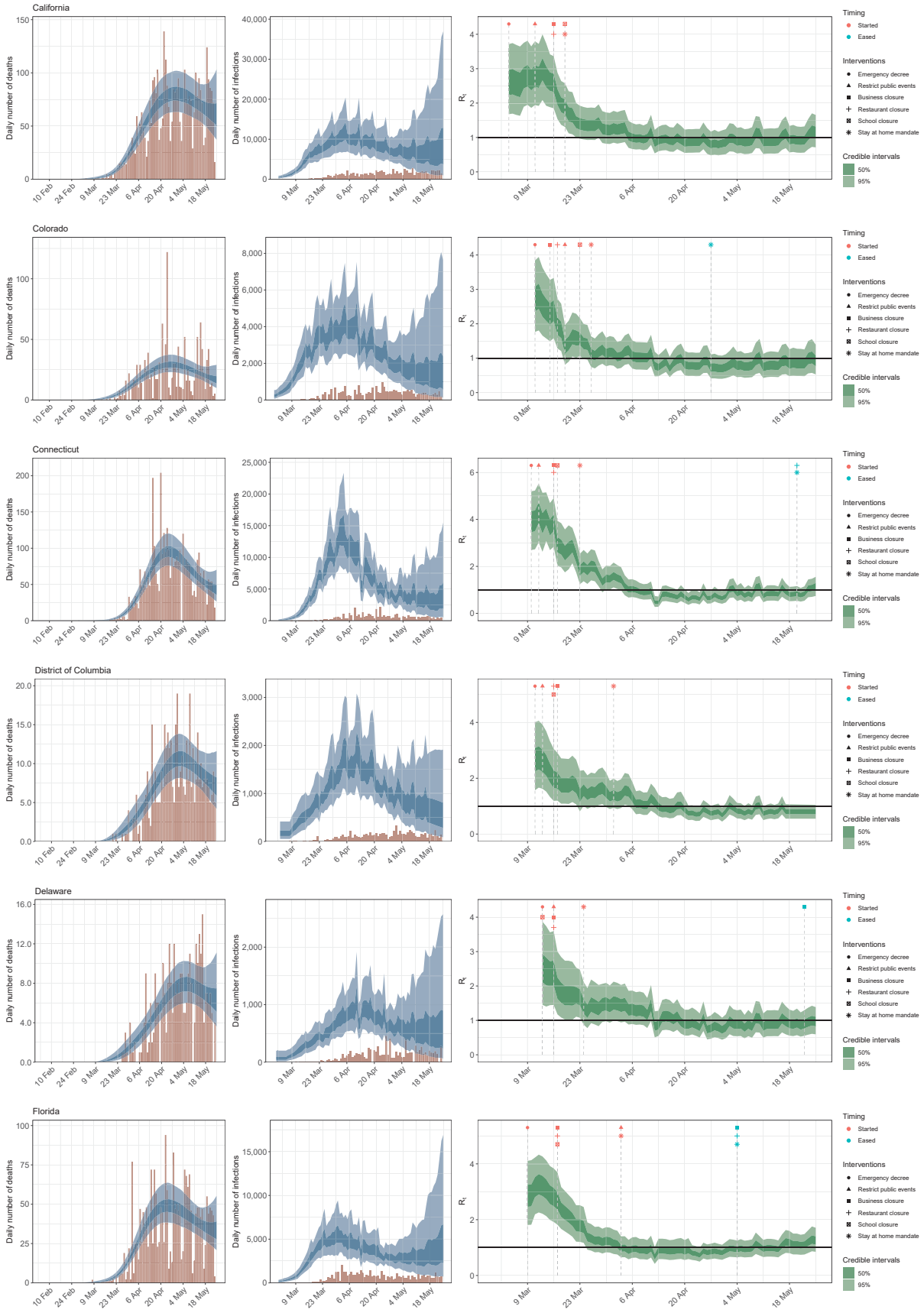
Figure 13: Percent reduction in R_t due to the weekly, state-level autoregressive effect after the emergency decree.

[3]Draws from the posterior are transformed with $1 - f(-\epsilon_{m,w_m(t)})$, where $f(x) = 2\exp(x)/(1+\exp(x))$ is twice the inverse logit function.

D Model predictions for all states

State-level estimates of infections, deaths and R_t. Left: daily number of deaths, brown bars are reported deaths, blue bands are predicted deaths, dark blue 50% credible interval (CI), light blue 95% CI. Middle: daily number of infections, brown bars are reported infections, blue bands are predicted infections, CIs are same as left. The number of daily infections estimated by our model drops immediately after an intervention, as we assume that all infected people become immediately less infectious through the intervention. Afterwards, if the R_t is above 1, the number of infections will start growing again. Right: time-varying reproduction number R_t dark green 50% CI, light green 95% CI. Icons are interventions shown at the time they occurred.




California
Colorado
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District of Columbia
Delaware
Florida
Daily number of deaths
Daily number of infections
R_t
Timing
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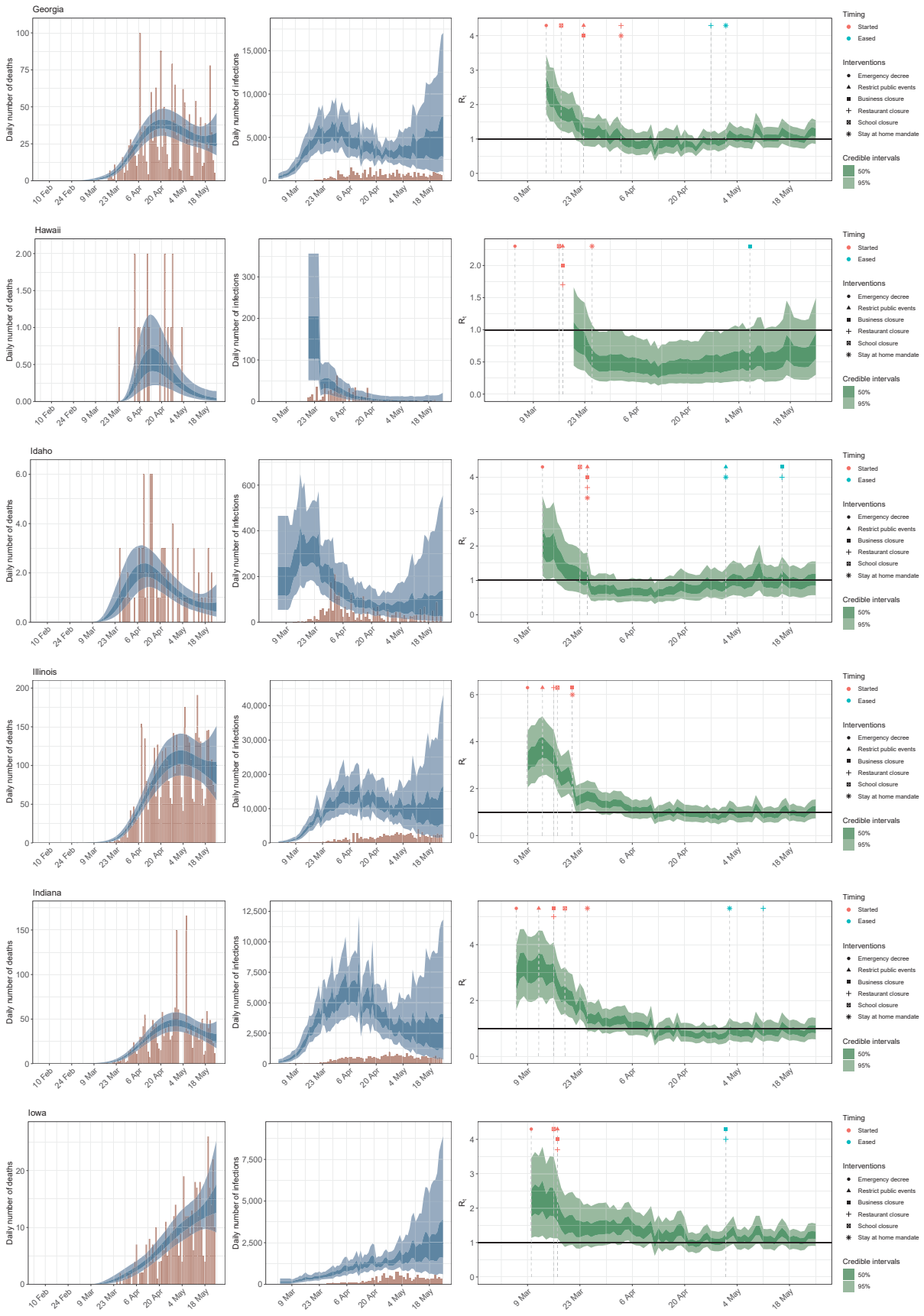
Eased
Interventions
Emergency decree
Restrict public events
Business closure
Restaurant closure
School closure
Stay at home mandate
Credible intervals
50%
95%


Georgia
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Interventions
Emergency decree
Restrict public events
Business closure
Restaurant closure
School closure
Stay at home mandate
Credible intervals
50%
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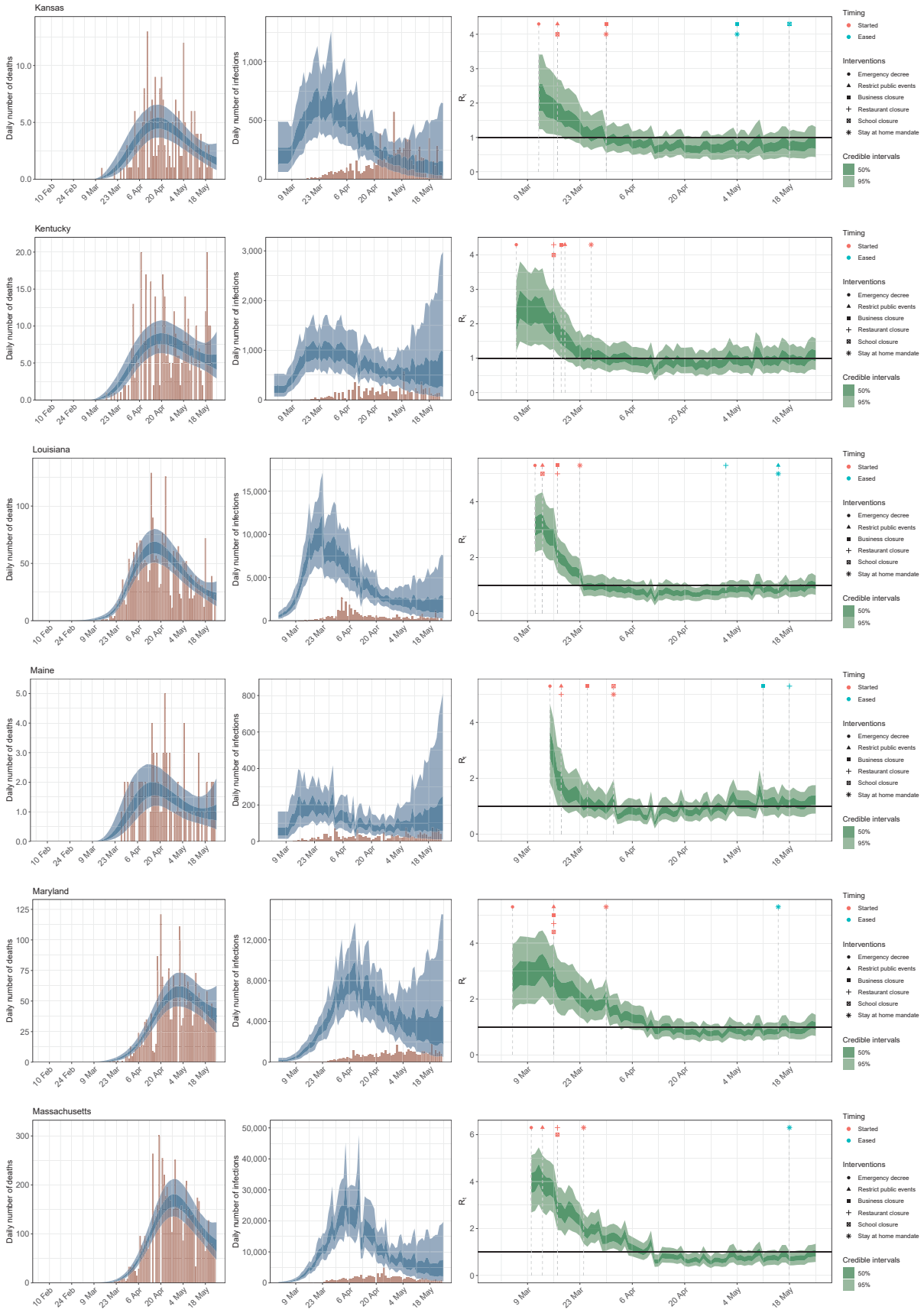
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Maryland
Massachusetts
Daily number of deaths
Daily number of infections
R_t
Timing
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Eased
Interventions
Emergency decree
Restrict public events
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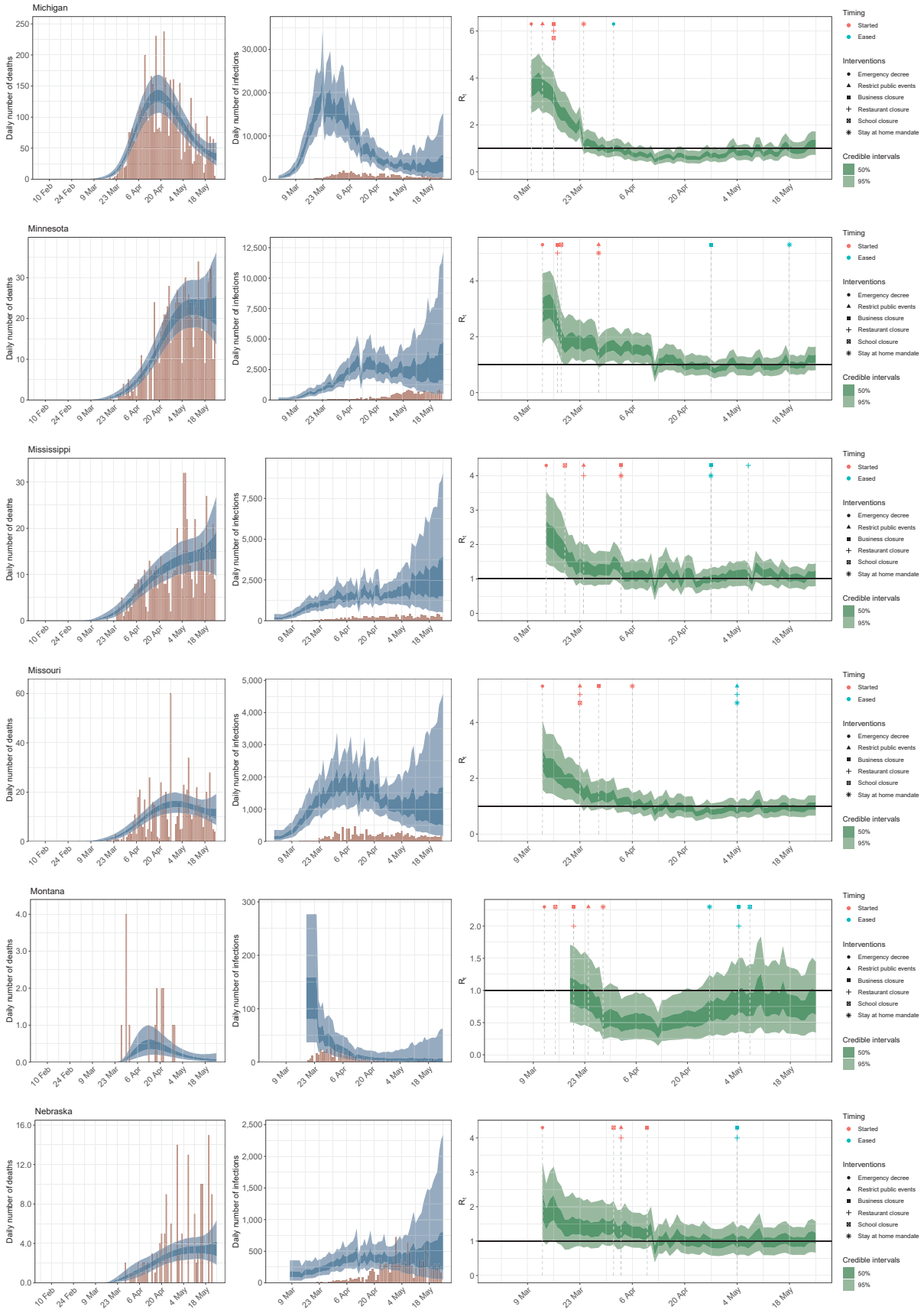
Michigan
Minnesota
Mississippi
Missouri
Montana
Nebraska
Daily number of deaths
Daily number of infections
R_t
Timing
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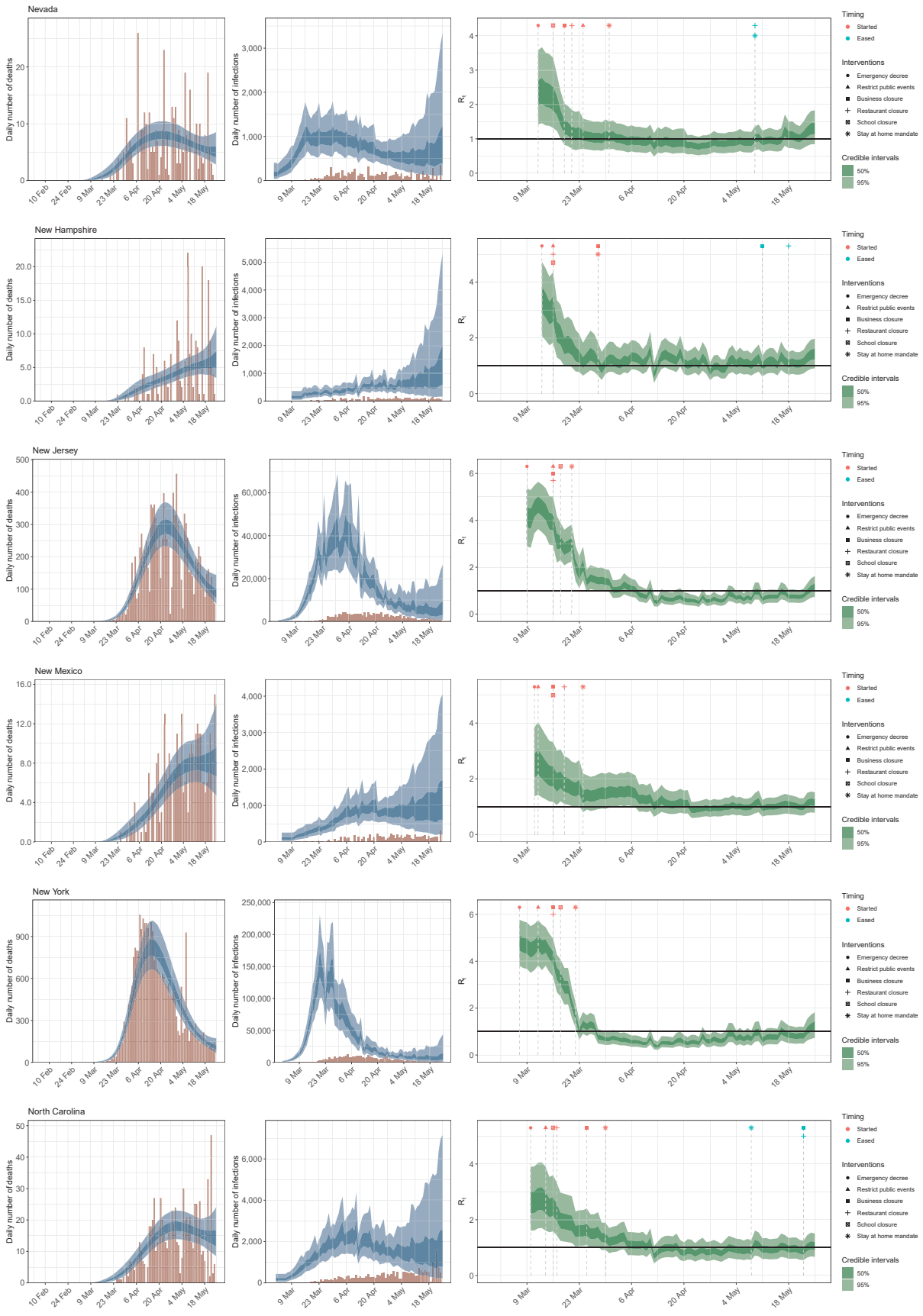
Restrict public events
Business closure
Restaurant closure
School closure
Stay at home mandate
Credible intervals
50%
95%


Nevada
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New Mexico
New York
North Carolina
Daily number of deaths
Daily number of infections
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Interventions
Emergency decree
Restrict public events
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Credible intervals
50%
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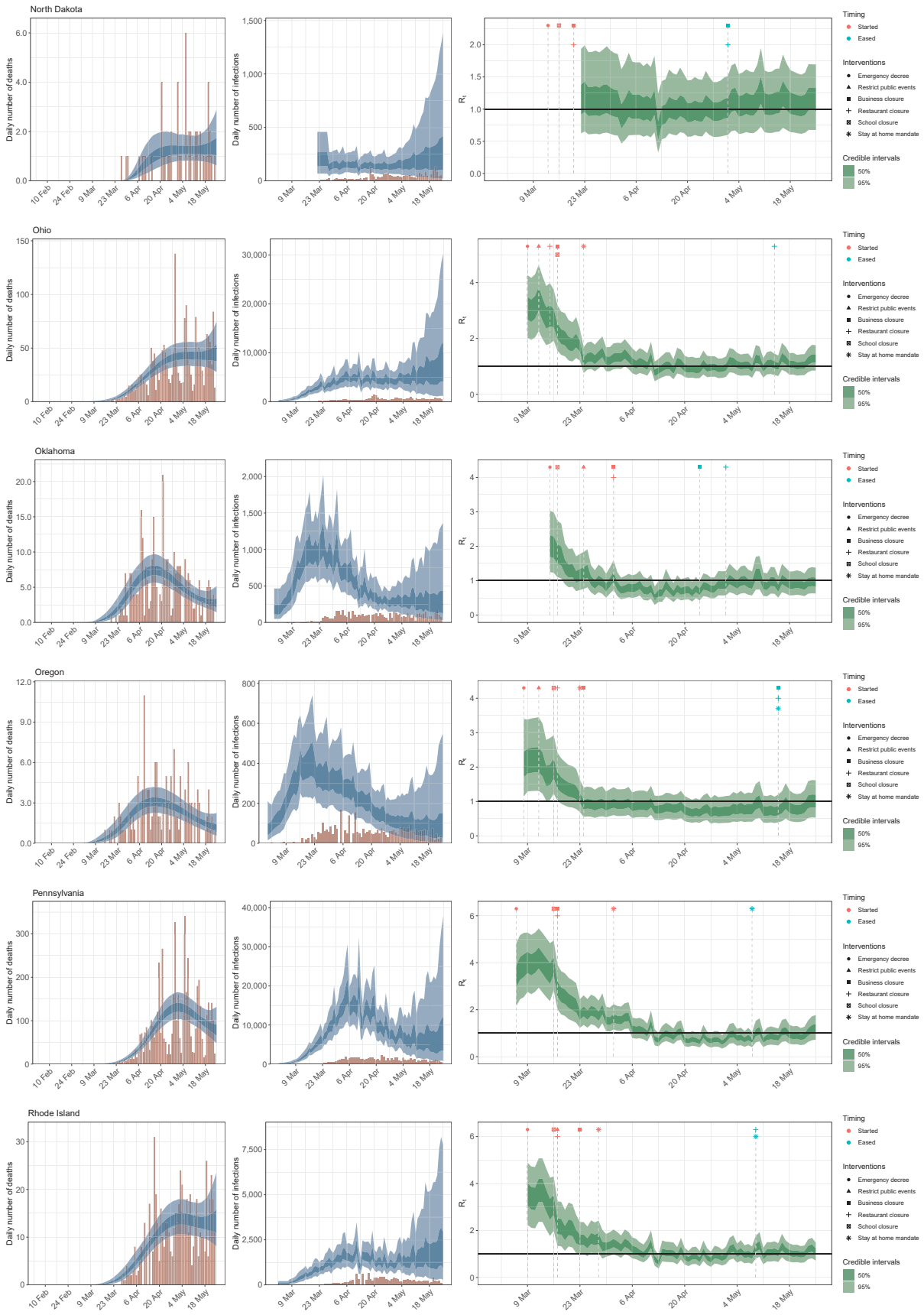
North Dakota
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Rhode Island
Daily number of deaths
Daily number of infections
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Interventions
Emergency decree
Restrict public events
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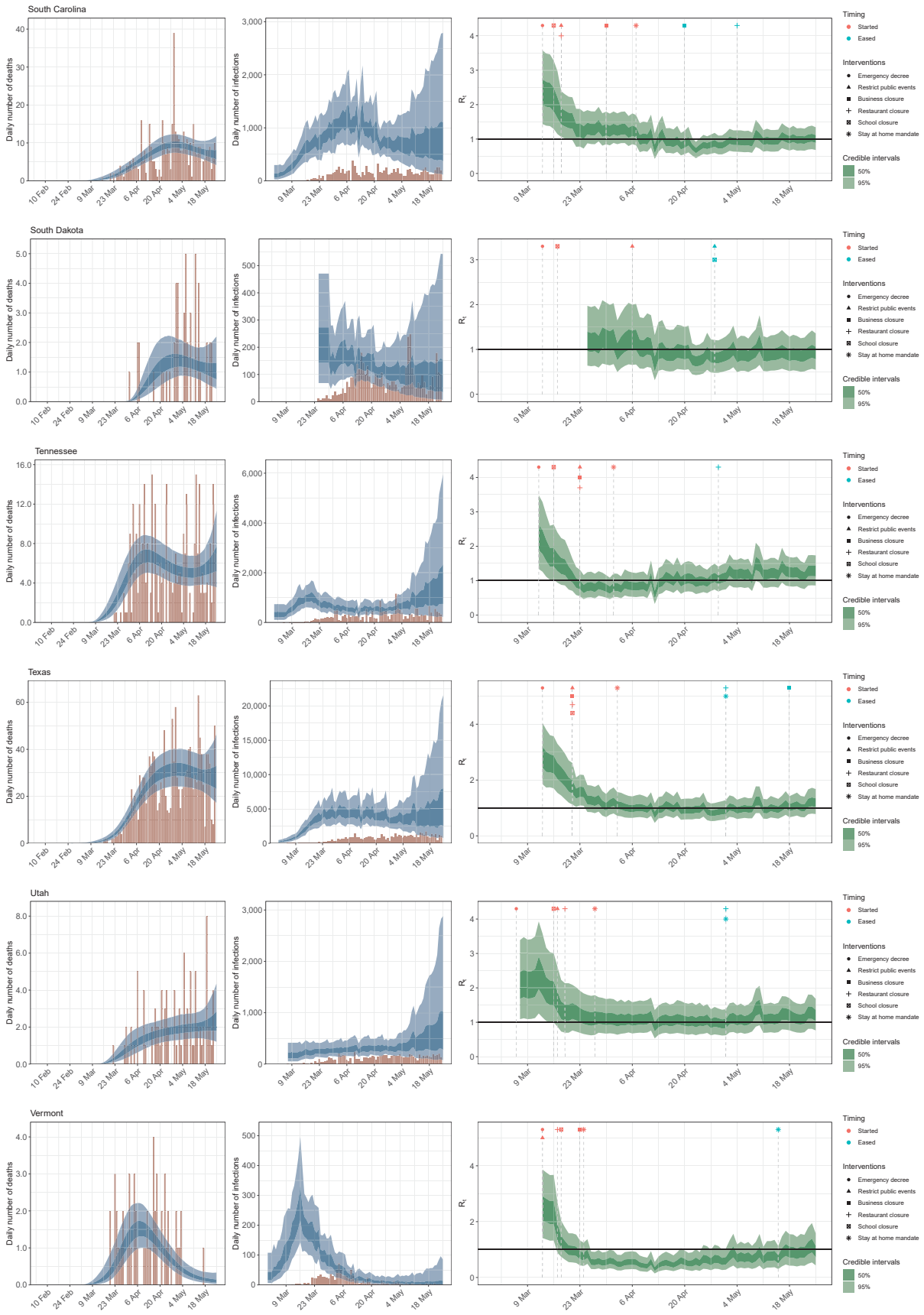
South Carolina
South Dakota
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Texas
Utah
Vermont
Daily number of deaths
Daily number of infections
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Timing
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Interventions
Emergency decree
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Business closure
Restaurant closure
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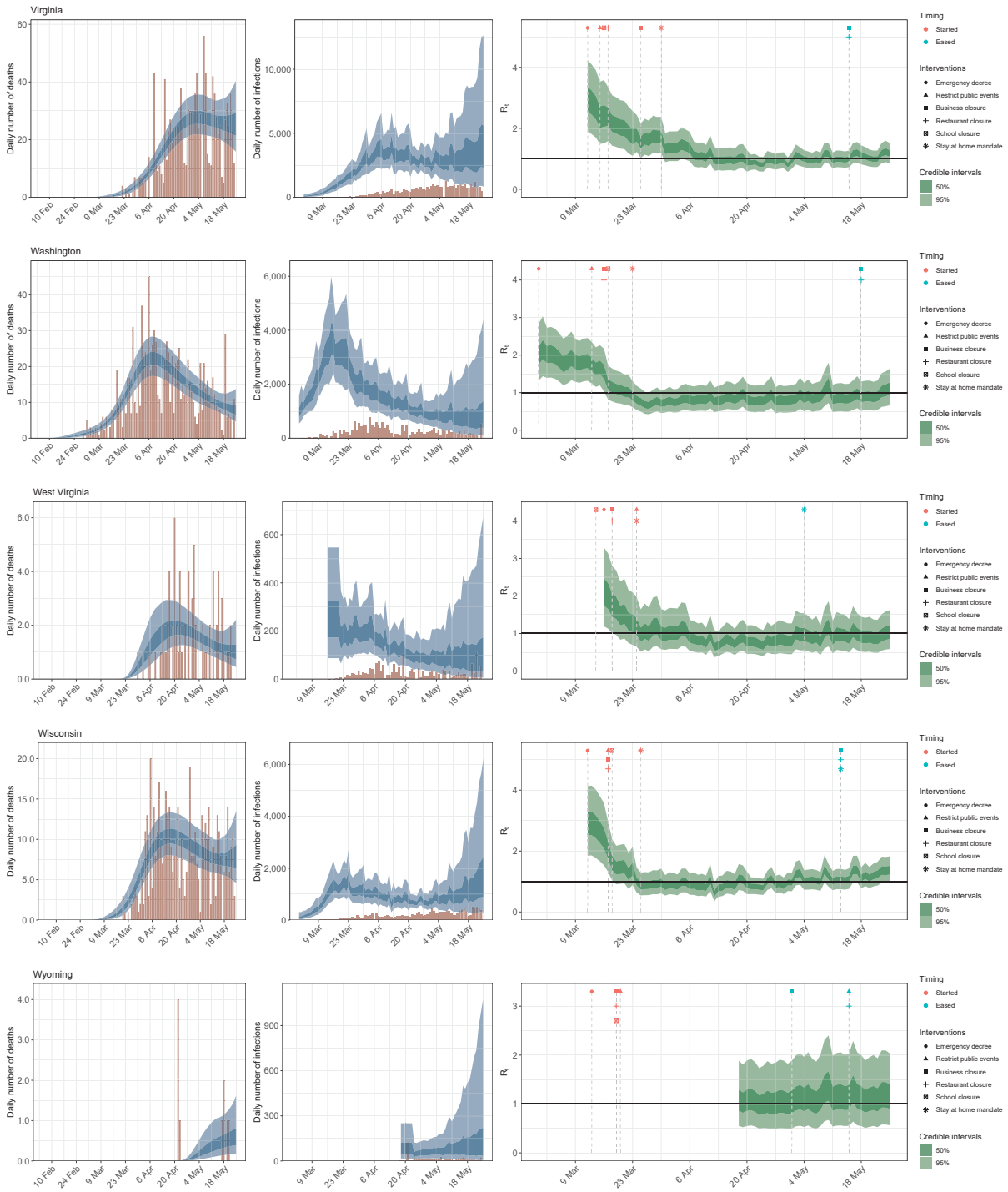
95%



E Effective number of infectious individuals for all states

The effective number of infectious individuals, c^*, on a given day is calculated by weighing how infectious a previously infected individual is on a given day. The fully infectious average includes asymptotic and symptomatic individuals. Estimates of the effective number of infectious individuals for all states can be found in Figure 14.

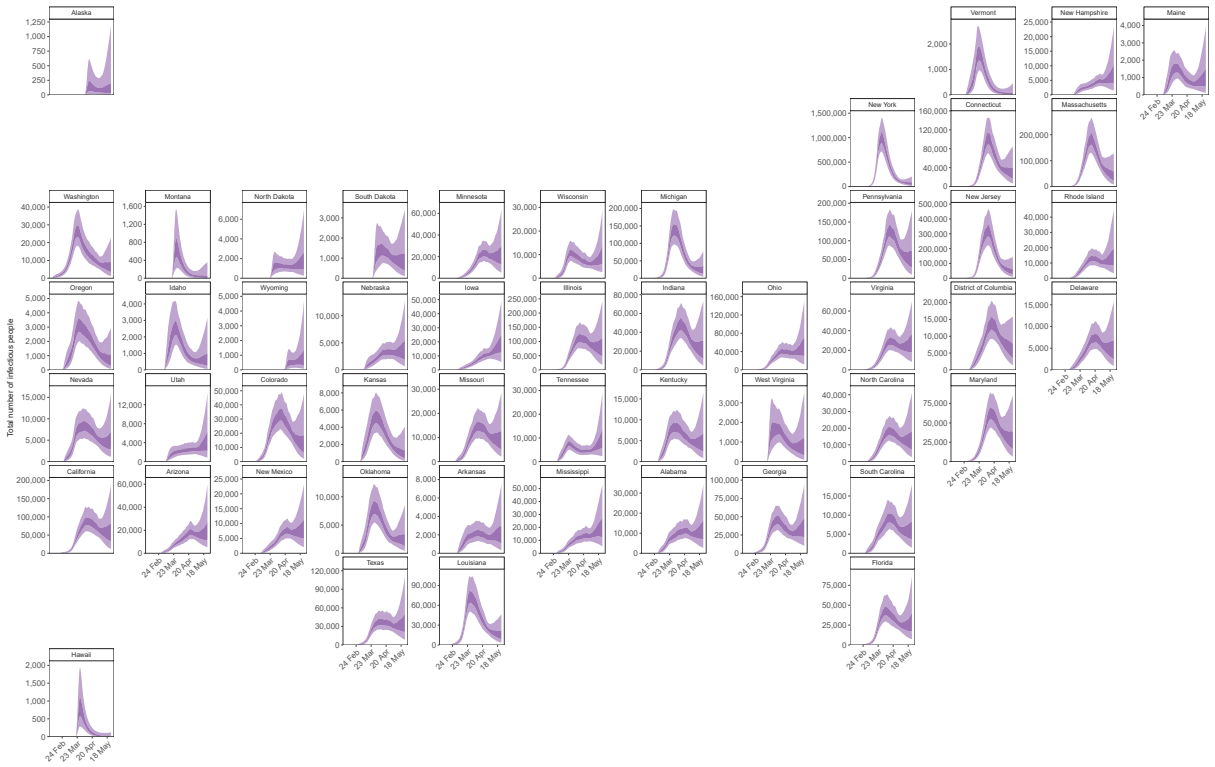


Figure 14: Estimates for the effective number of infectious individuals over time. The light purple region shows the 95% credible intervals and the dark purple region shows the 50% credible intervals.

To be more precise, the effective number of infectious individuals of infectious individuals, c^*, is calculated by first rescaling the generation distribution by its maximum, i.e. $g^*_\tau = \frac{g_\tau}{\max_t g_t}$. Based on (1), the number of infectious individuals is then calculated from the number of previously infected individuals, c, using the following:

$$c^*_{t,m} = \sum_{\tau=0}^{t-1} c_{\tau,m} g^*_{t-\tau},$$

where $c_{t,m}$ is the number of new infections on day t in state m. A plot of g^*_τ can be found in Figure 15.

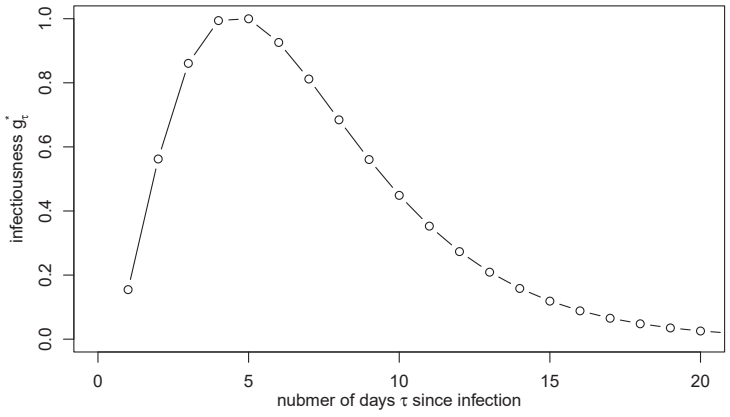


Figure 15: Infectiousness g^*_τ of an infected individual over time.

F Scenario results for all states

We show here state level scenario plots of an increase of mobility 20% and 40% of current levels.

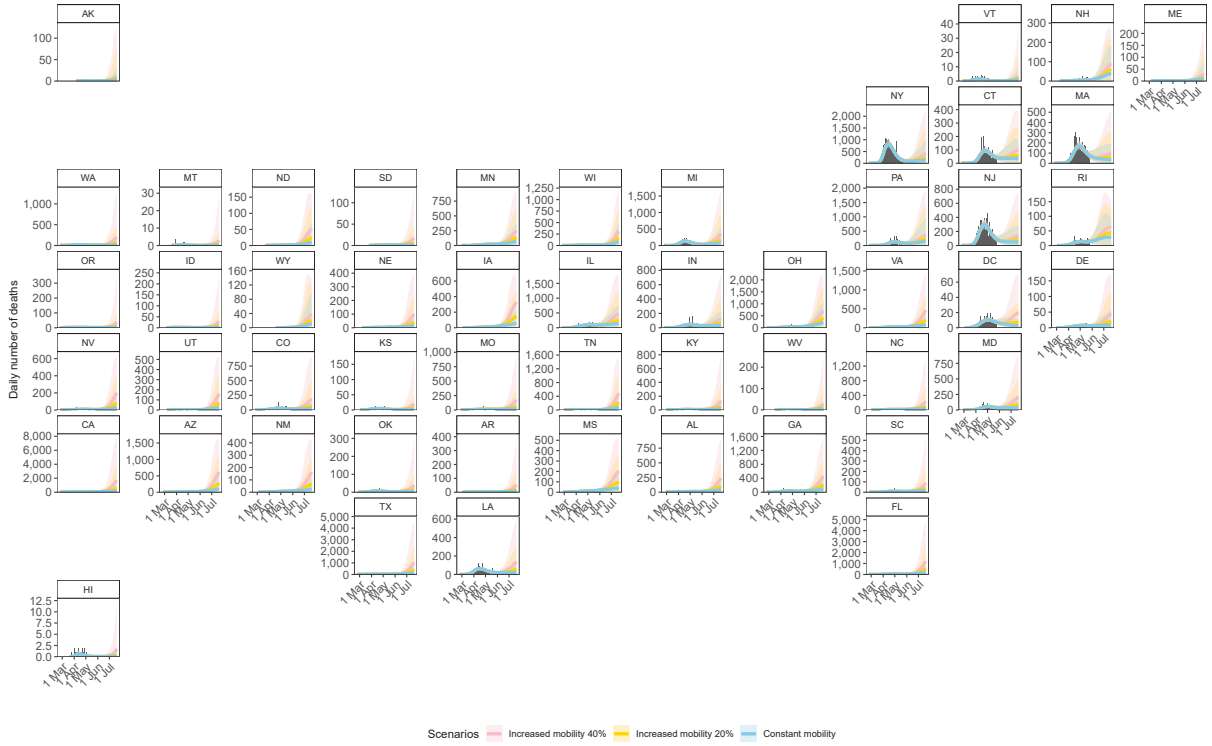


Figure 16: State-level scenario estimates for deaths. The blue ribbon shows the 95% credible intervals (CIs) for scenario (a) where mobility is kept constant at current levels, the yellow ribbon shows the same CIs for scenario (b) where there is a 20% return to baseline mobility and scenario (c) where there is a 40% return to baseline.

G Sensitivity analysis to infection fatality ratio

Geographic-specific contact surveys are important for calculating the weighted IFR values according to the methods in [23, 24]. There is no large-scale cross-generational contact survey, similar to the polymod survey [19], implemented in the USA. Therefore, it was important to understand if the model was robust to changes in the underlying contact survey. We calculated the IFRs using three different contact matrices: UK, France and Netherlands. We believe that the USA is culturally closest to that UK out of those countries we had contact matrices for, but also considered France where we saw the greatest mixing of the elderly and the Netherlands which showed the *average* behaviour of the European studies used in [24]. We found that the IFR, calculated for each state using the three contact matrices, lay within the posterior of IFR in our model (Figure 17). We also noted that our results remained approximately constant when using the IFR calculated from the three different contact matrices as the mean of the prior IFR in out model, see Section 5.

Since we are using the same contact matrix across all the states, the differences in IFR are due to the population demographics and not due to differential contacts. The low IFR in Texas and Utah reflects the younger population there whereas the higher IFR in Florida and Maine is due to the older population. This is a limitation of our methods.

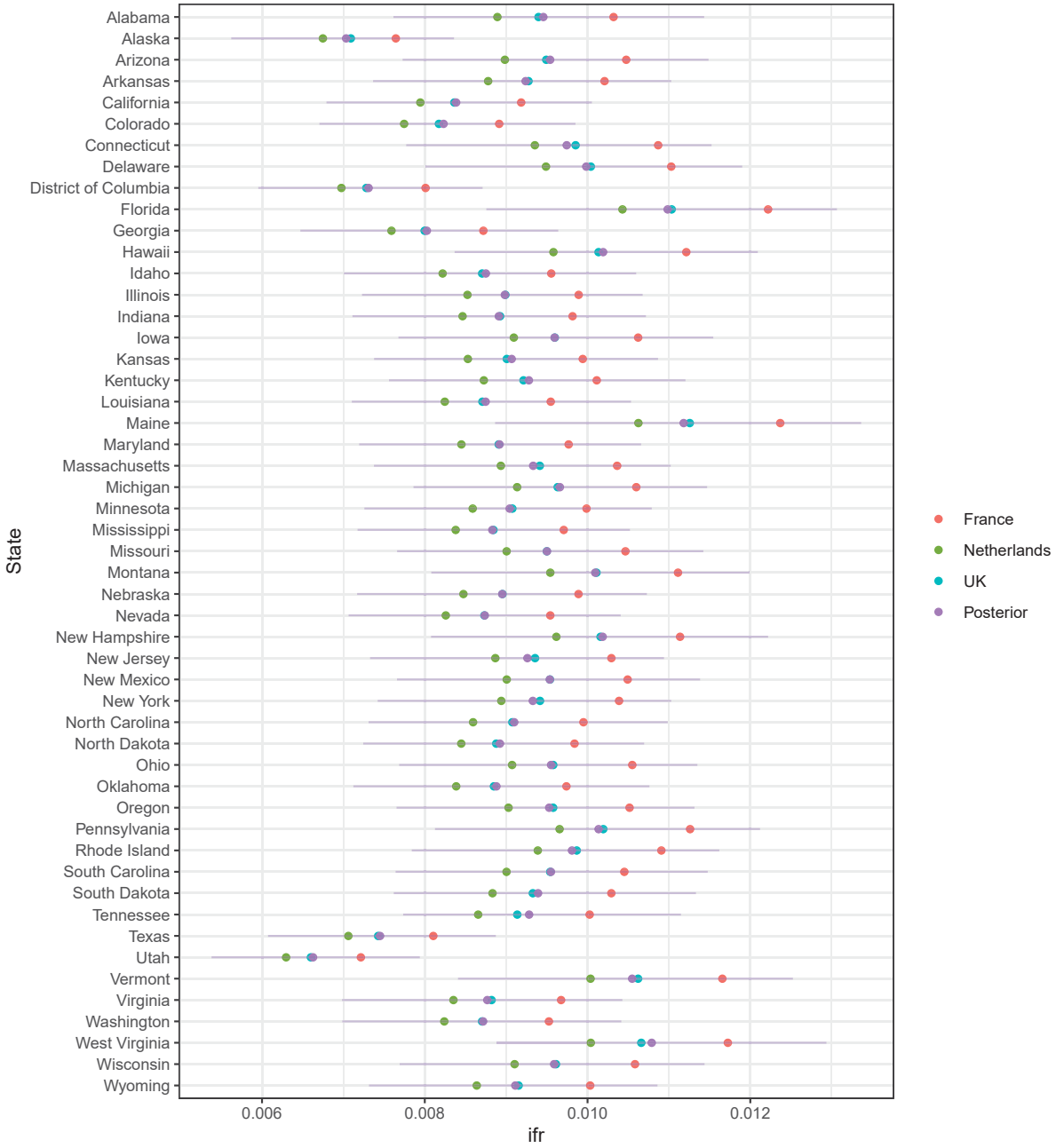


Figure 17: Sensitivity analysis for IFR. The red, green and blue dots show the IFR values calculated according to [23, 24] using the French, Dutch and and UK contact matrices respectively. The purple dot shows the mean of our posterior estimates for the IFR run using the UK contact matrix estimate and the purple error shows the 95% credible intervals of the distribution.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, and
ROBERT MUISE,

Plaintiffs,

v

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Defendants.

No. 1:20-cv-00323

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT B

U.S. Hits Another Record for New Coronavirus Cases

More than 45,000 new cases in the United States were reported on Friday, the third consecutive day with a record total. India's caseload surged past 500,000, as global infections approached 10 million.

Published June 26, 2020 Updated June 27, 2020

This briefing has ended. Click here for the latest updates.

Here's what you need to know:

- The U.S. reports another record number of cases, as hard-hit states retreat from reopening.
- As Fauci pleads for more caution, the E.U. aims to bar U.S. travelers.
- Florida reports more than 8,900 new daily cases and bans drinking in bars.
- China says it has tamed an outbreak in Beijing, at least for now.
- California's governor tells counties to consider pausing their reopenings, but doesn't commit to rolling them back.
- Norway partially reopened some gyms as an experiment. Here's what happened.
- Online learning in U.S. schools is here to stay for some students this fall.

Florida residents waited in their vehicles at a coronavirus testing site at Raymond James Stadium in Tampa on Friday. The state hit a daily high for new confirmed cases. Eve Edelheit for The New York Times

The U.S. reports another record number of cases, as hard-hit states retreat from reopening.

As the United States reached its third consecutive day with a record number of new infections, officials on Friday were urgently rethinking their strategies to head off new infections.

The U.S., which leads the world in total cases and deaths, reported more than 45,000 new infections on Friday, according to a Times database. Before this week, the country's largest daily total was 36,738 on April 24.

Globally, countries reported more than 191,000 new infections — a single-day record as the total number of cases neared 10 million. India's caseload surged past 500,000.

At least six U.S. states — Florida, Idaho, Kansas, Oregon, South Carolina and Utah — reported their highest one-day case totals, and Dr. Anthony S. Fauci, the country's top infectious diseases expert, also warned that outbreaks in the South and West could engulf the country.

Dr. Fauci said in a brief interview on Friday that officials were having "intense discussions" about a possible shift to "pool testing," in which samples from many people are tested at once in an effort to quickly find and isolate the infected.

European Union officials said the bloc was ready to bar most travelers from the U.S. and other countries considered too risky because they have not controlled the outbreak.

And for the first time, some U.S. governors were backtracking on reopening their states, issuing new restrictions for parts of the economy that had resumed.

Listen to 'The Daily': The Dilemma in Texas

The governor was insistent about reopening. And then the cases soared.

In Texas and Florida on Friday, leaders abruptly set new restrictions on bars, a reversal that appeared unthinkable just days ago. Near the end of the day, Mayor Carlos Giménez of Florida's Miami-Dade County said he would sign an emergency order closing down beaches from July 3 to July 7, citing the surge of new cases and fears about mass gatherings during the July Fourth holiday weekend.

Listen

In California, which had one of the earliest stay-at-home orders in the nation, Gov. Gavin Newsom announced new restrictions on Imperial County, which has the state's highest rate of infection.

"This disease does not take a summer vacation," he said.

The decisions in Texas and Florida represented the strongest acknowledgment yet that reopening had not gone as planned. Only days ago their Republican governors were adamantly resisting calls to close back down.

"If I could go back and redo anything, it probably would have been to slow down the opening of bars," Gov. Greg Abbott of Texas said in an interview with KVIA-TV in El Paso on Friday evening.

But even leaders outside the new hot zones in the South and West expressed mounting anxiety.

"This is a very dangerous time," Gov. Mike DeWine of Ohio said in an interview on Friday, as cases were trending steadily upward in his state after appearing to be under control. "I think what is happening in Texas and Florida and several other states should be a warning to everyone."

Yet a few hours earlier in Washington, at the White House coronavirus task force's first public briefing in almost two months, Vice President Mike Pence sought to take a victory lap for the Trump administration's pandemic response.

"We slowed the spread, we flattened the curve, we saved lives," Mr. Pence

said, making a claim that was true in earlier months but has become outdated after the seven-day average of new cases climbed in recent weeks.

Unlike the health officials around him, Mr. Pence did not wear a mask.

As Fauci pleads for more caution, the E.U. aims to bar U.S. travelers.

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MAG. PHILLIP J. GREEN

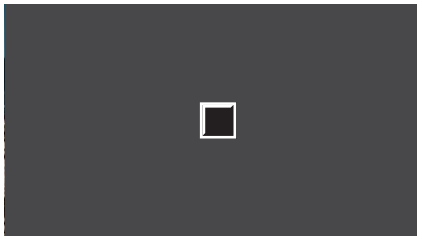
EXHIBIT C

NEWS | CORONAVIRUS HEALTH & SCIENCE

12 states have set record highs in new COVID-19 cases since Friday

Hospitalizations are increasing in 17 states, according to an ABC News analysis.

By **Meredith Deliso** and **Arielle Mitropoulos**
June 21, 2020, 8:06 PM • 6 min read



New evidence suggests America's fight with COVID-19 is far from over

Eleven states are reporting record numbers of new cases, while hospitalizations are up in seventeen states.

A dozen states have seen record highs of new COVID-19 cases since Friday, an ABC News analysis has found.

The states that saw the increase were Florida, Texas, Utah, South Carolina, Nevada, Georgia, Missouri, Montana, Arizona, California, Tennessee and Oklahoma, according to the analysis of state-released data compiled by the COVID Tracking Project.

People gather on the beach in Miami, June 16, 2020.
Eva Marie Uzcategui/ AFP via Getty Images

Florida's three-day streak of record-breaking numbers ended on Saturday, with 4,049 new cases of COVID-19.

MORE: Florida sets new record of COVID-19 cases with over 4,000 more

On Saturday, Gov. Ron DeSantis attributed the rise in the state's positive cases to an increase in testing. During a news briefing, he said that the state was in a "much better position today than we were at the beginning of April," pointing to an increase in hospital beds and a decreasing mortality rate.

MORE: Mask wearing sporadically enforced among nation's major police departments: Analysis

Amid the rising numbers, more Florida counties are now requiring facial coverings. Orange County, home to Orlando, started a new order requiring the use of masks in public on Saturday. And in Monroe County, which includes the Florida Keys, masks are now required in restaurants and other businesses. Palm Beach County is set to vote on the use of masks on Tuesday.

South Carolina, Nevada and Utah saw their second day in a row of record daily new cases on Saturday, and Missouri had its second straight day of record cases on Sunday.

Top Stories

12 states have set record highs in new COVID-19 cases since Friday
Jun 21, 8:06 PM

TRANSCRIPT: John Bolton interview with ABC News' Martha Raddatz
Jun 21, 9:03 PM

History will remember Trump as 'an aberration,' John Bolton says
Jun 22, 10:01 AM

Tennessee's largest county could return to Phase 1 due to spike in COVID-19 cases
Jun 22, 7:11 AM

Bolton says he hopes Trump is 1-term president, warns US imperiled by his reelection
Jun 21, 7:50 PM

ABC News Live

24/7 coverage of breaking news and live events.

Consumers wait in line at a Starbucks location as they return to retail shopping at the Arrowhead Towne Center, June 20, 2020, in Glendale, Arizona.
Christian Petersen/Getty Images

On Sunday, the same day Oklahoma set a record number of daily new COVID-19 cases, the state health department was urging anyone who had attended "large-scale gatherings in recent weeks" to get tested for COVID-19. Tulsa notably hosted thousands of supporters of President Donald Trump at an indoor rally on Saturday.

"As expected, Oklahoma's urban areas as well as a few communities around the state are experiencing a rise in active COVID-19 cases and hospitalizations due to increased social activity and mobility," Interim Commissioner Dr. Lance Frye said in a statement. "[We] need Oklahomans to get tested, even those without symptoms, so we can identify active cases and work together to minimize community spread."

The ABC News analysis also found that hospitalizations for COVID-19 are increasing in 17 states across the country. Those states are Alaska, Alabama, Arkansas, Arizona, Florida, Georgia, Hawaii, Mississippi, Montana, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas and Utah.

MORE: How to form a COVID-19 social bubble

Acting Secretary of Homeland Security Chad Wolf said on CBS's "Face the Nation" Sunday that the White House task force is "on top of all of these outbreaks," including states like Arizona, Texas and Florida that are "having those upticks."

He also told NBC's "Meet the Press" on Sunday that the White House coronavirus task force has been working with governors to make sure the United States "can open up this economy in a safe and reasonable way."

ABC News Joshua Hoyos, Josh Margolin and Jason Volack contributed to this report.

What to know about the coronavirus:

- *How it started and how to protect yourself:* ***Coronavirus explained***
- *What to do if you have symptoms:* ***Coronavirus symptoms***
- *Tracking the spread in the U.S. and worldwide:* ***Coronavirus map***

Tune into ABC at 1 p.m. ET and ABC News Live at 4 p.m. ET every weekday for special coverage of the novel coronavirus with the full ABC News team, including the latest news, context and analysis.

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EXHIBIT D

COVID-19 modeling site: Michigan one of three states 'on track to contain' virus

Craig Mauger, The Detroit News Published 11:27 a.m. ET June 17, 2020 | Updated 6:51 p.m. ET June 17, 2020

Lansing — A national nonprofit that's been monitoring the spread of COVID-19 says Michigan is one of three states "on track to contain" the novel coronavirus, but officials still warn the fight here is far from over.

COVID Act Now, a group of technologists, epidemiologists, health experts and public policy leaders, tweeted Tuesday that Michigan had moved to its lowest risk category on its warning dashboard for states.

"Cases are steadily decreasing and Michigan's COVID preparedness meets or exceeds international standards across our key metrics," the site tweeted.

COVID Act Now says Michigan has a low infection rate, widespread testing in place and sufficient contact tracing. The state has experienced seven straight weeks of declines in new deaths linked to the virus, according to tracking from the state

Department of Health and Human Services.

New York and Michigan, two states that were hit hard by COVID-19 in March and April but took drastic steps to try to stem its spread, were listed early Wednesday as the only two states with the "on track to contain COVID" designation, the lowest of four risk level categories, according to COVID Act Now. Later in the day, the organization gave New Jersey the designation.

"This is good news," Gov. Gretchen Whitmer said during a Wednesday news conference about the COVID Act Now tracking. But the governor added the state must remain vigilant and flexible to avoid a second wave.

The successes in Michigan are not necessarily permanent and the story is ongoing, said Dr. Joshua Sharfstein, vice dean for public health practice and community engagement at the Johns Hopkins Bloomberg School of Public Health.

The virus is taking different paths in different states, and Michigan has responded well, he added. And it's not just because of government officials' actions but also because of what residents have done, he said.

People could over-analyze the data and think it's all about particular policies, but it's also about messaging and individual decisions, Sharfstein said.

"The spread really depends on what people individually do," he said.

How states compare

According to COVID Act Now, four states — Alabama, Arizona, Georgia and Missouri — have the highest risk level of "either actively experiencing an outbreak" or "at extreme risk." Sixteen states are at the second-highest risk level, described as "at risk of an outbreak."

Michigan one of three states 'on track to contain' virus
June 17, 2020, 6:51 p.m.

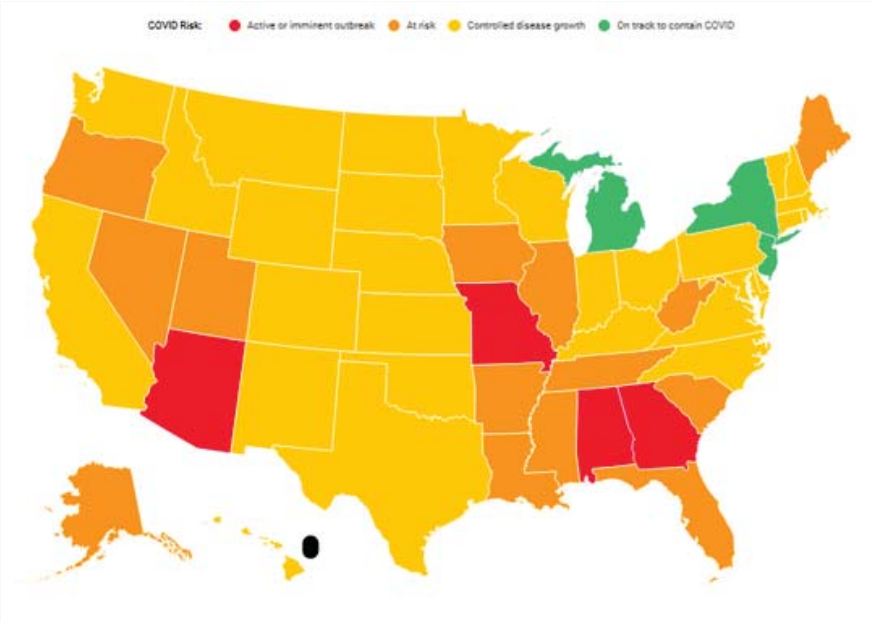
How the DNR ensnared Michigan's worst suspected wolf poacher
June 16, 2020, 9:02 p.m.

2 wounded, 1 killed in West Bloomfield Twp. shooting
June 17, 2020, 12:56 p.m.

Whitmer preps school reopening plan, calls GOP 'irresponsible'
June 17, 2020, 1:03 p.m.

Shelby Twp. police chief suspended for 30 days, keeps job
June 17, 2020, 12:19 a.m.

Dingell: 'I don't believe' numbers showing big Biden lead
June 16, 2020, 9:11 a.m.



A map from the website COVID Act Now shows Michigan, New Jersey and New York are the three states currently "on track" to contain COVID-19 as of Wednesday, June 17, 2020. *(Photo: Screenshot)*

Sharfstein said he's also watching Texas, where officials began reopening the economy May 1, for increasing cases.

“We don’t know, for sure, what exactly is happening," he said about states where there have been recent surges.

"I think, in some of the cases, the messaging has been pretty mixed about whether this a big deal," he said, referring to the virus.

COVID Act Now has been publishing modeling on the potential for the virus' spread nationally since March 20, 10 days after Michigan confirmed its first cases. Whitmer has cited the site's modeling in past weeks as she has taken steps to combat the virus.

The governor issued Michigan's first stay-at-home order on March 23 and has enforced measures against COVID-19 that have been among the most restrictive in the country. She lifted the stay-at-home order on June 1.

Both Michigan and New York had many cases of the virus early on but have been driven down its prevalence, said Jonathan Kreiss-Tomkins, one of the founders of COVID Act Now.

The two states were once among the top three nationally for confirmed cases and might have had an easier time decreasing their infection rates because of how high the rates once were, he acknowledged.

"The growth rate gives you a sense of your trend and momentum," Kreiss-Tomkins added. "You take action and you can see the effect of the actions."

As of Wednesday, Michigan reported 60,393 confirmed cases overall and 5,792 confirmed deaths linked to it. The caseload increases to 66,497 when including presumptive infections, and the death toll rises to 6,036 when including probable deaths — individuals who didn't test positive for the virus but whose death certificate listed COVID-19 as a cause of death.

Whitmer's efforts against the virus have drawn criticism from President Donald Trump and other Republicans who have argued she went too far, damaging the state's economy. But they have drawn praise from many epidemiologists who argue that she's done what's necessary to save lives.

Researchers at Imperial College London and Oxford University said last week that Whitmer's measures had potentially saved tens of thousands of lives in the state.

Michigan once had the third most COVID-19 cases and third most deaths linked to the virus nationally, according to tracking by Johns Hopkins University. Now, Michigan has the ninth most cases and sixth most deaths.

States that pursued weaker restrictions or kept restrictions in place for shorter periods, such as Texas and Florida, have moved ahead of Michigan in their total number of confirmed cases.

Gov. Gretchen Whitmer *(Photo: Michigan Executive Office of the Governor)*

Whitmer allowed restaurants and bars in Northern Lower Michigan and the Upper Peninsula to begin reopening dine-in service on May 22. Restaurants in other parts of the state were allowed to reopen on June 8.

Death toll forecast to rise

So far, Northern Lower Michigan and the Upper Peninsula haven't experienced spikes in new cases, but health officials in the regions are urging caution.

"This is certainly not over," said. Dr. Kevin Piggott, medical director for the Marquette County Health Department. "I know a lot of people act as though it's over."

The Institute for Health Metrics and Evaluation at the University of Washington released modeling last week that showed Michigan with the fourth most COVID-19 deaths nationally in a forecast that considers a potential second wave in September and goes through Oct 1.

The projected total for Michigan was 8,771 deaths by Oct. 1 — 2,979 more deaths than the state currently has reported.

"We're now able to look ahead and see where states need to begin planning for a second wave of COVID-19," IHME Director Dr. Christopher Murray said. "We hope to see our model proven wrong by the swift actions governments and individuals take to reduce transmission."

Last week, Michigan reported 115 new confirmed COVID-19 deaths statewide. That's

an 88% plunge from a peak of 966 confirmed deaths during the week of April 19-25.

cmauger@detroitnews.com

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, and
ROBERT MUISE,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, BRIAN L. MACKIE, in his official capacity as Washtenaw County Prosecuting Attorney,

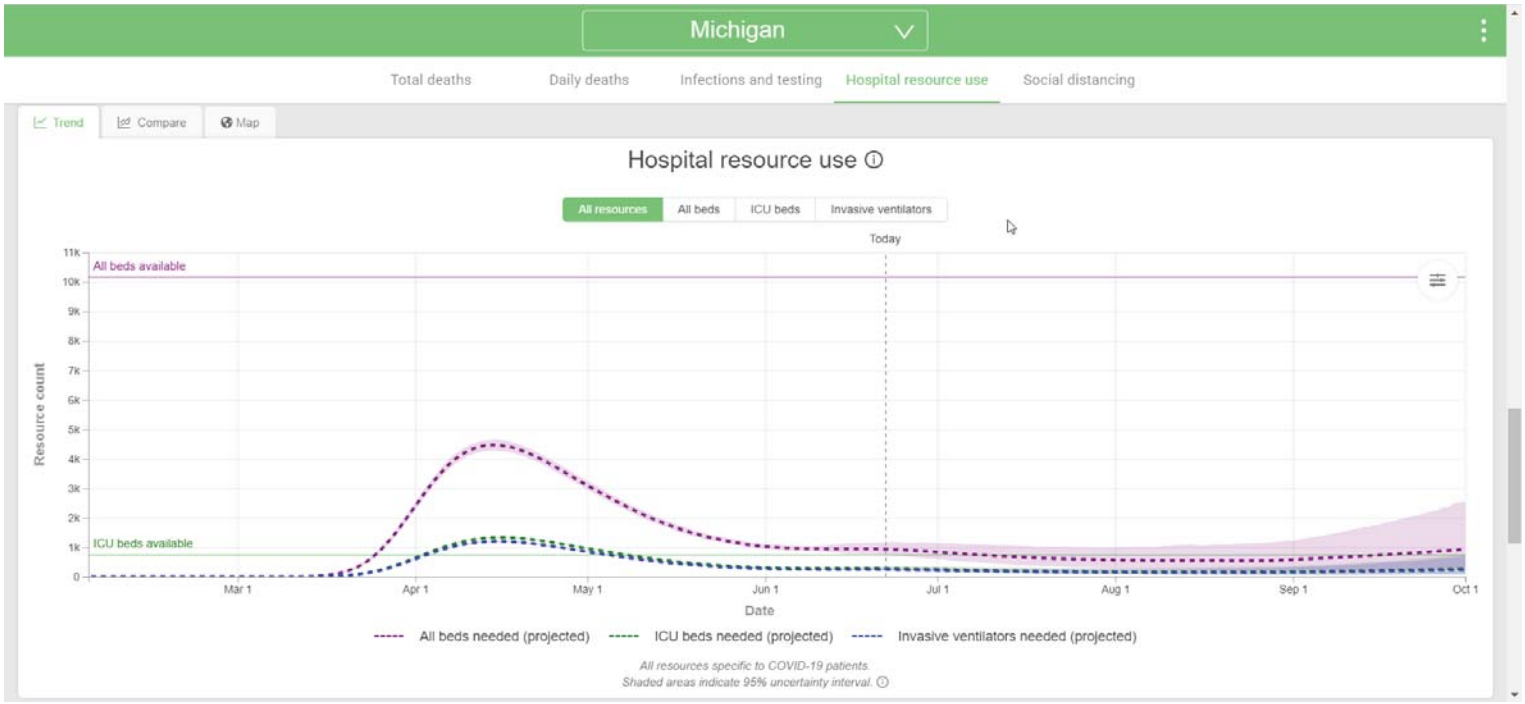
Defendants.

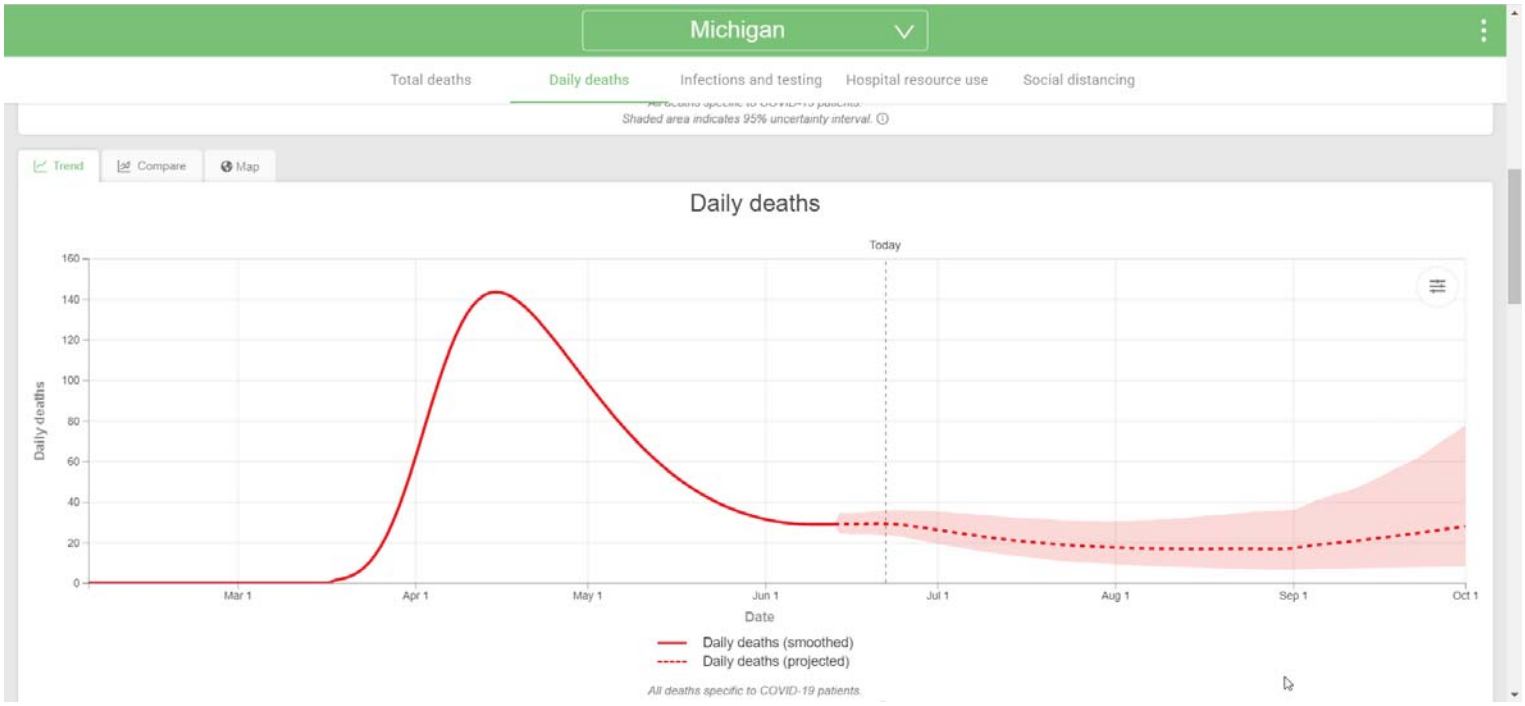
No. 1:20-cv-00323

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT E


Michigan
Total deaths
Daily deaths
Infections and testing
Hospital resource use
Social distancing
Trend
Compare
Map
Hospital resource use
All resources
All beds
ICU beds
Invasive ventilators
Today
All beds available
ICU beds available
Resource count
11k
10k
9k
8k
7k
6k
5k
4k
3k
2k
1k
0
Mar 1
Apr 1
May 1
Jun 1
Jul 1
Aug 1
Sep 1
Oct 1
Date
All beds needed (projected)
ICU beds needed (projected)
Invasive ventilators needed (projected)
All resources specific to COVID-19 patients.
Shaded areas indicate 95% uncertainty interval.


Michigan
Total deaths
Daily deaths
Infections and testing
Hospital resource use
Social distancing
Shaded area indicates 95% uncertainty interval.
Trend
Compare
Map
Daily deaths
Today
160
140
120
100
80
60
40
20
0
Daily deaths
Mar 1
Apr 1
May 1
Jun 1
Jul 1
Aug 1
Sep 1
Oct 1
Date
Daily deaths (smoothed)
Daily deaths (projected)
All deaths specific to COVID-19 patients.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, and
ROBERT MUISE,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, BRIAN L. MACKIE, in his official capacity as Washtenaw County Prosecuting Attorney,

Defendants.

No. 1:20-cv-00323

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVE MARTINKO, et al.,

Plaintiffs,

Civil Action No. 20-CV-10931

vs.

HON. BERNARD A. FRIEDMAN

GRETCHEN WHITMER,

Defendant.
_____/

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This matter is presently before the Court on defendant's motion to dismiss [docket entry 13]. Plaintiffs have filed a response in opposition. Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide this motion without a hearing. As the Court is granting defendant's motion, there is no need for defendant to file a reply.

Plaintiffs are Steve Martinko; Martinko's landscaping company, Contender's Tree and Lawn Specialists, Inc.; and Michael and Wendy Lackomar.[1] They are suing Gretchen Whitmer, the current governor of the State of Michigan, regarding two temporary, emergency Executive Orders ("EO") she issued in March and April 2020 in response to the coronavirus pandemic that has affected, and continues to affect, the state, the country, and the entire world. Specifically, plaintiffs complain that EO 2020-21 and EO 2020-42, which imposed certain travel and business restrictions with widespread application throughout the State of Michigan, deprived them of business income and interfered with their right, as to Martinko, to travel

[1] A fifth plaintiff, Jerry Frost, has voluntarily dismissed the complaint. He alleged that the executive orders at issue in this case violated his rights because they prevented him from traveling to visit his girlfriend.

between his residence and his business, and, as to the Lackomars, to travel between their primary residence and their cottage.

In Count I, plaintiffs claim that EO 2020-21 and EO 2020-42 constituted a regulatory "taking" of their property without compensation in violation of their Fifth Amendment rights. In Counts II and III, they couch the same allegations as substantive due process claims, in violation of their Fourteenth Amendment rights. Plaintiffs seek the following relief:

> a. Issuing a Temporary Restraining Order enjoining Defendant from enforcing Executive Orders 2020-21 and 2020-42 as a violation of Plaintiffs' fundamental rights under the First, Fifth and Fourteenth Amendments;
>
> b. A declaratory judgment that issuance and enforcement of Executive Orders 2020-21 and 2020-42 [i]s an unconstitutional violation of Plaintiffs['] substantive due process rights under the First and Fourteenth Amendment[s];
>
> c. Compensatory damages adequate to justly compensate Plaintiffs for the regulatory taking of their Physical Location and Tangible Property;
>
> d. Compensatory damages adequate to satisfy Plaintiffs in the amount owed for Defendants' [sic] violations of the Due Process Clause of the Fourteenth Amendment;
>
> e. Punitive damages;
>
> f. A declaratory judgment that issuance and enforcement of Executive Orders 2020-21 and 2020-42 [i]s an unconstitutional taking without just compensation, under the Fifth and Fourteenth Amendment[s];
>
> g. A declaratory judgment that issuance and enforcement of Executive Orders 2020-21 and 2020-42 [i]s an unconstitutional violation of Plaintiffs['] substantive due process rights under the First and Fourteenth Amendment[s];

> h. A permanent injunction to prohibit Defendant[] from enforcing the Executive Orders 2020-21 and 2020-42;
>
> i. An award of costs and expenses, including reasonable attorneys' fees under 42U.S.C. § 1988; and
>
> j. Such other and further relief as this Court deems appropriate.

Compl. at 20-21.

Defendant correctly argues that plaintiffs' complaint must be dismissed because this suit is barred by the Eleventh Amendment. A suit against Michigan's governor in her official capacity is a suit against the state itself, *see Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (citing *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)), and the Eleventh Amendment bars suits by citizens against a state in federal court. As the Supreme Court has explained,

> we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. *See, e.g.*, *Cory v. White*, 457 U.S. 85, 90, 102 S.Ct. 2325, 2329, 72 L.Ed.2d 694 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought"). . . . The Eleventh Amendment does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 48, 115 S.Ct. 394, 404, 130 L.Ed.2d 245 (1994); it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *Puerto Rico Aqueduct and Sewer Authority*, 506 U.S., at 146, 113 S.Ct., at 689 (internal quotation marks omitted).

Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 58 (1996). *See also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (reiterating that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state" and

that "[t]his jurisdictional bar applies regardless of the nature of the relief sought").[2] An exception to Eleventh Amendment immunity is recognized when a plaintiff seeks "prospective injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. 123 (1908)). *See also Pennhurst*, 465 U.S. at 103. However, this exception does not apply to "claims for retrospective relief," including claims for injunctive relief concerning statutes that have become moot by amendment. *Green*, 474 U.S. at 68-69.

In the present case, defendant notes that the executive orders plaintiffs challenge have been rescinded and that the restrictions that are the basis of this lawsuit no longer exist. Plaintiffs themselves concede that EO 2020-21, issued on March 24, 2020, was "revoked and replaced" by EO 2020-42 on April 9. *See* Compl. ¶¶ 17-18. Plaintiffs further concede that EO 2020-59 "rescinded 2020-42 and removed the ban on landscapers working and lifted the ban on traveling to second homes within Michigan," Pls.' Resp. Br. at 2, and that "there is no longer a direct restriction on Plaintiffs using or accessing their property." *Id.* at 8. The Court takes judicial notice of the fact that the governor has recently lifted the stay-at-home order and that most businesses may now operate normally. *See* EO 2020-110, dated June 1, 2020. Plaintiffs'

[2] The fact that plaintiffs claim that defendant has taken their property without compensation does not change the Eleventh Amendment analysis. Plaintiffs cite *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162 (2019), for the proposition that they may bring a § 1983 action as soon as government action "takes" their property. But the defendant in that case was a Pennsylvania township that issued an ordinance plaintiff claimed took her property without compensation, and the Court, in summarizing its holding, stated that "[a] property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation *by a local government*." *Id.* at 2179 (emphasis added). Plaintiffs in the present case cite no authority suggesting that a *state* is not entitled to Eleventh Amendment immunity as to a Fifth Amendment takings claim asserted in federal court.

assertion that "there is a good chance that these restrictions will come back," Pls.' Resp. Br. at 8, is pure speculation and does not suffice to avoid the conclusion that their request for prospective injunctive and declaratory relief is moot.

In short, plaintiffs are not entitled to damages or restrospective injunctive or declaratory relief because defendant enjoys Eleventh Amendment immunity. And they are not entitled to prospective injunctive or declaratory relief because the executive orders that underlie their complaint have been rescinded. Accordingly,

IT IS ORDERED that defendant's motion to dismiss is granted.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE

Dated: June 5, 2020
Detroit, Michigan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, and
ROBERT MUISE,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, BRIAN L. MACKIE, in his official capacity as Washtenaw County Prosecuting Attorney,

Defendants.

No. 1:20-cv-00323

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT G

2020 WL 2573463
Only the Westlaw citation is currently available.
United States District Court, E.D. Kentucky,
Central Division.
Frankfort.

Daniel CAMERON, in his Official Capacity as Attorney General of Kentucky, Plaintiffs,
v.
Andrew G. BESHEAR, in his Official Capacity as Governor of Kentucky, et al., Defendants.

Civil No. 3:20-cv-00023-GFVT
|
Signed 05/21/2020

Attorneys and Law Firms

Brett Robert Nolan, Carmine G. Iaccarino, M. Stephen Pitt, Victor B. Maddox, Attorney General's Office, Frankfort, KY, for Plaintiffs.

Joseph A. Newberg, II, Laura Crittenden Tipton, Taylor Payne, Steven Travis Mayo, Office of the Governor, Frankfort, KY, for Defendants.

MEMORANDUM OPINION & ORDER

Gregory F. Van Tatenhove, United States District Judge

***1** Before the Court is Plaintiff Attorney General Daniel Cameron's Motion to File Intervening Complaint. [R. 40.] Although the Travel Orders challenged by the original plaintiffs in this action are no longer in effect, the Attorney General asks the Court to proceed with this lawsuit. For the following reasons, the Attorney General's Motion [R. 40] is DENIED.

I

This lawsuit was filed in response to actions undertaken by Defendant Governor Andrew Beshear to mitigate spread of the coronavirus in the Commonwealth of Kentucky. On March 30, 2020, as part of his efforts to "flatten the curve," [1] Governor Beshear issued an executive order instructing Kentuckians to refrain from travel interstate except "when required by employment; to obtain groceries, medicine, or other necessary supplies; to seek or obtain care by a licensed healthcare provider; to provide care for the elderly, minors, dependents, persons with disabilities, or other vulnerable persons; or when required by court order." Executive Order 2020-258. Those residents returning to Kentucky from out of state "must ... self-quarantine for fourteen days." *Id.* Days later, Governor Beshear executed Executive Order 2020-266 which further restricts travel into Kentucky. Pursuant to that order, "residents of any other state than the Commonwealth of Kentucky may not travel into Kentucky," except for the same limited reasons allowed under Executive Order 2020-258. Out-of-state residents who enter Kentucky despite the order "must upon their entry into Kentucky self-quarantine for 14 days."

Attorney General Daniel Cameron was originally named as a defendant in this case. [R. 1.] On May 5, 2020, the Court dismissed the Attorney General as a defendant and granted the Attorney General's Motion to Realign as Plaintiff, which the Court construed as a motion to intervene. [R. 23; R. 34.] The Kentucky Supreme Court has explained that the Kentucky Attorney General has a "common-law obligation to protect public rights and interests by ensuring that our government acts legally and constitutionally." *Commonwealth ex rel. Beshear v. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016). Therefore, the Court found the Attorney General was an appropriate plaintiff to represent the interests of the Commonwealth to enjoin the enforcement of the challenged executive orders. [R. 34 at 9.]

Since then, however, another District Judge in the Eastern District of Kentucky has found the Governor's restraint on interstate travel to be unconstitutional. *See Roberts v. Neace*, No. 2:20-CV-054-WOB, —— F.Supp.3d ——, 2020 WL 2115358, 2020 U.S. Dist. LEXIS 77987 (E.D. Ky. May 4, 2020). In response to that decision, the Governor rescinded the offending orders and issued a new order governing travel. [R. 41 at 2.] Instead of prohibiting travel into and out of the Commonwealth, and mandating quarantine for those who cross state lines, under the new order "[a]ny person entering the Commonwealth with the intent to stay is *asked* to self-quarantine for fourteen (14) days[.]" *Id.* (emphasis in original).

***2** Recently, the Attorney General filed a Motion to File Intervening Complaint. [R. 40.] Because the challenged Travel Orders were rescinded, the Attorney General concedes there is no longer a need for a preliminary injunction. *Id.* at 2. However, the Attorney General argues the case is

not moot because Governor Beshear has not conceded the unconstitutionality of the original Travel Orders, and "he can indefinitely evade judicial review by revoking and re-imposing the unconstitutional restriction at will." *Id.* at 4. The Governor disagrees. [R. 41.] Governor Beshear argues this case should be dismissed in light of the *Neace* ruling and because the unconstitutional Travel Orders have been rescinded. *Id.* at 1.

II

"[F]ederal courts are courts of limited jurisdiction" and only have power to hear cases that are "authorized by Constitution and [federal] statute." *Metro Hydroelectric Co., LLC v. Metro Parks*, 541 F.3d 605, 610 (6th Cir. 2008) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)). "Article III of the United States Constitution empowers the judiciary to adjudicate only actual cases and controversies, and not to issue advisory opinions." *Ala. Power Co. v. Clean Earth Ky., LLC*, 312 Fed. App'x 718, 719 (6th Cir. 2008) (citing *Deakins v. Monaghan*, 484 U.S. 193, 199, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988)). Therefore, a federal court may not "give opinions upon moot questions or abstract propositions, or ... declare principles or rules of law which cannot affect the matter in issue in the case before it." *Id.* (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992)).

Here, the Travel Orders that spurred the filing of this lawsuit no longer exist, and the Governor has issued an amended Travel Order designed to conform with District Judge Bertelsman's Order in *Roberts v. Neace.* No. 2:20-CV-054-WOB, —— F.Supp.3d ——, 2020 WL 2115358, 2020 U.S. Dist. LEXIS 77987 (E.D. Ky. May 4, 2020). Nevertheless, the Attorney General argues adjudication of the merits is appropriate for two reasons: first, voluntary cessation of a challenged practice does not deprive the Court of jurisdiction over the matter; and second, the injury asserted is capable of repetition, yet evading review, because the Governor "can continue to reissue similarly problematic executive orders at any time[.]" [R. 40 at 2-3.] Neither argument bears weight.

"[V]oluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of that practice, if the conduct might reasonably be expected to recur." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 982 (6th Cir. 2012) (quoting *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, (3d Cir. 2008)). Although the coronavirus pandemic and Kentucky's response to it is ongoing, there is no reason to believe the Governor will re-impose the previous Travel Orders. Governor Beshear's executive orders have been subjected to numerous constitutional challenges, both in this Court and the Sixth Circuit. It has never been alleged that the Governor issued the executive orders for any reason other than to protect Kentuckians from the threat of the virus. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614-15 (6th Cir. 2020) ("We don't doubt the Governor's sincerity in trying to do his level best to lessen the spread of the virus or his authority to protect the Commonwealth's citizens."). At no point has the Governor's sincerity been called into question. Confronted with the ruling in *Roberts v. Neace*, it seems unlikely the Governor will re-issue the old constitutionally infirm Travel Orders.

Nor is the controversy "capable of repetition, yet evading review," as the Attorney General argues. [R. 40 at 2.] This exception to mootness applies when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). For the reasons already stated, it seems unlikely that the Travel Orders will be reissued. Likewise, executive orders are not inherently too short in duration to be litigated. The challenged Travel Orders were in effect for months before they were rescinded and amended. In that time, these and other executive orders were subject to review in multiple district courts and addressed by the Sixth Circuit. *See Roberts v. Neace*, No. 2:20-CV-054-WOB, —— F.Supp.3d ——, 2020 WL 2115358, 2020 U.S. Dist. LEXIS 77987 (E.D. Ky. May 4, 2020); *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-CV-278-DJH, —— F.Supp.3d ——, 2020 WL 2115358, 2020 U.S. Dist. LEXIS 70072 (W.D. Ky. Apr. 18, 2020). In the unlikely event the restraint on travel is reinstated, the Court will address any constitutional challenge promptly, as it has done with respect to every other constitutional challenge levied against one of Governor Beshear's executive orders.

III

***3** The Attorney General's challenge to the Executive Orders 2020-258 and 2020-266 was mooted when those orders were rescinded as they pertain to travel, and a new,

permissive Travel Order was issued. Therefore, there is no live "case or controversy" for this Court to adjudicate. Accordingly, it is hereby **ORDERED** that Attorney General Daniel Cameron's Motion to File Intervening Complaint **[R. 40]** is **DENIED**. This action is **DISMISSED AS MOOT** and **STRICKEN** from the Court's active docket.

All Citations

Slip Copy, 2020 WL 2573463

Footnotes

1 The term "flatten the curve" refers to slowing the spread of the coronavirus through the population. The goal is to "reduce[ ] the number of cases that are active at any given time, which in turn gives doctors, hospitals, police, schools, and vaccine-manufacturers time to respond, without becoming overwhelmed." Siobhan Roberts, *Flattening the Coronavirus Curve*, The New York Times, https://www.nytimes.com/article/flatten-curve-coronavirus.html. The result is that, when plotted on a line graph, the rate of infection appears as a flattened curve rather than a steep peak.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, and
ROBERT MUISE,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, BRIAN L. MACKIE, in his official capacity as Washtenaw County Prosecuting Attorney,

Defendants.

No. 1:20-cv-00323

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT H

2020 WL 2197855
Only the Westlaw citation is currently available.
United States District Court, N.D.
Indiana, Fort Wayne Division.

Regina KRACH, Plaintiff,
v.
Governor Eric J. HOLCOMB, Defendant.

Cause No. 1:20-CV-184-HAB
|
Signed 05/06/2020

Attorneys and Law Firms

Regina Krach, Fort Wayne, IN, pro se.

OPINION AND ORDER

HOLLY A. BRADY, JUDGE

***1** On March 23, 2020, the Defendant, Indiana Governor Eric J. Holcomb (the "Governor"), issued Executive Order 20-08, entitled "Directive for Hoosiers to Stay at Home" (the "Order"). The intent of the Order was "to ensure that the maximum number of people self-isolate in their homes or residences to the maximum extent feasible, while also enabling essential services to continue, in order to slow the spread of COVID-19 to the greatest extent possible." (ECF No. 1-2 at 9). The Order required Indiana residents to stay in their homes (unless one of several exceptions applied), put in place social distancing guidelines, closed all non-essential businesses, restricted gatherings to no more than ten people, and prohibited all but essential travel. On its terms, the Order expired on April 6, 2020. The Governor was certainly not alone in taking these steps; all but seven states have issued statewide shelter-in-place, stay-at-home, closure, or shutdown orders in response to the COVID-19 pandemic.

Before the Court today is a challenge to the Order. Plaintiff Regina Krach ("Krach") claims that the Governor exceeded his statutory authority in entering the Order, and further claims that the Order violates her rights, and the rights of all Indiana citizens, secured under the First, Fifth, Fourteenth, and Fifteenth Amendments to the United States Constitution. The thrust of Krach's allegations is that the COVID-19 threat has been exaggerated and, to borrow an idiom, the cure is worse than the disease.

However, it is not necessary for the Court to wade into the political arena and pass judgment on the Governor's efforts. The Order is no longer in effect, rendering Krach's lawsuit moot. Accordingly, this Court lacks Article III jurisdiction over this case, and dismissal is required.

A. Factual Background

Two weeks after issuing the Order, the Governor issued Executive Order 20-18, entitled "Continued Directive for Hoosiers to Stay at Home; Extension of Continuity of Operations of Government; and Extension of Executive Orders Pertaining to Restaurants and Alcoholic Beverages." Consistent with its title, Executive Order 20-18 extended "Executive Order 20-14 pertaining to in-person dining restrictions and Executive Order 20-09 relating to continuity of operations of state government." Exec. Order No. 20-18 at 3. The Order was not similarly extended. Instead, by its plain terms, Executive Order 20-18 "replace[d] Executive Order 20-08." *Id.* at 2. Executive Order 20-18 would itself be replaced by Executive Order 20-22 (Exec. Order No. 20-22 at 2). While Executive Order 20-22 is still nominally in effect, Executive Order 20-26 lifted many of its restrictions effective May 3, 2020, at 11:59 p.m., for all but three counties in Indiana. Executive Order 20-26 lifted the order for Hoosiers to remain in their homes, permitted the re-opening of retail businesses, raised the number of people who could attend a gathering to twenty-five, and set forth a roadmap for re-opening the rest of the state. Exec. Order No. 20-26.

B. Legal Analysis

***2** This, or any other Article III court, must be sure of its own jurisdiction before getting to the merits of an action. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999). For this reason, an objection that a federal court lacks subject matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage of the litigation, even after trial and entry of judgment. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006).

Article III of the Constitution limits the judicial power of the federal courts to actual "Cases" and "Controversies." U.S. Const. art. III, § 2. As the Supreme Court of the United States has said, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "If a dispute is not a proper case

or controversy, the courts have no business deciding it, or expounding upon the law in the course of doing so." *Id.*

Challenges to executive orders that have "expired by their own terms" no longer present a live case or controversy. *Trump v. Hawaii*, 138 S.Ct. 377 (2017); *Trump v. Int'l Refugee Assistance*, 138 S.Ct. 353 (2017). Such challenges must be dismissed as moot, without a discussion on the merits. *Id.*; *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). So it is here. The Order expired by its own terms on April 6, 2020. It was expressly replaced by Executive Order 20-18, which was itself replaced by Executive Order 20-22. Because Krach does not challenge any executive order other than the Order, the instant case does not present a live case or controversy and must be dismissed.

C. Conclusion

For the foregoing reasons, Krach's Emergency Motion for Stay of Order (ECF No. 1) is DISMISSED as moot.

SO ORDERED on May 6, 2020.

All Citations

Slip Copy, 2020 WL 2197855

End of Document

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, and
ROBERT MUISE,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, BRIAN L. MACKIE, in his official capacity as Washtenaw County Prosecuting Attorney,

Defendants.

No. 1:20-cv-00323

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT I

2020 WL 3287239
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

Mark Anthony SPELL; Life Tabernacle Church, Plaintiffs - Appellees

v.

John Bel EDWARDS, in his individual capacity and his official capacity as Governor of the State of Louisiana; Roger Corcoran, in his individual capacity and official capacity as Chief of Police of Central City, Louisiana; Sid Gautreaux, individually and in his official capacity as Sheriff of East Baton Rouge Parish, Louisiana, Defendants - Appellants

No. 20-30358
|
FILED June 18, 2020

Synopsis

Background: Pastor sued for injunction to prevent enforcement against church of stay-at-home orders issued by the Governor of Louisiana during the corona virus pandemic. The United States District Court for the Middle District of Louisiana denied pastor's motion for preliminary injunction against enforcement of orders, and pastor appealed.

Holdings: The Court of Appeals, Costa, Circuit Judge, held that:

[1] pastor's action seeking to enjoin stay-at-home orders issued by the Governor of Louisiana during the corona virus pandemic was rendered moot by expiration of orders while appeal from district court's denial of preliminary injunctive relief was pending, and

[2] "**capable** of **repetition**, yet **evading** **review**" exception to mootness doctrine did not apply to permit pastor to appeal from district court's order denying a preliminary injunction.

Appeal dismissed; preliminary injunction denied; district court's order vacated.

Ho, Circuit Judge, filed concurring opinion.

West Headnotes (10)

[1] **Federal Courts** Inception and duration of dispute; recurrence; "**capable** of **repetition** yet **evading** **review**"

Mootness is one of the doctrines which ensures that federal courts will only decide live cases or controversies. U.S. Const. art. 3, § 2, cl. 1.

[2] **Federal Courts** Available and effective relief

Matter is moot when it is impossible for court to grant any effectual relief whatever to the prevailing party.

[3] **Federal Courts** Change in law

Case challenging a statute, executive order, or local ordinance generally becomes moot if the challenged law has expired or been repealed; once the challenged law is off the books, there is nothing injuring the plaintiff and, consequently, nothing for the court to do.

[4] **Federal Courts** Voluntary cessation of challenged conduct

Defendant cannot automatically moot a case simply by ending its allegedly unlawful conduct once sued.

[5] **Federal Courts** Voluntary cessation of challenged conduct

To establish that its change of heart in voluntarily ceasing its unlawful activity is not mere litigation posturing, a defendant asserting mootness must demonstrate that it is absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur.

[6] **Federal Courts** Voluntary cessation of challenged conduct

Concerns that prevent a defendant from automatically mooting a case simply by halting its allegedly unlawful conduct once sued do not apply when an allegedly unlawful statute expires by its own terms, because the statute's lapse was predetermined and not in response to litigation; thus, statute's automatic expiration will moot a lawsuit challenging the statute.

[7] **Injunction** Mootness and ripeness; ineffectual remedy

Injunction Health

Pastor's action seeking to enjoin enforcement of stay-at-home orders issued by the Governor of Louisiana during the corona virus pandemic, orders that prohibited churches from holding services with more than ten people in them, was rendered moot upon expiration of these orders by their own terms, while appeal from district court's denial of preliminary injunctive relief was pending.

[8] **Federal Courts** Inception and duration of dispute; recurrence; "**capable** of **repetition** yet **evading review**"

"**Capable** of **repetition**, yet **evading review**" exception to mootness doctrine overcomes the general rule against deciding stale claims only if: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that plaintiffs will be subject to the same action again.

[9] **Federal Courts** Presumptions and burden of proof

Burden is on plaintiffs asserting that the "**capable** of **repetition**, yet **evading review**" exception to mootness doctrine applies to prove that the requirements for application of this exception are satisfied.

[10] **Federal Courts** Particular cases

"**Capable** of **repetition**, yet **evading review**" exception to mootness doctrine did not apply to permit pastor to appeal from district court's order denying a preliminary injunction against the now-expired stay-at-home orders issued by the Governor of Louisiana during the corona virus pandemic, given that it was entirely speculative, during time when businesses were reopening, that the Governor would issue a similar stay-at-home order to prevent church from holding services with more than a very limited number of congregants.

Appeal from the United States District Court for the Middle District of Louisiana

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Reconstructionist Rabbinical Association, Texas Impact, Texas Interfaith Center for Public Policy, Union for Reform Judaism, Women of Reform Judaism

Before SMITH, COSTA, and HO, Circuit Judges.

Opinion

GREGG COSTA, Circuit Judge:

***1** **COVID**-19 has brought another appeal to our court. A Louisiana church and its pastor ask us enjoin stay-at-home orders restricting in-person church services to ten congregants. But there is nothing for us to enjoin. The challenged orders expired more than a month ago. That means this appeal and the related request for an injunction under Federal Rule of Appellate Procedure 8(a)(1)(C) are moot.

I.

A.

In less than six months, **COVID**-19 has killed more than 115,000 Americans. [1] Parts of Louisiana were early hotspots for the virus.

On March 11, just two days after the first confirmed case in the Pelican State, Governor John Bel Edwards declared the **COVID**-19 pandemic a public health emergency. La. Exec. Dep't, Proclamation No. 25 JBE 2020, § 1. [2] Less than two weeks later, the Governor issued a proclamation closing certain businesses and ordering "individuals within the state ... to stay home unless performing an essential activity." La. Exec. Dep't, Proclamation No. 33 JBE 2020, § 3. [3] The order also "postponed or cancelled" "gatherings of 10 people or more." *Id.* § 2. Although some businesses were exempt from that restriction, churches and other religious meeting places were not. *Id.*

The Governor extended the stay-at-home order on April 2 because "the **COVID**-19 outbreak in Louisiana ha[d] expanded significantly." La. Exec. Dep't, Proclamation No. 41 JBE 2020. [4] He extended the order again on April 30. La. Exec. Dep't, Proclamation No. 52 JBE 2020. [5] The second extension was set to last from May 1 to May 15. *Id.* § 15.

The day before the second extension was set to expire, the Governor announced that Louisiana would follow the Trump Administration's three-phased reopening approach. [6] La. Exec. Dep't, Proclamation No. 58 JBE 2020. [7] So instead of renewing the stay-at-home order for a third time, the Governor issued a proclamation for Phase 1. It allowed churches to hold gatherings with up to 25 percent of their "total occupancy." *Id.* § 2(G)(4)(a). On June 5, the Governor transitioned the state to Phase 2. La. Exec. Dep't, Proclamation No. 74 JBE 2020. [8] The Phase 2 guidance—still in effect today—allows churches to operate at 50 percent capacity. *Id.* § 2(G)(4)(a).

B.

***2** Pastor Mark Anthony Spell leads Life Tabernacle Church in Baton Rouge. The church has over 2,000 members. They "sincerely believe that the Bible commands them to hold ... services in person."

When the Governor's first stay-at-home order went into effect, Life Tabernacle remained open. Pastor Spell was subsequently arrested for defying the order. And because he repeatedly held in-person services, police issued him six misdemeanor summons. Pastor Spell was also arrested for an alleged assault and, as a condition of bond, placed on house arrest. Nevertheless, he continued to preach to his congregation. On May 7, he and Tabernacle Life Church filed this lawsuit.

Attacking the stay-at-home orders' ten-person gathering limit, the plaintiffs asserted several federal and state constitutional claims. They asked for permanent injunctive relief and damages, but first sought a preliminary injunction to stop enforcement of the orders.

Working diligently to resolve the motion, the district court heard argument and issued an order denying the requested relief on May 15. *Spell v. Edwards*, —— F. Supp. 3d ——, 2020 WL 2509078 (M.D. La. 2020). The court denied the motion on the merits, but it also noted the possibility of mootness given that the challenged orders were set to expire that day. *Id.* at —— – ——, *5–6.

The plaintiffs did not immediately appeal the denial of injunctive relief. Instead, two weeks after the court's ruling, they filed an amended complaint acknowledging that the

Governor had lifted the ten-person gathering restriction. Not until three weeks after the district court's order did the plaintiffs notice this appeal. They also asked us to grant an injunction pending appeal. FED. R. APP. P. 8(a)(1)(C). They did not first ask the district court for that relief as the rule requires.

II.

[1] **[2]** This recap of the case's history shows why the current appeal—challenging only the denial of the motion for a preliminary injunction—is moot. Mootness is one of the doctrines that ensures federal courts are only deciding live cases or controversies. *Campbell-Ewald Co. v. Gomez*, —— U.S. ——, 136 S. Ct. 663, 669, 193 L.Ed.2d 571 (2016). A matter is moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012) (quotations omitted).

[3] It makes sense, then, that a case challenging a statute, executive order, or local ordinance usually becomes moot if the challenged law has expired or been repealed. *See, e.g.*, *Veasey v. Abbott*, 888 F.3d 792, 799 (5th Cir. 2018) ("Ordinarily, a[n] [action] challenging a statute would become moot by the legislature's enactment of a superseding law."). Once the law is off the books, there is nothing injuring the plaintiff and, consequently, nothing for the court to do. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, —— U.S. ——, 140 S. Ct. 1525, 1526, —— L.Ed.2d —— (2020) (holding that a claim for injunctive relief against a law was moot when the law was amended to give "the precise relief that [the plaintiffs] requested"); *Amawi v. Paxton*, 956 F.3d 816, 819, 821 (5th Cir. 2020) (dismissing an appeal as moot because a statutory amendment "provided the plaintiffs the very relief their lawsuit sought").

***3** **[4]** **[5]** That said, "a defendant cannot automatically moot a case simply by ending its [allegedly] unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S.Ct. 721, 184 L.Ed.2d 553 (2013); *see also Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 284–86 (5th Cir. 2012) (concluding that a city's repeal of an ordinance the night before oral argument did not moot the plaintiff's challenges to the ordinance). If that is all it took to moot a case, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Nike*, 568 U.S. at 91, 133 S.Ct. 721. To show that such a change of heart is not mere litigation posturing, a defendant asserting mootness must demonstrate "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 425 (5th Cir. 2020); *see also Yarls v. Bunton*, 905 F.3d 905, 910 (5th Cir. 2018) ("Essentially, the goal is to [decide] whether the defendant's actions are 'litigation posturing' or whether the controversy is actually extinguished.").

[6] But a statute that expires by its own terms does not implicate those concerns. Why? Because its lapse was predetermined and thus not a response to litigation. So unlike a postsuit repeal that might not moot a case, a law's automatic expiration does. *Trump v. Hawaii*, —— U.S. ——, 138 S. Ct. 377, 377, 199 L.Ed.2d 275 (2017) (dismissing as moot a challenge to an executive order's provisions that had "expired by [their] own terms"); *see also Burke v. Barnes*, 479 U.S. 361, 363–64, 107 S.Ct. 734, 93 L.Ed.2d 732 (1987) (holding "that any issues concerning whether [a bill] became a law were mooted when [it] expired by its own terms").

[7] Governor Edwards's stay-at-home orders expired by their own terms. The plaintiffs' request that we enjoin them is therefore moot. *Trump*, 138 S. Ct. at 377; *Burke*, 479 U.S. at 363–64, 107 S.Ct. 734. [9]

[8] **[9]** **[10]** Plaintiffs contend that another way around mootness—the "**capable** of **repetition**, yet **evading review**" exception—keeps this appeal alive. This exception overcomes the general rule against deciding stale claims only if: (1) "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration," and (2) "there [is] a reasonable expectation that the [plaintiffs] [will] be subject to the same action again." *Kingdomware Techs., Inc. v. United States*, —— U.S. ——, 136 S. Ct. 1969, 1976, 195 L.Ed.2d 334 (2016) (instructing that this "exception applies only in exceptional situations" (quotation omitted)). The plaintiffs must prove these requirements. *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010). Even if the first requirement (duration) is satisfied for the stay-at-home orders, the plaintiffs fail to establish that the Governor might reimpose another gathering restriction on places of worship. The trend in Louisiana has been to reopen the state, not to close it down. To be sure, no one knows what the future of **COVID**-19 holds. But it is speculative, at best, that the Governor might reimpose the ten-person restriction or a similar one. *Lopez v. City of Houston*, 617

F.3d 336, 340 (5th Cir. 2010) (requiring more than "merely a theoretical possibility" that the allegedly wrongful conduct would reoccur (quotation omitted)); *see also Cameron*, 2020 WL 2573463, at *2 (concluding that the exception did not apply to a mooted claim challenging expired **COVID**-19 restrictions in part because "it seem[ed] unlikely that [they] w[ould] be reissued").

***4** What is more, the plaintiffs fail to cite any authority applying the "**capable** of **repetition**" exception to support a Rule 8 injunction against an order that is no longer in effect. The exception usually applies to keep a case alive, largely out of a fear that the legal questions posed by cases prone to becoming moot will never be answered. *See* 13C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.8 (3d ed. 2020). That is not a concern here. While the expiration of the stay-at-home orders moots plaintiffs' request to enjoin them, their claim for damages remains. *See Opulent Life Church*, 697 F.3d at 286; *see also* EDWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5.2 (6th ed. 2012) ("[A] plaintiff seeking both injunctive relief and money damages can continue to pursue the case, even after the request for an equitable remedy is rendered moot."). We express no view on the merits of that claim, which has yet to reach final judgment.

* * *

Because this appeal is moot, the plaintiffs' motion for an injunction is DENIED. For the same reasons, the appeal is DISMISSED. And because the appeal became moot before appellate **review**, the district court's order denying preliminary relief is VACATED. *Spell*, —— F. Supp. 3d ——, 2020 WL 2509078. The plaintiff's claim for damages remains in the district court.

JAMES C. HO, Circuit Judge, concurring:

I agree that this appeal is moot due to recent changes to the Governor's order, and that the case will now return to the district court. I write separately to note how other recent events may affect this case going forward.

* * *

At the outset of the pandemic, public officials declared that the *only* way to prevent the spread of the virus was for everyone to stay home and away from each other. They ordered citizens to cease all public activities to the maximum possible extent—even the right to assemble to worship or to protest.

But circumstances have changed. In recent weeks, officials have not only tolerated protests—they have encouraged them as necessary and important expressions of outrage over abuses of government power.

For people of faith demoralized by coercive shutdown policies, that raises a question: If officials are now exempting protesters, how can they justify continuing to restrict worshippers? The answer is that 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."

I.

Officials may take appropriate emergency public health measures to combat a pandemic. *See Jacobson v. Massachusetts*, 197 U.S. 11, 30–31, 25 S.Ct. 358, 49 L.Ed. 643 (1905). *See also Prince v. Massachusetts*, 321 U.S. 158, 166–67, 64 S.Ct. 438, 88 L.Ed. 645 (1944). But "[n]othing in *Jacobson* supports the view that an emergency displaces normal constitutional standards." *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting) (emphasis omitted). [1]

The Governor invokes *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). But *Smith* upheld a "neutral law of general applicability" against challenge under the Free Exercise Clause. *Id.* at 879, 110 S.Ct. 1595 (quotations omitted). *Smith* does *not* cover laws that grant exemptions to some, while denying them to people of faith. "Religious liberty deserves better than that—even under *Smith*." *Horvath v. City of Leander*, 946 F.3d 787, 795 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part). [2]

***5** Instead, laws that burden religion while exempting the non-religious must pass strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). The burden on religion "must be justified by a compelling governmental interest," and the law "must be narrowly tailored to advance that interest." *Id.* at 531–32, 113 S.Ct. 2217. That is a heavy lift: Such laws "will survive strict scrutiny only in rare cases." *Id.* at 546, 113 S.Ct. 2217.

I do not expect this to be one of those "rare cases." *Id.* Pastor Mark Anthony Spell and his parishioners seek to worship as their faith directs. They cannot do so, however, due to a series of orders by Governor John Bel Edwards that forbid citizens from assembling in public—including inside churches.

The Governor no doubt issued those orders out of sincere public health concerns. To survive First Amendment scrutiny, however, those concerns must be applied consistently, not selectively. And it is hard to see how that rule is met here if the record is developed to take account of the recent protests.

It is common knowledge, and easily proved, that protestors do not comply with social distancing requirements. [3] But instead of enforcing the Governor's orders, officials are encouraging the protests—out of an admirable, if belated, respect for First Amendment rights. The Governor himself commended citizens for "appropriately expressing their concerns and exercising their First Amendment Rights." [4] And he predicted that "we will continue to see peaceful, nonviolent demonstrations and protests where people properly exercise their First Amendment rights." [5]

If protests are exempt from social distancing requirements, then worship must be too. As the United States recently observed, "California's political leaders have expressed support for such peaceful protests and, from all appearances, have not required them to adhere to the now operative 100-person limit.... [I]t could raise First Amendment concerns if California were to hold other protests ... to a different standard." Brief for the United States as Amicus Curiae at 24, *Givens v. Newsom*, No. 20-15949 (9th Cir. June 10, 2020). The same principle should apply to people of faith. *See, e.g.*, *Lukumi*, 508 U.S. at 537, 113 S.Ct. 2217 ("[Where] individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason.") (quotations omitted).

II.

The Governor may respond that his order forbids *only* indoor worship but still allows people of faith to worship outdoors. But whether health experts would endorse that dichotomy —and whether the First Amendment permits it—is far from obvious. [6]

***6** Underinclusive rules fail strict scrutiny just as overinclusive ones do. A "law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547, 113 S.Ct. 2217 (cleaned up). To survive strict scrutiny, then, the Governor must show that a rule restricting indoor worship, while exempting outdoor worship, is narrowly tailored to further a compelling interest.

That may not be easy. Plaintiffs can presumably find health experts who say outdoor protests present serious health concerns. [7] They might also find health experts who support and encourage the protests, not because they pose no health risk, but because their social value outweighs any risk. [8]

Such support for the protests reflects a commendable commitment to equality. But public officials cannot devalue people of faith while elevating certain protestors. That would offend the First Amendment—not to mention the principle of equality for which the protests stand.

* * *

None of this is to say that Pastor Spell and his parishioners *should* ignore the advice of health experts. But the same is true for the protestors. No doubt many other Louisianans would have protested too, but for the advice of health experts. The point here is that state and local officials gave them the choice. Those officials took no action when protestors chose to ignore health experts and violate social distancing rules. And that forbearance has consequences.

The First Amendment does not allow our leaders to decide which rights to honor and which to ignore. In law, as in life, what's good for the goose is good for the gander. In these troubled times, nothing should unify the American people more than the principle that freedom for me, but not for thee, has no place under our Constitution.

I concur in the dismissal of this appeal as moot, but in anticipation that a future appeal may turn out very differently.

All Citations

--- F.3d ----, 2020 WL 3287239

Footnotes

1 *Coronavirus Disease 2019 (**COVID**-19): Cases in the U.S.*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited June 17, 2020).

2 Available at https://gov.louisiana.gov/assets/Proclamations/2020/modified/25-JBE2020-Public-Health-Emergency-**COVID**-19.pdf.

3 Available at https://gov.louisiana.gov/assets/Proclamations/2020/JBE-33-2020.pdf.

4 Available at https://gov.louisiana.gov/assets/Proclamations/2020/modified/41-JBE2020-Public-Health-Emergency.pdf.

5 Available at https://gov.louisiana.gov/assets/Proclamations/2020/modified/52-JBE2020-State-of-Emergency-**COVID**-19-Extension-to-May-15.pdf.

6 *Opening Up America Again*, The White House, https://www.whitehouse.gov/openingamerica/ (last visited on June 17, 2020).

7 Available at https://gov.louisiana.gov/assets/Proclamations/2020/58-JBE-2020.pdf.

8 Available at https://gov.louisiana.gov/assets/Proclamations/2020/74-JBE-2020State-of-Emergency-**COVID**-19-Resilient-Louisiana-Phase-2.pdf.

9 *See also Martinko v. Whitmer*, —— F. Supp. 3d ——, ——, 2020 WL 3036342, at *3 (E.D. Mich. June 5, 2020) (holding that a claim challenging superseded **COVID**-19 restrictions was moot); *Ministries v. Newsom*, —— F. Supp. 3d ——, ——, 2020 WL 2991467, at *3 (S.D. Cal. June 4, 2020) (same); *Cameron v. Beshear*, 2020 WL 2573463, at *2–3 (E.D. Ky. May 21, 2020) (same); *Krach v. Holcomb*, 2020 WL 2197855, at *2 (N.D. Ind. May 6, 2020) (same).

1 Judge Collins has criticized our court for reading *Jacobson* too broadly in favor of the government. *See S. Bay*, 959 F.3d at 943 n.2 (criticizing *In re Abbott*, 954 F.3d 772 (5th Cir. 2020)). I would simply observe that, whatever *Jacobson*'s scope, *Abbott* makes clear that pandemic regulations must govern "evenhandedly"—precisely the problem here. *In re Abbott*, 954 F.3d at 792.

2 *Smith* has been derided by "[c]ivil rights leaders and scholars ... as 'the *Dred Scott* of First Amendment law,' " criticized by "[a]t least ten members of the Supreme Court," and "widely panned as contrary to the Free Exercise Clause and our Founders' belief in religion as a cornerstone of civil society." *Horvath*, 946 F.3d at 794–95 (Ho, J., concurring in the judgment in part and dissenting in part) (quoting other sources). *Smith* is troubling because it is of "little solace to the person of faith that a non-believer might be equally inconvenienced." *Id.* at 796. "For it is the person of faith whose faith is uniquely burdened—the non-believer, by definition, suffers no such crisis of conscience. This recalls Anatole France's mordant remark about 'the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread.' " *Id.* (quoting ANATOLE FRANCE, THE RED LILY 87 (1910)).

3 *See*, *e.g.*, *George Floyd protest in Baton Rouge: See photos, videos of peaceful march*, THE ADVOCATE (May 31, 2020), https://www.theadvocate.com/baton_rouge/multimedia/photos/collection_fc447130-a374-11ea-ba75-13e315745881.html#3.

4 David Gray, *Gov. Edwards commends Louisiana's 'peaceful' protests after 'egregious' death of George Floyd*, THE LIVINGSTON PARISH NEWS (June 2, 2020), https://www.livingstonparishnews.com/breaking_news/gov-edwards-commends-louisiana-speaceful-protests-after-egregious-death-of-george-floyd/article_8c81f514-a506-11ea-b00a-cffba12e8440.html.

5 Melinda Deslatte, *Louisiana governor praises state's peaceful Floyd protests*, AP NEWS (June 3, 2020), https://apnews.com/51fd29f1cd6bd7e6d2bea8799117fec8.

6 Under his logic, the Governor would allow tens of thousands of LSU fans to assemble this fall under the open sky at Tiger Stadium, while forbidding countless others from cheering on the Saints under the Superdome.

7 *See*, *e.g.*, Morgan Winsor, *Dr. Fauci voices concerns about coronavirus spreading amid nationwide protests*, ABC NEWS (June 10, 2020), https://abcnews.go.com/US/dr-faucivoices-concerns-coronavirus-spreading-amid-nationwide/story?id=71171103.

8 *See*, *e.g.*, Jamie Ducharme, *"Protest Is a Profound Public Health Intervention." Why So Many Doctors Are Supporting Protests in the Middle of the **Covid**-19 Pandemic*, TIME (June 10, 2020), https://time.com/5848212/doctors-supporting-protests/.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, and
ROBERT MUISE,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, BRIAN L. MACKIE, in his official capacity as Washtenaw County Prosecuting Attorney,

Defendants.

No. 1:20-cv-00323

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT J

2020 WL 2991467
Only the Westlaw citation is currently available.
United States District Court, S.D. California.

Abiding Place MINISTRIES, Plaintiff,
v.
Gavin NEWSOM, in his official capacity as the Governor of California, et al., Defendants.

Case No. 20-cv-683-BAS-AHG
|
Signed 06/04/2020

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Lisa J. Plank, California Attorney General, San Francisco, CA, Todd Grabarsky, California Attorney General's Office, Los Angeles, CA, for Defendants Gavin Newsom, Xavier Becerra, Sonia Y. Angell.

ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

[ECF No. 24]

Cynthia Bashant, United States District Judge

***1** Plaintiff Abiding Place Ministries challenges the stay-at-home and other orders issued by California Governor Gavin Newsom, and the corresponding orders issued by the County of San Diego. The stay-at-home orders were issued in an attempt to slow the spread of the novel coronavirus, also known as COVID-19.

Plaintiff filed a complaint against the County of San Diego and Public Health Officer of San Diego County Wilma J. Wooten, seeking a temporary restraining order and declaratory relief. (ECF No. 1.) Plaintiff also filed a motion for temporary restraining order on April 9, 2020, asking the Court to enjoin the county order so the church could assemble for Easter service on April 12, 2020. The Court held a telephonic hearing and denied the motion. (ECF Nos. 2, 10.)

Plaintiff filed an amended complaint against Defendants Gavin Newsom, Xavier Becerra, Sonia Y. Angell, and the County of San Diego. (First Amended Complaint, "FAC," ECF No. 22.) Plaintiff then filed a motion for preliminary injunction. ("Mot.," ECF No. 24.) The County filed a response in opposition to the Motion (ECF No. 42), as did the State Defendants (ECF No. 46). Plaintiff filed a reply, and the State Defendants filed a sur-reply. (ECF Nos. 48, 55.) The Court held a telephonic hearing on the Motion on June 3, 2020. For the reasons stated below, the Court **DENIES** the Motion.

I. FACTUAL BACKGROUD

San Diego County, like most if not all other counties in the United States, has been impacted by the COVID-19 pandemic. COVID-19 is the disease caused by the coronavirus, which was first detected in China in December 2019 and has since spread worldwide. The CDC determined that COVID-19 is spread primarily through in-person interactions, either "[b]etween people who are in close contact with one another" or "[t]hrough respiratory droplets produced when an infected person coughs, sneezes or talks." *See* CDC, How COVID-19 Spreads (last updated June 1, 2020), https://www.cdc.gov/corona-virus/2019-ncov/prevent-getting-sick/how covid-spreads.html. It can even be spread by those who are not showing symptoms and do not know they are infected with the virus. *Id.* Thus, the CDC currently recommends that everyone practice social distancing. Social distancing requires staying at least six feet away from other people and "avoid[ing] large and small gatherings." *See* CDC, What is Social Distancing? (last updated May 6, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html.

As of the date of this Order, there is no vaccine for the coronavirus. Although scientists and researchers are hopeful about potential vaccines that are currently being tested, as of now, everyone is at risk. The numbers of those infected by the virus continues to grow. *See* COVID-19 Statewide Update, https://update.covid19. ca.gov/ (last updated June 3, 2020).

Given the above, on March 4, 2020, Defendant Gavin Newsom, the Governor of California, declared a State of Emergency due to the pandemic. On March 13, 2020, President Donald Trump declared a national emergency. On

March 19, 2020, Governor Newsom issued Executive Order N-33-20, which directed all residents to "immediately heed the current State public health directives" including the March 19, 2020 Order of the State Public Health Officer. (Exhibit A to FAC, ECF No. 22-1.) The State Public Health Officer ordered "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." (*Id.*) Californians could leave their homes "to obtain or perform [certain] functions ..., or to otherwise facilitate authorized necessary activities." The Public Health Officer was permitted to "designate additional sectors as critical in order to protect the health and well-being of all Californians." (*Id.*) On March 22, 2020, the State published a list of " 'Essential Critical Infrastructure Workers' to help state, local, tribal and industry partners as they work to protect communities." (Exhibit D to FAC, ECF No. 22-4.)

***2** As relevant here, one essential business category on that list is "Faith based services that are provided through streaming or other technology." (*Id.* at 11.) On April 28, 2020, that category was changed to be: "Clergy for essential support and faith-based services that are provided through streaming or other technologies that support physical distancing and state public health guidelines." (Exhibit E to FAC, ECF No 22-5.) The Governor later clarified that this exemption from his stay-at-home order allows not only online streaming of religious services (and the work of individuals necessary to set up and run the streaming equipment), but also permits drive-in style services "provided congregants do not leave their cars and refrain from direct or indirect physical contact." (ECF No. 46, at 4.) On May 25, 2020, Governor Newsom announced new guidelines for places of worship that allow in-person worship services to resume, subject to county approval and compliance with certain public health requirements. The County of San Diego adopted the guidelines on May 26, 2020. The requirements limit attendance to 100 persons, or 25% of building capacity, whichever is lower. (Exhibit A to Reply, ECF No. 48-1.)

Plaintiff's Motion was filed prior to the new guidelines and brings challenges to the Governor's stay-at-home order for various reasons. Plaintiff brings claims for violation of the Free Exercise Clause, the Establishment Clause, the Free Speech Clause, the Freedom of Assembly Clause, the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause, and various sections of the California Constitution.[1] Plaintiff moves for a temporary restraining order and an order to show cause why a preliminary injunction should not be issued, seeking the following order: "Defendants, as well as their agents, employees, and successors in office, shall be restrained and enjoined from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on Plaintiff's engagement in religious services, practices, or activities at which the Center for Disease Control's social distancing guidelines are followed." (Mot. at 23.)

II. LEGAL STANDARD

The standard for a temporary restraining order and preliminary injunction are "substantially identical." *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Ass'ns Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 21, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)).

III. ANALYSIS

Considering the substantial changes to the State and County orders that have occurred since Plaintiff filed its operative complaint and Motion, the Court first addresses the issue of mootness.

The Constitution limits the federal judicial power to designated "cases" and "controversies." U.S. Const., Art. III, § 2. "The doctrine of mootness, which is embedded in Article III's case or controversy requirement, requires that an actual, ongoing controversy exist at all stages of federal court proceedings." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086 (9th Cir. 2011). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (citation omitted). A federal court must dismiss a case for lack of jurisdiction if it becomes moot. *Pitts*, 653 F.3d at 1086–87.

***3** Plaintiff seeks to "privately assemble away from the general public in the open air on a large, private ranch." (PI Mot. at 1.) Plaintiff has a "small congregation, with less than 100 persons typically present at its Sunday meeting." (FAC ¶ 25.) Plaintiff "moves for a preliminary injunction to enjoin the County and all persons acting at the County's direction from applying the County's Order of the Health Officer and

Emergency Regulations (Effective April 9, 2020) against Abiding Place Ministries." (*Id.* at 3.) In sum and as noted above, Plaintiff asks that: "Defendants, as well as their agents, employees, and successors in office, shall be restrained and enjoined from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on Plaintiff's engagement in religious services, practices, or activities at which the Center for Disease Control's social distancing guidelines are followed." (*Id.* at 23.)

The State's May 25 guidelines, which the County has adopted, allow Plaintiff's congregation (of less than 100 persons) to meet as long as certain CDC guidelines are followed. These most recent guidelines supersede any prior orders. While " 'repeal or amendment of an ordinance by a local government or agency does not necessarily deprive a federal court of its power to determine the legality of the practice' at issue," "[a] statutory change ... is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (citations omitted); *see also Twitter, Inc. v. Lynch*, 139 F. Supp. 3d 1075, 1081 (N.D. Cal. 2015) ("[W]hen subsequent legislation or rulemaking supersedes challenged regulations or rules, the challenge is moot."). Plaintiff challenges the prior State and County orders, not the May 25 guidelines. The prior orders are no longer in effect.

Any further arguments made by Plaintiff at oral argument —e.g., Plaintiff wants to hold a wedding at its church, its members do not wish to wear masks while singing, the new guidelines are unclear, and the church should not be compelled to tell members to stay home if they are sick— were not made in Plaintiff's amended complaint or its Motion. For a federal court to issue an injunction, there must be a "sufficient nexus between the claims raised in a motion for injunctive relief and the claims set forth in the underlying complaint itself. The relationship between the preliminary injunction and the underlying complaint is sufficiently strong where the preliminary injunction would grant relief of the same character as that which may be granted finally. Absent that relationship or nexus, the district court lacks authority to grant the relief requested." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015).

Because the amended complaint and the preliminary injunction Motion do not challenge the May 25 guidelines, and because the May 25 guidelines superseded the orders challenged in Plaintiff's papers, Plaintiff's Motion is moot. On this basis, the Court **DENIES** Plaintiff's Motion for Preliminary Injunction.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 2991467

Footnotes

1 Although not relevant to the Court's rulings below, it is worth mentioning that on May 29, 2020, the Supreme Court issued a decision on an application for injunctive relief in *South Bay United Pentecostal Church v. Newsom*, a case appealed from this Court. The Supreme Court declined to issue an injunction in favor of the church, finding California's guidelines that place restrictions on places of worship are consistent with the Free Exercise Clause of the First Amendment. *S. Bay United Pentecostal Church v. Newsom*, No. —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 2813056 (May 29, 2020).

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, and
ROBERT MUISE,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, BRIAN L. MACKIE, in his official capacity as Washtenaw County Prosecuting Attorney,

Defendants.

No. 1:20-cv-00323

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT K

2020 WL 2112374
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Western Division.

Stephen CASSELL and The Beloved Church, an Illinois not-for-profit corporation, Plaintiffs,
v.
David SNYDERS, Sheriff of Stephenson County, Jay Robert Pritzker, Governor of Illinois, Craig Beintema, Administrator of the Department of Public Health of Stephenson County, Steve Schaible, Chief of Police of the Village of Lena, Illinois, Defendants.

20 C 50153
|
Signed May 3, 2020

Synopsis

Background: Evangelical Christian church and its pastor brought action against Illinois Governor, sheriff, county's public health administrator, and police chief under § 1983 and state law, alleging stay-at-home orders issued during COVID-19 pandemic violated First Amendment's Free Exercise Clause, Illinois's Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and the Illinois Department of Health Act (DHA). Church and pastor moved for temporary restraining order (TRO) and preliminary injunction preventing enforcement of the stay-at-home orders.

Holdings: The District Court, John Z. Lee, J., held that:

[1] plaintiffs' claims for declaratory and injunctive relief with respect to orders that had been superseded were moot;

[2] plaintiffs' residual claims that applied to superseding order were not moot;

[3] plaintiffs faced credible threat of prosecution for violating stay-at-home order, and thus had -in-fact required for Article III standing;

[4] plaintiffs had less than negligible chance of prevailing on claim that the order violated Free Exercise Clause;

[5] stay-at-home order was neutral, generally applicable law, and thus rational basis test applied to claim that order violated Free Exercise Clause;

[6] Eleventh Amendment barred plaintiffs' state law claims;

[7] no equally effective but less restrictive alternatives were available to promote Illinois's compelling interest in controlling spread of COVID-19, as required for order to satisfy RFRA; and

[8] Governor had authority under EMAA to declare more than one emergency related to the ongoing COVID-19 pandemic.

Motion denied.

West Headnotes (44)

[1] **Injunction** Findings and conclusions

The district judge, in considering a motion for preliminary injunction, must make factual determinations on the basis of a fair interpretation of the evidence before the court.

[2] **Injunction** Extraordinary or unusual nature of remedy

Injunction Presumptions and burden of proof

Injunction Clear showing or proof

A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.

[3] **Injunction** Grounds in general; multiple factors

A party seeking a preliminary injunction must show that (1) its case has some likelihood of success on the merits, (2) it has no adequate

remedy at law, and (3) without relief it will suffer irreparable harm.

[4] **Injunction** Likelihood of success on merits

As part of the preliminary-injunction analysis, a district court may consider a nonmovant's defenses in determining the movant's likelihood of success on the merits.

[5] **Injunction** Balancing or weighing factors; sliding scale

Injunction Balancing or weighing hardship or injury

If the moving party meets the threshold requirements for obtaining a preliminary injunction, namely some likelihood of success on the merits, no adequate remedy at law, and irreparable harm, the district court weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied.

[6] **Injunction** Relation or conversion to preliminary injunction

The standards for granting a temporary restraining order (TRO) and a preliminary injunction are the same.

[7] **Declaratory Judgment** State officers and boards

Declaratory Judgment Counties and municipalities and their officers

Claims brought under First Amendment and Illinois Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and Illinois Department of Health Act (DHA) by evangelical Christian church and its pastor with respect to Illinois Governor's prior stay-at-home orders issued in response to COVID-19 pandemic were moot to the extent they sought declaratory and injunctive relief with respect to those orders, without regard to new provisions in subsequent order that allowed worshippers to engage in free exercise of religion in gatherings of no more than ten people so long as they complied with social distancing requirements. U.S. Const. Amend. 1; 20 Ill. Comp. Stat. Ann. 2305/2(a), 3305/7; 775 Ill. Comp. Stat. Ann. 35/15.

[8] **Civil Rights** Preliminary Injunction

Constitutional Law Mootness

Injunction Mootness and ripeness; ineffectual remedy

Injunction Health

Claims for preliminary injunctive relief brought under First Amendment and Illinois Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and Illinois Department of Health Act (DHA) by evangelical Christian church and its pastor with respect to Illinois Governor's prior stay-at-home orders issued in response to COVID-19 pandemic were not mooted by subsequent order that allowed worshippers to engage in free exercise of religion in gatherings of no more than ten people so long as they complied with social distancing requirements, to the extent that church and pastor asserted residual claims that applied equally to the subsequent order; church and pastor took umbrage at restrictions on religious gatherings imposed by the subsequent order, including the ten-attendee limit. U.S. Const. Amend. 1; 20 Ill. Comp. Stat. Ann. 2305/2(a), 3305/7; 775 Ill. Comp. Stat. Ann. 35/15.

[9] **Federal Courts** Rights and interests at stake

A case does not become moot as long as the parties have a concrete interest, however small, in the litigation.

[10] **Declaratory Judgment** Subjects of relief in general

Evangelical Christian church and its pastor faced credible threat of prosecution arising from their alleged intent to hold church services despite Illinois Governor's stay-at-home orders issued in response to COVID-19 pandemic, which imposed ten-attendee limit on worship services, and thus, church and pastor alleged an injury-in-fact, as required to have Article III standing to bring suit for declaratory and injunctive relief alleging the orders violated First Amendment's Free Exercise Clause, Illinois Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and Illinois Department of Health Act (DHA); orders were enforceable by State and local law enforcement, violators were subject to civil fines and criminal penalties, and sheriff did not provide assurance the orders would not be enforced. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 20 Ill. Comp. Stat. Ann. 2305/2(a), 3305/7; 775 Ill. Comp. Stat. Ann. 35/15.

[11] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. U.S. Const. art. 3, § 2, cl. 1.

[12] **Federal Civil Procedure** In general; injury or interest

As a general rule, an injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical. U.S. Const. art. 3, § 2, cl. 1.

[13] **Federal Civil Procedure** In general; injury or interest

An allegation of future injury may suffice to satisfy Article III standing requirements if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur. U.S. Const. art. 3, § 2, cl. 1.

[14] **Constitutional Law** Criminal Law

For Article III standing purposes, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. U.S. Const. art. 3, § 2, cl. 1.

[15] **Civil Rights** Preliminary Injunction

Constitutional Law Ripeness; prematurity

Injunction Mootness and ripeness; ineffectual remedy

Injunction Health

Ripeness, an Article III requirement, was satisfied for claims for preliminary injunctive relief brought under First Amendment, Illinois Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and Illinois Department of Health Act (DHA) by evangelical Christian church and its pastor challenging Illinois Governor's stay-at-home order issued in response to COVID-19, which included ten-attendee limit on services and social distancing requirements; the claims raised purely legal questions typically fit for judicial review, further factual development would provide little clarification, and denying judicial review imposed not-insignificant hardship by forcing choice between refraining from congregating and engaging in assembly while risking civil fines and criminal penalties. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 20 Ill. Comp. Stat. Ann. 2305/2(a), 3305/7; 775 Ill. Comp. Stat. Ann. 35/15.

[16] **Federal Courts** Fitness and hardship

To determine ripeness, an Article III requirement, courts examine (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. U.S. Const. art. 3, § 2, cl. 1.

[17] **Health** Contagious and Infectious Diseases

Courts only overturn rules issued by the government in response to an epidemic which lack a real or substantial relation to public health or that amount to plain, palpable invasions of constitutional rights.

[18] **Constitutional Law** Health

The judiciary has authority to strike down laws that use public health emergencies as a pretext for infringing individual liberties protected by the Constitution.

[19] **Health** Contagious and Infectious Diseases

When an epidemic ceases, government restrictions on constitutional rights must meet traditionally recognized tests.

[20] **Civil Rights** Preliminary Injunction

Evangelical Christian church and its pastor, which sought preliminary injunction enjoining enforcement of Illinois Governor's stay-at-home order issued in response to COVID-19, had less than negligible chance of prevailing on their claim that the order, which imposed ten-attendee limit on worship services and social distancing requirements, violated First Amendment's Free Exercise Clause; COVID-19 was public health crisis that threatened lives of all Americans, as it spread easily, caused severe and sometimes fatal symptoms, and resisted most medical interventions, and church and pastor did not credibly challenge Governor's estimate that ten to 20 times as many Illinoisans would have died without the stay-at-home restrictions. U.S. Const. Amend. 1.

[21] **Constitutional Law** Religious Organizations in General

Illinois Governor's stay-at-home order issued in response to COVID-19, which included ten-attendee limit on worship services and social distancing requirements, was neutral, generally applicable law, and thus rational basis test applied to claim that the order violated First Amendment's Free Exercise Clause; there was no evidence Governor had history of animus towards religion or religious people, order proscribed secular and religious conduct alike and expressly preserved various avenues for religious expression, including drive-in services, holding in-person religious services created higher risk of contagion than operating grocery stores or staffing manufacturing plants due to sustained interactions between many people, and order imposed same restrictions on schools. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[22] **Constitutional Law** Burden on religion

The First Amendment's Free Exercise Clause prevents the government from placing a substantial burden on the observation of a central religious belief or practice unless it demonstrates a compelling government interest that justifies the burden. U.S. Const. Amend. 1.

[23] **Constitutional Law** Neutrality; general applicability

Neutral, generally applicable laws may be applied to religious practice, consistent with the First Amendment's Free Exercise Clause, even when not supported by a compelling government interest. U.S. Const. Amend. 1.

[24] **Constitutional Law** Neutrality; general applicability

A neutral law of general applicability is constitutional, under the First Amendment's Free Exercise Clause, if it is supported by a rational basis. U.S. Const. Amend. 1.

[25] **Constitutional Law** Neutrality; general applicability

The neutrality element for applying the rational basis test to a neutral and generally applicable law challenged under the First Amendment's Free Exercise Clause asks whether the object of the law is to infringe upon or restrict practices because of their religious motivation. U.S. Const. Amend. 1.

[26] **Constitutional Law** Neutrality; general applicability

The general applicability element for applying the rational basis test to a neutral and generally applicable law challenged under the First Amendment's Free Exercise Clause forbids the government from imposing burdens only on conduct motivated by religious belief in a selective manner. U.S. Const. Amend. 1.

[27] **Constitutional Law** Neutrality; general applicability

In evaluating whether a law challenged under the First Amendment's Free Exercise Clause is both neutral and generally applicable, and thus subject to the rational basis test, courts draw on principles developed in the context of the Fourteenth Amendment's Equal Protection Clause. U.S. Const. Amends. 1, 14.

[28] **Constitutional Law** Intentional or purposeful action requirement

At its core, equal protection analysis hinges on whether the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon a particular group. U.S. Const. Amend. 14.

[29] **Constitutional Law** Neutrality; general applicability

Courts apply the rational basis test to Free Exercise Clause claims, unless the challenged rule fails to prohibit nonreligious conduct that endangers the government's interests in a similar or greater degree than religious conduct. U.S. Const. Amend. 1.

[30] **Constitutional Law** Neutrality; general applicability

Different treatment for religious conduct signals that the government's object is to target religious practices, in violation of the First Amendment's Free Exercise Clause, only if secular conduct that endangers the government's interests in a similar or greater degree receives favorable treatment. U.S. Const. Amend. 1.

[31] **Constitutional Law** Neutrality; general applicability

The fact that a government restriction refers to religious activity (while at the same time listing others) cannot be sufficient to show that its object or purpose is to target religious practices for harsher treatment, in violation of First Amendment's Free Exercise Clause. U.S. Const. Amend. 1.

[32] **Constitutional Law** Neutrality; general applicability

In engaging in a functional assessment of how the challenged law operates in practice, for purposes of a claim alleging a violation of First Amendment's Free Exercise Clause, courts must consider how a particular law treats secular and religious activities that are substantially comparable to one another. U.S. Const. Amend. 1.

[33] **Constitutional Law** Religious Organizations in General

Health Quarantine

Religious Societies Religious services and ordinances

Given the importance of slowing the spread of COVID-19 in Illinois, Illinois Governor's stay-at-home order issued in response to COVID-19 pandemic, which included ten-attendee limit

on worship services and social distancing requirements, satisfied rational basis scrutiny on claim of Christian church and its pastor that the order violated First Amendment's Free Exercise Clause. U.S. Const. Amend. 1.

[34] **Federal Courts** Law Enforcement
Federal Courts Sheriffs and deputies
Federal Courts Other particular entities and individuals

Eleventh Amendment barred claims brought by evangelical Christian church and its pastor against Illinois Governor, sheriff, county's public health administrator, and police chief alleging stay-at-home orders issued during COVID-19 pandemic violated Illinois Religious Freedom Restoration Act (RFRA), Illinois Emergency Management Agency Act (EMAA), and the Illinois Department of Health Act (DHA); the defendants were state officials who were sued in their official capacities and raised sovereign immunity. U.S. Const. Amend. 11; 20 Ill. Comp. Stat. Ann. 2305/2(a), 3305/7; 775 Ill. Comp. Stat. Ann. 35/15.

[35] **Federal Courts** Suits Against States; Eleventh Amendment and Sovereign Immunity
Federal Courts Waiver by State; Consent

Although not explicit in the text, the Eleventh Amendment guarantees that an unconsenting State is immune from suits brought in federal courts by her own citizens. U.S. Const. Amend. 11.

[36] **Federal Courts** Agencies, officers, and public employees

If properly raised, the Eleventh Amendment bars actions in federal court against state officials acting in their official capacities. U.S. Const. Amend. 11.

[37] **Federal Courts** Agencies, officers, and public employees

Individual state officials may be sued personally for federal constitutional violations committed in their official capacities, but, pursuant to the Eleventh Amendment, that principle does not extend to claims that officials violated state law in carrying out their official responsibilities. U.S. Const. Amend. 11.

[38] **Civil Rights** Particular cases and contexts

Even if stay-at-home order issued by Illinois Governor during COVID-19 pandemic, which prohibited in-person religious gatherings of more than ten people, was a substantial burden on religious exercise of evangelical Christian church and its pastor, no equally effective but less restrictive alternatives were available to promote Illinois's compelling interest in controlling the spread of COVID-19, as required for order to satisfy Illinois Religious Freedom Restoration Act (RFRA); there existed threat of additional infections in the context of large gatherings, and order allowed avenues for religious worship, prayer, celebration, and fellowship such as small group meetings, bible study meetings, and prayer gatherings. 775 Ill. Comp. Stat. Ann. 35/15.

[39] **Civil Rights** Particular cases and contexts

The least restrictive means element of a claim brought under the Illinois Religious Freedom Restoration Act (RFRA) turns on whether the government could have achieved, to the same degree, its compelling interest without interfering with religious activity. 775 Ill. Comp. Stat. Ann. 35/15.

[40] **Health** Quarantine

Illinois Governor had authority under State's Emergency Management Agency Act (EMAA) to declare more than one emergency related to the ongoing COVID-19 pandemic and was not limited to issuing a single 30-day disaster proclamation, so long as the Governor made new findings of fact to determine that a state of emergency still existed. 20 Ill. Comp. Stat. Ann. 3305/4, 3305/7.

[41] **Health** Quarantine

Religious Societies Religious services and ordinances

Stay-at-home order issued by Illinois Governor in response to COVID-19 pandemic, which included ten-attendee limit on worship services and social distancing requirements, was not a "quarantine" within the meaning of Illinois's Department of Health Act, and thus was not subject to the Act's provision that Illinois Department of Public Health had supreme authority in matters of quarantine and isolation; while the order curtailed ability of individuals to gather in large groups, it empowered religious leaders to, among other things, worship and pray with small groups of parishioners, visit them in their homes while observing social distancing, and lead drive-in sermons. 20 Ill. Comp. Stat. Ann. 2305/2(a).

[42] **Injunction** Balancing or weighing factors; sliding scale

Under the sliding scale approach for issuing preliminary injunctions, the less likely a claimant is to win, the more that the balance of harms must weigh in his favor.

[43] **Civil Rights** Preliminary Injunction

Injunction Health

Balance of hardships tilted markedly against granting temporary restraining order (TRO) and preliminary injunction preventing enforcement of stay-at-home order issued by Illinois Governor during COVID-19 pandemic, which evangelical Christian church and its pastor alleged violated First Amendment's Free Exercise Clause and state law due to order's ten-attendee limit on worship services; preventing order's enforcement would pose serious risks to public health, as COVID-19 was virulent and deadly disease that had killed thousands of Americans, places where people congregated, like churches, often acted as vectors for the disease, and church and pastor's interest in holding large, communal in-person worship services did not outweigh government's interest in protecting Illinois residents. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[44] **Civil Rights** Preliminary Injunction

Injunction Health

The promotion of the public interest weighed heavily against entry of temporary restraining order (TRO) and preliminary injunction preventing enforcement of stay-at-home order issued by Illinois Governor during COVID-19 pandemic, which evangelical Christian church and its pastor alleged violated First Amendment's Free Exercise Clause and state law due to order's ten-attendee limit on worship services, given COVID-19's virulence and lethality, together with the State's efforts to protect avenues for religious activity. U.S. Const. Amend. 1.

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MEMORANDUM OPINION AND ORDER

John Z. Lee, United States District Judge

***1** So far, over 60,000 Americans have died from contracting COVID-19. That is more than the number of people who perished during the 9/11 terrorist attacks, Pearl Harbor, and the Battle of Gettysburg combined. Hoping to

slow the pathogen's spread, governors and mayors across the country have implemented stay-at-home orders. While those orders have already saved thousands of lives, they come at a considerable cost. In Illinois, as in other states, the orders have interfered with the ability of residents to work, learn, and worship.

This case is about whether those restrictions are consistent with the religious freedoms enshrined in the Federal Constitution and in Illinois law. Every Sunday for the past five years, members of the Beloved Church have gathered with their pastor, Stephen Cassell, to pray, worship, and sing. Since Governor Pritzker's first stay-at-home order went into effect, however, the Beloved Church has been forced to move those services online. And, in the intervening weeks, the Governor has issued additional orders, extending the restrictions.

Convinced that these orders impermissibly infringe on their religious practices, Cassell and the Beloved Church have sued Pritzker, Stephenson County Sheriff David Snyders, Stephenson County Public Health Administrator Craig Beintema, and Village of Lena Police Chief Steve Schaible. In particular, Plaintiffs allege that the stay-at-home orders violate the First Amendment's Free Exercise Clause, Illinois's Religious Freedom Restoration Act ("RFRA"), 775 Ill. Comp. Stat 35/15, the Emergency Management Agency Act ("EMAA"), 20 Ill. Comp. Stat. 3305/7, and the Illinois Department of Health Act ("DHA"), 20 Ill. Comp. Stat. 2305/2(a).

Plaintiffs hope to return to their church on May 3, 2020, to worship without limitations. To that end, on April 30, 2020, they filed a motion asking the Court to enter a temporary restraining order and a preliminary injunction preventing Defendants from enforcing the stay-at-home orders. Given the time constraints, the Court ordered expedited briefing; Defendants filed their responses to the motion on May 1, 2020, and Plaintiffs submitted their reply on May 2, 2020.

The Court understands Plaintiffs' desire to come together for prayer and fellowship, particularly in these trying times. It is not by accident that the right to exercise one's religious beliefs is one of the core rights guaranteed by our Constitution. And whether it be the Apostles and Jesus gathering together to break bread and share wine on the night before his crucifixion (Luke 22:7-23), or Peter addressing the many at Pentecost and forming the first church (Acts 2:14-47), Christian tradition has long cherished communal fellowship, prayer, and worship.

But even the foundational rights secured by the First Amendment are not without limits; they are subject to restriction if necessary to further compelling government interests—and, certainly, the prevention of mass infections and deaths qualifies. After all, without life, there can be no liberty or pursuit of happiness.

***2** Recently, after this lawsuit was filed, Governor Pritzker issued a new order, recognizing the free exercise of religion as an "essential activity." April 30 Order § 2, ¶ 5(f), ECF No. 26-1. The order now states that worshippers may "engage in the free exercise of religion" so long as they "comply with Social Distancing Requirements" and refrain from "gatherings of more than ten people." *Id.* Furthermore, "[r]eligious organizations and houses of worship are encouraged to use online or drive-in services [which are not limited to ten people] to protect the health and safety of their congregants." *Id.*

The Court is mindful that the religious activities permitted by the April 30 Order are imperfect substitutes for an in-person service where all eighty members of Beloved Church can stand together, side-by-side, to sing, pray, and engage in communal fellowship. Still, given the continuing threat posed by COVID-19, the Order preserves relatively robust avenues for praise, prayer and fellowship and passes constitutional muster. Until testing data signals that it is safe to engage more fully in exercising our spiritual beliefs (whatever they might be), Plaintiffs, as Christians, can take comfort in the promise of Matthew 18:20—"For where two or three come together in my name, there am I with them."

For the reasons below, Plaintiffs' motion for a temporary restraining order and preliminary injunction is denied.

I. Preliminary Factual Findings [1]

A. The Pandemic

[1] COVID-19 is "a novel severe acute respiratory illness" that spreads rapidly "through respiratory transmission." April 30 Order at 1, ECF No. 26-1 ("April 30 Order" or "Order"). Making response efforts particularly daunting, asymptomatic individuals may carry and spread the virus, and there is currently no known vaccine or effective treatment. *Id.*; Pritzker Resp. Br. at 12, ECF No. 26. The virus has killed hundreds of thousands, infected millions, and disrupted the lives of nearly everyone on the planet. April 30 Order at 1–2.

In Illinois alone, at least 2,350 individuals have perished from the pathogen, with more than 50,000 infected. *Id.* at 2.

B. The Stay-at-Home Orders

To slow the spread of COVID-19, Governor Jay R. Pritzker issued a stay-at-home order on March 20, 2020. ECF No. 1-1. He extended that order two weeks later, before issuing a new directive with modified restrictions at the end of April. *See* April 30 Order. In substance, these orders direct Illinoisans to practice what experts call "social distancing." That means limiting activity outside the home, staying at least six feet apart from others, and refraining from congregating in groups of more than ten. *Id.* § 1. To facilitate these efforts, businesses deemed non-essential have been required to cease operations, and schools have been forced to close their doors. The Governor has determined that, if the orders were not in effect, "the number of deaths from COVID-19 would be between ten to twenty times higher." April 30 Order at 2.

At the same time, the stay-at-home orders have resulted in significant hardships for many individuals and their families. With schools closed, families have had to care for their children and oversee their education on a full-time basis. With businesses shuttered, many Illinoisans now find themselves furloughed or fired. And with large gatherings prohibited, religious groups have had to refrain from their usual activities.

***3** In an effort to alleviate some of those concerns, the April 30 Order, which is effective until the end of May, provides that Illinoisans may leave their homes to perform certain "Essential Activities." April 30 Order § 1, ¶ 5. Though the Order did not initially include religious events in its list of Essential Activities, it was amended shortly after Plaintiffs filed this lawsuit and their associated request for a temporary restraining order. *Compare* ECF No. 1-3, *with* ECF No. 26-1. As amended, the Order clarifies that worshippers may "engage in the free exercise of religion" so long as they "comply with Social Distancing Requirements" and refrain from "gatherings of more than ten people." April 30 Order § 2, ¶ 5(f). In doing so, "[r]eligious organizations and houses of worship are encouraged to use online or drive-in services to protect the health and safety of their congregants." *Id.*

C. The Beloved Church

Pastor Stephen Cassell formed the Beloved Church, an evangelical Christian organization, to promote "the truths of God's unconditional Love, amazing Grace, and majestic Restoration." Compl. ¶ 24, ECF No. 1. Cassell is passionate about "shar[ing] the love of God with [his] congregants, who form what [he] believe[s] is [a] Church family." *Id.* ¶ 25.

To that end, Cassell leads Sunday services at the Church's building in Lena, Illinois. *Id.* ¶ 27. On a typical Sunday, about eighty worshippers attend. *Id.* During each service, Cassell reads from scripture, delivers a sermon, and leads the congregation in prayer and song. *Id.* ¶ 28. After the ceremony, he encourages worshippers to engage in informal conversation with each other, building fellowship and community. *Id.* ¶ 29. Plaintiffs view Sunday prayer services as "the central religious rites of the Church congregation." *Id.* ¶ 31.

In late March, the Stephenson County Department of Public Health served Cassell with a cease-and-desist notice. *Id.* ¶ 48. It declared that the Beloved Church was required to adhere to the guidelines elaborated in the stay-at-home orders. *Id.* ¶ 49. For example, the notice stated that religious gatherings of over ten people would not be permitted. *Id.* ¶ 49. It went on to warn that violators "may be subject to additional civil and criminal penalties." *Id.* ¶ 49. Fearing fines and prosecution, the Beloved Church has refrained from holding Sunday services in person, *id.* ¶ 50, and, like many religious organizations, Cassell has instead held services online on various forums, including Facebook Live and YouTube. [2]

Viewing these remote services as "a violation of the Church's existence as a Christian congregation," Plaintiffs take aim at Governor Pritzker's most recent Order. Cassell Decl. ¶ 3, ECF No. 34. To support this challenge, Plaintiffs have submitted with their reply brief a declaration by Cassell stating that the Beloved Church's parking lot cannot accommodate drive-in services; that typically 10 to 15 family units attend a service, most of which consist of many members; that the church's facility can seat 15 family units with six feet of distance between each unit; and that Cassell will supply all attendees with masks (or other face coverings) and hand sanitizer. *Id.* ¶¶ 5, 8–10, 16.

II. Legal Standard

***4** **[2]** **[3]** **[4]** "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (internal quotation marks omitted). A party seeking a preliminary

injunction must show that (1) its case has "some likelihood of success on the merits," (2) it has "no adequate remedy at law", and (3) "without relief it will suffer irreparable harm." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 816 (7th Cir. 2018). As part of the preliminary-injunction analysis, a district court may consider a nonmovant's defenses in determining the movant's likelihood of success on the merits. *See Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 308 (7th Cir. 2010).

[5] **[6]** If the moving party meets these threshold requirements, the district court "weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied." *Ezell v. City of Chi.*, 651 F.3d 684, 694 (7th Cir. 2011). "The standards for granting a temporary restraining order and a preliminary injunction are the same." *USA-Halal Chamber of Commerce, Inc. v. Best Choice Meats, Inc.*, 402 F. Supp. 3d 427, 433 (N.D. Ill. 2019) (citation omitted).

III. Mootness, Standing, and Ripeness

As a threshold matter, Defendants question whether Article III authorizes this Court to adjudicate Plaintiffs' claims. In doing so, they articulate three distinct theories. First, Governor Pritzker says that Plaintiffs' motion is moot in light of the new provisions in the April 30 Order relating to religious activities. Second, Sheriff Snyders, Public Health Administrator Beintema, and Police Chief Schaible ("County and Village Defendants") submit that Plaintiffs lack standing to sue. Finally, the same group of Defendants argues that this case is not ripe for review.

A. Mootness

[7] To begin with, Governor Pritzker contends that Plaintiffs' claims have been mooted by the post-complaint issuance of the April 30 Order, which supersedes EO 2020-10 and EO 2020-18, and provides a new framework for religious organizations starting May 1, 2020. To the extent that Plaintiffs seek declaratory and injunctive relief with respect to EO 2020-10 and EO 2020-18, without regard to the new provisions in the April 30 Order, their claims are indeed moot. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, No. 18-280, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 1978708, at *1 (U.S. Apr. 27, 2020) (holding that a request for declaratory and injunctive relief was mooted by amendment of the statute).

[8] **[9]** But to the extent that Plaintiffs assert residual claims that apply equally to the April 30 Order, those claims are not moot. *Cf. id.* (remanding residual claims based on the new statute for further proceedings); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (same). "[A] case does not become moot as long as the parties have a concrete interest, however small, in the litigation[ ]...." *Campbell-Ewald Co. v. Gomez*, —— U.S. ——, 136 S. Ct. 663, 665, 193 L.Ed.2d 571 (2016). And it is clear that Plaintiffs take umbrage at the restrictions on religious gatherings imposed by the April 30 Order, including the ten-attendee limit. *See* Compl. ¶¶ 27–31. Accordingly, Governor Pritzker's argument that the case is moot fails.

B. Standing

[10] **[11]** Next, the County and Village Defendants contend that Plaintiffs lack standing. To establish standing, a plaintiff must show (1) an "injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Defendants focus their fire on the first element.

***5** **[12]** **[13]** **[14]** As a general rule, "[a]n injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (internal quotation marks omitted). But an "allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Id.* (emphasis deleted and internal quotation marks omitted). "[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights" *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *see MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007); *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 640 (7th Cir. 1990) (recognizing that "special flexibility, or 'breathing room,'...attaches to standing doctrine in the First Amendment context") (citation omitted).

Babbitt v. United Farm Workers National Union is instructive. 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). In that

case, the Supreme Court held that the plaintiffs could bring a pre-enforcement action because they alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exist[ed] a credible threat of prosecution thereunder." *Id.*, 442 U.S. at 298, 99 S.Ct. 2301. The statute at issue made it illegal to encourage consumers to boycott an "agricultural product .... by the use of dishonest, untruthful and deceptive publicity." *Id.* at 295, 99 S.Ct. 2301. And the plaintiffs pleaded they had "actively engaged in consumer publicity campaigns in the past" and "inten[ded] to continue to engage in boycott activities" in the future. *Id.* Even though the plaintiffs did not "plan to propagate untruths," they maintained that " 'erroneous statement is inevitable in free debate,' " and this was sufficient to establish standing. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).

As in *Babbitt*, Plaintiffs have alleged an Article III injury. According to Plaintiffs, Beintema issued and Snyders' deputy sheriff served a cease-and-desist notice on March 31, 2020, advising Plaintiffs that the Department of Public Health could issue a closure order if they did not adhere to Governor Pritzker's Executive Order 2020-10. Compl. ¶ 47. Although the notice references Executive Order 2020-10, the allegations create a reasonable inference that the notice also would apply to the April 30 Order, which prohibits "gatherings of more than ten people." April 30 Order § 2, ¶ 5(f).

Moreover, the notice stated that "police officers, sheriffs and all other officers in Illinois are authorized to enforce such orders. In addition to such an order of closure...you may be subject to additional civil and criminal penalties." *Id.*, Ex. C, Cease and Desist Notice, ECF No. 1-3. Along the same lines, the April 30 Order expressly warns that "[t]his Executive Order may be enforced by State and local law enforcement pursuant to, *inter alia*, Section 7, Section 15, Section 18, and Section 19 of the Illinois Emergency Management Agency Act, 20 ILCS 3305." April 30 Order § 2, ¶ 17.

For their part, Plaintiffs state that, for the past five years, they have held church services with eighty people in attendance, and they intend to hold a service on Sunday, May 3, 2020. *Id.* ¶¶ 11, 27. Plaintiffs further assert that, based on the cease-and-desist notice, they fear arrest, prosecution, fines, and jail time if the full congregation attends the service. *Id.* ¶ 50. And, although Snyders states that he does not intend to enforce the April 30 Order against Plaintiffs if they go through with their plans to gather on May 3, 2020, he does not provide any assurance that the Order will not be enforced thereafter. Therefore, based on the record, the Court finds that Plaintiffs face "a credible threat of prosecution," *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301, and the allegations in the complaint are sufficient to state an injury-in-fact.

C. Ripeness

***6** **[15]** In the alternative, the County and Village Defendants argue that Plaintiffs' claims do not satisfy the Article III requirement of ripeness. But when a court has determined that a plaintiff has sufficiently alleged an Article III injury, a request to decline adjudication of a claim based on prudential ripeness grounds is in "some tension" with the Supreme Court's "reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (internal quotation marks omitted); *see Susan B. Anthony List*, 573 U.S. at 167, 134 S.Ct. 2334.

[16] Be that as it may, ripeness is satisfied here. To determine ripeness, courts examine (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cty.*, 325 F.3d 879, 882 (7th Cir. 2003). First, Plaintiffs' claims raise purely legal questions that are typically fit for judicial review, and further factual development will provide little clarification as to these issues. *See Susan B. Anthony List*, 573 U.S. at 167, 134 S.Ct. 2334; *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011); *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cty.*, 325 F.3d 879, 882 (7th Cir. 2003).

Second, denying judicial review imposes a not-insignificant hardship on Plaintiffs by forcing them to choose between refraining from congregating at their church and engaging in assembly while risking civil fines and criminal penalties. Accordingly, the County and Village Defendants' argument that the Plaintiffs claims are unripe are unavailing. With that, the Court turns to the merits of Plaintiffs' motion.

IV. Likelihood of Success on the Merits

Plaintiffs challenge the April 30 Order on two grounds. First, they maintain that it runs afoul of the First Amendment's Free Exercise Clause. Second, they insist that the Order violates three state statutes—the Illinois Religious Freedom Restoration Act, the Emergency Management Agency Act, and the Illinois Department of Health Act.

A. Free Exercise Claim [3]

1. Government Authority During a Public Health Crisis

[17] The Constitution does not compel courts to turn a blind eye to the realities of the COVID-19 crisis. For more than a century, the Supreme Court has recognized that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27, 25 S.Ct. 358, 49 L.Ed. 643 (1905); *see Prince v. Massachusetts*, 321 U.S. 158, 166–67, 64 S.Ct. 438, 88 L.Ed. 645 (1944) ("The right to practice religion freely does not include liberty to expose the community...to communicable disease."). During an epidemic, the *Jacobson* court explained, the traditional tiers of constitutional scrutiny do not apply. *Id.*; *see In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). Under those narrow circumstances, courts only overturn rules that lack a "real or substantial relation to [public health]" or that amount to "plain, palpable invasion[s] of rights." *Jacobson*, 197 U.S. at 31, 25 S.Ct. 358. Over the last few months, courts have repeatedly applied *Jacobson*'s teachings to uphold stay-at-home orders meant to check the spread of COVID-19. *See, e.g.*, *Abbott*, 954 F.3d at 783–85; *Gish v. Newsom*, No. EDCV20755JGBKKX, 2020 WL 1979970, at *5 (C.D. Cal. Apr. 23, 2020).

***7** **[18]** **[19]** This is not to say that the government may trample on constitutional rights during a pandemic. As other judges have emphasized, *Jacobson* preserves the authority of the judiciary to strike down laws that use public health emergencies as a pretext for infringing individual liberties. *See, e.g.*, *Abbott*, 954 F.3d at 800 (Dennis, J., dissenting) (citing *Jacobson*, 197 U.S. at 28–29, 25 S.Ct. 358)). Furthermore, *Jacobson*'s reach ends when the epidemic ceases; after that point, government restrictions on constitutional rights must meet traditionally recognized tests. And so, courts must remain vigilant, mindful that government claims of emergency have served in the past as excuses to curtail constitutional freedoms. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), *abrogated by Trump v. Hawaii*, —— U.S. ——, 138 S. Ct. 2392, 2423, 201 L.Ed.2d 775 (2018).

[20] Today, COVID-19 threatens the lives of all Americans. The disease spreads easily, causes severe and sometimes fatal symptoms, and resists most medical interventions. April 30 Order at 1–2. When Governor Pritzker issued the amended stay-at-home rules, thousands of Illinoisans had perished due to the disease. *Id.* Based on the plethora of evidence here, the Court finds that COVID-19 qualifies as the kind of public health crisis that the Supreme Court contemplated in *Jacobson* and that the coronavirus continues to threaten the residents of Illinois.

While Plaintiffs acknowledge the seriousness of the pathogen, they insist that the stay-at-home orders have successfully flattened the curve of active COVID-19 cases, eliminating the need for continued precautions. But, to borrow an analogy from Justice Ginsburg, that "is like throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby Cty., Ala. v. Holder*, 570 U.S. 570 U.S. 529, 590, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (Ginsburg, J., dissenting). Without the stay-at-home restrictions, the Governor estimates that ten to twenty times as many Illinoisans would have died and that the state's hospitals would be overrun. April 30 Order at 2. Plaintiffs have failed to marshal any credible evidence that suggests otherwise.

As a fallback position, Plaintiffs portray the April 30 Order as "arbitrary" and "unreasonable." *Jacobson*, 197 U.S. at 28, 25 S.Ct. 358. Specifically, they claim that the Order subjects religious organizations to more onerous restrictions than their secular counterparts. But, as we shall shortly see, the Order adopts neutral principles that satisfy *Jacobson*'s reasonableness standard.

In sum, because the current crisis implicates *Jacobson*, and because the Order undoubtedly advances the government's interest in protecting Illinoisans from the pandemic, the Court finds that Plaintiffs have a less than negligible chance of prevailing on their constitutional claim.

2. Traditional First Amendment Analysis

[21] **[22]** **[23]** **[24]** Even if *Jacobson* were not to apply here, the Order nevertheless would likely withstand scrutiny under the First Amendment's Free Exercise Clause. That provision prevents the government from "plac[ing] a substantial burden on the observation of a central religious belief or practice" unless it demonstrates a "compelling

government interest that justifies the burden." *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 631 (7th Cir. 2007). As the Supreme Court has elaborated, however, "neutral, generally applicable laws may be applied to religious practice even when not supported by a compelling government interest." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S. Ct. 2751, 2761, 189 L.Ed.2d 675 (2014) (citing *Emp't Div. v. Smith*, 494 U.S. 872, 879–80, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)). In other words, a "neutral law of general applicability is constitutional if it is supported by a rational basis." *Ill. Bible Colleges Ass'n. v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017).

***8** **[25]** **[26]** For the rational basis test to apply, the challenged law must be both neutral and generally applicable. The neutrality element asks whether "the object of the law is to infringe upon or restrict practices because of their religious motivation." *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 743 (7th Cir. 2015) (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)). The general applicability element "forbids the government from impos[ing] burdens only on conduct motivated by religious belief in a selective manner." *Listecki*, 780 F.3d at 743. As these definitions suggest, the neutrality and general applicability requirements usually rise or fall together.

[27] **[28]** **[29]** In evaluating these two elements, courts draw on principles developed in the context of the Fourteenth Amendment's Equal Protection Clause. *See*, *e.g.*, *Lukumi*, 508 U.S. at 540, 113 S.Ct. 2217 (instructing lower courts to "find guidance in our equal protection cases"). At its core, equal protection analysis hinges on whether "the decisionmaker ...selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon a particular group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). In keeping with that framework, courts apply the rational basis test to Free Exercise Clause claims, unless the challenged rule "fail[s] to prohibit nonreligious conduct that endangers the [government's] interests in a similar or greater degree" than religious conduct. *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217.

Lukumi is instructive. There, the Supreme Court reviewed municipal ordinances that prescribed penalties for "any individual or group that kills, slaughters or sacrifices animals for any type of ritual." *Lukumi*, 508 U.S. at 527, 113 S.Ct. 2217. In holding that "the object or purpose of [the challenged] law is the suppression of religion or religious conduct," the Court looked to three main factors. *Id.* at 533, 113 S.Ct. 2217. First, it determined that the drafters of the ordinances displayed a "pattern" of animosity towards "Santeria worshippers," who practiced animal sacrifice. *Id.* at 542, 113 S.Ct. 2217. Second, it recognized that "the ordinances [we]re drafted with care to forbid few killings but those occasioned by religious sacrifice." *Id.* at 543, 113 S.Ct. 2217. Third, it concluded that the "ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense." *Id.* at 536, 113 S.Ct. 2217.

This case is different. For one, nothing in the record suggests that Governor Pritzker has a history of animus towards religion or religious people, and Plaintiffs do not argue otherwise. For another, the Order proscribes secular and religious conduct alike. *See*, *e.g.*, April 30 Order § 2, ¶ 3 (forbidding "any gathering of more than ten people"). Indeed, its limitations extend to most places where people gather, from museums to theaters to bowling alleys. *Id.* And finally, Plaintiffs have not established that the Order "suppress[es] much more religious conduct than is necessary" to slow the spread of COVID-19. *Lukumi*, 508 U.S. at 536, 113 S.Ct. 2217. To the contrary, the April 30 Order expressly preserves various avenues for religious expression, including gatherings of up to ten people and drive-in services. April 30 Order § 2, ¶ 5(f). For these reasons, the Court concludes that the Order does not "impose special disabilities on the basis of...religious status." *Smith*, 494 U.S. at 877, 110 S.Ct. 1595.

Neither of Plaintiffs' counterarguments is persuasive. First, they claim that the Order "targets... church services because it makes them the only Essential Activity effectively subject to the 10-person maximum requirement." But that argument rests on a misreading of the Order. In fact, the Order broadly prohibits "any gathering of more than ten people [other than members of the same household]... unless exempted by this Executive Order." April 30 Order § 2, ¶ 3. And nothing in the Section that enumerates "Essential Activities" appears to exempt secular activities from that generally-applicable constraint. *Id.* § 2, ¶ 5.

***9** It is true that the provision recognizing religious activities as essential reiterates the ten-person restriction. *Id.* ¶ 5(f). But, read as a whole, the Order appears to apply that limit to the other Essential Activities as well. For example, Section 2, ¶ 5 of the Order permits "individuals" to leave their homes in order to visit their doctors, pick up groceries, and travel

to work at "Essential Businesses" (which must abide by their own additional restrictions). *Id.* ¶ 5(a)–(d). It also lists "hiking," "running," and "[f]ishing" as essential activities. *Id.* ¶ 5(c). In practice, those are pursuits that individuals normally perform alone or in small groups. By contrast, people of faith tend to gather for worship in much greater numbers, as Plaintiffs themselves acknowledge. Compl. ¶ 27. Understood in that context, it makes sense for Order to explicitly remind worshippers that they must abide by the prohibition on large groups.

[30] Second, Plaintiffs complain that "grocery stores," "food and beverage manufacturing plants," and other "Essential Businesses" need not comply with the ten-person limitation. [4] April 30 Order § 2, ¶ 12(a), (b). If Walmart and Menards are allowed to host more than ten visitors, Plaintiffs' theory goes, then so should the Beloved Church. But the question is not whether any secular organization faces fewer restrictions than any religious organization. Rather, the question is whether secular conduct "that endangers the [government]'s interests in a similar or greater degree" receives favorable treatment. *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217. Only then does different treatment signal that the government's "object" is to target religious practices. *Id.* at 533, 113 S.Ct. 2217.

Contrary to Plaintiffs' suggestion, retailers and food manufacturers are not comparable to religious organizations. The avowed purpose of the Order is to slow the spread of COVID-19. As other courts have recognized, holding in-person religious services creates a higher risk of contagion than operating grocery stores or staffing manufacturing plants. *See*, *e.g.*, *Gish*, 2020 WL 1979970, at *6. The key distinction turns on the nature of each activity. When people buy groceries, for example, they typically "enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete." *Id.* The purpose of shopping is not to gather with others or engage them in conversation and fellowship, but to purchase necessary items and then leave as soon as possible. [5]

By comparison, religious services involve sustained interactions between many people. During Sunday services, for example, Cassell encourages members of his congregation to "converse" and "build fellowship and morale." Compl. ¶ 29. Indeed, Plaintiffs view "informal conversations and fellowship" as "essential parts of a functioning Christian congregation." *Id.* Given that religious gatherings seek to promote conversation and fellowship, they "endanger" the government's interest in fighting COVID-19 to a "greater degree" than the secular businesses Plaintiffs identify. *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217.

This distinction finds support in the record. There are many examples where religious services have accelerated the pathogen's spread. For instance, of eighty congregants who attended a Life Church service in Illinois on March 15, ten contracted the disease, and at least one died. *See* Anna Kim, "Glenview church hit by COVID-19 is now streaming service online, as pastor remembers usher who died of disease," *Chicago Tribune* (Mar. 31, 2020). Along the same lines, South Korea tracked more than 5,000 individual cases to a single church. *See* Youjin Shin, Bonnie Berkowitz, Min Joo-Kim, "How a South Korean church helped fuel the spread of the coronarvirus," *Washington Post* (Mar. 25, 2020). And, near Seattle, at least forty-five individuals who attended a church choir gathering were diagnosed with COVID-19. *See* Richard Read, "A choir decided to go ahead with rehearsal. Now dozens have COVID-19 and two are dead," *Los Angeles Times* (Mar. 29, 2020). In comparison, Plaintiffs have failed to identify a grocery store or liquor store that has acted as a vector for the virus.

***10** A more apt analogy is between places of worship and schools. Like their religious counterparts, educational institutions play an essential part in supporting and promoting individuals' wellbeing. At the same time, education and worship are both "activities where people sit together in an enclosed space to share a communal experience," exacerbating the risk of contracting the coronavirus. *Gish*, 2020 WL 1979970, at *6. And here, the Order imposes the same restrictions on schools as it does on churches, synagogues, mosques, and other places of worship.

What is more, the interior of Beloved Church (like many churches of its kind) resembles that of a small movie theater. And, like moviegoers, during a service, congregants generally focus on the pastor or another speaker, who is typically in the front of the room. *See* Cassell Decl. ¶ 15 (photos of church interior). But, here again, movie theaters and concert halls (unlike churches) are completely barred from hosting any gatherings. April 30 Order § 2, ¶ 3. This reinforces the conclusion that the Order is not meant to single out religious people or communities of faith for adverse treatment.

This is not the first time that a governor's stay-at-home order has been challenged by a religious group, and the majority of courts in those cases have determined that the orders reflect neutral, generally-applicable principles. *See*, *e.g.*, *Gish*, 2020

WL 1979970, at *5–6 ("Because the Orders treat in-person religious gatherings the same as they treat secular in-person communal activities, they are generally applicable."); *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB/SCY, 2020 WL 1905586, at *35 (D.N.M. Apr. 17, 2020) ("[The government] may distinguish between certain classes of activity, grouping religious gatherings in with a host of secular conduct, to achieve ... a balance between maintaining community health needs and protecting public health.").

For their part, Plaintiffs make much of *First Baptist v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020). In *First Baptist*, the stay-at-home orders in question prohibited "mass gatherings" at a number of establishments, including auditoriums, theaters, and stadiums, as well as "churches and other religious facilities." *Id.* at *2. The orders also exempted places like airports, "retail establishments where large numbers of people are present but are generally not within arm's length of one another for more than 10 minutes," and food establishments provided that patrons practice social distancing. *Id.*

Even though the orders covered a wide array of secular places as well as religious places, the court determined that the orders amounted to "a wholesale prohibition against assembling for religious services anywhere in the state by more than ten congregants." *Id.* at *4. "[B]oth orders," the court emphasized, "expressly state" that "their prohibitions against mass gatherings apply to churches or other religious facilities." *Id.* at *7. For that reason, *First Baptist* held that "these executive orders expressly target religious gatherings on a broad scale and are, therefore, not facially neutral." *Id.*

[31] **[32]** The approach in *First Baptist* is difficult to square with *Lukumi*. Taken alone, the fact that a government restriction refers to religious activity (while at the same time listing others) cannot be sufficient to show that its "object or purpose" is to target religious practices for harsher treatment. *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217; *see Maryville Baptist Church, Inc. et al. v. Andy Beshear*, No. 20-5427. —— F.3d ——, 2020 WL 2111316, at *3 (6th Cir. May 2, 2020) (slip opinion) (mentioning religious gatherings "by name" does not establish "that the Governor singled out faith groups"). Instead, *Lukumi* embraced a functional assessment of how the challenged law operates in practice. In engaging in that analysis, courts must consider how a particular stay-at-home order treats secular and religious activities that are substantially comparable to one another. *First Baptist* overlooked that step. [6]

***11** Nor does *Maryville Baptist*, a recently released Sixth Circuit opinion, support Plaintiffs' position. That case involved a pair of stay-at-home orders that proscribed both "drive-in and in-person worship services," while permitting their secular equivalents. *Maryville Baptist*, 2020 WL 2111316,. at 1. Because Kentucky's governor "offered no good reason" to treat drive-in religious services and drive-in businesses differently, the court halted enforcement of the prohibition on drive-in services. *Id.* at *4. At the same time, because of gaps in the factual record, the Court of Appeals allowed the ban on in-person services to continue pending further proceedings in the district court. *Id.*

Applied here, the Sixth Circuit's reasoning counsels in favor of upholding Governor Pritzker's Order. Unlike in *Maryville Baptist*, the April 30 Order confirms that religious organizations in Illinois may hold drive-in services. *See* Supp. Not. at 1–2, ECF No. 32. To the extent that the Sixth Circuit expressed concerns about restrictions on in-person services, those doubts stemmed from the fact that the Kentucky Governor's orders prohibit in-person religious gatherings, regardless of how many worshippers attend. *Maryville Baptist*, slip. op. at 9. "[I]f the problem is numbers, and risks that grow with greater numbers," the court reasoned, "there is a straightforward remedy: limit the number of people who can attend a service at one time." *Id.* That is exactly what Governor Pritzker's latest order does.

[33] Ultimately, then, the Court concludes that the April Order qualifies as a neutral, generally applicable law. It therefore withstands First Amendment scrutiny so long as "it is supported by a rational basis." *Anderson*, 870 F.3d at 639. Given the importance of slowing the spread of COVID-19 in Illinois, the Order satisfies that level of scrutiny, and Plaintiffs do not seriously argue otherwise. As a result, the Court finds that Plaintiffs' Free Exercise claim is unlikely to succeed on the merits.

B. State Law Claims

1. Sovereign Immunity

[34] **[35]** **[36]** The Eleventh Amendment protects Defendants from Plaintiffs' RIFRA, EMAA, and DHA claims. That provision dictates that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const.

amend. XI. Although not explicit in the text, the Eleventh Amendment also "guarantees that an unconsenting State is immune from suits brought in federal courts by her own citizens." *Council 31 of Am. Fed'n of State, Cty. & Mun. Employees, AFL-CIO v. Quinn*, 680 F.3d 875, 881–82 (7th Cir. 2012) (citations and quotation marks omitted). "[I]f properly raised, the amendment bars actions in federal court against ... state officials acting in their official capacities." *Id.* (citation omitted).

[37] Because Defendants are state officials, who have been sued in their official capacities and have raised sovereign immunity, the Eleventh Amendment shields them from Plaintiffs' state law claims. To be sure, "individual state officials may be sued personally" for federal constitutional violations committed "in their official capacities." *Goodman v. Carter*, No. 2000 C 948, 2001 WL 755137, at *9 (N.D. Ill. July, 2, 2001) (citing *Ex Parte Young*, 209 U.S. 123, 160, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). But that principle does not extend to "claim[s] that officials violated state law in carrying out their official responsibilities." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

For example, in *Carter*, a court in this circuit considered a suit that raised claims under the First Amendment's Free Exercise Clause, as well as Illinois's RFRA statute. 2001 WL 755137, at *1 . "[Plaintiff]'s ILRFRA claim," the *Carter* court observed, "asks this court to instruct state officials on how to conform their conduct to state law." *Id.* at *10. Explaining that "such a state-law claim may not be entertained under this court's supplemental jurisdiction simply because a proper § 1983 claim is also presented," the court applied the doctrine of sovereign immunity and dismissed the RFRA claim. *Id.* (citing *Pennhurst*, 465 U.S. at 121, 104 S.Ct. 900). For the same reason, the Eleventh Amendment almost certainly forecloses Plaintiffs' state law claims here.

2. Merits of the State Law Claims

***12** Sovereign immunity aside, the Court finds that Plaintiffs' RFRA, EMAA, and PHDA claims are unlikely to succeed on the merits. The Court addresses each statutory claim in turn.

a. RFRA

[38] For starters, Plaintiffs maintain that the Order violates Illinois's RFRA statute. Under that statute, the "government may not substantially burden a person's exercise of religion ...unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling government interest." 775 Ill. Comp. Stat 35/15.

At this stage, the Court assumes (without deciding) that the Order's prohibition on in-person religious gatherings of more than ten people qualifies as a "substantial burden" under the RFRA. *Id.* § 35/15. That means that Defendants must show that the ten-person limitation is the least restrictive way to promote a compelling interest.

Turning first to the government's interest in fighting COVID-19, Plaintiffs reiterate their claim that "the coronavirus epidemic 'curve' has been substantially 'flattened' statewide." Compl. ¶ 69. Because previous stay-at-home orders have partially succeeded in limiting the pathogen's spread, Plaintiffs posit that the government no longer has a compelling interest in preventing large gatherings. Yet the virus continues to proliferate, Illinoisans continue to die, and restrictions remain vital to ensuring that hospitals are not overwhelmed. April 30 Order at 1–2. In these exceptional circumstances, controlling the spread of COVID-19 counts as a compelling interest. *See United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (recognizing that the government's interest in "the safety...of [its] citizens" is "compelling").

[39] The remaining question is whether the ten-person limit is the "least restrictive means" of pursuing that goal. 775 Ill. Comp. Stat 35/15. This element turns on "whether [the government] could have achieved, to the same degree, its compelling interest" without interfering with religious activity. *Affordable Recovery Hous. v. City. of Blue Island*, No. 12 C 4241, 2016 WL 5171765, at *8 (N.D. Ill. Sept. 21, 2016). But Plaintiffs have failed to spotlight, and the Court has not found, any less restrictive rules that would achieve the same result as the prohibition on large gatherings.

While permitting the Beloved Church to hold in-person services with its full congregation might be less disruptive, it would not advance the government's interest in curtailing COVID-19 "to the same degree" as the ten-person limit. *Id.* The Court recognizes that Cassell has promised to equip worshippers with masks, place hand sanitizer at entryways,

and arrange seating so that families can remain six feet apart and follow the social distancing requirements set forth in the Order. Cassell Decl. ¶¶ 7–11. But it is not entirely clear, given the seating configuration at Beloved Church, whether social distancing would be possible.

According to Cassell, ten to fifteen families attend a typical service, and many are "large families, some with up to 12 members." [7] *Id.* ¶ 12. Yet the photographs of the church's interior provided by Cassell depict a total of twenty rows, many with fewer than seven seats. *Id.* ¶ 15. To remain six feet apart, it appears that each family unit must sit at least one row apart from another. It is difficult to see how the church could accommodate ten to fifteen large families in this manner. [8] But, even assuming that it is possible, an eighty-person service poses a greater risk to public safety than a gathering of ten or fewer or a drive-in service.

***13** Indeed, Defendants highlight the example of a church choir practice where the members actually used hand sanitizer and practiced social distancing. *See* Richard Read, "A choir decided to go ahead with rehearsal. Now dozens have COVID-19 and two are dead," *Los Angeles Times* (Mar. 29, 2020). Despite those efforts, forty-five choir members ended up contracting COVID-19 and two died. *Id.* As that example illustrates, large gatherings magnify the risk of contagion even when participants practice preventative measures.

It is also important to recognize the religious exercises that the April 30 Order does allow. In addition to drive-in services and smaller worship services, the Order permits Cassell and other staff members to visit and minister to parishoners in their homes. It allows small group meetings, bible study meetings, and prayer gatherings at the church or in private homes, subject to the ten-person limit. It empowers Cassell and members of his congregation to celebrate communion in small groups. And it authorizes individual congregants to go to the church to obtain spiritual help and guidance from their pastor and/or other church staff members. *See* Compl. ¶ 33 (noting that "prayer and spiritual counseling visits and meetings are central functions of [Cassell's] leadership").

Considering the seriousness of the continuing COVID-19 pandemic, the threat of additional infections in the context of large gatherings, and the avenues for religious worship, prayer, celebration, and fellowship that the April 30 Order does allow, the Court finds that no equally effective but less restrictive alternatives are available under these circumstances, and Plaintiffs' RFRA claim is thus unlikely to succeed on the merits.

b. Emergency Management Agency Act

[40] Plaintiffs also contend that Governor Pritzker exceeded his authority under the EMAA. That Act equips the Governor with an array of emergency powers, including the authority "[t]o control... the movement of persons within the area, and the occupancy of premises therein." 20 Ill. Comp. Stat. 3305/7(8). To make use of those powers, the Governor must first issue a proclamation "declar[ing] that a disaster exists." *Id.* § 3305/7. After that, he may invoke the Act's emergency powers "for a period not to exceed 30 days." *Id.*

The question here is whether the Act permits Governor Pritzker to declare more than one emergency related to the spread of COVID-19. [9] In Plaintiffs' view, the ongoing pandemic only justifies a single 30-day disaster proclamation. In response, Defendants maintain that, so long as the Governor makes new findings of fact to determine that a state of emergency still exists, the Act empowers him to declare successive disasters, even if they stem from the same underlying crisis.

Based on the text and structure of the Act, Defendants have the better argument. By its terms, the Act defines a disaster as "an occurrence or threat of widespread or severe damage, injury or loss of life...resulting from ... [an] epidemic." 20 Ill. Comp. Stat. 3305/4. The data show that COVID-19 has infected more and more residents and continues to do so; therefore, a "threat of widespread or severe damage, injury or loss of life" continues to exist. *Id.*; *see* April 30 Order at 1–2 (discussing the continued threat imposed by Covid-19).

***14** This statutory construction makes sense. Some types of disasters, such as a storm or earthquake, run their course in a few days or weeks. Other disasters may cause havoc for months or even years. For example, the Act designates "air contamination, blight, extended periods of inclement weather, [and] drought" as disasters. 20 Ill. Comp. Stat. 3305/4. Those events pose a threat that may persist for long periods of time and certainly beyond a single 30-day period. It is difficult to see why the legislature would recognize these long-running problems as disasters, yet divest the Governor of the tools he needs to address them.

This is not to say that the Governor's authority to exercise his emergency powers is without restraint. To support each successive emergency declaration, the Governor must identify an "occurrence or threat of widespread or severe damage, injury or loss of life." 20 Ill. Comp. Stat. 3305/4. Once an emergency has abated, the facts on the ground will no longer justify such findings, and the Governor's emergency powers will cease. And, should this or any future Governor abuse his or her authority by issuing emergency declarations after a disaster subsides, affected parties will be able to challenge the sufficiency of those declarations in court. But in this case, Plaintiffs do not question the Governor's factual findings, only his authority to issue successive emergency proclamations based on the same, ongoing disaster. For these reasons, the Court concludes that this claim lacks even a negligible chance of success.

c. Department of Health Act

[41] Lastly, Plaintiffs invoke Illinois's Department of Health Act, 20 Ill. Comp. Stat. 2305/2(a). Under that Act, the "State Department of Public Health....has supreme authority in matters of quarantine and isolation." *Id.* § 2305/2(a). Before exercising its authority to "quarantine," "isolate," and make places "off limits the public," however, the Department must comply with certain procedural requirements. *Id.* § 2305/2(c). As Plaintiffs see it, the Act vests the Department with the exclusive authority to quarantine and isolate Illinoisans, making Governor Pritzker's orders *ultra vires*.

The problem for Plaintiffs is that the challenged Order does not impose restrictions that fall within the meaning of the Act. By definition, a "quarantine" refers to "a state of enforced isolation." *Quarantine*, Merriam-Webster, https://www.merriam-webster.com/dictionary/quarantine; *see also*, *e.g.*, *In re Washington*, 304 Wis.2d 98, 735 N.W.2d 111, 121–22 (2007) (explaining that to "quarantine" is "to isolate"); *Com. v. Rushing*, 627 Pa. 59, 99 A.3d 416, 423 (2014) (indicating that to "place in quarantine" equates to requiring an individual to be "*set apart*" from other members of society (emphasis added)); *Ex Parte Culver*, 187 Cal. 437, 202 P. 661, 664 (1921) (" 'Quarantine' as a verb means to keep persons, when suspected of having contracted or been exposed to an [infectious] disease, out of a community, or to confine them to a given place therein, and *to prevent intercourse between them and the people generally of such community*.' " (emphasis added) (citation omitted)).

As discussed above, the Order empowers Cassell to, among other things, worship and pray with small groups of his parishioners, visit them in their homes (while observing social distancing), and lead drive-in sermons. *See Daniel v. Putnam Cty.*, 113 Ga. 570, 38 S.E. 980, 981 (1901) (noting that even stringent means of preventing disease dissemination are not "quarantine" unless they preclude engagement between the individual and members of their community). So, while the Order curtails the ability of individuals to gather in large groups, it falls far short of a "quarantine" as that term appears in the Act. The Court therefore concludes that this claim has almost no likelihood of success on the merits.

V. Equitable Considerations

***15** **[42]** The remaining factors confirm that Plaintiffs are not entitled to a preliminary injunction. Under the Seventh Circuit's "sliding scale approach," the less likely a claimant is to win, the more that the "balance of harms [must] weigh in his favor." *Valencia v. City of Springfield, Ill.*, 883 F.3d 959, 966 (7th Cir. 2018). Given that Plaintiffs' claims have little likelihood of prevailing on the merits, they cannot obtain a preliminary injunction without showing that the scales tip heavily in their direction.

[43] But, if anything, the balance of hardships tilts markedly the other way. Preventing enforcement of the latest stay-at-home order would pose serious risks to public health. The record reflects that COVID-19 is a virulent and deadly disease that has killed thousands of Americans and may be poised to devastate the lives of thousands more. April 30 Order at 1–2. And again, the sad reality is that places where people congregate, like churches, often act as vectors for the disease. *See* Pritzker Resp. at 12–13 (collecting examples). Enjoining the Order would not only risk the lives of the Beloved Church's members, it also would increase the risk of infections among their families, friends, co-workers, neighbors, and surrounding communities.

While Plaintiffs' interest in holding large, communal in-person worship services is undoubtedly important, it does not outweigh the government's interest in protecting the residents of Illinois from a pandemic. Certainly, the restrictions imposed by the Order curtail the ability of the congregants of Beloved Church to worship in whatever way they would like. But this is not a case where the government has "ban[ned]" worshippers from practicing their religion altogether, as Plaintiffs insist. PI Mot. at 8, ECF No. 7. And again, the

Order empowers Cassell and the other members of his church to worship, sing, break bread, and pray together in drive-in services, online meetings, and in-person in groups of ten or fewer. April 30 Order § 2, ¶ 5(f). Such allowances go a long way towards mitigating the harms Plaintiffs identify.

[44] Taking into account COVID-19's virulence and lethality, together with the State's efforts to protect avenues for religious activity, the Court finds that equitable considerations, including the promotion of the public interest, weigh heavily against the entry of the temporary restraining order and preliminary injunction that Plaintiffs seek. Coupled with the relative weakness of Plaintiffs' legal arguments, this is fatal to their motion.

VI. Conclusion

These are unsettling times. Illinois and the rest of world are engaged in a massive effort to stave off the COVID-19 pandemic and the human suffering and death that it brings. At the same time, the stay-at-home orders issued by government officials as part of these efforts have resulted in their own form of loss and suffering—financial, emotional, psychological, and spiritual. The broader societal and political debate about how to balance these interests is beyond the purview of this Court. For present purposes, it suffices to state that Governor Pritzker's April 30 Order satisfies minimal constitutional requirements as they pertain to religious organizations, like the Beloved Church. Accordingly, Plaintiffs' motion for a temporary restraining order and a preliminary injunction is denied.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 2112374

Footnotes

1 "[T]he district judge, in considering a motion for preliminary injunction...must make factual determinations on the basis of a fair interpretation of the evidence before the court." *Darryl H. v. Coler*, 801 F.2d 893, 898 (7th Cir. 1986). The facts summarized here derive from Plaintiffs' complaint, the parties' briefs supporting and opposing the motion, and the accompanying exhibits; none are materially disputed.

2 For example, in recent weeks, Cassell has presented a series of sermons titled "Corona-Lie," where he has expressed skepticism regarding the extent of the COVID-19 crisis, as well as the government's motives in responding to it. *See*, *e.g.*, Beloved Church Media, *Sunday March 15, 2020: Corona-Lie (Pastor Steve Cassell)* at 38:35, YOUTUBE, https://www.youtube.com/watch?v=QJix0dCxhGQ&t=1699s ("Why don't we shut the country down for the 2500 people that have died from [Corona Beer]? Because it doesn't fit the narrative. I don't know if you realize this, but you are being absolutely manipulated and controlled by a system that wants you to believe what it tells you."). *See* *Goplin v. WeConnect, Inc.*, 893 F.3d 488, 491 (7th Cir. 2018) (approving the district court taking judicial notice of a party's website in deciding a motion where the counterparty cited the website in its response brief).

3 Plaintiffs' motion focuses on their claim under the Free Exercise Clause. In the reply brief, however, they also argue that the Order violates the First Amendment's Free Speech and Freedom of Assembly provisions. But, because Plaintiffs failed to include these arguments in their opening brief and offer them only in reply, the arguments are waived as a matter of fairness. *See* *Wonsey v. City of Chi.*, 940 F.3d 394, 399 (7th Cir. 2019).

4 At times, Plaintiffs also argue that the government does not enforce social distancing requirements as applied to Essential Businesses. *See* Pls.' Reply at 8. In support, Cassell states that he has observed social distancing violations while shopping at Menards and Walmart. Cassell Decl. ¶ 16. But limited, anecdotal instances of noncompliance contribute little to the inference that the "object or purpose" of the challenged order is to interfere with religious practices. *Lukumi*, 508 U.S. at 527, 113 S.Ct. 2217.

5 Indeed, among other things, the Order requires retail stores that are designated as Essential Businesses to set up aisles to be one-way "to maximize spacing between customers and identify the one-way aisles with conspicuous signage and/or floor markings." April 30 Order § 2.

6 *On Fire Christian Center, Inc. v. Fischer*, another district court case Plaintiffs cite, does not support their position either. No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020). In *Fischer*, the City of Louisville proscribed "drive-in church services, while not prohibiting a multitude of other non-religious drive-ins and drive-throughs." *Id.* at *6. That is not the case here.

7 In fact, as Plaintiffs put it, "[t]he Church has numerous families that have taken seriously the biblical admonition to 'be fruitful and multiply.' " Pl. Reply at 3.

8 Cassell also states that "[i]t is not feasible to conduct drive-in services on TheBeloved Church's property" because they "do not have a parking lot that can accommodate such services." *Id.* ¶ 5. But the church appears to have a large parking lot that can accommodate a number of cars to conduct such services. *See* https://www.google.com/maps/place/216+W+Mason+St,+Lena,+IL+61048/@42.3784957,-89.827654,3a,75y,99.24h,66.75t/data=!3m6!1e1!3m4!1s- EqLIBLYW6X0O96wk9B0nA!2e0!7i13312!8i6656!4m5!3m4!1s0x8808103eadade1e7:0x6807f35e1247a6cb!8m2!3d42.378454!4d-89.8273456; *see also* *Ke Chiang Dai v. Holder*, 455 Fed. Appx. 25, 26 n.1 (2012) (taking judicial notice of Google Maps).

9 Plaintiffs also cast Governor Pritzker's previous orders as improper continuations of the initial emergency declaration. Given that the Governor has issued a new disaster declaration, that argument is moot.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLY BEEMER, and
ROBERT MUISE,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, BRIAN L. MACKIE, in his official capacity as Washtenaw County Prosecuting Attorney,

Defendants.

No. 1:20-cv-00323

HON. PAUL L. MALONEY

MAG. PHILLIP J. GREEN

EXHIBIT L

2020 WL 2850291
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

Janice ALTMAN, et al., Plaintiffs,
v.
COUNTY OF SANTA CLARA, et al., Defendants.

Case No. 20-cv-02180-JST
|
Signed 06/02/2020

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ORDER DENYING PRELIMINARY INJUNCTION

Re: ECF No. 20

JON S. TIGAR, United States District Judge

***1** We are in the midst of the COVID-19 pandemic. Over 1.8 million people in the United States have been infected, and more than 20,000 new cases were reported yesterday alone. In order to limit the spread of this deadly disease, four Bay Area counties – among many others throughout the state – issued shelter-in-place orders limiting their residents' ability to travel, eliminating gatherings, and closing businesses within their borders. The orders made exceptions for certain "essential businesses" to ensure their residents' continued health, safety, and sanitation, but did not exempt firearms retailers or shooting ranges. Plaintiff firearms retailers, Second Amendment-related nonprofits, and individuals seeking to exercise their right to keep and bear arms now seek a preliminary injunction requiring the counties

to exempt firearms retailers and shooting ranges from the shelter-in-place orders. ECF No. 20. Since the lawsuit was filed, three of the counties at issue now permit in-store retail, and the case is now moot as to those counties. Only the Alameda County order remains at issue.

Having carefully considered the extensive briefing submitted by the parties and the arguments presented by counsel, the Court concludes that Alameda County's shelter-in-place order passes constitutional muster. The order has a real and substantial relation to the important goal of protecting public health; it reasonably fits that goal; it is facially neutral and does not target firearms retailers or shooting ranges in particular; and it is limited in time. Thus, the burden the order places on the exercise of the Second Amendment right is constitutionally reasonable.

The Court will deny the motion.

I. BACKGROUND

Our state, our country, and the entire world are in the middle of an unparalleled public health emergency. The novel coronavirus and the disease it causes, COVID-19, "first appeared in December 2019 and has since spread to most countries in the world, including the United States." ECF No. 46-6 ¶ 6. In the short time since, the virus "has thrust humankind into an unprecedented global public health crisis." *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482, at *1 (S.D. Fla. Apr. 30, 2020), *order clarified*, No. 20-21553-CIV, 2020 WL 2203576 (S.D. Fla. May 2, 2020). "Experts consider this outbreak the worst public health epidemic since the influenza outbreak of 1918." ECF No. 46-6 ¶ 6. The virus "is extremely easy to transmit, can be transmitted by infected people who show no symptoms, has no cure, and the population has not developed herd immunity." ECF No. 46-7 ¶ 5. COVID-19 "is fatal to up to eighty percent of patients who go into intensive care units in hospitals." *Id.*

***2** As of the date of this order, COVID-19 has sickened at least 6,325,303 people worldwide and 1,820,523 in the United States, and has killed 377,460 people globally and 105,644 nationally. Center for Systems Science and Engineering at Johns Hopkins Univ., *COVID-19 Dashboard* (last visited June 2, 2020), https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6 (last visited June 2, 2020). In California alone, 115,908 have been infected and 4,235 have died. L.A. Times Staff, *Tracking Coronavirus in California*, *L.A. Times* (last visited June 2, 2020), https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/. In just the four counties that are the subject of this lawsuit, the numbers are 9,976 sick and 361 dead. Chronicle Digital Team, *Coronavirus Tracker*, *S.F. Chronicle* (last visited June 2, 2020), https://projects.sfchronicle.com/2020/coronavirus-map/. And these numbers, as shocking as they are, actually understate the damage inflicted by the virus, because a lack of testing masks the true number of infections and underreporting masks the true number of fatalities. *See* ECF No. 46-3 ¶ 5 (noting that "limited testing capacity means that case counts represent only a small portion of actual cases").

In response to this extraordinary challenge, both the State of California and individual counties have issued what are known as "shelter-in-place" orders. Such orders typically require non-essential businesses to close; limit individuals' ability to travel; and require individuals to avoid behaviors that make transmission of the virus more likely. The purpose of such orders is "[t]o slow virus transmission as much as possible, to protect the most vulnerable, and to prevent the health care system from being overwhelmed." ECF No. 46-6 ¶ 10. The orders are formulated based on guidance from the Centers for Disease Control and Prevention, the California Department of Public Health, and other public health officials throughout the United States and around the world. *See id.*; ECF No. 46-7 ¶ 6 ("Right now, shelter-at-home orders are being used worldwide to minimize the potential for people infected with the novel coronavirus to spread it."), *id.* ¶ 10 ("Effective containment of the virus requires limiting people's contact with each other because of the way that the virus is transmitted."). Shelter-in-place orders have inarguably slowed the spread of the virus, ECF No. 46-6 ¶¶ 17, 20, resulting in the saving of innumerable lives.

Defendants Santa Clara County, Alameda County, San Mateo County, and Contra Costa County first issued shelter-in-place orders on March 16, 2020. First Amended Complaint ("FAC"), ECF No. 19 ¶¶ 80, 93, 103, 114; *see* ECF No. 46-6 at 11-17 ("Mar. 16 Order"). The Orders required most businesses to "cease all activities at facilities located within the County." [1] FAC ¶ 81. The Orders exempted 21 categories of "essential businesses," *id.*, such as grocery stores, health care operations, and banks, *see* Mar. 16 Order ¶ 10.f. The Orders authorized law enforcement officials to "ensure compliance with and enforce this Order." *Id.* ¶ 11. Firearm and ammunition retailers and shooting ranges were not exempted. FAC ¶ 81.

On March 31, 2020, Defendant Counties issued additional orders superseding the March 16 Orders and extending the shelter-in-place period until May 3, 2020. FAC ¶ 83; *see* ECF No. 46-6 at 19-33 ("Mar. 31 Order"). These Orders also did not exempt firearm and ammunition retailers and shooting ranges as essential businesses. FAC ¶ 84. The March 31 Orders stated that "violation of any provision of this Order constitutes an imminent threat and menace to public health, constitutes a public nuisance, and is punishable by fine, imprisonment, or both." Mar. 31 Order ¶ 15. On April 29, 2020, Defendant Counties issued a new set of Orders extending the shelter-in-place period until May 31, 2020. *See* ECF No. 46 at 13 n.5.

***3** On May 15 and May 18, 2020, the Counties updated their Orders yet again. *See* ECF No. 50 at 25-44 ("May 18 Order"). [2] "[I]n light of progress achieved in slowing the spread of COVID-19," the new Orders permit a new category of "Additional Businesses," including all retail businesses, to resume operation "subject to specified conditions and safety precautions to reduce associated risk of COVID-19 transmission." *See id.* ¶ 1. These conditions include offering goods for curbside pickup and, in two Counties, delivery. *See id.*, App. C-1 ¶1(b)(i)(1). The May 15 and 18 Orders also permit the socially distanced operation of "Outdoor Businesses" as well as travel to and from all permitted activities. *Id.* ¶¶ 3, 15.i, 15.l. Unlike their prior iterations, these Orders have no set end date. Rather, they specify that "[t]he Health Officer will continually review whether modifications to the Order are warranted" based on "progress on the COVID-19 Indicators[,]" including but not limited to new cases and hospitalizations, hospital, testing, and contract tracing capacity, and availability of personal protective equipment; "developments in epidemiological and diagnostic methods for tracing, diagnosing, treating, or testing for COVID-19"; and "scientific understanding of the transmission dynamics and clinical impact of COVID-19." *Id.* ¶ 11.

On May 29, 2020, San Mateo County issued a superseding Order that permits retail businesses to resume socially distanced in-store sales. ECF No. 58 at 20. Santa Clara County issued a similar Order on June 1, 2020, to take effect on June 5, 2020. ECF No. 59. Contra Costa County issued a similar Order on June 2, 2020, to take effect on June 3, 2020. ECF No. 60. [3]

On March 31, 2020, Plaintiffs filed a complaint challenging these orders and their effect on firearms retailers and shooting ranges. Plaintiffs make a single claim under the Second and Fourteenth Amendments of the United States Constitution and seek injunctive and declaratory relief. ECF No. 1. Plaintiffs fall into three categories: (1) eight individual residents of Defendant counties ("Individual Plaintiffs") who wish to "exercise [their] right to keep and bear arms ... and would do so, but for the reasonable and imminent fear of arrest and criminal prosecution under Defendants' laws, policies, orders, practices, customs, and enforcement, and because Defendants' orders and actions have closed firearm and ammunition retailers and ranges," *Id.* ¶¶ 6-12; (2) three firearms retailers located in three different Defendant counties ("Retailer Plaintiffs") who "would conduct training and education, perform California [Firearm Safety Certificate ('FSC')] testing for and issue FSC certificates to eligible persons, and sell and transfer arms ... but for the reasonable and imminent fear of criminal prosecution and loss of [their] licenses because of Defendants' laws, policies, orders, practices, customs, and enforcement thereof," *id.* ¶¶ 13-15; and (3) five nonprofit entities focused on Second Amendment rights ("Institutional Plaintiffs") who bring the action on behalf of themselves and their members, *id.* ¶¶ 16-20. Defendants include the four Counties as well as various law enforcement and public health officials associated with them, along with the cities of San Jose, Mountain View, Pacifica, and Pleasant Hill and various officials associated with them. *Id.* ¶¶ 21-40.

On April 10, 2020, Plaintiffs amended their complaint as of right, adding a second claim under the Fifth and Fourteenth Amendments and seeking declaratory and injunctive relief as well as nominal damages and attorney's fees and costs. FAC ¶¶ 147-55. That same day, Plaintiffs filed a motion for temporary restraining order or, in the alternative, preliminary injunction. ECF No. 20. On April 10, finding that Plaintiffs had failed to make the required showing under Rule 65(b)(1), the Court denied the application for a temporary restraining order and set a hearing on the application for a preliminary injunction. ECF No. 22. On May 1, 2020, Defendants filed a consolidated opposition. ECF No. 46. Plaintiffs replied on May 8, 2020, ECF No. 48, and the Court held a video-conference hearing on May 20, 2020.

***4** Plaintiffs filed a supplemental brief on May 22, 2020 addressing whether the case was mooted by the May 15 and 18 Orders. ECF No. 54. Defendants filed a supplemental opposition on May 27, ECF No. 55, and Plaintiffs replied on May 29, ECF No. 57. The Court took the matter under submission without an additional hearing.

II. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

III. LEGAL STANDARD

The Court applies a familiar four-factor test on a motion for a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839-40 & n. 7 (9th Cir. 2001). To obtain preliminary injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest. *Id.* at 20. Preliminary relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

To grant preliminary injunctive relief, a court must find that "a certain threshold showing [has been] made on each factor." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per curiam). Assuming that this threshold has been met, "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotation marks omitted).

IV. DISCUSSION

Under California's firearm regulations, an individual is generally required to obtain an FSC, undergo a background check, and wait ten days before acquiring a gun. *See* Cal. Penal Code §§ 27545, 28050 *et seq.*, 30342 *et seq.*, 30370 *et seq.*, 31615. Moreover, anyone wishing to buy ammunition must conduct the transaction through a licensed vendor in a face-to-face transaction. *Id.* § 30312. As stated by Plaintiffs, this means that, with "few very limited exceptions," FAC ¶ 65, individuals "must visit a retailer at least once for ammunition, and at least twice for firearms," ECF No. 20-1 at 6. Because firearms retailers are not considered "essential businesses" under the shelter-in-place orders, Plaintiffs argue that "millions of Californians in an entire region" are prohibited "from exercising fundamental rights guaranteed by the Second Amendment," including the right to possess, acquire, and maintain proficiency with firearms. ECF No. 20-1 at 16-17. They also argue that the Orders abridge their due process rights because they are "arbitrary and capricious, overbroad, [and] unconstitutionally vague." *Id.* at 26.

Plaintiffs argue that they are likely to succeed on their Second Amendment and due process claims and that these constitutional violations constitute irreparable injury that tips the public interest and balance of the equities in their favor. *Id.* at 28-29.

A. Mootness

Plaintiffs' FAC challenges only the March 16 and March 31 orders. At the hearing, Plaintiffs stipulated that they also challenged the Orders issued on April 29, May 15, and May 18. ECF No. 53. The Court ordered supplemental briefing on whether the May 15 and 18 Orders, which allow for curbside retail sales and, in two Counties, delivery retail, mooted Plaintiffs' claims. After this briefing had been submitted, San Mateo, Santa Clara, and Contra Costa Counties requested judicial notice of their May 29, June 1, and June 2 Orders, respectively, which permit the resumption of all in-store retail sales, subject to certain social distancing requirements. *See* ECF Nos. 58, 59, 60.

***5** The doctrine of mootness requires a court to dismiss a case "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S.Ct. 721, 184 L.Ed.2d 553 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982) (per curiam)). "The party alleging mootness bears a 'heavy burden' in seeking dismissal." *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172, 133 S.Ct. 1017, 185 L.Ed.2d 1 (2013) (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012)). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (quoting *Knox*, 567 U.S. at 307-08, 132 S.Ct. 2277).

Because Plaintiffs in San Mateo, Santa Clara, and Contra Costa Counties are now clearly able to purchase firearms and ammunition (or will be once the Orders go into effect), the

Court holds that the case is moot as to those Defendants. The San Mateo, Santa Clara, and Contra Costa Defendants are hereby dismissed.

As for Alameda County, Plaintiffs argue that existing state and federal statutes and regulations prohibit them from purchasing firearms or ammunition curbside or via delivery. [4] ECF No. 54 at 4-7. Under California law, anyone selling, leasing, or transferring a firearm must obtain a license, Cal. Penal Code § 26500, and "the business of a licensee shall be conducted only in the buildings designated in the license," *id.* § 26805(a). *See also id.* § 30348(a) (requiring that sale of ammunition "be conducted at the location specified in the license"). A licensee must keep all firearms in its inventory "within the licensed location." *Id.* § 26885(a). A firearm "may be delivered to the purchaser, transferee, or person being loaned the firearm" at "the building designated in the license" or at "[t]he place of residence of, the fixed place of business of, or on private property owned or lawfully possessed by, the purchaser, transferee, or person being loaned the firearm." *Id.* § 26805(d).

Plaintiffs argue that a plain reading of these statutes mandates that firearms transactions occur "in the licensee's building," not on an adjacent sidewalk or parking lot. ECF No. 54 at 6; ECF No. 57 at 2; *see also* Cal. Penal Code § 16810 (defining "licensed premises," "licensee's business premises," or "licensee's place of business" in relevant articles as "the *building* designated in the license") (emphasis added). They argue that home delivery is not an option in practice due to "the totality of statutes and regulations imposing both pre and post-delivery requirements [that] prevent firearm and ammunition transactions and transfers to take place outside a licensee's building." ECF No. 57 at 3. [5] Plaintiffs argue that curbside and delivery sales of firearms are further complicated by the requirement that the recipient perform a "safe handling demonstration" of the firearm in question, which Plaintiffs assert would violate California's open-carry prohibition. *See* ECF No. 54 at 6; Cal. Penal Code §§ 26850 (handguns); 26853 (semiautomatic pistols); 26856 (double-action revolvers); 26859 (single-action revolvers); 26860 (long guns); 26350(a)(1)(A) (open-carry prohibition). The Court notes an additional potential conflict with the requirement that dealers administering FSC tests "designate a separate room or partitioned area" for an applicant to take the test and "maintain adequate supervision to ensure that no acts of collusion occur while the objective test is being administered." *Id.* § 31640(f).

***6** Defendants respond that Plaintiffs' interpretation of these provisions is "incorrect and formalistic." ECF No. 55 at 2. They point to case law interpreting "building" in California's vandalism and burglary statutes to include certain outdoor areas. *Id.* at 4 (citing *People v. LaDuke*, 30 Cal. App. 5th 95, 103, 241 Cal.Rptr.3d 187 (Cal. Ct. App. 2018); *People v. Thorn*, 176 Cal. App. 4th 255, 263, 97 Cal.Rptr.3d 605 (2009)). They also cite an April 10, 2020 guidance from the Bureau of Alcohol, Tobacco, Firearms, and Explosives stating that federal regulations pose no bar to curbside and drive-through firearms transactions. *Id.*; ECF No. 55-1 at 4-6. Defendants cite no precedent, however – nor is the Court aware of any – regarding the legality of curbside or drive-through firearms transactions under California law. Since this question would turn on how various state and municipal law enforcement agencies interpret the regulations discussed above, different entities might take different approaches. Plaintiffs who attempt to exercise their right to acquire firearms and ammunition in the manner Defendants claim is currently permitted would risk potential criminal liability. *See* Cal. Penal Code § 26500 (making violation of California's firearms licensing requirements a misdemeanor).

The Court need not resolve these questions definitively now. It is sufficient to hold that, given the uncharted legal landscape for selling firearms and ammunition curbside or via delivery, Defendants have not met their "heavy burden" to establish mootness as to the Alameda County Defendants. *See Rosemere*, 581 F.3d at 1173.

B. Likelihood of Success on the Merits

1. Second Amendment Claim

"The Second Amendment protects an individual right to keep and bear arms ... that is fully applicable to the states and municipalities." *Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015) (citing *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742, 750, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010)). Plaintiffs argue that Alameda County's Order infringes this right by preventing them from "acquiring or practicing with firearms or ammunition, and during a time of national crisis," when they claim these rights are most important. ECF No. 20-1 at 6-7, 19-20 (emphasis omitted).

a. Standard of Review

The parties dispute which standard of review governs Plaintiffs' Second Amendment claim. Plaintiffs argue that the Order constitutes a "complete and unilateral suspension on the right of ordinary citizens to acquire firearms and ammunition" that is "categorically unconstitutional" under *Heller*. ECF No. 20-1 at 18. By this, they mean that "any interest-balancing test, including tiered scrutiny, is inappropriate under *Heller*." *Id.* at 20, 129 S.Ct. 365. Plaintiffs acknowledge their suggested approach is contrary to Ninth Circuit law, *see* ECF No. 20-1 at 20, which applies either intermediate or strict scrutiny to laws that burden Second Amendment rights depending on "how close the law comes to the core of the Second Amendment right" and "the severity of the law's burden on the right," *Wilson v. Lynch*, 835 F.3d 1083, 1092 (9th Cir. 2016) (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)). "The result is a sliding scale. A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) (quoting *Jackson v. City and County of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014)). "A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny. Otherwise, intermediate scrutiny is appropriate." *Id.* (internal citation omitted). This Court is bound by Ninth Circuit precedent.

Defendants, meanwhile, urge the Court to review the Order under the "deferential standards for emergency directives."[6] ECF No. 46 at 13-15. They rely on *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), in which the Supreme Court upheld a mandatory vaccination law imposed by the Cambridge, Massachusetts board of health during the midst of a smallpox epidemic. The Supreme Court acknowledged states' police power to enact quarantine and public health laws while noting that these laws "must always yield in case of conflict with ... any right which [the Constitution] gives or secures." *Id.* at 25, 25 S.Ct. 358. However, "the liberty secured by the Constitution ... does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* at 26, 25 S.Ct. 358. Evaluating a Fourteenth Amendment challenge to the vaccination law, the Court held that

> ***7** if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, 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, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 31, 25 S.Ct. 358.

Given that smallpox was "prevalent and increasing" in Cambridge, the Court held that the vaccination program had a "real or substantial relation to the protection of the public health and the public safety." *Id.* Because the law was "applicable equally to all in like condition" and because "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand," the Court concluded that mandatory vaccination could not "be affirmed to be, beyond question, in palpable conflict with the Constitution." *Id.* at 29-31, 25 S.Ct. 358. It noted, however, that

> the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.

Id. at 38, 25 S.Ct. 358.

Although Plaintiffs attempt to dismiss *Jacobson* as "arcane constitutional jurisprudence," ECF No. 48 at 6, the case remains alive and well – including during the present pandemic. *See S. Bay United Pentecostal Church v. Newsom*,

No. 19A1044, —— U.S. ——, ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 2813056, at *1 (May 29, 2020) (mem.) (Roberts, C.J., concurring) (citing *Jacobson* in denying injunctive relief regarding California's COVID-19-related restrictions on religious gatherings). Two circuits have recently held that district courts erred by not using *Jacobson* to evaluate pandemic-related restrictions on constitutional rights. *See In re Abbott*, 954 F.3d 772, 785 (5th Cir. 2020) (evaluating temporary restraining order on Texas pandemic restrictions as they related to abortion); *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (same as to Arkansas restrictions). In *Abbott*, the Fifth Circuit referred to *Jacobson* as "the controlling Supreme Court precedent that squarely governs judicial review of rights-challenges to emergency public health measures." 954 F.3d at 785. Two other circuits have endorsed approaches that combine *Jacobson* with the legal framework particular to the right in question. *See Robinson v. Marshall*, No. 2:19-cv-365-MHT, —— F.Supp.3d ——, ——, 2020 WL 1847128, at *8 (M.D. Ala. Apr. 12, 2020), *denying stay pending appeal*, *Robinson v. Att'y Gen.*, 957 F.3d 1171 (11th Cir. 2020) (regarding Alabama's COVID-19 restrictions on abortion); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925-26 (6th Cir. 2020) (regarding Tennessee's COVID-19 restrictions on abortion). And while the Ninth Circuit has not yet announced a rule, district courts within the circuit have relied on *Jacobson* to evaluate the burdens that California and Arizona's pandemic orders have placed on religious exercise and travel. *See McGhee v. City of Flagstaff*, No. CV-20-08081-PCT-GMS, 2020 WL 2308479, at *5 (D. Ariz. May 8, 2020); *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-00832-JAM-CKD, —— F.Supp.3d ——, ——– ——, 2020 WL 2121111, at *3-4 (E.D. Cal. May 5, 2020); *Gish v. Newsom*, No. EDCV 20-755 JGB (KKx), 2020 WL 1979970, at *5 (C.D. Cal. Apr. 23, 2020).

***8** Plaintiffs also seek to distinguish *Jacobson* by characterizing the case as "bottomed on a substantial degree of *legislative* deference to which Defendants' Orders and enforcement practices are simply not entitled." ECF No. 48 at 8. This argument misrepresents the case. At issue in *Jacobson* were two laws: (1) a state statute providing that "the board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants thereof ...," and (2) a Cambridge board of health regulation mandating vaccination to combat the smallpox outbreak. *Jacobson*, 197 U.S. at 12, 25 S.Ct. 358. While the *Jacobson* plaintiff challenged only the state statute, the Court considered the interplay of state and local power in setting a deferential standard:

> 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 the public safety.... It is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety.

Id. at 25, 25 S.Ct. 358 (internal citations omitted). The Court further held that "surely it was appropriate for the legislature to refer" the question of when to impose mandatory vaccination "to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions." *Id.* at 27, 25 S.Ct. 358.

We find ourselves in much the same situation here. The Order in this case was imposed by Alameda County's health officer, pursuant to authority granted to her by the California Health and Safety Code. *See* ECF No. 46 at 9; Cal. Health & Safety Code § 101040 ("The local health officer may take any preventive measure that may be necessary to protect and preserve the public health from any public health hazard during any 'state of war emergency,' 'state of emergency,' or 'local emergency,' as defined by Section 8558 of the Government Code, within his or her jurisdiction."); *id.* §§ 101085, 120175. Accordingly, the rationale in *Jacobson* applies with equal force here as it did there.

The Court need not decide whether *Jacobson* or the Ninth Circuit's Second Amendment framework applies here because, as explained below, the Court concludes that the Order survives review under either test. [7] *See Robinson*, —— F.Supp.3d at ——, 2020 WL 1847128, at *8 ("The court need not decide which legal framework applies, and instead assumes that they can and should be applied together in these circumstances.").

b. *Jacobson* Standard

Under *Jacobson*, an emergency "statute purporting to have been enacted to protect the public health, the public morals, or the public safety" must yield to a fundamental right if it "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion" of the right. 197 U.S. at 31, 25 S.Ct. 358.

Defendants argue that the Order substantially relates to "their objectives – minimizing COVID-19 transmission rates and conserving healthcare resources – by limiting the number and types of organizations that can expose their employees, customers, and business partners to infection." ECF No. 46 at 14. In support, they submit a declaration from Dr. Erica Pan, the Interim Health Officer for the Alameda County Public Health Department, explaining that the goal of such orders is:

> ***9** to lower the number of total people who become sick and to save lives by slowing the spread of the coronavirus in order to ensure that communities have enough space and resources in their hospitals for people who develop severe illness. Sheltering in place is proven to slow the spread of the virus if everyone decreases the number of people with whom they come in contact because it decreases the number who might get sick from someone who is infected.

ECF No. 46-6 ¶ 12. Dr. Pan states that her decision to issue the Order "was based on evidence of the rapidly increasing case rate of COVID-19 within Alameda County and surrounding Bay Area counties and scientific evidence and best practices regarding the most effective approaches to slow the transmission of COVID-19," *id.* ¶ 14, and that it is informed by "consideration of guidance from the Centers for Disease Control and Prevention, the California Department of Public Health, and other public health officials throughout the United States and around the world," *id.* ¶ 10. Addressing the need for the additional restrictions contained in the March 31 Order as well as the effectiveness of shelter-in-place orders, Dr. Pan states:

> The need for the March 31 orders could not be starker. When I and the other Bay Area health officers issued shelter-in-place orders on March 31, 2020, the public health emergency had substantially worsened since our March 16, 2020 shelter-in-place orders, with a significant escalation in the number of positive cases, hospitalizations, and deaths, and a corresponding increasing strain on health care resources. At the same time, evidence suggested that the restrictions on mobility and social distancing requirements imposed by the prior orders were slowing the rate of increase in community transmission and confirmed cases by limiting interactions among people, consistent with scientific evidence of the efficacy of similar measures in other parts of the country and world.

Id. ¶ 17.

Defendants also submit a declaration from Dr. George W. Rutherford, an epidemiologist who is leading a COVID-19 contact tracing program in San Francisco at the request of the city's Department of Public Health. ECF No. 46-7. Dr. Rutherford states that because "[t]he effectiveness of containment measures depends not only on how soon they are enacted but how strict they are[,] ... [e]xceptions must be narrowly defined because each exception increases the risks of community transmission." *Id.* ¶ 11. Dr. Rutherford also provides empirical evidence of the success of shelter-in-place orders in reducing the transmission of COVID-19 in Italy, as well as comparisons of United States jurisdictions showing that earlier implementation of shelter-in-place has led to a slower spread of the disease. *Id.* ¶¶ 9, 17-18.

Plaintiffs dispute neither the need for the Order nor whether the Order has a real or substantial relationship to the legitimate public health goal of reducing COVID-19 transmission and preserving health care resources, and the Court easily concludes that the Order bears such a relationship to this goal. *See Rutledge*, 956 F.3d at 1029 ("On the record before us,

the State's interest in conserving PPE resources and limiting social contact among patients, healthcare providers, and other staff is clearly and directly related to public health during this crisis."); *Abbott*, 954 F.3d at 787 ("In sum, it cannot be maintained on the record before us that GA-09 bears 'no real or substantial relation' to the state's goal of protecting public health in the face of the COVID-19 pandemic.") (quoting *Jacobson*, 197 U.S. at 31, 25 S.Ct. 358).

***10** The Court next turns to whether the Order effects a "plain, palpable invasion" of Plaintiffs' Second Amendment rights. *See Jacobson*, 197 U.S. at 31, 25 S.Ct. 358. Defendants argue that the Order is not " 'beyond question' arbitrary or unreasonable, as [it was] drawn neutrally, appl[ies] temporarily, and reasonably make[s] limited exceptions only for businesses that support the basic needs of residents." ECF No. 46 at 14 (citing *Jacobson*, 197 U.S. at 31, 25 S.Ct. 358). Plaintiffs focus their *Jacobson* argument on why that standard does not apply but make no argument as to why it is not met here. While the Court has found no authority applying *Jacobson* in the Second Amendment context, it sees significant overlap between the "plain, palpable invasion" prohibited by *Jacobson* and the "complete prohibition" on the Second Amendment right that *Heller* deemed categorically unconstitutional. *See Heller*, 554 U.S. at 629, 128 S.Ct. 2783. It will thus consider whether the Order effects such a prohibition in order to determine whether it can be upheld under *Jacobson*.

"[T]he Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense." *McDonald*, 561 U.S. at 791, 130 S.Ct. 3020 (citing *Heller*, 554 U.S. at 635, 128 S.Ct. 2783); *see also id.* (Second Amendment right incorporated to the states via the Fourteenth Amendment). Moreover, the right is not limited to possession; the Ninth Circuit has observed that "the core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms." *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)). While *Teixeira* did not "define the precise scope of any such acquisition right under the Second Amendment," it made clear that such a right exists. *Id.* at 678; *see also Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018), *petition for cert. filed*, No. 18-843 (Dec. 28, 2018) ("bypass[ing] the constitutional obstacle course of defining the parameters of the Second Amendment's individual right in the context of commercial sales"). *Teixera* likewise confirms that the Second Amendment right extends to "maintaining proficiency in firearms use." 873 F.3d at 677; *see also Ezell*, 651 F.3d at 711 (remanding with instructions to preliminarily enjoin ordinance prohibiting firing ranges in city limits).

Plaintiffs argue that "the effect of Defendants' expansive Orders and actions, among other restrictions," is an absolute firearm ban of the kind rejected in *Heller*. ECF No. 20-1 at 18. They contend that, "[d]ue to the ever-expanding nature of the laws regulating firearm transfers, in-person visits to gun stores and retailers are the only legal means for ordinary, law-abiding citizens to acquire and purchase" firearms and ammunition within California. *Id.* at 18-19. These laws include requirements that all firearm transfers be processed through licensed dealers, Cal. Penal Code § 27545; all ammunition transactions be made through licensed vendors in face-to-face transfers, *id.* § 30312; and firearm and ammunition retailers initiate background checks at the point of transfer, collect various information from the buyer, and require the buyer to perform a safe handling demonstration, *id.* §§ 28200; *id.* §§ 28150 *et seq*; *id.* § 26850. As a result of these regulations, Plaintiffs allege, firearm purchases "cannot be done remotely as many other, non-firearm online retailers are able to do." *Id.* at 19 (citing firearm delivery requirements at Cal. Penal Code § 27540).

Defendants argue that because the May 18 Order allows for curbside pickup and delivery of firearms, it makes it less convenient for Plaintiffs to exercise their right to acquire firearms rather than eliminating the right all together. ECF No. 55 at 2. As discussed in the mootness section above, *see supra* IV.A., it is far from clear that curbside pickup and delivery of firearms is permitted under California law. Accordingly, the Court will treat the Order as barring most individuals in Alameda County from purchasing firearms. Because it is undisputed that outdoor shooting ranges have been permitted to operate in all Defendant Counties since the April 29 Orders, however, any infringement on the right to maintain proficiency with firearms is clearly not categorical.

***11** As to the prohibition on in-store sales of firearms and ammunition, Defendants argue that the Order's "temporal limits make any categorical analysis inappropriate." ECF No. 46 at 22. Defendants also emphasize certain exceptions to California's requirement that licensed dealers participate in firearms transactions. *Id.* at 23. For example, firearms may be transferred between family members, presuming the acquirer has a valid FSC, *see* Cal. Penal Code § 27875; loaned between family members for 30 days, presuming the lendee has a valid FSC, *see id.* § 27880; loaned for use at the lender's residence,

see id. § 27881; and loaned for three days if the lender "is at all times within the presence of the person being loaned the firearm," *see id.* § 27885. [8]

Defendants also make a brief argument that Individual Plaintiffs do not have standing because the Order "only limit[s] arms-related commerce: the ability to acquire *new* weapons, *more* ammunition, and to target-shoot at commercial facilities," and "[n]one of the individual Plaintiffs claims he or she did not already own guns and ammunition before the Health Orders issued, and none of their organizational counterparts claim their members are so situated either." ECF No. 46 at 23-24. Because "there is no evidence that any of these Plaintiffs has been deprived – even temporarily – of the core Second Amendment right to self-defense," Defendants argue, Plaintiffs lack standing "to argue that [the Order] would be unconstitutional if applied to third parties in hypothetical situations." *Id.* at 24 (quoting *Cty. Ct. of Ulster Cty., N.Y. v. Allen*, 442 U.S. 140, 155, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)).

This argument is unpersuasive. For one thing, Defendants cite no authority for the proposition that the *Heller* right is limited to a single firearm. Moreover, the Ninth Circuit has observed that "permitting an overall ban on gun sales 'would be untenable under *Heller*' because a total prohibition would severely limit the ability of citizens to *acquire* firearms." *Teixeira*, 873 F.3d at 688 (quoting *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010)) (emphasis in original). The *Teixeira* court also did not discuss whether the constitutionality of such a prohibition would differ based on whether particular would-be purchasers already owned firearms. The Court will not impose a previously unannounced limitation on the *Heller* right, especially when the issue has not been directly raised or briefed. The Court holds that Individual Plaintiffs who reside in Alameda County do have standing to challenge the Order. Because the only Retailer Plaintiffs named in the FAC are located in San Mateo, Contra Costa, and Santa Clara Counties, however, the Court holds that these Plaintiffs do not have standing to challenge the Alameda County Order.

Turning to the merits of Plaintiffs' argument, the Court concludes that the Order is not the equivalent of the handgun ban in *Heller*. The District of Columbia made it a crime to carry an unregistered firearm and prohibited the registration of handguns, thus "totally ban[ning] handgun possession in the home." *Heller*, 554 U.S. at 574-75, 128 S.Ct. 2783. By contrast, the Order in this case effectively bans most residents of Alameda County from purchasing handguns *for the limited duration of the Order*. Plaintiffs argue that the Court should treat the ban as permanent given that the latest Order "ha[s] no end date and can be renewed and revised *infinitum* per [its] own terms." ECF No. 54 at 4. But Alameda County's May 18 Order imposes clear and well-defined criteria for its termination, requiring the County's health officer to "continually review whether modifications to the Order are warranted" based on progress on certain enumerated, empirical "COVID-19 Indicators." May 18 Order ¶ 11. It was review of these indicators that prompted the Counties to revise their Orders to allow for certain outdoor activities as well as curbside pickup and delivery of retail items. *Id.* Plaintiffs have presented no reason to believe that the remaining restrictions will be kept in place long term. Indeed, the recent decisions by the Santa Clara, San Mateo, and Contra Costa Defendants to permit in-store retail sales, including of firearms and ammunition, is strong evidence of the temporally limited nature of the Order. Because this short-term restriction falls short of the permanent ban in *Heller*, it is not "unconstitutional under any level of scrutiny." *Silvester*, 843 F.3d at 821.

***12** The same reasoning leads the Court to conclude that the Order does not effect a "plain, palpable invasion" of Plaintiffs' Second Amendment rights. This conclusion is supported by the fact that the Order, like the vaccination law in *Jacobson* and unlike the handgun ban in *Heller*, is facially neutral. Apart from a reference to "shooting and archery ranges" as an example of recreational facilities that were forced to close by the early Orders, *see* Mar. 31 Order ¶ 13.a.iii.3., [9] none of the Orders have mentioned firearms. While Plaintiffs provide examples of the Orders being enforced against firearms retailers, *see* ECF No. 20-1 at 10-12, 14, they do not argue that the Orders are being *selectively* enforced, i.e., that other non-exempt businesses are not also being forced to close. Plaintiffs make a passing reference to "Defendants' motivations," but offer in support only a statement attributed to the mayor of San Jose: "We are having panic buying right now for food. The one thing we cannot have is panic buying of guns." ECF No. 20-1 at 25; ECF No. 20-2 at 56. The mayor's statement postdates the issuance of the Orders and was not made by a decision-maker in any of the four Counties – much less the County that remains a Defendant in this case – and so provides no basis to question Defendants' motivations. Nor does it undermine the facial neutrality of the Orders.

Courts applying *Jacobson* to other COVID-19 restrictions have found that facial neutrality weighed in favor of upholding them. *See Abbott*, 954 F.3d at 789 (holding that postponement of all non-essential medical procedures was not an "outright ban" on pre-viability abortion partly because it "applie[d] to 'all surgeries and procedures' " and did "not single out abortion") (internal quotation omitted); *Rutledge*, 956 F.3d at 1030 (agreeing with *Abbott* that facially neutral postponement of non-essential medical procedures "does not constitute anything like an 'outright ban' on pre-viability abortion") (quoting *Abbott*, 954 F.3d at 789); *compare First Baptist Church v. Kelly*, No. 20-1102-JWB, —— F.Supp.3d ——, —— – ——, 2020 WL 1910021, at *5-6 (D. Kan. Apr. 18, 2020) (declining to apply *Jacobson* in part because Kansas's orders "expressly purport to restrict in-person religious assembly by more than ten congregants" and are thus "not facially neutral").

For these reasons, the Court concludes that the Order cannot "be affirmed to be, beyond question, in palpable conflict with" the Second Amendment. *See Jacobson*, 197 U.S. at 29-31, 25 S.Ct. 358. Plaintiffs have thus failed to demonstrate a likelihood of success on their Second Amendment claim under *Jacobson*.

c. Second Amendment Standard

"To evaluate post-*Heller* Second Amendment claims, the Ninth Circuit, consistent with the majority of our sister circuits, employs a two-prong test: (1) the court 'asks whether the challenged law burdens conduct protected by the Second Amendment'; and (2) if so, what level of scrutiny should be applied.' " *Fyock*, 779 F.3d at 996 (quoting *Chovan*, 735 F.3d at 1136).

i. Burden on Conduct Protected by Second Amendment

Defendants argue that Individual and Retailer Plaintiffs' claims fail at step one of the *Chovan* test because "the Constitution does not confer a freestanding right on commercial proprietors to sell firearms." ECF No. 46 at 21 (quoting *Teixeira*, 873 F.3d at 673). But Plaintiffs' complaint is premised on the right to *acquire* firearms, not *sell* them. *See* FAC ¶ 130 (alleging that the Orders "stand as a bar on firearms acquisition, ownership, and proficiency training at shooting ranges, and thus amount to a categorical ban on and infringement of the right to keep and bear arms"). *Teixeira* confirms that this right, as well as the right to "maintain[ ] proficiency in firearms use," falls within the Second Amendment's protections and that both individuals and retailers have standing to challenge regulations that burden their or their customers' "right to acquire arms." 873 F.3d at 677-78.

***13** Even if the Ninth Circuit had not already established these baseline protections, the Court would follow the " 'well-trodden and judicious course' of assuming that the Second Amendment applies and analyzing the regulation under the appropriate level of scrutiny." *Brandy v. Villanueva*, No. 10-cv-2874-AB (SKx), ECF No. 29 (C.D. Cal. Apr. 6, 2020) (quoting *Pena*, 898 F.3d at 976).

ii. Level of Scrutiny

"The appropriate level of scrutiny for laws that burden conduct protected by the Second Amendment 'depend[s] on (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right.' " *Lynch*, 835 F.3d at 1092 (quoting *Chovan*, 735 F.3d at 1138). A regulation "implicates the core" of the Second Amendment right when it "applies to law-abiding citizens, and imposes restrictions on the use of handguns within the home." *Jackson*, 746 F.3d at 963. In *Lynch*, the Ninth Circuit held that federal statutes, regulation, and guidance that prevented the plaintiff from purchasing a gun based on her state medical marijuana registry card "burden[ed] the core of [plaintiff's] Second Amendment right because they prevent[ed] her from purchasing a firearm under certain circumstances and thereby impede[d] her right to use arms to defend her 'hearth and home.' " 835 F.3d at 1092 (quoting *Jackson*, 746 F.3d at 961). In this case, the Order applies to all residents of Alameda County, "law-abiding" or not, and prevents them from purchasing firearms for as long as it is in place. Because the Order "impede[s Plaintiffs'] right to use arms to defend [their] 'hearth and home,' " *see id.*, it burdens the core Second Amendment right.

The Court now turns to the severity of that burden. In the Ninth Circuit, "laws which regulate only the 'manner in which persons may exercise their Second Amendment rights' are less burdensome than those which bar firearm possession completely." *Jackson*, 746 F.3d at 961 (quoting *Chovan*, 735 F.3d at 1138). "Similarly, firearm regulations which leave open alternative channels for self-defense are less likely to

place a severe burden on the Second Amendment right than those which do not." *Id.*

Because the Order regulates the purchase and sale of firearms rather than barring their "possession completely," *Jackson*, 746 F.3d at 961, it constitutes a restriction on the manner in which Plaintiffs may exercise their Second Amendment rights. In this way, it is similar to the ten-day waiting period upheld in *Silvester*, which did not "prevent any individuals from owning a firearm" but rather delayed their purchases. 843 F.3d at 827. Because there is "nothing new in having to wait for the delivery of a weapon," the Ninth Circuit held that the waiting period did not place a substantial burden on a Second Amendment right. *Id. See also Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 207 (5th Cir. 2012) (holding that the "temporary nature" of a burden imposed by a law prohibiting 18- to 20-year-olds from purchasing handguns "reduce[d] its severity," as those subject to it would "soon grow up and out of its reach"). To be sure, the delay here – at least two-and-a-half months from the date of this order – is significantly longer than the ten days upheld in *Silvester*. But Plaintiffs cite no authority concerning nor provide any guidance as to how the Court might determine how long a delay would constitute a severe burden on the acquisition right.

***14** Pushing the other way is the fact that, unlike the regulations in *Lynch*, the Order does not "leave open alternative channels for self-defense." *See Jackson*, 746 F.3d at 961. *Lynch* held that the restrictions at issue barred "only the sale of firearms to [plaintiff] – not her possession of firearms." 835 F.3d at 1093. As in this case, the plaintiff "could have amassed legal firearms before acquiring a [marijuana] registry card, and [the restrictions] would not impede her right to keep her firearms or to use them to protect herself and her home." *Id.* Unlike in this case, however, plaintiff there could also "acquire firearms and exercise her right to self-defense at any time by surrendering her registry card." *Id. See also Chovan*, 735 F.3d at 1138 (finding that burden of lifetime ban on firearm possession by persons convicted of domestic violence misdemeanors was "lightened" by exemptions for "those with expunged, pardoned, or set-aside convictions, or those who have had their civil rights restored"); *United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019) (holding that ban on firearm possession by undocumented immigrants was "tempered" because an undocumented immigrant seeking to obtain a firearm "may remove himself from the prohibition by acquiring lawful immigration status"). At least while the Order is in effect, Plaintiffs here have no similar way of reacquiring the means to purchase firearms lawfully – i.e., they cannot take any action that would allow them to "exercise [their] right to self-defense at any time." *Lynch*, 835 F.3d at 1093. [10]

Defendants attempt to characterize the Order's restrictions on firearm acquisition as "not absolute," *see* ECF No. 46 at 23, but the exceptions they cite do not allow for full exercise of Second Amendment rights. The ability to borrow someone else's gun for use at their residence or for three days if accompanied by the lender, *see* Cal. Penal Code §§ 27881, 27885, for example, is of little use to someone who wishes to keep a gun in her own home for the purpose of self-defense. And while California law does allow firearm transfers between family members that do not require visiting a retailer, *see id.* §§ 27875, 27880, it goes without saying that not all residents have family members who could loan or sell them a firearm, or have the FSC required to benefit from such a transfer. For someone who does not already have a functioning firearm at home, the Order makes it virtually impossible to exercise the *Heller* right for as long as it is in force.

Plaintiffs argue that this burden merits strict scrutiny, but they cite no case in which the Ninth Circuit – or any other circuit – has applied anything but intermediate scrutiny to a law that burdens a Second Amendment right. Presumably, this is because "[t]here is ... near unanimity in the post-*Heller* case law that when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate." *Silvester*, 843 F.3d at 823. The only case Plaintiffs cite that applies strict scrutiny to a firearm regulation is *Bateman v. Perdue*, 881 F. Supp. 2d 709 (E.D.N.C. 2012), in which the district court held unconstitutional various North Carolina statutes restricting the possession, sale, and transport of firearms during declared states of emergency. The court applied strict scrutiny because, "[w]hile the bans imposed pursuant to these statutes may be limited in duration, it cannot be overlooked that the statutes strip peaceable, law abiding citizens of the right to arm themselves in defense of hearth and home, striking at the very core of the Second Amendment." *Id.* at 716. The Court is not persuaded that *Bateman* applies here.

The Court first notes that *Bateman* does not cite *Jacobson*, likely because the defendants did not raise it. *See Bateman v. Perdue*, No. 5:10-cv-265, ECF Nos. 54 (Dec. 15, 2010), 61 (Dec. 16, 2010), 64 (Dec. 16, 2010), 73 (Jan. 10, 2011). Thus,

the *Bateman* court had no occasion to determine whether the *Jacobson* framework applied. Also, the restrictions at issue in *Bateman* were more onerous than that at issue here, because they were certain to recur – and recur frequently. *Bateman*, 881 F. Supp. 2d at 711 ("Due to natural disasters and severe weather, states of emergency are declared with some frequency in North Carolina."); *see also id.* (stating that the governor issued four statewide and one county-specific emergency declaration in 2010 alone, in addition to states of emergency declared by local officials). By contrast, the instant Order was drafted to address the once-in-a-generation circumstances presented by the current pandemic and not be reused for future emergencies. Finally, the *Bateman* court did not explain how it arrived at its conclusion, and its language would seem to suggest that strict scrutiny applies to any firearms regulation. That is not the law. Thus, without deciding the level of scrutiny this Court would apply if faced with the facts in *Bateman*, the Court finds that *Bateman* is not helpful.

***15** Weighing these considerations, the Court concludes that intermediate scrutiny is appropriate. Without question, the Order burdens the core Second Amendment right "to possess a handgun in the home for the purpose of self-defense." *McDonald*, 561 U.S. at 791, 130 S.Ct. 3020 (citing *Heller*, 554 U.S. at 635, 128 S.Ct. 2783). Given the temporary nature of this burden, however, and the fact that "[t]he case law in our circuit and our sister circuits ... clearly favors the application of intermediate scrutiny in evaluating the constitutionality of firearms regulations," *Silvester*, 843 F.3d at 823, this burden is not so severe as to merit strict scrutiny. *See McDougall v. County of Ventura Cal.*, No. 2:20-cv-02927-CBM-AS, ECF No. 12 at 2, 2020 WL 2078246 (Apr. 1, 2020) (finding county closure of gun stores pursuant to COVID-19 stay-at-home order does not substantially burden Second Amendment right because it "does not specifically target handgun ownership, does not prohibit the ownership of a handgun outright, and is temporary"). Accordingly, the Court applies intermediate scrutiny to the Order.

iii. Application of Intermediate Scrutiny

Intermediate scrutiny is a two-step test that requires "(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *Jackson*, 746 F.3d at 965 (quoting *Chovan*, 735 F.3d at 1139). "[I]ntermediate scrutiny does not require the least restrictive means of furthering a given end." *Id.* at 969. The government must "show only that the regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Silvester*, 843 F.3d at 829 (quoting *Fyock*, 779 F.3d at 1000). "The test is not a strict one," but "requires only that the law be 'substantially related to the important government interest ....' " *Id.* at 827 (quoting *Jackson*, 746 F.3d at 966).

The stated objective of the Orders is "to slow the spread of COVID-19." May 18 Order ¶ 2. Defendants' second stated objective – conserving health care resources, *see id.*; ECF No. 46 at 14 – follows naturally from this first goal. Plaintiffs concede that "Defendants have a legitimate interest in reducing the population's exposure to COVID-19," a pandemic that is "serious in nature." ECF No. 20-1 at 6-7, 30. They argue, however, that "a governmental interest that is as inconsistently pursued as Defendants' here is not and cannot be a substantial one for constitutional purposes." *Id.* at 24, 25 S.Ct. 358. But this argument is really about fit, not interest. Defendants do not seriously contest that preventing the spread of a deadly global pandemic is a "significant, substantial, or important" government interest. *See Jackson*, 746 F.3d at 965 (quoting *Chovan*, 735 F.3d at 1139); *Brandy*, No. 20-cv-02874-AB (SKx), ECF No. 29 at 5.

As for fit, Defendants submit declarations from public health officials and experts supporting their argument that the shelter-in-place order is necessary to prevent the spread of COVID-19. Dr. Pan, the Alameda County health officer, states that "[c]oronaviruses spread through the air by coughing or sneezing and close personal contact, or by touching contaminated objects or surfaces and then touching your mouth, nose, or eyes." ECF No. 46-6 ¶ 8. Moreover, it is not possible to know who is infected, because "[s]ome people who are infected remain asymptomatic and spread the virus." *Id.* That means that a person might be at risk for contracting COVID-19 if "they were in close contact (within six feet for a prolonged period of time) with a person confirmed to have COVID-19, for up to 48 hours before the onset of symptoms, or in contact with an asymptomatic carrier of the virus." *Id.* Accordingly, Dr. Pan concludes that "[c]ompliance with social distancing guidelines is critical because people without symptoms could be contagious." *Id.* Sheltering in place, which is "more rigorous than social distancing," *id.* ¶ 11, "is proven to slow the spread of the virus if everyone decreases the number of people with whom they come in contact because it decreases the number who might get sick from someone who is infected," *id.* ¶ 12. The "restrictions on

mobility and social distancing requirements imposed by the prior orders" are "slowing the rate of increase in community transmission and confirmed cases by limiting interactions among people, consistent with scientific evidence of the efficacy of similar measures in other parts of the country and world." *Id.* ¶ 17.

***16** Dr. Rutherford, the epidemiologist leading the COVID-19 contact tracing project, states that "[t]he effectiveness of containment measures depends not only on how soon they are enacted but how strict they are." ECF No. 46-7 ¶ 11. "Exceptions must be narrowly defined because each exception increases the risks of community transmission." *Id.* "Implementing social distancing protocols for non-essential activities and businesses lowers but does not eliminate the increased transmission risks those activities and businesses create." *Id.* ¶ 12. Thus, for example, Alameda County's March 16 Order "prohibited all public and private gatherings of any number of people occurring outside a household or living unit, except for the limited purposes of performing [e]ssential [a]ctivities, such as obtaining food and medication, visiting a health care professional, or obtaining products needed to maintain safety and sanitation"; "prohibited all travel, except [e]ssential [t]ravel"; and required "[a]ll businesses with a facility in the County, except [e]ssential [b]usinesses ... to cease all activities except certain [m]inimum [b]asic [o]perations...." ECF No. 46-6 ¶¶ 13. This Order was issued "based on evidence of increasing occurrence of COVID-19 within the County and throughout the Bay Area, scientific evidence and best practices regarding the most effective approaches to slow the transmission of communicable diseases generally and COVID-19 specifically, and evidence that the age, condition, and health of a significant portion of the population of the County places it at risk for serious health complications, including death, from COVID-19." ECF No. 46-6 at 21.

Plaintiffs do not challenge the accuracy or credibility of this evidence. Rather, they fault these declarations for not offering "any explanation as to why less restrictive alternatives – like those used in other retail settings Defendants consider essential – cannot be applied to firearm and ammunition retailers, why Plaintiffs and others like them must be prevented from travelling to and from firearms retailers in other jurisdictions, or how the orders are narrowly tailored as to them." ECF No. 48 at 14. The Ninth Circuit, however, does not require narrow tailoring for firearm regulations subject to intermediate scrutiny. *See Pena*, 898 F.3d at 986 (holding that state had met its burden under intermediate scrutiny to show that regulation was "*reasonably* tailored to address the substantial" state interest) (emphasis added); *compare Chovan*, 735 F.3d at 1150 (Bea, J., concurring) (arguing that challenged regulation would survive strict scrutiny, which does require narrow tailoring). In support of their argument that Defendants bear the burden "to show that less restrictive alternatives either are not available, or are not a reasonable fit," ECF No. 48 at 12, Plaintiffs cite the tests for commercial speech, *see* ECF No. 20-1 at 22 (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480-81, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)), and for content-neutral time, place, and manner restrictions on speech, ECF No. 48 at 12 (citing *McCullen v. Coakley*, 573 U.S. 464, 477, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014)). But notably absent from Plaintiffs' argument is any mention of the ample Ninth Circuit authority applying intermediate scrutiny in the Second Amendment context.

The Court concludes that Defendants have demonstrated a reasonable fit between the burden the Order places on Second Amendment rights and Defendants' goal of reducing COVID-19 transmission. In *Jackson*, the Ninth Circuit found that San Francisco's ban on the sale of "hollow-point ammunition," which the city had found more fatal than other types of ammunition, was substantially related to the city's interest in reducing the fatality of shootings. 746 F.3d at 969-70. The court rejected the plaintiff's arguments that "San Francisco could have adopted less burdensome means of restricting hollow-point ammunition, for example by prohibiting the possession of hollow-point bullets in public, but allowing their purchase for home defense." *Id.* at 969. Even if this were correct, the Court held, "intermediate scrutiny does not require the least restrictive means of furthering a given end." *Id.* Rather, a "city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 969-70 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). The *Jackson* court also held that San Francisco's requirement that gun owners keep their guns locked or disabled was substantially related to its interest in reducing firearm-related deaths and injuries, despite the fact that the regulation applied "even when the risk of unauthorized access by children or others is low, such as when a handgun owner lives alone." *Id.* at 966.

***17** Likewise, *Lynch* found a reasonable fit between regulations prohibiting illegal drug users from purchasing guns and the government's interest in preventing gun violence even though the regulations burdened the Second

Amendment rights of a "small population of individuals who – although obtaining a marijuana registry card for medicinal purposes – instead h[e]ld marijuana registry cards only for expressive purposes" and thus were not illegal drug users. 835 F.3d at 1094. Because it was "eminently reasonable for federal regulators to assume that a registry cardholder is much more likely to be a marijuana user than an individual who does not hold a registry card," the court found the fit "reasonable but not airtight" and upheld the regulations. *Id.* *See also* *Silvester*, 843 F.3d at 827-29 (upholding ten-day waiting period as substantially related to government's interests in giving state time to complete background checks and providing "cooling-off" period, even though the law applied to those who passed background checks in less than ten days as well as to those who already owned guns they could use to commit impulsive acts of violence).

The fit between the Order and Alameda County's interest in reducing the spread of COVID-19 is much closer than the fits upheld in *Jackson*, *Lynch*, and *Silvester*. While the regulations in all of those cases affected some number of people who did not actually pose the danger the regulations were intended to abate, here, every resident of Alameda County is a potential vector for COVID-19. Defendants have produced evidence that any decrease in human contact and in-person interaction helps slow the virus's spread, and thus that any exception to the shelter-in-place order makes the order less effective at achieving its goal. This evidence forecloses Plaintiffs' argument that allowing firearms and ammunition retailers to operate under social distancing and sanitation guidelines would constitute a less restrictive alternative that would further Defendants' goals. According to the evidence Defendants have submitted, adding these retailers to the list of essential businesses exempted from the Order would "increase[ ] the risks of community transmission" even when social distancing protocols are followed, as those protocols "lower[ ] but do[ ] not eliminate the increased transmission risks." ECF No. 46-7 ¶¶ 11-12. And even if this alternative did further the County's goals, "intermediate scrutiny does not require the least restrictive means of furthering a given end." *Jackson*, 746 F.3d at 969.

Plaintiffs further argue that the Order "inconsistently pursues" Defendants' goals because it is "so pierced by exemptions and inconsistencies that [they] cannot hope to exonerate [it]." ECF No. 20-1 at 24 (quoting *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999)). Putting aside the fact that Plaintiffs again rely on a commercial speech case for this argument, the exemptions here are a far cry from the regulations in *Greater New Orleans*, which prohibited broadcast advertising by private casinos but not tribal or government-operated casinos. 527 U.S. at 190, 119 S.Ct. 1923. The Court found that the government had presented "no convincing reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos," *id.* at 191, 119 S.Ct. 1923, and that "there was 'little chance' that the speech restriction could have directly and materially advanced [the government's aim of alleviating the social costs of casino gambling by limiting demand], 'while other provisions of the same Act directly undermine[d] and counteract[ed] its effects,' " *id.* at 193, 119 S.Ct. 1923 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995)).

By contrast, Defendants here have offered a "convincing reason" for exempting the essential businesses enumerated in the Orders. *See* ECF No. 46-7 ¶ 11 (explaining that exempted businesses "such as grocery stores, pharmacies, laundromats/dry cleaners, and hardware stores are deemed essential because they provide for the basic needs of residents for food, medicine, hygiene, and shelter. If people have no opportunity to wash their clothes, they can get fleas and ticks, which can spread other infectious diseases, such as flea-borne (murine) typhus and trench fever.... And hardware stores provide supplies needed to maintain shelter, such as heat, indoor plumbing, and refrigeration, that will require maintenance and repair to keep them working."). Perhaps a different governmental entity could conclude that firearms and ammunition retailers and shooting ranges are essential, and some have. *See* Cybersecurity & Infrastructure Security Agency, *Guidance on the Essential Critical Infrastructure Workforce* (last revised Apr. 24, 2020), https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Work (guidance from United States Department of Homeland Security recommending that state and local jurisdictions classify "[w]orkers supporting the operation of firearm, or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges" as essential).[11] Unlike the regulatory scheme in *Greater New Orleans*, however, the efficacy of the Order is not "undermine[d]" or "counteract[ed]" by the exclusion of firearms and ammunition retailers from the list. 527 U.S. at 193, 119 S.Ct. 1923. In fact, as Defendants have offered evidence that "each exception increases the risks of community transmission," ECF No. 46-7 ¶ 11, excluding these retailers in fact "directly and materially advance[s]" Alameda County's interest in controlling the spread of COVID-19, *see* *Greater New*

Orleans, 527 U.S. at 193, 119 S.Ct. 1923. The Court thus rejects Plaintiffs' argument that inconsistencies in the list of exempted businesses undermines the degree to which the Order is substantially related to Defendants' goal.

***18** For these reasons, the Order survives intermediate Second Amendment scrutiny and Plaintiffs have failed to demonstrate a likelihood of success on their Second Amendment claim.

2. Due Process Claim

Plaintiffs premise their due process claim on the argument that the Order and Defendants' enforcement of it is "arbitrary and capricious, overbroad, [and] unconstitutionally vague." ECF No. 20-1 at 26. To the degree Plaintiffs intend to invoke substantive due process to argue that the Order arbitrarily designates certain businesses as exempt or overbroadly bars other businesses from operating under the essential business exemption, this claim is precluded by the principle that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)). Because the Court has already considered and rejected these arguments in the Second Amendment context, it declines to do so again under the doctrine of substantive due process.

This leaves only Plaintiffs' argument that the Order is unconstitutionally vague.[12] A criminal law is unconstitutionally vague if it "fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, ––– U.S. ––––, 135 S. Ct. 2551, 2556, 192 L.Ed.2d 569 (2015). Assuming that a county order of the sort issued here, violation of which constitutes a misdemeanor, is a criminal law subject to this standard, it easily satisfies it. The version of the Order currently in force mandates that "individuals may leave their residence only for" certain enumerated activities. May 18 Order ¶ 3. The Order also states that all non-exempted businesses "are required to cease all activities at facilities located within the County except Minimum Basic Operations," which the Order defines in depth. *Id.* ¶¶ 5, 15. Prior versions of the Order have provided similar levels of detail as to what was and was not permitted throughout their duration. Moreover, Plaintiffs provide no explanation as to how the Order "invites arbitrary enforcement," *see Johnson*, 135 S. Ct. at 2556, much less any evidence supporting their allegation that the Order is in fact being arbitrarily enforced. Accordingly, they are unlikely to succeed on the merits of their vagueness argument.

For these reasons, Plaintiffs fail to show a likelihood of success on the merits of their due process claim.

C. Other Factors

Defendants do not dispute that, had Plaintiffs been able to establish a likelihood of success on the merits, they would also have established irreparable harm. ECF No. 46 at 29; *see Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.' ") (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). But they do dispute whether an injunction would be in the public interest, an inquiry that the Court considers alongside the balance of the equities. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) ("When the government is a party, [the public interest and equities] factors merge."). Plaintiffs bear the burden of showing that both factors weigh in their favor. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138-39 (9th Cir. 2009).

***19** Plaintiffs argue that "public interest concerns are always implicated when a constitutional right has been violated." ECF No. 48 at 16. That point is not debatable. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.") (quoting *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)). But it does not follow, as Plaintiffs claim, that these concerns "always" weigh in favor of a preliminary injunction. ECF No. 48 at 16; *see Abbott*, 954 F.3d at 791 (holding that district court erred by "rotely" concluding that "all injunctions vindicating constitutional rights serve the public interest"). Rather, the Court must balance the public's interest in preventing constitutional harm against the government's – and the public's – interest in controlling the spread of a dangerous pandemic. *See Stormans*, 586 F.3d at 1138 ("In assessing whether the plaintiffs have met [their burden to show that the balance of equities tips in their favor], the district court has a 'duty ... to balance the interests of all parties and weigh the damage

to each.' ") (quoting *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980)).

In the First Amendment context, "[t]he public interest in maintaining a free exchange of ideas, though great, has in some cases been found to be overcome by a strong showing of other competing public interests, especially where the First Amendment activities of the public are only limited, rather than entirely eliminated." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002), *abrogated on other grounds by Winter*, 555 U.S. 7, 129 S.Ct. 365. In *Stormans*, for example, the court considered whether the district court had erred in enjoining rules requiring pharmacies to fill all prescriptions based on their likelihood to infringe on the free exercise rights of certain pharmacists. 586 F.3d at 1139. The court reversed the district court for many reasons, including that the injunction was overbroad and the district court had not applied the proper test in considering the likelihood of success on the merits. *Id.* at 1137-38, 1141. The district court also had not considered the public interest, which was implicated by the fact that the injunction "reached non-parties and implicated issues of broader public concern that could have public consequences." *Id.* at 1139. Even if the injunction had been limited to the plaintiffs, the court noted that the public interest factor may have weighed against an injunction given the "general public interest in ensuring that all citizens have timely access to lawfully prescribed medications." *Id.* Because the case "may present a situation in which 'otherwise avoidable human suffering' results from the issuance of the preliminary injunction ... the district court clearly erred by failing to consider the public interest at stake." *Id.* at 1140.

Given Defendants' showing that any loosening of the shelter-in-place order would increase the risk of transmission of COVID-19 – not just for those who visit particular retailers, but for everyone in the community – the Court concludes that this case also presents a situation in which "otherwise avoidable human suffering" would result from the issuance of the requested injunction. *Id.*; *see also City and County of San Francisco v. U.S. Citizenship & Immigration Servs.*, 408 F. Supp. 3d 1057, 1127 (N.D. Cal. 2019) (finding that public interest "in decreasing the risk of preventable contagion" weighed in favor of enjoining rule that would lead to Medicaid disenrollment and thus decreased vaccination rates). The Court thus finds that the public's interest in controlling the spread of COVID-19 outweighs its interest in preventing the constitutional violations alleged here, especially given that Plaintiffs have failed to establish a likelihood of success on the merits. For these reasons, the balance of equities and public interest weigh against a preliminary injunction.

CONCLUSION

***20** For the foregoing reasons, Plaintiffs are not entitled to the "extraordinary remedy" of a preliminary injunction. *See Winter*, 555 U.S. at 22, 129 S.Ct. 365. Plaintiffs' motion is therefore DENIED.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 2850291

Footnotes

1 In their motion, Plaintiffs refer to the Orders as "substantively identical." ECF No. 20-1 at 10, 12, 13. Unless otherwise indicated, the Court looks to Alameda County's Orders, *see* ECF No. 46-6 at 11-17, 19-33, as representative of all four Counties' Orders.

2 The Court grants Defendants' request for judicial notice of these four Orders, which are matters of public record. *See* ECF No. 50; *see* Fed. R. Evid. 201 ("The court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). Unless otherwise indicated, it looks to Alameda's order, *see* ECF No. 50 at 25-44, as representative of all four Counties' orders.

3 The Court grants all three Counties' requests for judicial notice of these Orders. *See supra*, 2 n.3. The Court is not aware of a new order issued by Alameda County.

4 Defendants argued at the hearing and in their supplemental brief that, beginning with the April 29 Orders, outdoor shooting ranges have been permitted to operate. *See* ECF No. 55 at 7. Plaintiffs do not dispute this interpretation of the Orders. *See* ECF No. 57 at 2 (arguing only that use of an indoor range is prohibited). The Court will address this issue in its consideration of Plaintiffs' likelihood of success on their Second Amendment claim.

5 Plaintiffs submit a supplemental declaration from Plaintiff Roman Kaplan, co-owner of Plaintiff City Arms East LLC, in support of this argument. ECF No. 57-1. The Court disregards this evidence because it was presented for the first time on reply. *See* *In re Hansen Natural Corp. Sec. Litig.*, 527 F. Supp. 2d 1142, 1150 (C.D. Cal. 2007).

6 Defendants also alternatively argue that the Court should apply rational basis review because the Order is a "neutral and generally applicable regulation[ ]" that only "incidentally implicates arms." ECF No. 46 at 15. Defendants admit that this approach "has not been applied in Second Amendment contexts," citing only two dissents by Ninth Circuit judges as support for applying it here. *Id.* at 20. The Court will not apply rational basis review.

7 *Jacobson*, which involved a Fourteenth Amendment claim, appears to apply to all constitutional claims. Defendants do not argue, however, that *Jacobson* should govern Plaintiffs' due process claim. Because the Court finds that Plaintiffs have not demonstrated a likelihood of success on the merits of that claim under the traditional due process framework, the Court need not consider whether the claim would also be precluded under *Jacobson*.

8 In their reply brief, Plaintiffs mention in a footnote that they "cannot even privately transfer firearms and ammunition under State law." ECF No. 48 at 15 n.4. Without further explanation of why the exceptions cited by Defendants do not apply in the current circumstances, the Court disregards this argument. *See* *Estate of Saunders v. Comm'r*, 745 F.3d 953, 962 n.8 (9th Cir. 2014) ("Arguments raised only in footnotes, or only on reply, are generally deemed waived."); *Sanders v. Sodexo, Inc.*, No. 2:15-cv-00371-JAD-GWF, 2015 WL 4477697, at *5 (D. Nev. July 20, 2015) ("Many courts will disregard arguments raised exclusively in footnotes." (quoting Bryan Garner, *The Redbook: A Manual on Legal Style* 168 (3d ed. 2013))).

9 This Order sweeps broadly to include "shared facilities for [any] recreational activities outside of residences, including, but not limited to, golf courses, tennis and pickle ball courts, rock parks, climbing walls, pools, spas, shooting and archery ranges, gyms, disc golf, and basketball courts." *Id.* Moreover, outdoor shooting ranges have, along with other outdoor recreational facilities, been permitted to reopen starting with the April 29 Orders. *See supra*, 7 n.5.

10 The Court notes that, given that the current Order allows outdoor shooting ranges to operate, it leaves ample opportunity to maintain proficiency in firearms use and thus any remaining burden on this right is insubstantial.

11 While Plaintiffs attempted to submit this guidance via their counsel's declaration, *see* ECF No. 20-2 at 129-30, the exhibit omits the pertinent portion of the guidance. The Court thus takes sua sponte judicial notice of this document, which is a public record. *See* Fed. R. Evid. 201; *Rollins v. Dignity Health*, 338 F. Supp. 3d 1025, 1032 (N.D. Cal. 2018) (explaining that courts often take judicial notice of government agency websites).

12 Plaintiffs briefly argue that the Order is "made even more constitutionally suspect because it bypassed the constitutionally authorized method for enacting laws," thus "violat[ing] separation of powers." ECF No. 20-1 at 27. As Plaintiffs provide no authority for this argument and do not respond to Defendants' counter-arguments in their reply brief, the Court declines to consider this argument.